



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 44 | Number 1

Article 28

12-1-1965

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Recommended Citation

John R. Jolly Jr., *Torts -- Successive Automobile Collisions -- Joint and Several Liability*, 44 N.C. L. REV. 249 (1965).

Available at: <http://scholarship.law.unc.edu/nclr/vol44/iss1/28>

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so dangerous in relation to the particular circumstances as to be ultrahazardous in nature, the plaintiff may also seek to hold the defendant-employer absolutely liable regardless of fault.⁴³

It can be safely concluded that in North Carolina a plaintiff will recover from the employer of an independent contractor who is under any of the nondelegable duties enumerated in the preceding discussion. However, the determination of this question does not necessarily determine the issue of who—the employer or the independent contractor—will ultimately bear the financial burden of the plaintiff's judgment.

C. RALPH KINSEY, JR.

Torts—Successive Automobile Collisions—Joint and Several Liability

That joint tort-feasors are jointly and severally liable¹ for the injuries caused by their negligence and can be joined in the same action by the injured party is a basic principle of law accepted by most jurisdictions.² Generally, joint tort-feasors are persons who

defendant on that theory, and upon the principle of agency or respondeat superior, a relation which as the evidence now stands did not exist. *Id.* at 261, 17 S.E.2d at 130. The writer is not certain of the ramifications of this language and recognizes that any attempted explanation is conjectural. However, one possible explanation may be that the plaintiff failed to formulate the issue with respect to the negligence of the independent contractor. This is based on the following language used by the court: "The contractor may, of course, be liable for the same want of due care in not taking the necessary precautions, for the omission of which the employer becomes liable. . . ." *Id.* at 259, 17 S.E.2d at 129.

⁴³ There should be no problem in joining this cause of action with that for negligence under N.C. GEN. STAT. § 1-123 (1953). The plaintiff may be presented with the problem of election of remedies. However, these alternative theories do not appear to be inconsistent, and it is submitted that the plaintiff should be allowed to have them submitted to the jury as alternative, provided, of course, the evidence in the case warrants it. See Brandis, *Civil Procedure (Pleadings and Parties)*, 43 N.C.L. REV. 871, 877 (1965); Brandis, *Recent Developments in the Field of Permissive Joinder of Parties and Causes in North Carolina*, 34 N.C.L. REV. 405 (1956); Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N.C.L. REV. 1 (1946); *Civil Procedure, Eleventh Annual Survey of N.C. Case Law*, 42 N.C.L. REV. 600, 612 (1964); *Civil Procedure, Ninth Annual Survey of N.C. Case Law*, 40 N.C.L. REV. 482, 491 (1962); Note, 13 N.C.L. REV. 226 (1935). In federal practice the plaintiff would be able to join both claims for relief and would not be put to an election of remedies. FED. R. CIV. P. 8(e) (2).

¹ See, e.g., *Harward v. General Motors Corp.*, 89 F.Supp. 170 (E.D.N.C. 1950); *White v. Carolina Realty Co.*, 182 N.C. 536, 109 S.E. 564 (1921).

² See, e.g., *Phoenix Ins. Co. v. The Atlas*, 93 U.S. 302 (1876); *Van*

act either intentionally, or negligently, in concert in committing a wrong which results in injury to person or damage to property.³ Under this rule, when concert of action or purpose exists,⁴ or the breach of a common duty occurs,⁵ each tort-feasor is liable for all injuries caused, on the theory that the act of one is the act of each.⁶ Neither the fact that the negligence of one may contribute more or less to the injury than that of others,⁷ nor the fact that one may be more culpably negligent than the others makes any difference.⁸ Furthermore, it does not matter whether there is one single injury to the plaintiff,⁹ or whether each wrongdoer's action results in separate injuries.¹⁰ A majority of courts have held that tort-feasors who commit separate and independent acts of negligence with *no* concert of action or purpose are not jointly and severally liable,¹¹ but that each is liable only for the injuries proximately caused by

Troop v. Dew, 150 Ark. 560, 234 S.W. 992 (1921); Drake v. Keeling, 230 Iowa 1038, 299 N.W. 919 (1941); Tricoli v. Centalanza, 100 N.J.L. 231, 126 Atl. 214 (1924); Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1958). It should be pointed out that there is a great difference between the joinder which holds the defendants to joint and several liability and that which is merely procedural, allowing two separate causes of action to be tried at the same time, for convenience. In this note, except where otherwise indicated, "joinder" will mean joint and several liability. See generally PROSSER, TORTS § 44 (3d ed. 1964).

³ Bost v. Metcalfe, 219 N.C. 607, 14 S.E.2d 648 (1941). See 1 HARPER & JAMES, TORTS § 10.1, at 692 (1956).

⁴ Concert of action and concert of purpose usually arise in conjunction with each other. *E.g.*, Brown v. Thayer, 212 Mass. 392, 99 N.E. 237 (1912) (defendants engaged in racing their automobiles passed one on each side of a wagon); Boykin v. Bennett, 253 N.C. 725, 118 S.E.2d 12 (1961), holding that in an automobile race, all participating parties may be held liable even though the accident happened when the driver lost control without coming in contact with any other vehicle.

⁵ *E.g.*, Leishman v. Brady, 39 Del. (9 Harr.) 559, 3 A.2d 118 (1938); Johnson v. Chapman, 34 W. Va. 639, 28 S.E. 744 (1897) (defendants who had a duty to maintain a party wall held liable when it collapsed, destroying plaintiff's warehouse).

⁶ Sir John Heydon's Case, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613).

⁷ *E.g.*, Hall v. Carroll, 253 N.C. 220, 116 S.E.2d 459 (1960); Hale v. City of Knoxville, 189 Tenn. 491, 226 S.W.2d 265 (1949).

⁸ *E.g.*, Bechtler v. Bracken, 218 N.C. 515, 11 S.E.2d 721 (1940); West v. Collins Baking Co., 208 N.C. 526, 181 S.E. 551 (1935); Myers v. Southern Pub. Utils. Co., 208 N.C. 293, 180 S.E. 694 (1935).

⁹ *E.g.*, Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Brown v. Thayer, 212 Mass. 392, 99 N.E. 237 (1912); Boykin v. Bennett, 253 N.C. 725, 118 S.E.2d 12 (1961).

¹⁰ See, *e.g.*, Miller v. Singer, 131 Colo. 112, 279 P.2d 846 (1955); Rouse v. Jones, 254 N.C. 575, 119 S.E.2d 628 (1961); Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911 (1943).

¹¹ See, *e.g.*, Stephens v. Schadler, 182 Ky. 833, 207 S.W. 704 (1919); Bost v. Metcalf, 219 N.C. 607, 14 S.E.2d 648 (1941). See PROSSER, TORTS § 44 n.47 (3d ed. 1964).

his negligence.¹² Recently, however, the trend has been toward a general relaxation of the requirement of concert of action or purpose, and many jurisdictions, under certain circumstances, now impose joint and several liability even though the tort-feasors did *not* act in concert.¹³

The imposition of joint and several liability where separate and independent acts of negligence cause automobile collisions will be examined in this note. The most common situation arises where the separate acts of two wrongdoers concur as to time and place and unite to set into operation a single force which produces a *single* impact, resulting in injury to the plaintiff. For example, the automobiles of two defendants collide, and the plaintiff, a passenger in one, is injured;¹⁴ or two vehicles collide, and one goes out of control, hitting a pedestrian.¹⁵ Although in each case the collision and injury resulted from independent acts of negligence, the courts now hold that joint and several liability may be imposed.¹⁶ The negligent acts concurred at the *same* point in time and space to produce a single impact and injury to the plaintiff, and each was thus the actual and proximate cause of the plaintiff's injuries.¹⁷

¹² See, *e.g.*, Glenn v. Chenoweth, 71 Ariz. 271, 226 P.2d 165 (1951); Symmes v. Prairie Pebble Phosphate Co., 66 Fla. 27, 63 So. 1 (1913); Garret v. Garret, 228 N.C. 530, 46 S.E.2d 302 (1948); Rice v. McAdams, 149 N.C. 29, 62 S.E. 774 (1908).

¹³ See Leasure, *Joinder of Joint and Concurrent Tortfeasors*, 23 OHIO ST. L.J. 521 (1962); *North Carolina Case Law—Torts*, 41 N.C.L. REV. 401, 514 (1963); 31 N.C.L. REV. 237 (1953); PROSSER, TORTS § 44 (3d ed. 1964).

¹⁴ *E.g.*, Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Rouse v. Jones, 254 N.C. 575, 119 S.E.2d 628 (1961).

¹⁵ *E.g.*, Myers v. Southern Pub. Utils. Co., 208 N.C. 293, 180 S.E. 694 (1935).

¹⁶ See, *e.g.*, Chesser v. Williams, 268 Ala. 57, 104 So. 2d 918 (1958). The North Carolina decisions are in accord. Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Rouse v. Jones, 254 N.C. 575, 119 S.E.2d 628 (1961). For other cases, see Annot., 62 A.L.R. 1425 (1929); Annot., 62 A.L.R. 1181 (1929); Annot., 16 A.L.R. 465 (1922).

¹⁷ This is on the theory that there can be two or more actual and proximate causes of an injury, for absent the negligence of either party, the accident would not have happened. See, *e.g.*, Salter v. Lovick, 257 N.C. 619, 127 S.E.2d 273 (1962); Darroch v. Johnson, 250 N.C. 307, 108 S.E.2d 589 (1959); White v. Carolina Realty Co., 182 N.C. 536, 109 S.E. 564 (1921). In Darroch v. Johnson, *supra*, the court said:

There may be one or more proximate causes of an injury. These may originate from separate and distinct sources or agencies operating independently of each other, yet if they join and concur in producing the result complained of, the author of each cause would be liable for the damages inflicted, and action may be brought against any one or all. Darroch v. Johnson, *supra* at 313, 108 S.E.2d at 593.

A more difficult situation is illustrated by *successive* collisions where independent negligent acts cause *multiple* impacts upon plaintiff, either of which may, or may not, cause injury. Three basic situations arise in relation to such collisions, two of which do not present a great problem for the courts.

The first arises where there are successive collisions, and the plaintiff is injured in the second collision only. An illustration of this situation is where *A* negligently hits *B*, the plaintiff, without injuring him, and pushes him into the path of *C*, who negligently hits and injures *B*.¹⁸ *C* would obviously be liable for all *B*'s injuries since his negligence directly caused those injuries. *A* can also be held liable for all the injuries if it is found that his negligence was an actual and proximate cause of the second collision, so that joint and several liability exists.¹⁹

The second situation arises where there are separate collisions, each of which has produced injuries that are *both* theoretically and practically divisible.²⁰ Such a case would exist where *A* runs over *B*, the plaintiff, breaking his right arm; and an instant later, *C* also runs over *B*, breaking his left arm.²¹ Assuming the first defendant's negligence contributed in no causal way to the second accident, there is no problem of joint and several liability.²² The plaintiff is able to show the injury caused by each defendant, and each is liable only for that caused by his own negligence.²³

In the third situation, the main concern of this note, definite

¹⁸ See, e.g., *Penton v. Fisher*, 155 So. 35 (La. App. 1934); *Batts v. Faggart*, 260 N.C. 641, 133 S.E.2d 504 (1963), where plaintiff's car was struck from the rear by the vehicle negligently operated by the first defendant, and left standing crossways in the highway, subsequently being hit by second defendant's car; *Derleder v. Piper*, 239 Wis. 269, 1 N.W.2d 146 (1941), where defendant's negligently operated car in which plaintiff was riding collided with the car ahead, leaving defendant's car disabled on the highway, where it was then struck by a following car. For other cases, see Annot., 58 A.L.R.2d 270 (1958).

¹⁹ See generally, *Byrd & Dobbs, Torts, North Carolina Case Law*, 43 N.C.L. REV. 906, 926-31 (1965).

²⁰ See, e.g., *Smith v. Alabama Water Serv. Co.*, 225 Ala. 510, 143 So. 893 (1932); *Resolute Ins. Co. v. Cunningham*, 132 So. 2d 244 (La. App. 1961) (damage done by the first collision could be identified and distinguished, first negligent driver not held liable for damage caused by the second collision); *Young v. Dille*, 127 Wash. 398, 220 Pac. 782 (1923).

²¹ See cases cited note 20 *supra*.

²² See note 19 *supra*.

²³ See *Leishman v. Brady*, 39 Del. 559, 3 A.2d 118 (1938); *Cf.*, *Hampton v. North Carolina Pulp Co.*, 49 F. Supp. 625 (E.D.N.C. 1943); 25 C.J.S. *Damages* § 25 n.67 (1941).

problems arise. Here, successive or independent collisions arise out of separate and independent acts of negligence, each producing injuries which are *theoretically*, but not *practically*, attributable to the negligent act of each wrongdoer.²⁴ A good illustration of the problem has arisen in the recent Wisconsin case of *Caygill v. Ipsen*.²⁵ In August, 1961, the plaintiff, a guest passenger in an automobile, was injured when the automobile was struck from the rear by a vehicle driven by defendant Ipsen. In January of the same year—some five months later—while the plaintiff was operating her own automobile in a different county of the same state, it was struck from the rear by a vehicle operated by defendant Thompson.

The plaintiff, in her action for personal injuries, attempted to join both defendants in one action on the theory that each of the collisions had caused injury to her cervical spine of such a nature as to make allocation of the damage done by the negligent act of each defendant impossible and that they should therefore be held jointly and severally liable for her total injury. The court rejected this contention, holding that the two collisions gave rise to separate causes of action and that joint and several liability could not be properly imposed. Thus, plaintiff's only remedy was a separate action against each tort-feasor. Her problem is readily seen: Each of the separate actions may, in turn, be defeated if she cannot somehow produce evidence of the injury done by each collision.²⁶ Plaintiff is caught up in a "vicious circle."

Successive collisions presenting this problem arise in a variety of situations. The first defendant's automobile may strike the plaintiff, knocking him into the path of an oncoming second defendant who also collides with plaintiff.²⁷ The first collision may leave plaintiff stranded in his own lane to be struck by a second defendant's automobile following plaintiff.²⁸ The plaintiff, after the first collision, may recover control of his car and continue on his way,

²⁴ *E.g.*, *Barber v. Wooten*, 234 N.C. 107, 66 S.E.2d 690 (1951); *Neubert v. Sichel*, 333 Pa. 90, 3 A.2d 778 (1939).

²⁵ — *Wis.* —, 135 N.W.2d 284 (1965).

²⁶ *Weisenmiller v. Nestor*, 153 Neb. 153, 43 N.W.2d 568 (1950).

²⁷ See, *e.g.*, *Rundle v. Grubb Motor Lines, Inc.*, 300 F.2d 333 (4th Cir. 1962); *Horvath v. Tontini*, 126 Conn. 462, 11 A.2d 846 (1940); *Leinbach v. Pickwick Greyhound Lines*, 135 Kan. 40, 10 P.2d 33 (1932).

²⁸ See, *e.g.*, *Borst v. Langsdale*, 8 Ill. App. 2d 88, 130 N.E.2d 520 (1955); *Barney v. Adcock*, 162 Neb. 179, 75 N.W.2d 683 (1956); *Copple v. Warner*, 260 N.C. 727, 133 S.E.2d 641 (1963); *Gatlin v. Parsons*, 257 N.C. 469, 126 S.E.2d 51 (1962).

only to be struck then by the second defendant.²⁹ In any case, it often happens that the plaintiff is unable to allocate the injuries to the individual acts of negligence. Generally, as in *Caygill*, courts have refused to impose joint and several liability.³⁰ Plaintiff may, however, recover the whole amount of his injuries from the first defendant.³¹ If the requisite causal relationship is not present, plaintiff is faced with proving the separate injuries inflicted by each, or being defeated in a suit against either defendant.³² Thus, without the imposition of joint and several liability, plaintiff faces the real possibility of getting no recovery for his injuries.

Most jurisdictions which refuse to allow the plaintiff to hold the wrongdoers jointly and severally liable reason that a tort-feasor should be liable *only* for that injury actually and proximately caused by his negligence and that the burden of proving the injury caused by a defendant's negligence should remain with the plaintiff.³³ The difficulty or impossibility of allocating the injuries makes no difference.³⁴ These courts view the situation from the standpoint of the negligent acts themselves, holding that each col-

²⁹ *E.g.*, *Batts v. Faggart*, 260 N.C. 641, 133 S.E.2d 504 (1963).

³⁰ See, *e.g.*, *Leishman v. Brady*, 39 Del. 559, 3 A.2d 118 (1938); *Close v. Matson*, 102 Ga. App. 663, 117 S.E.2d 251 (1960).

³¹ See note 19 *supra*. He may also recover from the second defendant for any increased injuries done by the second collision. But, again, this requires him to separate the injuries done by each collision. See generally, *Graver v. Rundle*, 255 N.C. 744, 122 S.E.2d 720 (1961); *Riddle v. Artis*, 243 N.C. 688, 91 S.E.2d 894 (1956); *Waller v. Skeleton*, 31 Tenn. App. 103, 212 S.W.2d 690 (1948).

³² *Cf.*, *Farley v. Crystal Coal & Coke Co.*, 85 W. Va. 595, 102 S.E. 265 (1920), holding that if plaintiff cannot separate the damages, he does not sustain his burden of proof and cannot recover against either tort-feasor.

³³ These courts refuse to put upon the negligent party the possible burden of having to pay more than his share of the injury done. See, *e.g.*, *Weisenmiller v. Nestor*, 153 Neb. 153, 43 N.W.2d 568 (1950); *La Bella v. Brown*, 103 N.J.L. 491, 133 Atl. 82 (1926); *Young v. Dille*, 127 Wash. 398, 220 Pac. 782 (1923). The court in *Leishman v. Brady*, 39 Del. 559, 3 A.2d 118 (1938) said:

When . . . a person seeks to recover from several tortfeasors compensation for separate injuries, resulting from distinct and disconnected wrongful acts, some of which are committed by one wrongdoer, and others by entirely different persons, a single action will not lie against all of such wrongdoers. . . . If the results as well as the acts are separable, in theory at least, so that it can be said that the act of each would have resulted in some injury, however difficult it may be as a practical matter to establish the exact proportions of injury caused thereby, each can be held liable only for so much of the injury as was caused by his act.

Leishman v. Brady, *supra* at 566, 3 A.2d at 120-21.

³⁴ *E.g.*, *Caygill v. Ipsen*, — Wis. —, 135 N.W.2d 284 (1965). See also note 32 *supra*.

lision—and the specific injury resulting therefrom—constitutes a separate cause of action.³⁵ As one court said: “It is the wrongful act, and not the injury, that creates liability.”³⁶ Many authorities have criticized this approach³⁷ on the ground that the significant factor should be the injuries to the innocent party and his plight in being unable to allocate these injuries. They contend that the whole injury done is the cause of action.³⁸ As Dean Wigmore has pointed out, there is a manifest unfairness in:

Putting on the injured party the impossible burden of proving the specific shares of harm done by each. . . . Such results are simply the law's callous dullness to innocent sufferers. One would think that the obvious meanness of letting wrongdoers go scot free in such cases would cause the courts to think twice and to suspect some fallacy in their rule of law. . . . The rule should be: Wherever two or more persons by culpable acts, whether concerted or not, cause a single general harm, not obviously assignable in parts to the respective wrongdoers, the injured party may recover from each for the whole. In short, wherever there is any doubt at all as to how much each caused, take the burden of proof off the innocent sufferer; make any one of them pay him for the whole, and then let them do their own figuring among themselves as to what is the share of blame for each.³⁹

As successive collisions have become more common, some jurisdictions—perhaps in response to reasoning such as that of Dean Wigmore—have allowed independent tort-feasors causing such collisions to be held jointly and severally liable.⁴⁰ In the leading case of *Maddux v. Donaldson*,⁴¹ plaintiff's car was struck from the front by the first defendant and thirty seconds later was struck from the rear by the second defendant's vehicle. It was impossible

³⁵ See note 34 *supra*.

³⁶ *Caygill v. Ipsen*, — Wis. —, —, 135 N.W.2d 284, 286 (1965).

³⁷ Jackson, *Joint Torts and Several Liability*, 17 TEXAS L. REV. 399 (1939); Wigmore, *Joint-Tortfeasors and Severance of Damages*, 17 ILL. L. REV. 458 (1923); 27 COLUM. L. REV. 754 (1927); 19 CALIF. L. REV. 630 (1931); 31 N.C.L. REV. 237 (1953).

³⁸ See authorities cited note 37 *supra*.

³⁹ Wigmore, *Joint-Tortfeasors and Severance of Damages*, 17 ILL. L. REV. 458, 459 (1923).

⁴⁰ *E.g.*, *Ruud v. Grimm*, 252 Iowa 1266, 110 N.W.2d 321 (1961); *Maddux v. Donaldson*, 362 Mich. 425, 108 N.W.2d 33 (1961); *Barber v. Wooten*, 234 N.C. 107, 66 S.E.2d 690 (1951); *Hodgin v. North Carolina Pub. Serv. Corp.*, 179 N.C. 449, 102 S.E. 748 (1920). See also *North Carolina Case Law—Torts*, 41 N.C.L. REV. 401, 514 (1963); 31 N.C.L. REV. 237 (1953). For a collection of cases, see Annot., 100 A.L.R.2d 16 (1965).

⁴¹ 362 Mich. 425, 108 N.W.2d 33 (1961).

to allocate plaintiff's injuries to either collision. In overturning Michigan precedent⁴² and allowing joint and several liability, the court said:

The challenging situation . . . [is] before us, involving two substantial impacts with multiple injuries, in respect of which a jury would be well justified in concluding that the plaintiff's various injuries may not be identified as to origin. As a matter of fact, it may be utterly unrealistic to insist that the plaintiff is suffering from merely a series of wounds, separable either legally or medically. Actually the plaintiff may suffer from a composite injury, the ingredients of which are impossible to identify in origin and impracticable to isolate in treatment.⁴³

Continuing, the court questioned the policy of requiring separate actions in such cases: "Is it better, that a plaintiff, injured through no fault of his own, take nothing, rather than that a tort-feasor pay no more than his theoretical share of the damages accruing out of a confused situation which his wrong has helped to create?"⁴⁴ By the same reasoning, some courts have imposed joint and several liability for independent and unrelated torts in other areas.⁴⁵

The questions facing the parties involved in such a situation are: How far do the courts now go in imposing joint and several liability, and, is there any way to determine this as to future cases? The Wisconsin court, in *Caygill*, pointed out that in most situations where joint and several liability has been allowed, there has been a substantial relation between the collisions in time and place—⁴⁶ that the collisions have occurred in such close proximity as to be considered "one event or occurrence in the eyes of the lay onlooker."⁴⁷ Indeed, the Wisconsin court itself declined to rule out joint

⁴² *E.g.*, *Meier v. Holt*, 347 Mich. 430, 80 N.W.2d 207 (1960), where the court held that second tort-feasor who inflicts injuries on plaintiff who has been previously injured by first tort-feasor, is liable only for the amount of increased injuries.

⁴³ *Maddux v. Donaldson*, 362 Mich. 425, 431, 108 N.W.2d 33, 36 (1961).

⁴⁴ *Id.* at 435, 108 N.W.2d at 38.

⁴⁵ This can be seen in the cases involving pollution, diversion, obstruction, or flooding of a stream by various independent persons. See *McDaniel v. Cherryvale*, 91 Kan. 40, 136 Pac. 899 (1913); *Lineberger v. City of Gastonia*, 196 N.C. 445, 146 S.E. 79 (1929); *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731 (1952). *But see*, *Farley v. Crystal Coal & Coke Co.*, 85 W. Va. 595, 102 S.E. 265 (1920); *Mitchell Realty Co. v. City of West Allis*, 184 Wis. 352, 199 N.W. 390 (1924). See also 31 N.C.L. Rev. 237 (1953).

⁴⁶ *Caygill v. Ipsen*, — Wis. —, —, 135 N.W.2d 284, 289 (1965).

⁴⁷ *Id.* at —, 135 N.W.2d at 289.

and several liability where the collisions occur in close relation as to time and place,⁴⁸ but did point out that it has consistently refused to allow any type of joinder where the torts are completely separate and unrelated, "though their results do concur to cause an individual injury to the plaintiff."⁴⁹ It views the *Caygill* situation, where there is obviously no time relation between the collisions, as being composed of separate causes of action.

Many of the courts which impose joint and several liability upon tort-feasors have specifically stated that they require a close relation in time and space between the collisions.⁵⁰ Those which have not so stated have apparently considered the time and place relation an important factor, for there seems to be no decision imposing joint and several liability where it could not be said there was a reasonable time relationship between the accidents.⁵¹ Thus, the relation of the collisions in time and place might offer some indication of whether, in a given situation, a court will allow joinder.

The Michigan court, in *Maddux*, however, seems to have gone beyond most of the jurisdictions which recognize exceptions to the old rule of joint and several liability for only joint tort-feasors. It places its emphasis entirely upon the injury to the plaintiff and purports to disregard completely the relation of time and place. "The fact that one wrong takes place a few seconds after the other is without legal significance. What is significant is that the injury is indivisible. . . . The reason for the rule as to joint liability was the indivisibility of the injuries, not the time of the various blows."⁵² It must be remembered, however, that the court in *Maddux* was specifically considering chain-reaction type collisions, in which the accidents occurred only "a few seconds"⁵³ apart. The language

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *E.g.*, *Ruud v. Grimm*, 252 Iowa 1266, 110 N.W.2d 321 (1961).

⁵¹ *E.g.*, *Ruud v. Grimm*, 252 Iowa 1266, 110 N.W.2d 321 (1961) (from one to three seconds); *Maddux v. Donaldson*, 362 Mich. 425, 108 N.W.2d 33 (1961) (thirty seconds); *Barber v. Wooten*, 234 N.C. 107, 66 S.E.2d 690 (1951) (simply saying one collision occurred immediately after the other); *Hodgin v. North Carolina Pub. Serv. Corp.*, 179 N.C. 449, 102 S.E. 748 (1920); *Annot.*, 100 A.L.R.2d 16 (1965). Some courts have denied joint and several liability where the time lapse was appreciable. *Hughes v. Great Am. Indem. Co.*, 236 F.2d 71 (5th Cir.), *cert. denied* 352 U.S. 989 (1956) (more than three full minutes between collisions); *Montgomery v. Polk Milk Co.*, 118 Ind. App. 433, 79 N.E.2d 108 (1948) (an interval of from five to seven minutes between collisions).

⁵² *Maddux v. Donaldson*, 362 Mich. 425, 434, 108 N.W.2d 33, 38 (1961).

⁵³ *Ibid.*

here, then, may not be sufficient basis for saying the Michigan court will disregard the time factor.

In the recent case of *Watts v. Smith*⁵⁴ however, the Michigan court has more directly centered upon the time element and has raised some doubt whether it will require *any* time and place relationship between collisions. In this case, plaintiff was riding in an automobile which was struck from the rear twice in the same day—once while enroute to work, and again while returning home, some eight hours later. Plaintiff felt pain in his neck after the first collision, but remained on the job throughout the day. After the second collision, he had more pain in his neck and back, yet he went to work the next day. Two days later, it became evident that he was substantially injured. The lower court refused joinder, but the Michigan Supreme Court reversed, allowing plaintiff to bring action against both defendants in the same suit. The court indicated that this was not joint and several liability, but merely *procedural* joinder.⁵⁵ Plaintiff still had two separate causes of action and would be required to show, in the single trial, the separate injuries done by each negligent party.⁵⁶

The court then indicates, however, that it *might* be inclined to impose *joint and several liability* in this situation, if it happened that plaintiff was unable to give sufficient evidence of the respective injuries inflicted by each collision: "If deadlock should develop over apportionment of damages, it would then be incumbent upon the trial court to consider the language of *Maddux v. Donaldson*."⁵⁷ The language to which the court referred is, "The difficulties and dangers [of the suit] are to be thrown upon those presumably in the wrong, rather than upon him who was not in fault."⁵⁸ Thus, the Michigan court may be prepared to disregard *completely* the time and place relation of the collisions. When there is a substantial time and place difference between the collisions, as in *Watts* and *Caygill*, the plaintiff will usually have some opportunity to ascertain the amount of injury done by the first collision before the second

⁵⁴ 375 Mich. 220, 134 N.W.2d 194 (1965).

⁵⁵ Prosser seems to favor the rule against joint and several liability, but he strongly advocates allowing procedural joinder. Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 435 (1937).

⁵⁶ *Watts v. Smith*, 375 Mich. 220, 134 N.W.2d 194 (1965).

⁵⁷ *Watts v. Smith*, *supra* at —, 134 N.W.2d at 196.

⁵⁸ *Maddux v. Donaldson*, 362 Mich. 425, 426, 108 N.W.2d 33, 38 (1961), quoting *Cuddy v. Horn*, 46 Mich. 596, 603, 10 N.W. 32, 34 (1891).

occurs. Whereas, when the collisions occur within a short time of each other, it is reasonable to assume that the injuries will not be ascertainable until after the second collision.⁵⁹ It would seem that when the plaintiff does have an opportunity to determine the extent of his injuries from one of the collisions, the courts should require him to do so and allow only separate actions against the wrongdoers. If for some reason the plaintiff fails to determine his injuries after the first collision, the inference of *Watts* is that the Michigan court still would impose joint and several liability upon the defendants.

Whether the individual courts specifically concern themselves with the plight of the plaintiff, the time and place relation of the collisions, or other criteria, it seems they are in reality making the same fundamental determination—whether, as a policy matter, they are going to impose joint and several liability, on the theory that it would be unfair to make the plaintiff sustain the burden of allocating the injuries in a given case. Bound up in this must necessarily be the consideration of how far they will go in imposing such liability, which seems to be largely determined by whether the collisions are sufficiently related in terms of time and place to make the burden of separation of damages more unfair to the plaintiff than to the defendants. What that time and place relation must be is the concern of the individual court, which should apply the above considerations to the facts of *each* case separately.⁶⁰ Any attempt at prediction of the outcome of a given situation would be useless,

⁵⁹ This is well stated by the concurring opinion of Black, J.:

The time element in these cases is usually crucial to decisions the trial judge must make when he prepares to instruct the jury. It is so because, if there is a lapse of appreciable time between the consecutive blows, that lapse usually provides some proof or inference from proof, on strength of which the trier or triers of fact may and accordingly should assess the plaintiff's damages in separate amounts, however difficult it may be as a practical matter to establish the exact proportion. On the other hand, if the time element is too short for such proof, or if other factors combine to eliminate any such proof, the jury should be instructed that the causally negligent actors are to be held liable as joint tortfeasors.

Watts v. Smith, *supra* at —, 134 N.W.2d at 197.

⁶⁰ In *Watts v. Smith*, 375 Mich. 120, 134 N.W.2d 194 (1965), the concurring opinion of Black, J., pointed this out:

The received delineative proof in each case will determine best what rule or rules of law the trier or triers of fact should apply to these successive impact cases, and . . . the availability of proof (of what was after the first impact, and . . . after the second . . . and so on) will . . . provide . . . dependable legal guides.

Watts v. Smith, *supra* at —, 134 N.W.2d at 197.

though it does seem safe to predict that the courts will not impose joint and several liability where there is absolutely no relation between the collisions, as in *Caygill* and *Watts*. This, of course, is with the possible exception of Michigan.

As for the negligent defendant, the recent trend in relaxing the rules of joint and several liability has put him at a disadvantage. He is now subjected to the possibility of being required to pay a greater share of the damages than was actually caused by his own negligence. However, one of the parties must necessarily be at a disadvantage in having the burden of proof, and it seems quite fair to put this upon the defendant rather than upon the innocent plaintiff. In mitigation of the harshness of this rule, a few courts that impose joint and several liability will permit either defendant to produce evidence to show what degree of the damage was, or was not, caused by his negligence and will allow any judgment against him to be reduced accordingly.⁶¹

JOHN R. JOLLY, JR.

⁶¹ See, e.g., *Copley v. Putter*, 93 Cal. App. 2d 453, 207 P.2d 876 (D.C. Cal. 1949). Cf., *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948) (in effect shifting the burden of proof to the defendants). North Carolina in the past has held negligent drivers causing successive collisions jointly and severally liable without giving them an opportunity to prove that they were not responsible for all the damage. E.g., *Hodgin v. North Carolina Pub. Serv. Corp.*, 179 N.C. 449, 102 S.E. 748 (1920). But see, *Fox v. Hollar*, 257 N.C. 65, 125 S.E.2d 334 (1962), and its treatment in *North Carolina Case Law—Torts*, 41 N.C.L. REV. 401 (1963).