Negotiating Arkansas's Law of Several Liability

by Joseph Falasco

Life intersects art, sometimes. As a practicing lawyer, I have tried to employ rules, statutes, and laws in service of a defined and client-oriented goal. As a potter, I work to form a lump of clay into a functional piece of art. When the Arkansas General Assembly enacted the Civil Justice Reform Act in 2003, it provided a moist ball of clay. Tort reform is by nature controversial. We all knew that some of its provisions were going to be challenged—one way or another—in Arkansas's courts. Regardless of how you feel about the Act, we can all agree that the General Assembly presented Arkansas lawyers with a new set of statutes to mold into a functional body of law. After some years of kneading by lawyers and the Arkansas Supreme Court, the Act as it exists today looks different than it did eight years ago. Yet, what remains of the Act must be further applied in a way so that it functions in a meaningful manner and does real work for all litigants. This writing provides background information on some lingering issues and suggests how the remaining clay can be put to good use by the legal potters–whether they be lawyers or judges.

Through the Arkansas Civil Justice Reform Act, the Arkansas General Assembly eliminated joint-and-several liability and, subject to some minor exceptions, replaced it with several liability.[1] In 2009, the Arkansas Supreme Court held in *Johnson* that the procedure created by the General Assembly for assessing non-party fault was unconstitutional.[2] In the wake of *Johnson*, courts and lawyers have struggled to apply Arkansas's law of several liability. What follows are some suggestions on how to negotiate Arkansas's law of several liability within the confines of *Johnson* and the Arkansas Rules of Civil Procedure.

A. Joint Tortfeasors Are Severally Liable In Arkansas.

The Arkansas Civil Justice Reform Act ("ACJRA")[3] changed the legal landscape for cases involving a personal injury, medical injury, property damage, or wrongful death. A central part of the ACJRA is the elimination of joint-and-several liability.[4] Under the ACJRA, a defendant's liability is several. As used by the General Assembly, this means that any judgment is calculated with reference to the particularized fault assessed by the fact finder to each separate defendant.[5]

B. A Brief Developmental History Of Joint-And-Several Liability In Arkansas.

At their core, the doctrines of joint liability and several liability create the legal mechanism for attributing liability between plaintiffs, defendants, and third parties. The historical trails of joint liability and several liability flow naturally from the doctrines of contributory negligence, comparative fault, and contribution. Conceptually, joint liability is the legal recognition that certain kinds of harm—like a wrongful death—cannot be divided; therefore, if Party A is a substantial contributing factor of the harm then Party A is liable for the entire harm, regardless of whether Party B, C, or D may have substantially contributed to the harm.[6] In those cases of joint liability, Arkansas solved the inequities of holding one liable beyond its apportioned fault by creating a cause of action for contribution.[7]

The doctrine of contributory negligence provided a complete defense to an action in tort at common law.[8] In 1955, Arkansas replaced contributory negligence with pure comparative fault.[9] In 1957, Arkansas converted from pure comparative fault to a form of modified comparative fault.[10] From 1957 through the enactment of the ACJRA the statutory language embodying Arkansas's version of comparative fault changed slightly.[11] These changes mattered.

The Arkansas Supreme Court has interpreted the minor language changes in the statute as providing significant changes in the law of comparative fault. For example, in *Nations Bank, N.A. v. Murray Guard, Inc.*, the Arkansas Supreme Court held that cases decided under the 1973 Act did not apply to cases decided under the 1975 Act.[12] More specifically, under the 1973 Act, fault could be

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compared "among all those responsible for the harm" but, under the 1975 Act, fault could only be compared with those from whom the plaintiffs sought to recover damages.[13]

With the ACJRA, the General Assembly moved from joint-and-several liability to several liability. The ACJRA makes two things clear: (1) a defendant is liable only for damages allocated to that defendant in direct proportion to that defendant's percentage of fault; and (2) a plaintiff's recovery is barred if a fact finder determines that the plaintiff's fault is fifty percent or greater.[14] Thus, while Arkansas still embraces modified comparative fault between a plaintiff and defendant, it also recognizes that a defendant's liability is limited by the fault specifically apportioned to that defendant.

C. Giving Substance To Several Liability

The substance-versus-procedure debate surfaced in *Johnson v. Rockwell Automation, Inc.*[15] There, the Arkansas Supreme Court ruled that the procedure provided in Ark. Code Ann. § 16-55-202(b) for assessing non-party fault was unconstitutional because it violated the doctrine of separation of powers.[16] The Arkansas Supreme Court did not rule unconstitutional the General Assembly's decision to replace joint-and-several liability with several liability. If several liability is to have substance, the fault of all those responsible for the harm must be considered. And, although the Arkansas Supreme Court held the procedure unconstitutional, § 202(b) makes undeniable that the General Assembly intended fact finders to assess non-party fault. The legislative branch endorsed the policy of giving to the jury the right to assess fault based on the actions of all persons or entities, regardless of whether they were, or could have been, named in an action by a plaintiff.[17] The point stressed here is that only the mechanism for assessing fault to all potential tortfeasors is missing in the light of *Johnson*. That an assessment of non-party fault can and should be done was not decided by *Johnson*.

In *McCoy v. Augusta Fiberglass Coatings, Inc.*,[18] the Eighth Circuit Court of Appeals questioned Arkansas's law of several liability. In that case, the Eighth Circuit relied on *Johnson* and held that a jury is not allowed to assess fault to any non-party.[19] *McCoy* was briefed by the parties before *Johnson* was decided but was handed down after *Johnson*. The Eighth Circuit did not have the benefit of briefing to address the sure and practical effect of *Johnson*. Moreover, the Eighth Circuit did not consider § 201(a) of the ACJRA—the substantive provision of Arkansas's law on several liability. Relying on *Belz-Burrows, L.P. v. Cameron Constr. Co.*,[20] the panel merely stated that, after *Johnson*, "the law reverts back to what it was prior to the passage of the Civil Justice Reform Act, under which the jury could not apportion the fault of non-parties."[21] In short, the analysis in *McCoy* falls short of establishing the law in Arkansas post-*Johnson*.

A complete analysis requires *Belz-Burrows* to be put into context. That case was decided before the ACJRA was enacted, when Arkansas law provided that "a jury should not be permitted to assign a percentage of fault to a person who is not a party to the suit."[22] The Arkansas Court of Appeals explained that this rule derived "from Arkansas's comparative-fault statute, which provides that a plaintiff's fault may be compared with the fault chargeable to 'the party or parties *from whom [he] seeks to recover damages*.' Ark. Code Ann. § 16-64-122 (emphasis added)."[23] Indeed, before the ACJRA, the Arkansas Supreme Court narrowly construed Arkansas's comparative fault statute[24] as limiting the comparison of fault only between those parties from whom the plaintiff sought to recover damages; according to the Arkansas Supreme Court, a party with which a plaintiff settled was not a party from which the plaintiff sought damages.[25]

In 2003, the General Assembly changed the statutory language providing for assessment of fault to allow fault to be assessed to all potentially responsible persons or entities.[26] It follows that the statutory basis for denying a jury the opportunity to assess fault to all responsible persons or entities—the language in Ark. Code Ann. § 16-64-122—no longer exists. The ACJRA has changed that law in sections that are presumed constitutional. Those provisions allow a fact finder to apportion fault to all potentially responsible persons or entities. While the Eighth Circuit's decision in *McCoy* properly ruled that the law reverts back to what it was prior to the passage of Ark. Code Ann. § 16-55-202, the Eighth Circuit was not asked to consider that, even without § 202, Arkansas follows the law of several liability.

D. Procedures And Rules Forcing The Assessment Of Fault Of All Those Responsible.

Johnson held that the procedure in § 202 was unconstitutional because it conflicted with the Arkansas Supreme Court's rule making authority. Today, trial courts and lawyers should look first to the Arkansas Rules of Civil Procedure to fill the procedural void.

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1. Rule 19

Rule 19 of the Arkansas Rules of Civil Procedure speaks to necessary and indispensable parties:

> **(a) Persons to Be Joined if Feasible.** A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties . . . .
> **(b) Determination by Court Whenever Joinder Not Feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.[27]

Section 19(a) addresses the issue of "necessary" parties while section 19(b) deals with whether a necessary party is an "indispensable" party.[28] The provisions of Rule 19(a), which are the same as its federal counterpart, are mandatory.[29]

Under Arkansas or Federal Rule 19, one

mechanism for ensuring that fault is apportioned among all those responsible is to hold that all potential tortfeasors are necessary and indispensable parties.[30] For example, in *Leick v. Schnellpressenfabrik AG Heidelberg*,[31] the district court was confronted with a similar issue where a plaintiff failed to name a potentially responsible party under the Iowa Comparative Fault Act, which limited fault attribution to parties in the action. The district court explained that, because a jury could not assess fault of a non-party, the named parties may be assessed fault for which they were not responsible.[32] Accordingly, absence of potential tortfeasors would prejudice the named defendants because they could be allocated fault for which they were not responsible.[33]

2. Third Party Practice—Rule 14

Rule 14(a) of the Arkansas Rules of Civil Procedure provides the mechanism for a defendant to sue a third party. It says:

> At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action **who is or may be liable to him** for all or part of the plaintiff's claim against him.[34]

Before the ACJRA modified joint and several liability, a defendant could file a claim for contribution against a third party even before discharging a common liability or paying more than his or her *pro rata* share of liability.[35]

However, contribution is a creature of statute and exists only where there is joint liability. Under Arkansas's Uniform Contribution Among Torfeasors Act, a joint tortfeasor is not entitled to contribution until he or she has discharged the common liability by payment or has paid more than his or her *pro rata* share of the common liability.[36] Under the ACJRA, however, a defendant is only liable for the amount of damages allocated in direct proportion to that defendant's percentage of fault.[37] Accordingly, a defendant held to several liability only will never pay the common liability or more than his or her *pro rata* share of liability. As a result, the enactment of several liability under § 16-55-201 arguably precludes any potential claim for contribution under § 16-61-202. It follows that, because a typical claim of contribution will not result in a third-party being liable to a **defendant** for all or a part of the plaintiff's claim against that defendant, the plain language of Rule 14(a) fails to provide a mechanism to bring into the action a third-party tortfeasor.[38]

It may be time for Rule 14 to do more work. Faced with a similar problem created by the conflict between several liability and contribution, Alaska developed a theory of equitable apportionment under Rule 14.[39] In fact, the Alaska Rules of Civil Procedure were amended to provide for a third-party claim of equitable apportionment.[40] Although Arkansas has not endorsed a claim of equitable apportionment, it can be argued as a basis for asserting a third-party claim and as a solution to the conflict between Arkansas's contribution statute and several-liability statute.

3. Rule 81

As a third potential tool for assessing fault to all responsible, a defendant may ask the trial court to develop a mechanism to allow a fact finder to apportion fault to a non-party. Because the Arkansas Supreme Court only held unconstitutional the procedure provided by the General Assembly for assessing non-party fault, a party is conceptually free to ask a circuit court to carry out, in some manner, the substantive provisions of Ark. Code Ann. § 16-55-201 under the Arkansas Rules of Civil Procedure.[41] The Arkansas Rules of Civil Procedure "govern the procedure in the circuit court in all suits or action of a civil nature with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy and inexpensive determination of every action."[42] In addition, "when no procedure is specifically prescribed by [the Rules], the court shall proceed in any lawful manner not inconsistent with the Constitution of this State, these rules, or any applicable statute."[43] Our circuit courts are empowered to carry out the substantive provisions of Ark. Code Ann. § 16-55-201 by employing a procedural mechanism to assesses fault. As a guide, trial courts may look to the procedure set in Ark. Code Ann. § 16-55-202.

4. Jury Instructions

Proper jury instructions and arguments of counsel may also provide an adequate method to apportion several liability under Ark. Code Ann. § 16-55-201. In *Reed v. Malone*, for example, the United States District Court for the Western District of Arkansas explained that the issues of allocating non-party fault "are best addressed by properly drafted jury instructions."[44]

Arkansas Model Jury Instructions provide an illustrative instruction for apportioning fault in a multiparty action:

> Using 100% to represent the total responsibility for the occurrence and any injuries or damages resulting from it, apportion the responsibility between the parties whom you have found to be responsible.[45]

To animate Arkansas's law of several liability, the jury should be instructed that the total responsibility need not total 100%. The model illustrative instruction could be modified to provide:

> If you have determined that any one of [the defendants] was the proximate cause of damages to [the plaintiff], then, understanding that the total fault cannot exceed 100%, but can be less than 100%, apportion the fault between the parties that you have found to be responsible.

Following this model allows the jury to assign fault directly to the parties before them without creating the artificial paradigm of requiring allocation of 100% responsibility. And, when a court sits as the fact finder, AMIs also act as guide.

Conclusion

Laws change. Just as it takes a potter to turn some mud into a useful mug, it takes lawyers to transform the stagnant words of rules, statutes, and cases into a valuable tool to effect the policies of the state of Arkansas as decided by the General Assembly. As a policy-making body, the General Assembly concluded years ago that liability in Arkansas should be several and that, in rendering a fair verdict, a fact-finder must be able to consider the fault of all potential responsible tortfeasors. Given the Arkansas Supreme Court's holding in *Johnson*—that the General Assembly overstepped its bounds in creating the procedure for assessing non-party fault—lawyers must now help reform the law using the Arkansas Rules of Civil Procedure, ACJRA, and *Johnson*. Whatever form it ultimately takes, Arkansas law should allow several liability and the concomitant ability of a fact finder to assess fault to parties and non-parties.

Endnotes

1. *See* Ark. Code Ann. § 16-55-201.
2. *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135.
3. Ark. Code Ann. §§ 16-55-201 et. seq.
4. *See* Ark. Code Ann. § 16-55-201.
5. Ark. Code Ann. § 16-55-201(b)-(c).
6. *See, e.g.*, Restatement (Second) of Torts § 433A.
7. *See* Ark. Code Ann. § 16-61-202.
8. *See Miller v. Hometown Propane Gas, Inc.*, 86 Ark. App. 189, 199, 167 S.W.3d 172, 179, n.3 (2004).

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9. 1955 Ark. Acts 191.
10. 1957 Ark. Acts 296.
11. *Compare* 1957 Ark. Acts 296 with 1973 Ark. Acts 303 with 1975 Ark. Acts 367 codified at Ark. Code Ann. § 16-64-122.
12. 343 Ark. 437, 36 S.W.3d 291 (2001) (*distinguishing Riddell v. Little*, 253 Ark. 686, 488 S.W.2d 34 (1972)).
13. *Id.*
14. *See* Ark. Code Ann. §§ 16-55-201 and 216.
15. 2009 Ark. 241, 308 S.W.3d 135.
16. *Id.*
17. *See*, *e.g.*, 2003 Ark. Acts 649, § 26 ("It is found and determined by the General Assembly of the State of Arkansas that in this state, existing conditions, such as the application of joint and several liability regardless of percentage of fault, are adversely impacting [the State.]").
18. 593 F.3d 737 (8th Cir. 2010).
19. *Id.*
20. 78 Ark. App. 84, 78 S.W.3d 126, 129 (2002).
21. *Id.* at 744.
22. 78 Ark. App. at 89, 78 S.W.3d at 129.
23. *Id.*
24. Ark. Code Ann. § 16-64-122.
25. *See Nations Bank, N.A. v. Murray Guard, Inc.*, 343 Ark. 437, 36 S.W.3d 291 (2001).
26. *See* Ark. Code Ann. § 16-55-201.
27. Ark. R. Civ. P. 19.
28. *See* Reporter's Notes to Rule 19 (citing *Wright v. First Nat'l Bank*, 483 F.2d 73 (10th Cir. 1973)).
29. *Arkansas State Med. Bd. v. Bolding*, 324 Ark. 238, 920 S.W.2d 825 (1996); *see also* Reporter's Notes to Ark. R. Civ. P. 19.
30. *See*, *e.g.*, *Estate v. Alvarez v. Donaldson Co., Inc.*, 213 F.3d 993 (7th Cir. 2000) (holding that tortfeasors were indispensable under Indiana's Comparative Fault Act because nonparties must be assessed fault).
31. 128 F.R.D. 106 (S.D. Iowa 1989).
32. *Id.*
33. *Id*; *see also Stat-Rite Indus., Inc. v. Allstate Ins. Co.*, 96 F.3d 281 (7th Cir. 1996) (holding that, under Rule 19, a responsible party must be joined in the absence of joint and several liability "to fully and accurately allocate liability").
34. Ark. R. Civ. 14(a) (emphasis added).
35. *See* Ark. Code Ann. § 16-61-207.
36. Ark. Code Ann. § 16-61-202.
37. Ark. Code Ann. § 16-55-201.
38. *See also Reed v. Malone*, Case No. 09-2061, W.D. Ark., Docs. # 37, 57 (June 4 and July 8, 2010).
39. *See McLaughlin v. Lougee*, 137 P.3d 267 (Alaska 2006).
40. *See* Alaska R. Civ. P. 14(c); *see also Benner v. Wichman*, 874 P.2d 949, 956 (Alaska 1994) ("Now that the voters have eliminated contribution through the [modification of joint and several liability], equity requires that defendants have an avenue for bringing in others who may be liable to the plaintiff.").
41. *See, e.g.*, *Mercury Marketing Technologies of Delaware, Inc. v. State ex rel. Beebe*, 358 Ark. 319, 189 S.W.3d 414 (2004) (Hannah, J., dissenting) (explaining that circuit courts follow judicially created procedure when no rule or statutory procedure exists).
42. Ark. R. Civ. P. 1.
43. Ark. R. Civ. P. 81(c).
44. *Reed v. Malone*, Case No. 09-2061, W.D. Ark., Doc. 57 (July 8, 2010) (Dawson, J.).
45. *See* AMI-Civil, Ch. 36 § II at Interogatory 5. ■