

# **PRACTICAL ALTERNATIVES TO THE RULE OF JOINT AND SEVERAL LIABILITY: REGULATORY NEGLIGENCE AS A CASE STUDY**

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## **I. INTRODUCTION**

Imagine that you are the regulatory authority in the Ministry of Environmental Protection that is tasked with reducing and preventing air pollution. Now consider a scenario where an inn is located adjacent to a polluting factory in some isolated locality. Due to the factory's decision to increase its production, it consciously increases the level of pollution that it is causing, beyond the level permitted by your office. Despite the periodic tests conducted by your office, no violations are detected within a reasonable time-frame. As a result of the increase in air pollution, the owner of the inn contracts a respiratory disease, with his medical bills totaling \$300,000. Furthermore, rumors begin spreading about excessive air pollution in the area, and despite the fact that you are implementing the requisite supervisory measures, people stop touring in the area, which causes the inn owner economic damages totaling \$200,000, increasing the inclusive damage to the inn to \$500,000. The inn owner files a claim for damages against your regulatory authority, and when the claim is filed, it turns out that the polluting factory has become insolvent and you can no longer receive indemnity from it. What is the optimal rule of compensation in these scenarios?

This case will be used as an analogy (hereinafter “the analogy of the polluting factory”), which will help analyze and explain the judicial doctrines and rules that are presented in this article. As is evident from the outset, this article analyzes the rules of compensa-

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tion in damage claims involving three key players: (1) a negligent supervised entity (the polluting factory, in the analogy), which is the direct tortfeasor, whose share of the damage is usually greater than the share of the other players involved in the array of torts; (2) a negligent supervisory authority that supervises the negligent supervised entity<sup>1</sup> (in the analogy, the regulatory authority in the Ministry of Environmental Protection). This is the indirect tortfeasor that supervises the tortious actions of the direct tortfeasor or regulates them; (3) a plaintiff, the injured party, who sometimes is also negligent and sometimes not (the inn owner).

Our working assumption is that the first two, the supervised entity and the supervisory authority, are “joint tortfeasors”<sup>2</sup> or “multiple tortfeasors.”<sup>3</sup> From the perspective of the injured party, both the factory and the regulatory body were jointly negligent towards the injured party’s sense of security. The injured party also relied on the quality and safety of the service or product that he consumed. Therefore, they should be deemed joint tortfeasors that together committed a tortious act, even though they had not coordinated this action between them, or as multiple tortfeasors that operated separately but caused a single injury. Simply put, we have a situation where it is known that the supervised entity and the supervisory authority tortiously caused the plaintiff’s damages, but it

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<sup>1</sup> This article discusses instances when it is known and has been proven that both the supervised entity and the supervisory authority were negligent, and as a consequence, a single incident of damage was caused to a known injured party (or to a known group of injured parties). In the analysis presented by Gilead, this category of cases is called “Category B”, in which the extent of the damage caused by the defendant is indeterminate. More precisely, in Gilead’s opinion, these cases actually belong to “sub-category B.1”, in which *all* of the injured party’s damage was caused by the tortious conduct of the defendants, potentially and actually. See ISRAEL GILEAD, MICHAEL D. GREEN & BERNHARD A. KOCH, PROPORTIONAL LIABILITY: ANALYTICAL AND COMPARATIVE PERSPECTIVES 15 (Israel Gilead et al. eds., 2013).

<sup>2</sup> Within this scope are the following tortfeasors: tortfeasors that committed a tort in concert; a principal tortfeasor and another tortfeasor that contributed or assisted in the commission of the wrongdoing; or a principal tortfeasor and a secondary tortfeasor that bears vicarious liability.

<sup>3</sup> These are tortfeasors that operated separately and committed wrongdoings that are not interdependent, but that caused a single inseparable damage.

is not possible to accurately prove what share each of them had in this damage.<sup>4</sup>

Insofar as the method of compensation in these cases derives from the outdated “all-or-nothing” rule, then the court must choose one of two paths that are polar extremes. The first is to negate the supervisory authority’s liability and thus impose “zero liability” on it. This is the law in relation to particular cases in the United States<sup>5</sup> and in England.<sup>6</sup> The second is to impose liability on the regulatory

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<sup>4</sup> In other words, what typifies the scenarios discussed below is that it had been proven in these cases that the supervised entity and the supervisory authority caused the damage through their negligence; however, there is some ambiguity as to the regulatory authority’s share in this damage. For cases belonging to this category, even if other than only within the context of regulatory accidents, see for example: *Fitzgerald v. Lane* [1989] 1 AC 328 House of Lords, which involved a plaintiff who was injured by two vehicles, one after the other, when it was unclear which vehicle caused what share of the injuries; *Huddell v. Levin* 537 F.2d 726 (3d Cir. 1976), which involved a person who was killed during a traffic accident. His estate sued both the negligent driver who collided with his vehicle, and the car manufacturer, alleging that it had manufactured a defective headrest; *Chrysler Corp. v. Todorovich*, 580 P.2d 1123 (Wyo. 1978) *Town of Sentinel v. Riley*, 43 P.2d 742 (Okla. 1935), during which the liability was imposed on the creator of the nuisance, even though various nuisance-creators operated in the area who also contributed to the damage; *Azure v. The City of Billings*, 182 Mont. 234, 596 P.2d 460 (1979), which involved a person who was assaulted by an individual, and the victim’s injuries were exacerbated as a result of negligent conduct by the police in his case, and it had not been possible to ascertain which percentage of his injuries was caused by which tortfeasor. It should be noted that the general approach of the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARMS § 28 (2010) is that in cases of this type, the burden of proof should be imposed on the defendant, where he has to prove what share of the injured party’s injuries he caused. If he does not bear this burden, then he will be held liable for the entire damage.

<sup>5</sup> See generally *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), (involving supervision of in-flight safety); *United States v. Gaubert*, 499 U.S. 315 (1991), (involving supervision of a savings and loan association). In these two cases, the public authorities were released from liability, under the judgment exception currently prescribed in the Federal Tort Claims Act. 28 U.S.C. § 2680(a) (1946).

<sup>6</sup> See Financial Services and Markets Act, 2000, c.8 (Eng.), which in particular instances grants a release from liability to the regulatory authority; see also *Yuen Kun-Yeu v. A-G of Hong Kong*, [1987] 2 All E.R. 705 (UKPC); and *Davis v. Radcliffe*, [1990] 1 W. L. R. 821 (UKPC). These two cases involved supervision

authority, thereby, according to the Rule of Joint and Several Liability, also exposing the regulatory authority to a risk of full liability, if there is no additional tortfeasor with collectible assets. There are also examples of this in the United States<sup>7</sup> and in England.<sup>8</sup>

In close connection to this, any judicial methodology that engages in determining the rules of compensation in these situations can ponder three central judicial rules, as follows. The first rule is a rule that is stringent towards the injured party, the plaintiff. According to this rule, the burden of proof must be imposed on the plaintiff (the inn owner in the analogy) to prove all of the grounds for his lawsuit in a way that tilts the balance of probabilities in his favor (preponderance of evidence). With this rule, the plaintiff's lawsuit is liable to be systematically dismissed in limine, due to the uncertainty regarding the precise share of damages caused by each defendant. This rule, which systematically leaves injured parties in a hopeless situation if they were injured by two tortfeasors, both of which are at fault due to their conduct, is not optimal and should be rejected.

The second rule is a rule that is stringent towards the regulatory authority, the defendant. According to this rule, both of the tortfeasors including the supervised entity (the polluting factory) and the supervisory authority (the regulatory authority in the Ministry of Environmental Protection), should be held liable for all of the damage suffered by the injured party. Because once damage was caused that is inseparable, it would be proper for the tortfeasors to bear it in its entirety, even if one of them will bear a far greater share

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of bank stability, when the supervisory failures caused damage to customers of a bank, which had collapsed. This was a claim for purely economic damage and it was dismissed.

<sup>7</sup> See *Berkovitz v. United States*, 486 U.S. 531 (1988) (involving negligence in supervising a vaccination that the plaintiff received, who contracted polio as a result). The lawsuit was filed against the regulatory authority that had approved the manufacture of the drug, and against the Food and Drug Administration that had approved the marketing of the defective shipment.

<sup>8</sup> See *Perrett v. Collins*, [1999] PNLR 77 (EWCA Civ 1998) (involving the crash of an aircraft that led to the imposition of liability on the authority, due to negligent licensing and supervision, which caused personal injuries to the plaintiffs).

than it actually caused. As will be elaborated below, this extreme rule is also not optimal in cases involving regulatory negligence.

The third and proposed rule is the rule of the intermediate path. According to this rule, a rebuttable presumption may be applied, where the regulatory authority shall be held liable for a particular portion of the injured party's damages. This portion, as shall be explained at length below, can be determined either by imposing a statutory maximum compensation, or by imposing proportional liability on the regulatory authority, or by a combination of rules. This intermediate path will be the focus of this article.

The objective of this article therefore, is to chart an intermediate path that enables the allocation of responsibility and the imposition of some liability on the regulatory authority, but that concurrently facilitates the avoidance of any systematic, exaggerated and excessive bias against the supervisory authority in a way that solely focuses on the objective of the compensation. Indeed, under these circumstances, the supervisory authority should not be entirely exempted from paying compensation to the injured party, but at the same time it should not be adjudged to pay the entire sum. It would be preferable to impose some of the amount on the supervisory authority and to leave the other portion imposed on the injured party, particularly in instances when the latter is also culpable for causing damage. This issue is of great importance in environmental law because it is common for polluters to go insolvent or otherwise be unavailable to pay what they may be liable for.

The progression of the chapters in this article will be from the normative to the positive, as follows. This article will begin with an analysis of the main rules for limiting the regulatory authority's liability. Initially, the discussion will focus on the Rule of Proportional Liability (section II), followed by the Rule of the Statutory Maximum (section III). During the analysis presented in these chapters, this article will first relate to the advantages and disadvantages of the aforesaid rules, and after laying the theoretical foundation, the article will present a section under each rule in which practical tools for applying the rule in order to enable its logical implementation are presented.

First, the article will discuss the mode of implementation of the Rule of Proportional Liability. Under this section, this article will propose taking the middle road, which reflects openness on the one hand and prudence on the other, through the presentation of six alternatives for implementing the Rule of Proportional Liability solely in particular circumstances. Subsequently, the discussion will focus on the Rule of the Statutory Maximum. This discussion will be divided into two parts: how the maximum is determined, and how the rule is applied. After exhausting the discussion of the Rule of Proportional Liability and the Rule of the Statutory Maximum, in relation to both their theoretical and practical aspects, the article will discuss a number of plausible hybrid rules that integrate the three rules of compensation (proportional liability, statutory maximum and joint and several liability) (section IV). The article will culminate with a summary of the conclusions (section V).

## II. RULE OF PROPORTIONAL LIABILITY

Various jurists have called for the abrogation of the Rule of Joint and Several Liability and the application of the Rule of Proportional Liability in its stead in particular circumstances.<sup>9</sup> According to the latter rule, the liability of any defendant is limited to its proportionate share of the cause of damage incurred by the plaintiff,<sup>10</sup> so that the joint tortfeasor is no longer forced to bear a liability that is disproportionate to his relative responsibility. In the context of this discussion, in a scenario where a supervised entity and the supervisory authority cause a single inseparable damage, each of them will be liable to the injured party according to their proportionate share of the liability. In other words, each of the

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<sup>9</sup> See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 258 (1986). It should be noted that the rule to be discussed in this section is sometimes referred to in the literature addressing this topic as “the Comparative Fault Rule.”

<sup>10</sup> See generally WILLIAM L. PROSSER & PAGE W. KEETON, *ON TORTS* 475 (5th ed. 1984); see also M. Lindsey, *Compensation, Fairness, and the Costs of Accident—Should Pennsylvania’s Legislature Modify or Abrogate the Rule of Joint and Several Liability Among Concurrently Negligent Tortfeasors?*, 91 *DICK. L. REV.* 947, 947 (1986).

tortfeasors will bear liability for a portion of the compensation according to its proportionate share, but will not bear joint liability for all the damage caused. This rule is not foreign to judicial methodologies around the world and is applied, in particular circumstances, in England,<sup>11</sup> Austria,<sup>12</sup> Poland,<sup>13</sup> and in the United States.<sup>14</sup>

Possible ways to determine each tortfeasor's share of the inclusive damage will be discussed at length in a later section. Nonetheless, this article will point out here that according to the customary approach in tort law, two key considerations should be taken into account when determining each tortfeasor's relative share of the damage. The first consideration is the extent of each defendant's proportionate fault. The second consideration is the extent of each defendant's causative contribution to the damage.<sup>15</sup> Using the analogy of the polluting factory, if the injured party suffered damage amounting to the inclusive sum of \$500,000, the court will be able to adjudicate that the direct tortfeasor's share of the damage (i.e., the supervised entity) is 4/5, while the indirect tortfeasor's share (i.e., the supervising regulatory authority) is only 1/5. In this way, the regulatory authority's liability will be only \$100,000.

The adoption of the Rule of Proportional Liability has three major implications. First, according to this rule, the supervisory authority (the regulatory authority) will be adjudged to pay compensation according to its proportionate share of the liability, i.e., only \$100,000, even if the injured party (the inn owner) has no possibility of collecting the balance of his damages (\$400,000) from the supervised entity (the polluting factory), which, as stated, became insolvent. In other words, according to the Rule of Proportional Liability, the injured party, and not the indirect tortfeasor, shoulders the risk that the direct tortfeasor's share of the compensation will not be collectible. Second, the indirect tortfeasor will no longer bear the

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<sup>11</sup> GILEAD, GREEN & KOCH, *supra* note 1, at 121–51.

<sup>12</sup> *Id.* at 77–96.

<sup>13</sup> *Id.* at 253–78.

<sup>14</sup> *Id.* at 343–69.

<sup>15</sup> This approach was also adopted under American law in relation to determining defendants' relative fault in class actions involving violations of securities laws. *See* 15 U.S.C. §§ 78u-4(f)(3)(C) (1995).

burden of filing contribution claims against direct tortfeasors subject to its supervision, while the burden of suing all of the tortfeasors together and of collecting from them the entire compensation will be imposed on the injured party.<sup>16</sup> Third, although upon adoption of the Rule of Proportional Liability the ratio of compensation to be adjudged to indirect tortfeasors will be reduced, since the sum of the compensation can be expected to vary from lawsuit to lawsuit (as well as the indirect tortfeasors' relative shares of the damage), the reduction in the compensation ratios will not be constant and known in advance, but rather will vary from case to case.

### A. Advantages

The Rule of Proportional Liability has been presented in academic literature as offering significant advantages over the Rule of Joint and Several Liability by referring to the variety of objectives that tort law is striving to achieve.<sup>17</sup>

First, the advantage of this rule lies in its fairness from the point of view of indirect tortfeasors, such as regulatory authorities. It is obvious that one of the justifications for limiting the volume of regulatory authorities' liability is the lack of fairness of a judicial rule that imposes on them the risk of shouldering the burden of the entire compensation. The Rule of Proportional Liability can be expected to rectify this distortion. Once this rule is adopted, not only will the regulatory authority no longer bear the main direct tortfeasors' shares, but also, by determining its proportionate share of the liability, the court will be able to give expression to the fact

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<sup>16</sup> See Stephanie A. Kraft, *Modification of the Doctrine of Joint and Several Liability: Who Bears the Risk?*, 11 NOVA L. REV. 165, 177 (1986); see also Lindsey, *supra* note 10, at 963.

<sup>17</sup> See generally John W. Hill & Michael B. Metzger, *Auditor Liability and the S&L Crisis: Shaping the Future of the Profession?*, 11 ANN. REV. BANKING L. 263 (1992); Jordan H. Leibman & Anne S. Kelly, *Accountants' Liability to Third Parties for Negligent Misrepresentation: The Search for a New Limiting Principle*, 30 AM. BUS. J.L. 347 (1992); Robert Mednick & Jeffery J. Peck, *Proportionality: A Much-Needed Solution to the Accountants' Legal Liability Crisis*, 28 VAL. U. L. REV. 867 (1993); Kenneth E. Shore, *Watching the Watchdog: An Argument for Auditor Liability to Third Parties*, 53 SMU L. REV. 387 (2000).



that the regulatory authority's contribution to the damage is indirect and secondary, and therefore, so is the extent of its negligence.<sup>18</sup>

Second, the Rule of Proportional Liability also offers advantages in terms of effective deterrence. This rule can be expected to heighten the regulatory authority's incentives to take reasonable precautionary measures when performing its regulatory work. This rule acknowledges that, in terms of deterrence, it is important for the tortfeasor to be exposed to a risk of liability that is commensurate with the social loss expectancy that it is caused by its tortious conduct. That being the case, the Rule of Proportional Liability incentivizes regulatory authorities to act with reasonable standards of care. Although the Rule of Joint and Several Liability also incentivizes regulatory authorities to avoid negligence, the Rule of Proportional Liability provides incentives to institute reasonable, but not excessive, precautionary measures. Now, the implementation of precautionary measures will not only reduce the probability of the damage occurring or the probability of the imposition of liability, but it could also affect the regulatory authority's proportionate share of the liability, and therefore its share of the compensation if damage is eventually caused and if liability is imposed on it.

Third, the Rule of Proportional Liability can also be expected to reduce the administrative costs of accidents that originate in contribution claims between tortfeasors. The Rule of Joint and Several Liability incentivizes injured parties to sue the tortfeasor with the deepest pockets rather than all of the tortfeasors. Accordingly, this rule poses a significant risk that the question of the division of liability among the tortfeasors will be left to the second stage of the litigation, with all of the administrative costs that this entails. The Rule of Proportional Liability, which requires the injured party to collect the proportionate share of the compensation from each tortfeasor, incentivizes injured parties to sue all of the

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<sup>18</sup> See Kraft, *supra* note 16, at 186; E. J. McBride, *Fair Enough? Modifying the Rule of Joint and Several Liability in New Jersey*, 20 RUTGERS L.J. 175, 184 (1988); Lindsey, *supra* note 10, at 967, 978; Richard W. Wright, *Allocating Liability among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1165-68 (1987).

tortfeasors under a single lawsuit. In this way, the Rule of Proportional Liability increases the chances of concluding the action in a single proceeding and could thus render superfluous the need to file contribution claims and would thus avoid the administrative costs that this entails. Moreover, the Rule of Joint and Several Liability is liable to lower defendants' incentives to settle, even in instances when settling is the most efficient alternative, because defendants who settled worry about being sued under a contribution claim by defendants who did not settle. The Rule of Proportional Liability, which eliminates the need to file contribution claims, can be expected to alleviate this concern too, and thus highlights the efficiency of settlement agreements.

## **B. Disadvantages**

Despite the advantages of the Rule of Proportional Liability, it appears to have several disadvantages that should also be taken into account. The first disadvantage concerns the economic stability of the regulatory authority. Although the Rule of Proportional Liability can be expected to reduce the volume of regulatory authorities' liabilities, the reduction according to this rule is not fixed and the regulatory authority does not know the volume of its liability in advance, since it depends in each case on the extent of the damage suffered by the injured party and on the regulatory authority's proportionate share of this damage. Therefore, in instances where the damage caused is substantial in scope (as in the negligent supervision of a polluting factory that is adjacent to a densely populated metropolis), and in instances when the regulatory authority's proportionate share of the cause of the damage is substantial (as in the negligence of granting a license to market baby food that is unfit for human consumption), the regulatory authority is liable to bear a high percentage of the compensation, even under the Rule of Proportional Liability. The sums of the compensation are therefore liable to increase and adversely affect the authority's economic stability.

Another difficulty concerns excessive deterrence of the regulatory authority. The risk of bearing extensive liability at a

volume that is not known in advance, as well as the uncertainty with regard to the court's ruling on the question of the negligence, leaves the risk of excessive deterrence on the table, which exists anyway, in the judicial regime of full liability as well.

Furthermore, the Rule of Proportional Liability does not completely eliminate the risks of not reaching efficient settlements. Since this rule still involves uncertainty regarding the volume of liability that the regulatory authority will be forced to bear, it could harm the prospects of reaching settlements, even in instances when economic efficiency considerations support concluding the action with a settlement. Furthermore, considering the risk of bearing very extensive liability, the volume of which is not known in advance, the Rule of Proportional Liability is also liable to retain plaintiffs' incentives to file damage claims against regulatory authorities, even if their negligence is doubtful, in the hope that the authority will strive to reach settlement agreements even for unsubstantiated claims, and even if at issue are futile claims.

Finally, another possible argument against the Rule of Proportional Liability is its unfairness from the point of view of the injured party since, if this rule is applied, all of the risk of not being able to collect the compensation from the direct tortfeasor falls on the injured party's shoulders. However, this argument against the rule is not enough to justify preferring the Rule of Joint and Several Liability over the Rule of Proportional Liability. The main reason for this is that under the "simple" circumstances of tort law, in which the plaintiff's damage was caused by a single tortfeasor, the plaintiff bears the entire risk of not being able to collect the compensation from the tortfeasor. The mere existence of an additional tortfeasor does not justify changing the judicial rule and passing the risk from the plaintiff's shoulders to the shoulders of the solvent tortfeasor.<sup>19</sup> The argument that this could avoid unfairness towards

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<sup>19</sup> See *Bartlett v. New Mexico Welding Supply Inc.*, 648 P.2d 579, 585 (N.M. 1982) (where the Supreme Court of New Mexico refused to apply the Rule of Joint and Several Liability on the basis of this rationale when it asked: "[b]etween one plaintiff and one defendant, the plaintiff bears the risk of the defendant being insolvent; on what basis does the risk shift if there are two defendants, and one is insolvent?").

that plaintiff is not sufficiently convincing, since shifting the risk from the plaintiff to the solvent tortfeasor simultaneously creates unfairness from the latter's point of view<sup>20</sup> (and also from the perspective of the entire public that is free of fault) when at issue is a public tortfeasor. However, this argument may support the adoption of a softer version of the Rule of Proportional Liability, to be elaborated on in later section.

Consideration of all of the above leads us to the conclusion that even under the Rule of Proportional Liability, the sums of compensation that the regulatory authority will be adjudged to pay are liable to increase, thereby retaining the concerns about the authority's economic instability, excessive deterrence against it, parties not reaching efficient settlements and unfairness towards the injured party. However, as will be now clarified, while these disadvantages should be considered, they do not suffice to justify rejecting the Rule of Proportional Liability, along with its advantages as discussed in a later section. The adoption of the Rule of Proportional Liability, which links the extent of the regulatory authority's culpability to the extent of its liability, may still provide a solution for the majority of the disadvantages of the Rule of Joint and Several Liability.

### **C. Proportional Liability—From Theory to Practice**

This section will present practical tools for applying the Rule of Proportional Liability. The purpose is to translate the theoretical analysis presented in sections II(A) (Advantages) and II(B) (Disadvantages) into practical rules, and to explain how the proposed solutions can be implemented during judicial proceedings. This discussion, coupled with the theoretical analysis presented above, will respond to the question of which rule is the optimal one. It should be stressed that, if possible, the court should attribute to each

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<sup>20</sup> See Canadian Institute of Chartered Accountants, *Proportionate Liability and Canadian Auditors—Brief Prepared for Legal Liability Task Force*, 44 (1996); Leibman & Kelly, *supra* note 17, at 391; Nancy L. Manzer, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 645–46 (1988).

tortfeasor the precise share of the injured party's inclusive damage that it caused.<sup>21</sup> However, it appears that it is usually not possible to do so in cases of regulatory and supervisory negligence.

In the analogy, it appears to be impossible to ascertain the precise share of the inn owner's inclusive damage that was caused by the Ministry of Environmental Protection, and to differentiate it from the polluting factory's share of this damage, because the negligence of the supervised entity and the negligence of the supervisory authority jointly led to damage that is inseparable and unattributable. Consequently, the rules should be formulated in a way that enables the court to allocate the damage among the various tortfeasors. This allocation, to be discussed in the following section, will be implemented not only on the basis of precise data, but also by way of estimation and relying on a general assessment based on life experience and on common sense. Therefore, according to the Rule of Proportional Liability, a rebuttable presumption will be applied, where the regulatory authority is liable for a portion of the plaintiff's damage, the extent of which may be determined according to three allocation methods as follows:

One method is to retrospectively impose on defendants a rough allocation of the particular share of the overall damage that they caused.<sup>22</sup> This test is burdensome for the defendant, since it will be difficult for the regulatory authority to prove what its share of the overall damage was and to differentiate it from the direct tortfeasor's share. According to this method, if the regulatory authority does not meet its burden, the court will apply the Rule of Joint and Several Liability; with all of its inherent disadvantages and difficulties (unless the court deems it appropriate to divide the damage by way of estimation). Consequently, this method results in undesirable outcomes; particularly in instances of regulatory accidents in which there is a wide gap between the extent of the regulatory authority's culpability and the extent of the direct tortfeasor's culpability, in terms of fairness, justice and effective deterrence.

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<sup>21</sup> As in the case where a plaintiff is attacked by two dogs belonging to two different people, with one dog biting his arm and the other biting his leg, when it is possible to attribute to each tortfeasor its precise share of the injury caused by it.

<sup>22</sup> This is the "retrospective causation test."

Given the undesirable outcomes of the first method, it would be preferable to look to the other allocation methods. The second method, which also requires the court to allocate the liability by way of estimation, is to ascertain the relative culpability of each of the tortfeasors during the relevant tortious conduct and to allocate the damage among them accordingly.<sup>23</sup> This possibility provides some relief to the regulatory authority, because it enables it to indicate its share of the overall damage not by “marking” its share precisely (which can be nearly impossible), but according to the extent of its relative fault, so that its liability will be partial from the outset.

According to the third method, which also provides relief to the regulatory authority, each tortfeasor’s share will be determined according to the ratio between the degree of risk to the plaintiff created by the supervised entity and the degree of risk to the plaintiff created by the supervisory authority (and only in the absence of any relevant information will the damage be allocated equally). Here, too, the court will be required to act by way of estimation. The court will be delegated the task of evaluating the extent of the causal contribution to the risk posed by the supervisory authority compared to the extent of the causal contribution to the risk posed by the supervised entity.<sup>24</sup>

It should be emphasized that even though the determination of the regulatory authority’s proportionate share of the liability according to each of these three methods might appear to be arbitrary at this stage, this is not necessarily the case. The court will be able to consider a variety of parameters when reaching its judgment, including the gravity of the alleged negligence of each of the tortfeasors, the duration of the alleged negligence by each of the tortfeasors, and all data that could indicate the degree of risk of possible damage to which each of the tortfeasors exposed the plaintiff.

The process necessary to reach a precise determination, to the extent possible, of each tortfeasor’s share in the inclusive damage is not easy. When clarifying the extent of the regulatory authority’s

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<sup>23</sup> This is the “comparative culpability test.”

<sup>24</sup> This is the “causal contribution test.”

liability for the damage, the court will be able to consider the intensity of the connection between the regulatory failure and the damage suffered by the injured party. At one end of the scale are instances where there is a close connection between the regulatory failure and the injured party's damage. An example of this type of case could be an individual who was injured when the planning authorities rezoned land that is adjacent to his home, enabling the construction of a public project such as the construction of an airport. At the other end of the scale are cases where the authority's connection to the individual's damage is loose and indirect. For example, party "A" negligently leaves a pool of diesel fuel on the roadway and the authority procrastinates in cleaning the hazard. In the meantime, party "B," a truck driver, drives negligently over the fuel spill, his truck skids, overturns, and creates lengthy traffic jams. Party "C," a businessman who is stuck in one of these traffic jams, is late for a business meeting and as a result loses an opportunity to sign a contract that was expected to generate handsome profits for him.

The actions of supervisory authorities have a direct and indirect impact on all spheres of life in society and that in instances such as these, tort law raises a similar question: assuming that the authority was negligent and is liable, along with the direct tortfeasor, towards the individual, what share of the liability should the authority bear? According to the latter parameter, the intensity of the connection between the regulatory failure and the damage suffered by the injured party, the court must ascertain whether the authority's failure constitutes a central key link in the cause of the damage or whether it is minor and secondary. The more indirect the connection between the authority and the damage caused, and the lower the concern that the damage was caused due to the authority's abuse of its power in order to harm a single group or benefit another group, the lower the authority's proportionate share of the damage, and accordingly, the lower will be the volume of the liability that it must bear. The determination that the authority's share is minor also stems from an unwillingness to make it legitimate for an injured party to sue the regulatory authority just because it has deep pockets. Determining that the authority's share of the damage is minor conveys a moral and educational message: it is acknowledged and

agreed that the authority's share of the damage is very minor, and that the compensation must be sought elsewhere, in the pockets of the direct tortfeasor.

Notwithstanding this position, it is clear that the shift from the Rule of Joint and Several Liability to the Rule of Proportional Liability might be perceived as a daring leap and as a drastic change that is hard to digest. Revisions and amendments to the customary judicial rule are best done in measured steps, in order to lay the foundation and allow people to adjust their mindset. That being the case, how can we strike a balance between these two rules that are vying for precedence? The Rule of Proportional Liability is desirable, due to considerations of fairness and justice, since fairness demands that the liability of the defendant should be limited to its share in the cause of damage and that the plaintiff shall not be granted an advantage in receiving the compensation just because it was injured by two or more defendants. However, fairness demands that the risk of the insolvency of any of the tortfeasors should be allocated to the rest of the tortfeasors that are culpable for their conduct, and not to the innocent plaintiff.

In close connection to this, the Rule of Proportional Liability indeed promotes important objectives, but at the expense of the objective of compensation. Considering the aforesaid dilemmas, it might be preferable to apply a more complex judicial rule, which does not completely abandon the Rule of Joint and Several Liability on the one hand, and does not entirely adopt the Rule of Proportional Liability on the other.<sup>25</sup> A rule, in fact, that integrates the Rule of Joint and Several Liability with the Rule of Proportional Liability. Such a rule could be optimal in terms of fairness and corrective justice, in terms of effective deterrence, and in terms of the objective of compensation. In light of this, it is proposed below that the middle road should be taken, one that strikes a balance between the various objectives and expresses openness on one hand and prudence on the other. This will be done by proposing six alternatives

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<sup>25</sup> Kraft, *supra* note 16, at 185–87.



for the application of the Rule of Proportional Liability solely under particular circumstances, as detailed henceforth.<sup>26</sup>

**i. The First Alternative—Clarifying the Tortfeasor’s Share of the Damage**

According to this alternative, the Rule of Proportional Liability should be applied only in instances when the defendant’s proportionate share of the liability is lower than a particular ratio.<sup>27</sup> In this way, the indirect defendant can benefit from the advantages of the Rule of Proportional Liability, without exposing itself to disproportionate liability, only if its culpability is “minor” and its share of the cause of damage is negligible compared to the direct tortfeasor. This alternative provides a solution of sorts for the lack of fairness in imposing all of the compensation on the supervisory authority, when its responsibility for the damage is secondary and indirect.

**ii. The Second Alternative—Clarifying the Injured Party’s Share of the Damage**

According to this alternative, the Rule of Proportional Liability should be applied only in instances when the plaintiff is found to have some contributory culpability.<sup>28</sup> This alternative is based on the idea that it is fair to impose the risk of the inability to collect from the direct tortfeasor on the plaintiff in instances when he also has some culpability for his conduct.<sup>29</sup>

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<sup>26</sup> This may be referred to as the use of a “modified form” of the Rule of Proportional Liability, as opposed to its “pure form.” See *id.* at 169; Lindsey, *supra* note 10, at 950.

<sup>27</sup> Leibman & Kelly, *supra* note 17, at 393.

<sup>28</sup> Lindsey, *supra* note 10, at 965–66.

<sup>29</sup> This alternative applies the Rule of Joint and Several Liability in instances when the plaintiff has no culpability, as the courts in Oklahoma have on several occasions. See *Anderson v. O'Donoghue*, 677 P.2d 648 (1983); *Berry v. Empire Indem. Ins. Co.*, 634 P.2d 718 (1981); *Boyles v. Okla. Natural Gas Co.*, 619 P.2d 613 (1980). Kraft notes that in the past, the Florida Senate has proposed to legislate the principle negating the Rule of Joint and Several Liability in instances

This alternative may be improved by tilting it in favor of the plaintiff, so that the application of the Rule of Proportional Liability will be limited to instances when the defendant's proportionate share of the liability is lower than or equal to the plaintiff's proportionate share of the liability. The fairness of this alternative is expressed by abandoning the Rule of Joint and Several Liability and changing the "rules of the game" to the detriment of the plaintiff, when the latter also contributed to the damage to itself and when its share of the cause of the damage crosses a particular threshold. On the other hand, in instances when the plaintiff's share did not cross this threshold, the plaintiff can benefit from the Rule of Joint and Several Liability, which is more advantageous.<sup>30</sup> Prosser refers to this method as an "equal fault bar" and a "greater fault bar."<sup>31</sup> According to the equal fault bar method, the plaintiff is prevented any possibility of receiving all of the compensation from the accessible and solvent defendant if it is found that the plaintiff is equally culpable, or more culpable, than the defendant. According to the greater fault method, the plaintiff is prevented any possibility of collecting the entire sum as stated, only if it is found that its culpability is greater than that of the defendant.

A salient question that arises in this context of scenarios of regulatory negligence is what is the fate of this alternative, whether according to the equal fault bar or according to the greater fault bar, when the lawsuit involves multiple defendants? Should the plaintiff's negligence be compared to that of a particular defendant (i.e., solely against the regulatory authority's negligence) or compared to the negligence of the entire group (i.e., to the negligence of the supervised entity plus the negligence of the supervisory authority)? While there are those who believe that the rule should apply when the plaintiff's share of the damage is equal to or higher than that of a particular defendant, others believe that the plaintiff's negligence should be compared to the cumulative negligence of all of the

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where the plaintiff's conduct constituted contributory negligence. *See also* Kraft, *supra* note 16, at 187.

<sup>30</sup> *See* James Granelli, *The Attack on Joint and Several Liability*, 71 A.B.A. J. 60, 62 (1991); Kraft, *supra* note 16.

<sup>31</sup> PROSSER & KEETON ON THE LAW OF TORTS; *see* Lindsey, *supra* note 10, at 473.

defendants.<sup>32</sup> In these scenarios, one can consider adopting the “49 Percent Rule,”<sup>33</sup> where the plaintiff can receive full compensation from the accessible and solvent defendant only if the extent of the plaintiff’s negligence is less than that of that same defendant. Accordingly, the extent of the plaintiff’s negligence should be compared to that of each defendant severally, so that the Rule of Joint and Several Liability will exclusively apply to the case only if the plaintiff’s negligence is less than that of each of the defendants severally. If this is not the case, then the Rule of Joint and Several Liability will apply only in connection to a tortfeasor whose negligence is greater than that of the plaintiff.

The logic of this alternative can be demonstrated through the judgment in the *Elder* case.<sup>34</sup> At issue was a judgment handed down by the Supreme Court of Pennsylvania, which well demonstrates the harsh criticism against the Rule of Joint and Several Liability in terms of justice and fairness in the context of public tortfeasors. In this case, the borough of Harrisville closed a portion of a highway in the commonwealth in order to hold a march to commemorate Memorial Day.<sup>35</sup> As a result, vehicular traffic in this portion of the highway was slowed.<sup>36</sup> The plaintiff, Elder, drove on that highway in the direction of Harrisville, and when he approached the area he noticed a truck in front of him that braked suddenly when it reached the top of a hill.<sup>37</sup> Elder, in turn, also slowed down his car when he approached the top of the hill, and when he passed it, his car was rear-ended when a car driven by defendant, Orluck, collided forcefully into the back of his car.<sup>38</sup> As a result, Elder suffered severe injuries and he filed for damages in respect thereof.<sup>39</sup> Orluck, the direct tortfeasor, adjoined the borough of Harrisville to the lawsuit.

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<sup>32</sup> *Id.*

<sup>33</sup> See Kraft, *supra* note 16, at 169–71, regarding the judicial methodologies that enable a plaintiff to receive compensation only if the extent of its negligence is *less than* that of the defendants.

<sup>34</sup> *Elder v. Orluck*, 515 A.2d 517 (1986) (hereinafter *Elder* case).

<sup>35</sup> *Id.* at 518.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

The allegation against the borough was its negligence, in that it failed to warn drivers arriving at that locality about the existence of the barrier, and that it did not detour the vehicular traffic so that it would have a route around the march.<sup>40</sup>

The court ruled that Elder's damages totaled \$50,000, and the jury divided the liability for the cause of the damage among the parties involved, as follows: Elder, the injured party, 25 percent, Orluck, the direct tortfeasor, 60 percent, and the borough of Harrisville, the indirect public tortfeasor, 15 percent.<sup>41</sup> During the hearing, the borough of Harrisville argued that Elder should not receive compensation from the borough since the plaintiff himself borne a greater share of the responsibility for the cause of the damage than the indirect tortfeasor.<sup>42</sup> The court rejected this argument, and on appeal, the Supreme Court of Pennsylvania ratified the lower court's decision and ruled that in cases such as these, the plaintiff will be denied the right to full compensation only if its share of the cause of the damage is greater than the shares of all of the defendants aggregately.<sup>43</sup> In light of the application of the Rule of Joint and Several Liability in the circumstances of this case, the court adjudged the borough of Harrisville to pay Elder the entire sum, \$187,500, despite the fact that its proportionate share totaled only \$37,500.<sup>44</sup> Theoretically, the borough of Harrisville had the right to be indemnified by Orluck to the sum of \$150,000, but since this was not collectible, the borough was forced to bear the payment of the full sum by itself.

As shown in this case, the court interpreted the Rule of Proportional Liability as applying only in instances when the negligent plaintiff's share of the damage was larger than the aggregate shares of all of the negligent defendants. This interpretation is not devoid of difficulties. According to the judgment in the Elder case, even when the regulatory authority's share of the damage is smaller than the plaintiff's share, the former is liable to be adjudged to pay

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See Lindsey, *supra* note 10, at 951.

<sup>44</sup> Elder case, *supra* note 34, at 525-24.

the entire sum, as long as the plaintiff's share is not larger than the aggregate shares of the regulatory authority and the direct tortfeasor. Therefore, theoretically, according to this judgment, a plaintiff whose share of the damage is fifty percent can receive the entire compensation from the accessible and solvent authority whose share of the damage is only one percent. It appears that the origins of this interpretation are in an outdated approach that views tort law as a battle between a tortfeasor on one side and an injured party on the other side, without analyzing the differentiation between the various tortfeasors.

To clarify this position, this article will apply the approach that should have been adopted in the factual scenario in the Elder case. To reiterate, in that case, the plaintiff-Elder's share of the damage was twenty-five percent, the direct tortfeasor, Orluck's share was sixty percent, while the share of the indirect tortfeasor, the authority, was only fifteen percent. According to the proposed line of reasoning, Orluck, the direct tortfeasor who generated the main damage and is the party whose share of the cause of the damage is higher than the plaintiff's share, should be subject to the Rule of Joint and Several Liability with all the risks that this entails. Therefore, in the event that the authority cannot pay its share of the compensation, Orluck bears this share as well. In this way, the main generator of the damage is the party that bears its own share of the damage, and in addition bears the risk that the indirect and secondary tortfeasor's share might turn out to be uncollectible. On the other hand, the liability of the indirect and secondary tortfeasor, the authority should be limited solely to its proportionate share of the compensation when, unlike Orluck, its share of the cause of the damage is smaller than the plaintiff's share. This approach reflects the fact that the tortfeasors are not comprised of a single unit and that there should be differentiation between the main generator of the damage and a party whose share of the cause of damage is secondary and indirect.

Lindsey notes in this context that the states of Louisiana, Nevada, Oregon, and Texas adopted a similar approach a while ago in order to strike a better balance between the Rule of Joint and

Several Liability and the Rule of Proportional Liability.<sup>45</sup> In these states, the defendant was liable according to the Rule of Joint and Several Liability only if its relative fault exceeded that of the plaintiff.<sup>46</sup> If not, it was liable only for its proportionate share of the cause of the damage.<sup>47</sup> This approach compares the culpability of the plaintiff to that of each defendant, and then allocates to the party with the greatest culpability the risk of bearing damage which is disproportionate to its relative fault, in the event one of the defendant's shares is uncollectible.<sup>48</sup> In other words, if the culpability of the plaintiff is greater than that of each defendant, the plaintiff will be awarded compensation with respect to the defendants' share of the liability, and the defendants will only be held liable for their proportionate share of the compensation that is awarded to the plaintiff.

On the other hand, if the plaintiff's culpability is less than that of each defendant, all of the defendants will be liable to the plaintiff jointly and severally, and each of them will bear the risk of any uncollected shares of the other defendants. When the plaintiff's culpability is greater than that of one defendant and less than that of another defendant, the first defendant will be liable to the plaintiff according to the Rule of Proportional Liability, while the other defendant will be liable to the plaintiff jointly and severally, and will risk bearing liability that is disproportionate to its share of the damage. The rationale behind both variations of the "Forty-Nine Percent Rule" is that it is unfair to enable a plaintiff whose ratio of culpability is greater than that of the defendants to benefit from the Rule of Joint and Several Liability at the expense of defendants who are less culpable.

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<sup>45</sup> See Lindsey, *supra* note 10, at 966.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Lindsey further reviews draft bills that aim to exempt particular public authorities from the Rule of Joint and Several Liability, when the percentage of their culpability is equal to or less than that of the plaintiffs, and equal to or less than 50% of the total of all negligence attributed to the defendants as a group. See *id.* at 970–71.

### **iii. The Third Alternative—Clarifying the Category of Damage Caused**

Following this approach, the Rule of Joint and Several Liability should be applied only when the heads of damage society attributes to them has considerable and special importance, and considers them to be grave damages, such as personal injury. On the other hand, in relation to other heads of damage, such as pain and suffering, the Rule of Proportional Liability applies. This alternative strives to hold each defendant liable jointly and severally for the damages suffered by the plaintiff, apart from “negligible” damages, in relation to which the Rule of Proportional Liability will apply. Therefore, this approach increases the plaintiff’s prospects of being awarded the entire compensation for the majority of its damages.<sup>49</sup> In other words, this rule may ensure full compensation to an injured party for those heads of damage in instances when, without full compensation in respect thereof, he is liable to collapse. However, the plaintiff bears the risk that it may not collect some of the compensation with respect to minor damages.<sup>50</sup>

We have doubts with regard to the efficacy of this alternative. If we return to the analogy of the polluting factory, the personal injuries that the injured party suffered were subject to the Rule of Joint and Several Liability. Under this alternative, his economic damages, which totaled \$200,000, could have been subject to the Rule of Proportional Liability; however, in the absence of full compensation in respect of this head of damage, he was liable to collapse, considering all the secondary costs of accident this entails. Moreover, it appears that the differentiation between major heads of damage to which the society attributes primary importance and minor heads of damage that are insufficiently clear is subject to interpretation and is liable to result in the prolonging of the litigation

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<sup>49</sup> See Kraft, *supra* note 16, at 186.

<sup>50</sup> This approach was applied in the state of California, where the Rule of Joint and Several Liability was not applied only in the instance of non-economic damages. See Lindsey, *supra* note 10, at 978 (noting that this approach is consistent with the ruling of the Supreme Court of California in the case of *American Motorcycle Assn. v. Superior Court*, 20 Cal. 3d 578, 582 (1978)).

and an increase in the administrative costs of accident that this entails.<sup>51</sup>

#### **iv. The Fourth Alternative—Dividing the Risk Between the Indirect Tortfeasor and the Plaintiff**

This alternative posits that the risk that the direct tortfeasor's share will be uncollectible should be divided between the regulatory authority and the plaintiff, independent of the question of the latter's contributory culpability. Dividing risk between the indirect tortfeasor and plaintiff is an innovative approach, as that the direct tortfeasor's share, if uncollectible, does not fall entirely on the regulatory authority's (one of the outcomes of applying the pure form of the Rule of Joint and Several Liability) plaintiff's shoulders (one of the outcomes of applying the pure form of the Rule of Proportional Liability). Instead, the risk is divided between both parties. Consequently, the court must first ascertain the proportionate share of each "player" in the damage the plaintiff suffered, according to the Rule of Proportional Liability. During the second inquiry, the court must divide the share of the defendant's damage which is uncollectible among the rest of the parties in a way the court deems just and fair. In the absence of any information proving otherwise, this share will be divided equally between the indirect tortfeasor and the plaintiff.

To illustrate this alternative, we return to the analogy of the polluting factory, in which the injured party suffered inclusive damage totaling \$500,000. Assume at the court's initial inquiry, the court rules that the (insolvent) direct tortfeasor's share of the inclusive damage is 3/5, while the supervisory authority's share is 2/5. According to the proposed rule, the regulatory authority will pay its share of the cause of the damage, i.e., \$200,000. Now, if the direct tortfeasor's share was collectible, it would bear its share of the damage (\$300,000), and the regulatory authority would not be forced to pay any additional payment. Since this was not the case,

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<sup>51</sup> Lindsey also expresses doubt about the ability of this method to promote the objectives of tort law effectively. *See* Lindsey, *supra* note 10, at 978.



the court had to divide the polluting factory's share between the regulatory authority and the plaintiff in a just and fair way, and in the absence of any information proving otherwise, this share would be divided equally.

If this share is divided equally between the parties, then the regulatory authority will pay an additional sum of \$150,000 beyond its share of the damage, while the injured party will be compensated to an extent that is short of the difference, since the overall compensation that he will be awarded will be \$350,000. The additional \$150,000 that the regulatory authority is bearing, and the \$150,000 that the injured party will not be able to receive, reflect the division of the risk of the direct tortfeasor's insolvency. Although this rule partially suffers from the disadvantages discussed in the earlier sections of this article, in terms of corrective justice and efficient deterrence, it also partially benefits from the discussed advantages, in terms of the objective of the compensation and the distributive justice approach. In this way, this alternative presents a middle road whose adoption should be considered.

#### **v. The Fifth Alternative—Application of the Rules at the Court's Discretion**

This alternative proposes to leave the court to decide whether the Rule of Joint and Several Liability should be applied or the Rule of Proportional Liability. This decision should be reached while taking into consideration all of the circumstances of the case, including the ratio of the plaintiff's relative fault. If the court chooses to apply the Rule of Proportional Liability, it will decide each defendant's share of the compensation according to the rules discussed at the beginning of this chapter. The advantage of this alternative is its flexibility and also that it allows the court to weigh all of the relevant considerations when deciding which rule is desirable under the specific circumstances of the case at hand.

#### **vi. The Sixth Alternative—Hybrid Rules**

Additional possible rules may be formulated through a combination of any of the five alternatives discussed above. Thus, for example, it is possible to abandon the Rule of Joint and Several Liability and adopt instead the Rule of Proportional Liability when the plaintiff is more culpable than the defendant in the cause of damage (the second alternative), provided that the injured party suffered damages that are not personal injuries (the third alternative). Accordingly, the Rule of Joint and Several Liability will apply in relation to personal injuries, while in relation to other damages the plaintiff can benefit from the advantages of this rule, provided that its culpability for the cause of damage is less than that of the defendants.

### **III. THE RULE OF THE STATUTORY MAXIMUM**

According to the Rule of the Statutory Maximum, a statutory maximum compensation should be prescribed by law in relation to the volume of the supervisory authority's liability. If the court decides that the regulatory authority's proportionate share of the compensation exceeds the maximum sum, it will not be possible to adjudge that it pays a share higher than the maximum. On the other hand, if the court decides that the regulatory authority's proportionate share of the compensation is lower than the sum of the maximum, it will be possible to collect compensation from it not only at the ratio of its proportionate share (which is not the Rule of Proportional Liability), but also the balance of the compensation up to the maximum, by virtue of the Rule of Joint and Several Liability. In such an instance, the regulatory authority will have the option of recouping from the direct tortfeasor the difference between its proportionate share of the compensation and the maximum sum.

This issue will be clarified through the analogy of the polluting factory. Assume that the sum prescribed as the maximum is \$200,000. The injured party's damages total \$500,000. If it becomes evident that the regulatory authority's share of the damage is \$220,000 and that the direct tortfeasor's share is \$280,000, then it

will not be possible to adjudge the regulatory authority to pay a share that exceeds the maximum, and it will be adjudged to pay only \$200,000. On the other hand, if it becomes evident that the regulatory authority's share of the damage is \$100,000 while the direct tortfeasor's share is \$400,000, then the injured party will be able to collect compensation from the regulatory authority not only at the ratio of its proportionate share of the damage (\$100,000) but also the balance of the compensation up to the maximum, i.e., a total of \$200,000. In such an instance, the regulatory authority will be able to file a contribution claim against the direct tortfeasor in order to recoup from it the difference between its proportionate share of the compensation and the maximum, i.e., \$100,000.

#### **A. Advantages**

The alternative that limits liability through a statutory maximum has several advantages. The first being the over-deterrence aspect. Contrary to the Rule of Proportional Liability, this method ensures that the regulatory authority's liability, in any case, will not exceed the particular sum stipulated as the maximum. Consequently, this method creates certainty with regard to the maximum sums that the regulatory authority might be adjudged to pay, and thus avoids the risk of extensive liability, the volume of which is not known in advance. Another advantage, closely connected to this, is that it might moderate to some extent the concern about causing economic instability to the authority, with all of the negative repercussions that this entails, primarily, harm to the authority's regulatory work.

Furthermore, this method can be expected to lead to savings in the administrative costs of accident for a number of reasons. First, the creation of certainty as to the maximum sums of compensation that the regulatory authority is liable to be adjudged can be expected to incentivize injured parties and tortfeasors to settle in instances when settlement is the most efficient solution. Second, in instances when the regulatory authority's proportionate share of the compensation is higher than the sum stipulated as the maximum, it is possible to adjudge it to pay compensation up to the maximum and

no more than that. In these instances, the regulatory authority will not need to file a contribution claim proceeding against the direct tortfeasor, with all the administrative costs that this mechanism entails. Moreover, the reduction of the sums of compensation and the greater certainty with regard to these sums may reduce injured parties' incentives to file futile claims and reduce regulatory authorities' incentives to settle claims of this type. The outcome can be expected to be a reduction in the administrative costs of accident and also a reduction in the phenomenon of excessive deterrence.

As for the considerations of fairness and justice when dividing risks, the adoption of the Rule of the Statutory Maximum will give expression to the fact that the regulatory authority's contribution to damage in these cases is indirect and secondary. Furthermore, the adoption of this rule will lead to a division of the risk of the direct tortfeasor's insolvency between the regulatory authority and the injured party. These matters may be illustrated using the analogy of the polluting factory. Again assume that the sum prescribed as the maximum is \$200,000 and that the injured party's damage totals \$500,000. If the regulatory authority's proportionate share of the compensation is \$220,000, the injured party will bear the risk that he might be incapable of collecting the balance of the compensation exceeding the maximum (\$20,000) from the direct tortfeasor, as well as the risk that he will be incapable of collecting the direct tortfeasor's share of the compensation (\$280,000). On the other hand, if the regulatory authority's proportionate share of the compensation is only \$100,000, the risk of the direct tortfeasor's insolvency will be divided between the regulatory authority and the injured party jointly. The injured party will be able to be compensated by the regulatory authority up to the maximum, i.e., \$200,000. The regulatory authority will bear the risk of not being able to recoup from the direct tortfeasor, the difference between the maximum sum, and the regulatory authority's share of the damage, i.e., \$100,000. On the other hand, the injured party will bear the risk of not being able to collect the balance of his damage, i.e., \$300,000.

## **B. Disadvantages**

The main difficulty inherent in the Rule of the Statutory Maximum is the fact that by its very nature this rule is characterized by a significant degree of arbitrariness, such that it gives rise to a concern of setting too high or too low a maximum. As a result of this concern, a variety of difficulties might arise that will not be resolved. Thus, in terms of expressive considerations that attribute importance to the unique status of the regulatory authority as a defendant, the determination not only that the authority was negligent but also the extent of the damage that the regulatory authority was responsible for causing may be important for public and political criticism of the regulatory authority's activities (and consequently for the purposes of drawing conclusions, enacting regulations and the like). If the Rule of the Statutory Maximum is set too low, this might prevent this important public and political criticism of the regulatory authority's activities.

In terms of effective deterrence, considering the attempt to direct the behavior of the regulator efficiently, the setting of a maximum that is too high can be expected to retain the concern about over-deterrence of the authority. On the other hand, the setting of a maximum that is too low may create a loss expectancy that is lower than the damage that the regulatory authority actually caused, with the likely outcome being inadequate deterrence.

Another disadvantage of the Rule of the Statutory Maximum is its lack of fairness. Although the Rule of the Statutory Maximum divides the risk of an inability to collect from the direct tortfeasor between the regulatory authority and the injured party, its fairness depends to a large extent on the height of the defined maximum. A particularly high maximum will benefit the injured party but will be unfair from the regulatory authority's perspective. The injured party will be able to collect compensation from the authority that exceeds its proportionate share of the compensation, up to the maximum sum. If indeed a very high maximum is defined, it will increase the risk of a gap between the regulatory authority's proportionate share of the compensation and the maximum sum. Accordingly, it will increase the risk of not being able to collect from the direct tort-

feasor, which will be imposed on the regulatory authority's shoulders. On the other hand, the setting of a maximum that is exceedingly low will benefit the authority but will be unfair from the injured party's perspective. The setting of a maximum that is too low will retain the risk of an inability to collect from the direct tortfeasor, a risk that will now be imposed on the injured party.

The setting of a statutory maximum that is too low is also liable to create a lack of fairness in relation to another aspect that relates to a difference in the volume of damages between the injured parties *inter se*. For example the negligent regulation of a polluting factory, which eventually causes damage to two communities, one that is adjacent to the factory and another that is some distance away. The residents of the community adjacent to the factory suffer severe personal injuries, while the residents of the more distant community suffer only minor personal injuries. Under the judicial regime of a statutory maximum, a scenario might occur where the injured parties who suffered serious injuries will be awarded the same sum of compensation awarded to the injured parties who suffered only minor injuries<sup>52</sup> (assuming that the mild personal injuries are also equal to or higher than the maximum sum). In close connection to this, while some injured parties will be awarded full compensation for their damages, others will only receive partial compensation, an outcome that contradicts the objective of compensation and considerations of corrective justice.<sup>53</sup>

Finally, setting a statutory maximum that is excessively high can be expected to retain the concern about high administrative costs of accident, for a variety of reasons including the expected increase in the number of claims, prolonging of the duration of proceedings due to the authority's investment of considerable resources in defending itself against the claims, the thwarting of efficient settlements and the prolonging of the duration of proceedings due to recourse claims. In this context, it should be emphasized that the Rule of the Statutory Maximum does not have the power to prevent administrative costs derived from recourse claims among tortfea-

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<sup>52</sup> See Manzer, *supra* note 20, at 646–47.

<sup>53</sup> See Leibman & Kelly, *supra* note 17, at 434.

sors. In essence, the degree of reduction of these costs depends on the height of the maximum, so that the higher the maximum, the greater the risk that supervisory authorities will be adjudged to pay higher compensation than their share of the damage, and therefore they will strive to recoup the balance of the compensation that they incurred from the direct tortfeasors.

### **C. Statutory Maximum—From Theory to Practice**

#### **i. How to Determine the Maximum**

An important conclusion to be drawn from the theoretical analysis in section II(B) (Disadvantages) is that when beginning to implement the Rule of the Statutory Maximum we must strive to avoid setting a single uniform sum that will apply to all of the supervisory authorities in all possible scenarios. As shown, the danger here lies in its arbitrariness, and in the concern that the maximum set might be too high, or, alternatively, too low. Thus, for example, that same maximum might be too low in the instance of a major authority whose pockets are deep and whose activities generate a particularly high loss expectancy, but it might create a risk of a substantial economic loss for a small authority with meagre budgets that usually generates a negligible loss expectancy. Likewise, that same maximum might be too low in relation to damages caused to many individuals due to the failures of a major regulatory authority, whose supervisory activities affect many, but disproportionately high in the case of a single individual who was injured due to the failures of a small regulatory authority, whose activities are relevant to him alone (or to a miniscule number of individuals). Considering these matters, the question arises: in what ways can a customized, dynamic, and varying maximum sum be determined? Proposed below are two possible methods in response to this question.

One possible method is to determine the maximum sum as some function of the number of individuals—the consumers of the relevant regulatory activity at the time the alleged negligence occurred. Of course, supervisory failures relating to a popular infant

food are not similar in magnitude to supervisory failures relating to a horse farm that operated without a permit. This method for determining the maximum sum gives expression to the fact that the extent of the damage caused due to the authorities' supervisory failures can vary depending upon the number of individuals relying on the regulatory activity.

It appears that determining the maximum sum in this way has several advantages: since the number of individuals relying on the regulatory activity reflects to some extent the extent of the damage expected from this activity, and since the regulatory authority is aware, or should be aware, of the number of individuals that it is affecting with its activities, this criterion is consistent with considerations of effective deterrence. Regulatory authorities whose activities affect a large population will be aware of the fact that they are exposed to wide-scale liability and, accordingly, will take significant measures of care when performing their regulatory work, and vice versa. A regulatory authority that is aware of the size of the population relying on its activities can, in this way, pre-assess the magnitude of the liability to which it is exposed and plan ahead accordingly, to decide to not supervise particular bodies at all, to closely supervise others, etc. From the point of view of potential injured parties, this method also enables them to pre-assess the maximum compensation to which they will be entitled in the event that they incur damage and prepare themselves accordingly.

Notwithstanding its advantages, this method for determining the maximum is not free of difficulties. For example, while the number of consumers of the regulatory activity in particular sectors (such as the car insurance sector), is known at almost any given moment, in other sectors (such as the retail food sector) it is more difficult to assess this number. Moreover, the number of individuals relying on the State's regulatory activities might fluctuate considerably and not remain constant. These characteristics could create uncertainty with regard to the volume of the liability to which the regulatory authority might be exposed in the event of a tort claim, could thwart the objective of effective deterrence and could lower the parties' incentives to settle. Furthermore, we have to acknowledge that the number of consumers of the regulatory activity might



not reflect the volumes of the damage that might be caused to third parties as a result of the regulatory authority's supervisory failures. These volumes depend not only on the number of injured parties, but also on the types of damage incurred. In the event that a limited number of individuals suffer serious personal injuries, the magnitude of the damage is liable to be substantially higher than a maximum that is based solely on the number of individuals relying on the regulatory activities. The outcome of these circumstances can be expected to be disproportionate prejudice to the injured parties' right to compensation.

A second possible method for formulating the maximum sum is determining it as some function of the regulatory authority's total budgets in the budget year relevant to the alleged negligence.<sup>54</sup> This method provides a single stable criterion for assessing the size of the regulatory authority, which is based on the assumption that the size of an authority's budgets also reflects to some extent the loss expectancy anticipated from its activities. Simply put, the more that the regulatory activities involve higher risk, the more likely it is that the regulatory authority will take this risk into account by demanding higher budgets,<sup>55</sup> so there is some correlation between the volume of the budgets allocated to the authority and the loss expectancy of its activities. If this is the case, higher budgets, which will, in turn, lead to the setting of a higher maximum, will usually be connected to a high loss expectancy—and vice versa. The outcome can be expected to be effective deterrence.

Furthermore, since there is some connection between the size of an authority's budget and the loss expectancy that its regulatory activities generate, this method can be expected to create a correlation between the height of the maximum and the extent of the damage that is liable to be caused to third parties—an outcome that is consistent with considerations of corrective justice and the objective of compensation.

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<sup>54</sup> The origin of this proposal is a suggestion to set the maximum sum as a function of the fee charged by a private supervisor. See Leibman & Kelly, *supra* note 17, at 434.

<sup>55</sup> See Dan E. Simunic & Micheal T. Stein, *The Impact of Litigation Risk on Audit Pricing: A Review of the Economics and the Evidence*, 15 AUDITING 119 (1996).

However, notwithstanding the logic in these assumptions, it appears that a correlation does not necessarily exist between the size of an authority's budgets and the loss expectancy that its activities generate, because the activities of a regulatory authority with meager budgets are also liable to potentially cause extensive damage. In other words, a maximum set solely according to the size of the authority's budgets is liable to not faithfully reflect the high loss expectancy that the authority's activities generate, and thus also might not take into account the substantial damage that the injured parties actually suffered. Moreover, not only does a correlation not necessarily exist between a large budget and the extensive damage that the authority is liable to cause to third parties, sometimes the opposite is the case, i.e., the authority's budgets reflect its strength and its ability to institute measures of care. If this is the case, then actually it is regulatory authorities with "shallow pockets" that are prone to generate a higher loss expectancy. The outcome can be expected to be, therefore, inadequate deterrence and prejudice to injured parties' right to fair compensation. Finally, it appears that the volume of authorities' budgets is also subject to some fluctuations, due to either economic prosperity or recession, a government decision to lower the tax rate or raise it, and so on. If this is the case, then this criterion is also liable to create uncertainty in relation to the extent of regulatory authorities' liability, including the potential for ineffective deterrence that is inherent in this.

As can be seen, both methods for determining the sum of the statutory maximum discussed in this section are characterized by theoretical and practical difficulties. These difficulties led me, in the final analysis, to reject a statutory maximum in its pure form.

## **ii. How to Implement the Maximum**

Regardless of the method for setting the maximum, the question still remains: which method should be adopted to implement this maximum?<sup>56</sup> The three possible methods include: (1) applying the maximum to every lawsuit successfully won against

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<sup>56</sup> See Leibman & Kelly, *supra* note 17, at 433.

the authority separately; (2) applying the maximum to all lawsuits successfully won against the authority during a given budget year; (3) applying the maximum to all lawsuits successfully won against the authority that derive from the same regulatory failure.

As stated, the first method for implementing the maximum is to apply the maximum to every lawsuit successfully won against the authority separately, and its advantage is in instances when a single regulatory failure produced a single giant lawsuit against the regulatory authority. In these cases, it is enough to apply the maximum to that lawsuit in order to eliminate those negative outcomes mentioned in the previous sections. On the other hand, this method might not provide an adequate solution for the aforesaid negative outcomes in instances where a series of small or medium-sized lawsuits are filed against the authority by various injured parties, whether deriving from a single failure or different failures—when each of them on its own does not exceed the maximum sum but together exceed it significantly. In these instances, although each lawsuit on its own does not pose a serious threat to the authority, if they are filed consecutively and before the authority manages to recover, they will create a real danger, due to all of the concerns that justify limiting the liability, as discussed and analyzed above. Moreover, in the absence of a maximum sum of compensation that the authority is liable to incur in a given budget year, and considering that the number of injured parties and the volume of the damages are not known, this retains the problem of uncertainty about the volume of liability to be imposed on the authority, with all of the negative repercussions that this entails.

A second method for implementing the maximum is to apply the maximum to all lawsuits successfully won against the authority in a given budget year. This method provides a solution for the disadvantages of the first method. Since according to this method the maximum is applied to all lawsuits received during the budget year, it could reduce the economic risk to which the regulatory authority is exposed and the uncertainty as to the volume of its liability during this period. However, this method is also not free of disadvantages and difficulties. One way to apply this method is to award compensation to injured parties up until the maximum

prescribed by law for that budget year is exhausted. Applying the method in this way might lead to giving coincidental preference to injured parties who filed lawsuits separately according to the chronological order of the judgments being handed down. As a result, some injured parties will be awarded compensation for all of their damages, while others will not receive any compensation at all, which is an outcome that is inconsistent with the objective of compensation and with principles of fairness, equality and corrective justice. Also, adopting the filing date of the lawsuit as the record date so that the maximum will apply to all lawsuits filed during the budget year will not resolve this difficulty.

Although this rule may motivate plaintiffs to file their lawsuits as soon as possible, it is obvious that not all lawsuits will be filed by that deadline. Consequently, once again, this creates coincidental preference among injured parties according to the chronological order of the filing of lawsuits. We can try to cope with this difficulty by collecting and postponing all execution proceedings until the end of the budget year, when the inclusive sum of the lawsuits accepted against the regulatory authority becomes evident, but it appears that this also poses some difficulty, since it would require postponing the carrying out of judgments and thus delay the payment of compensation to injured parties. Furthermore, in the absence of a decision about how to divide the maximum compensation among the various injured parties, and due to the fact that the lawsuits are likely to derive from different failures, disputes among injured parties can be expected to arise with regard to the mode of distribution of the maximum sum. The resolution of these disputes will apparently require another round of litigations, with the increase in the administrative costs of accident that this entails.

Moreover, according to the second method, the application of the statutory maximum is subject to manipulation by any of the parties, to the extent that they can influence the date of issue of the judgment. The authority, on its part, will strive to concentrate as many judgments as possible in a single budget year so that the inclusive sum that it will incur in a given year will exceed the maximum sum. On the other hand, injured parties will strive to spread out the judgments over several years so that the inclusive

sum that the authority will incur in a given year will not exceed the maximum sum. Furthermore, according to this method, the application of the maximum is liable to be influenced by incidental reasons relating to the judge's docket, such as an unusually heavy workload, i.e., reasons that have nothing to do with considerations that justify limiting the regulatory authority's liability.

The third method for applying the maximum focuses on all lawsuits successfully won against the authority deriving from the same regulatory failure. This method has an advantage over the first method in instances when a single failure prompts a large number of lawsuits and when each of them on its own does not exceed the maximum sum but together, they do exceed it. In these instances, the maximum will apply to all lawsuits deriving from that same act or omission, thereby mitigating the economic risk facing the regulatory authority and reducing the uncertainty as to the volume of its liability, with all of the advantages that this entails. On the other hand, in instances where different failures prompted different lawsuits, then this method has disadvantages compared to the first method, and it does not remove the economic risk facing the authority or create the necessary certainty as to the expected volume of liability.

Furthermore, it appears that this method has disadvantages compared to the second method. If this method is applied so that the court will award compensation to plaintiffs who filed separate lawsuits in respect of the same regulatory failure until the maximum prescribed by law is exhausted, then this will create coincidental preference to injured parties depending upon the date the judgment was issued.<sup>57</sup> Applying the maximum in a concentrated manner to all lawsuits filed in respect of the same failure will force the court to wait until the statute of limitations prescribed by law has passed (i.e., until the deadline for filing lawsuits in respect of the same cause) in order to distribute the compensation among the injured parties. The outcome will be a significant delay in paying compensation to the injured parties.

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<sup>57</sup> See *id.* at 434.

Considering the three methods discussed in this section, there are jurists who believe that the optimal method for applying the maximum is the third method, coupled with devising a mechanism for consolidating all lawsuits originating from the same act or omission in a single proceeding, so that a single judgment will be handed down with regard to the mode of distribution of the maximum sum of the compensation among all of the injured parties.<sup>58</sup> This method will enable the application of the maximum one time for the same regulatory failure, regardless of the number of lawsuits accepted against the regulatory authority due to that same failure, whatever it may be. This method will mitigate to some extent the economic risk that the regulatory authority faces and raise the level of certainty regarding the volume of its liability. At the same time, this method will eliminate the disadvantages of the other methods, such as preferential treatment of injured parties and manipulations of judgment issue dates.

Furthermore, a method that combines a single judicial decision with the application of the maximum on all lawsuits deriving from the same regulatory failure will enable the court to distribute the sum of the maximum compensation among the injured parties at the time of the judgment, proportionately to the sums of compensation awarded to them. This will minimize disputes between the parties as to the mode of distribution of the maximum sum and will avoid another round of litigations over the mode of distribution of this sum. Furthermore, we can expect a consolidation of the hearing of actions that raise similar judicial and factual questions in order to streamline and shorten the proceedings, which will also avoid instances of contradictory judgments. This should produce savings in administrative costs. Coupled with these advantages, this method requires the creation of a procedural mechanism as stated, with all of the costs that this entails. Moreover, according to this method, in instances where a number of claims deriving from different failures are filed against the authority, the economic risk that the authority faces will remain, along with the uncertainty regarding the total size of compensation.

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<sup>58</sup> *See id.*

#### IV. HYBRID RULES

In sections B, Rule of Proportional Liability, and C, The Rule of the Statutory Maximum, we discussed pure rules for limiting the liabilities of supervisory authorities. The first rule was based on the concept of proportional liability alone, while the second rule was based on the concept of the statutory maximum. The law in practice is also often based on a key central concept, which is joint and several liability. Nonetheless, this does not mean that it is not possible to combine these three concepts and to forge mixed rules for the purpose of limiting the liability. Here the discussion will focus on three possible rules for limiting the liability, which integrate the aforesaid concepts: the first rule will be a “hybrid” between the concept of the statutory maximum and the concept of proportional liability; the second rule will integrate joint and several liability with proportional liability; and the third rule will integrate to some extent all three concepts of joint and several liability, proportional liability and a statutory maximum.<sup>59</sup>

##### A. Between a Statutory Maximum and Proportional Liability

According to this rule, the liability of public supervisory authorities will be limited through a combination of a statutory maximum and proportional liability. Therefore, if the statutory maximum will be higher than the regulatory authority’s proportionate share of the compensation, injured parties will be able to receive compensation from it up to its proportionate share of the compensation, and it will not be possible to collect the balance of the compensation from it up to the maximum sum. On the other hand, if the statutory maximum will be lower than the regulatory authority’s proportionate share of the compensation, it will be possible to adjudge the payment of compensation solely up to the statutory maximum, even if its share of the compensation is higher.

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<sup>59</sup> See Kraft, *supra* note 16, at 186; McBride, *supra* note 18, at 175–76, 184; Lindsey, *supra* note 10, at 967–68, 978; Wright, *supra* note 18, at 1165–68.

In order to illustrate this rule, return to the analogy of the polluting factory, in which the injured party's damages totaled \$500,000. Now assume that the sum of the statutory maximum is \$150,000. If the court rules that the regulatory authority's proportionate share of the damage is \$100,000, then it will not be possible to collect from the latter the balance of the compensation up to the height of the maximum, but only its proportionate share (\$100,000). On the other hand, if the court rules that the regulatory authority's proportionate share of the damage is \$200,000, then it will be possible to adjudge the payment of compensation solely up to the maximum sum (\$150,000), even though its share of the compensation is higher than this sum.

The advantage of this rule is that it provides a solution for the key difficulties inherent in the Rule of Proportional Liability. This rule enhances the certainty as to the maximum sums of compensation that the regulatory authority is liable to incur, with all of the positive implications that this entails. Coupled with this advantage, this rule retains the other advantages of the Rule of Proportional Liability. Thus, for example, this rule enables the reflection of the regulatory authority's relative fault (when its share of the damage is smaller than or equal to the maximum sum). Thus, this rule is consistent with considerations of fairness and deterrence (as long as the maximum sum is not less than the regulatory authority's proportionate share of the damage).

However, the weakness of this rule is quite obvious. From the perspective of injured parties, this alternative is the most disadvantageous of all of the alternatives discussed up to this point, since the regulatory authority's liability is now limited by two thresholds. Now the injured party will be awarded low compensation, both in instances when the regulatory authority's proportionate share of the compensation is lower than the maximum sum (since in that case, the injured parties will receive low compensation according to the regulatory authority's proportionate share and not according to the maximum sum), and in instances when the regulatory authority's proportionate share of the compensation is higher than the maximum sum (since in that case, the injured parties will receive low compensation according to the maximum sum, and



not the regulatory authority's full proportionate share of the damage). Consequently, this alternative can be expected to produce outcomes that are not optimal in terms of considerations of fairness, corrective justice and the objective of compensation.

### **B. Between Proportional Liability and Joint and Several Liability**

According to this hybrid rule, each of the tortfeasors will be adjudged to pay a share of the damage according to their relative culpability for causing the damage. Furthermore, in instances when it becomes evident that a portion of the compensation is not collectible from any of the tortfeasors, the injured party will be awarded compensation because the solvent tortfeasors will bear relative liability for this portion of the compensation according to the rate of their relative fault.<sup>60</sup> It is possible to characterize two methods for implementing this rule. According to one method, the Rule of Proportional Liability will be applied initially so that the injured party can collect the various tortfeasors' proportionate shares of the compensation and no more than that. During the second stage, after it becomes evident that the injured party cannot collect compensation from any of the tortfeasors according to its share, the injured party will be able to apply to the court to re-allocate this portion of the compensation. According to the second method, the Rule of Joint and Several Liability will be applied initially, and the injured party will be able to collect all of the compensation from each of the tortfeasors. During the second stage, and only after it becomes evident that the tortfeasor that bore the entire compensation cannot recoup from any of the tortfeasors its portion of the compensation, will that tortfeasor be able to apply to the court to re-allocate this portion of the compensation.

Return to the analogy of the polluting factory, but this time in order to illustrate how this rule is implemented. The facts of the

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<sup>60</sup> See John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?*, 10 AM. J. TRIAL ADVOC. 193, 198-99 (1986); see also Lindsey, *supra* note 10, at 967.

case will be slightly changed by adding another polluting factory. Now, an inn and two polluting factories are located in close proximity to one another, and the two factories are consciously raising the level of the pollution they are causing above the level permitted by the regulatory authority. The authority, notwithstanding periodic tests that it conducts, does not detect the violations of the two factories. The injured party's inclusive damage in the analogy remains at \$500,000. Assume that during the hearing, the court decides that Factory A's proportionate share of the damage is \$200,000 and Factory B's proportionate share of the damage is also \$200,000, while the regulatory authority's proportionate share is only \$100,000. It further becomes evident that Factory A's share is uncollectible. According to this rule, the court will be able to re-allocate the uncollectible share among the rest of the tortfeasors according to their relative culpability.

One method for calculating the compensation is by relying on the fact that Factory B and the regulatory authority will jointly pay a total of \$300,000 to the injured party, whereas Factory B paid  $\frac{2}{3}$  of this sum and the regulatory authority paid  $\frac{1}{3}$  of the sum. According to this method, the uncollectible share of Factory A should also be divided, so that Factory B will pay \$133,333 of the uncollectible \$200,000, while the regulatory authority will pay \$66,000 of that sum. According to this method, Factory B will pay a total of \$333,333, while the regulatory authority will pay a total of \$166,000. This distribution demonstrates that the regulatory authority is an indirect and secondary tortfeasor, and also awards full compensation to the injured party.

A second method relies on Factory's B's share of the inclusive damage is  $\frac{2}{5}$ , while the regulatory authority's share is  $\frac{1}{5}$ . That being the case, according to this method, Factory A's uncollectible share will also be divided between the two, so that Factory B will pay \$80,000 of those uncollectible \$200,000, while the regulatory authority will pay a total of \$40,000 of that sum. It is important to note that according to this method, the solvent tortfeasors are paying only  $\frac{3}{5}$  of the insolvent tortfeasor's share. This method also shows that the regulatory authority's contribution to the damage in these cases is indirect and secondary. Furthermore, unlike

the first method, this method divides the risk that any of the tortfeasors' shares will not be collectible between the injured party and the rest of the tortfeasors, since the rest of the tortfeasors will not bear the remaining 2/5 of factory A's share, and the injured party will not be awarded compensation for this share. In this way, all of the "players" involved in the array of torts are taking part. The injured party is not awarded compensation for all of his damage, while the solvent tortfeasors are paying him more than their share. On the other hand, this method does not fulfill the objective of compensation as well as the first method does.

There are many advantages to this rule. Unlike the alternative of applying the pure form of the Rule of Joint and Several Liability (where all of the risk of an uncollectible share of compensation falls on the shoulders of the more accessible and solvent tortfeasor), and unlike applying the pure form of the Rule of Proportional Liability (when all of the risk of an uncollectible share of compensation falls on the shoulders of the injured party), this hybrid rule enables dividing the risk of an uncollectible share of compensation among the various tortfeasors and also between the injured party and the tortfeasors. This rule is not plagued by the lack of fairness that exists in the pure alternatives, which require choosing between achieving fairness from the injured party's perspective and achieving fairness from the tortfeasor's perspective.<sup>61</sup> The advantage of this method compared to the Rule of the Statutory Maximum is that according to the latter, the division of the risk of an uncollectible share of compensation between the tortfeasor and the injured party is often arbitrary. Furthermore, this alternative achieves better outcomes in terms of the objective of compensation by allowing the injured party to be compensated by the tortfeasor at a ratio larger than its proportionate share of compensation.<sup>62</sup> Finally, preserving a principle of relative fault also in relation to the division of the risk of an uncollectible share of compensation is consistent with the considerations of effective deterrence, since now the tortfeasor's

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<sup>61</sup> See McBride, *supra* note 18, at 189.

<sup>62</sup> See Lindsey, *supra* note 10, at 976–77.

incentives will also be motivated by an attempt to influence its relative share of the risk of an uncollectible share of compensation.

Despite the advantages of this alternative, its disadvantages are also quite obvious. First, this alternative's advantages are primarily relevant in situations involving three or more tortfeasors, and when the share of one tortfeasor is uncollectible. Obviously, in instances when only two parties caused damage (a direct tortfeasor and a supervisory authority) and the direct tortfeasor's share is uncollectible, it would be pointless for the regulatory authority to apply to the court to re-allocate the direct tortfeasor's share of the compensation among the rest of the tortfeasors, because apart from the regulatory authority itself there are no additional tortfeasors (although the adoption of the second mode of implementation discussed above will lead to a situation where, also in scenarios such as these, the regulatory authority will not bear the direct tortfeasor's entire share). Furthermore, since this alternative is based on the principle of proportional liability, it has all of the disadvantages of the Rule of Proportional Liability discussed above, i.e., it retains the risk of an extensive volume of liability, as well as the uncertainty regarding the sums of compensation, with all of the negative repercussions this entails. Moreover, unlike the method of the pure form of proportional liability, this alternative entails higher administrative costs, due to the need to apply for a re-allocation of the uncollectible sum, similarly to the mechanism of contribution claims.

### **C. Between Joint and Several Liability and Proportional Liability—Through a Statutory Maximum**

This rule reflects some representation of the three concepts vying for precedence: joint and several liability, proportional liability and a statutory maximum. It preserves the concept of joint and several liability in particular scenarios and adopts the concept of proportional liability in other scenarios, while decision making on the question of which concept applies under the circumstances of the case is guided by a statutory maximum. These matters require an explanation.

According to the proposed rule, the joint-and-several liability regime should be retained so long as the plaintiff's total damages do not exceed a particular sum. On the other hand, in instances when the injured party's damage is higher than the maximum sum, the liability for his damages will be according to the proportional liability regime.<sup>63</sup> In this way, when the inclusive sum of the plaintiff's damages does not exceed the maximum sum, the accessible and solvent regulatory authority bears the risk that the direct tortfeasor's share will be uncollectible, and the plaintiff is assured that he will receive compensation for all of his damage. This is based on the idea that up to a particular sum defined as a maximum, the regulatory authority is not exposed to any significant economic risk.

Although this rule attempts to take the middle road, it presents material difficulties. First, it retains the problem of the maximum sum being arbitrary, as discussed above. Furthermore, the objective of compensation is adversely affected under this rule precisely when the plaintiff's damages are severe and substantial, i.e., in situations when one can assume that the injured party is in dire need of compensation, he is made to bear the risk that the direct tortfeasor might be insolvent. Finally, this rule is liable to encourage the filing of futile lawsuits that do not exceed the maximum sum, with all of the administrative costs of accident that this entails. Therefore, it appears that this rule is not optimal.

## V. CONCLUSION

As the Rule of Joint and Several Liability gives rise to numerous disputes, this article analyzed several alternatives to the rule, with the key question being: which rule optimally divides—between the plaintiff and the indirect tortfeasor—the risk that the direct tortfeasor's share of the compensation is uncollectible? Three possible alternatives for limiting the liability of regulatory authori-

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<sup>63</sup> Kraft uses the state of Florida as an example where the Rule of Joint and Several Liability was applied in cases in which the total damage did not exceed \$25,000, while in cases where the sum is higher than that, the liability for the injured party's damages was based on the relative fault of each of the parties. *See* Kraft, *supra* note 16, at 196–98.

ties were scrutinized and analyzed: (1) switching to the Rule of Proportional Liability; (2) adopting the Rule of a Statutory Maximum; and (3) the use of hybrid rules. This article discussed the various advantages and disadvantages of each of the alternatives, the choice between them depending to a large extent on the objective facing the legislature. The decision about which of the paths analyzed in this article should be taken is a normative question, which depends on the outcomes that each path produces and upon a normative assessment of these outcomes compared to their alternatives.

In light of the aforesaid, the position of this article is that as a principled decision, it is warranted to examine the possibility of adopting a flexible rule that will be customized according to the circumstances of the case. As presented in this article, there are contexts in which it would be preferable to consider the Rule of Joint and Several Liability, while in others the Rule of Proportional Liability would be preferable, and in others the Rule of a Statutory Maximum. When deciding which path to take, the court can take into account numerous considerations including the gravity of the alleged negligence, its duration, the type and extent of the damage caused, the degree of risk to the cause of the damage to which the regulatory authority exposed the injured party, the intensity of the connection between the regulatory failure and the damage suffered by the injured party, the question of whether the authority's failure constitutes a major and key link in the cause of the damage or whether it is minor and secondary, the injured party's access to insurance, considerations of fairness and justice, and additional considerations. This flexible rule may better fulfill the objectives of tort law than the current situation. In the final analysis, the preferable alternative in our view is, therefore, a determination that the choice of the proper rule should be based on these considerations, and the contents of these considerations should be decided on the basis of the factual data in each case.

Insofar as the court will choose the Rule of Proportional Liability, and as evident from the discussion in section II(C) (Proportional Liability—from Theory to Practice), it is not recommended to apply the pure form of proportional liability, but rather

taking a middle road that advocates openness on one hand and prudence on the other, through six alternatives for the application of the Rule of Proportional Liability solely under particular circumstances. Among the six alternatives proposed, special attention may be given to the fourth alternative, which divides the risk between the indirect tortfeasor and the plaintiff. Although this alternative is not free of difficulties, it gives fair expression to the main justifications for limiting the liability of regulatory authorities, without abandoning the objective of compensating the injured party. It creates a delicate balance between these competing objectives in that it divides the risk that the direct tortfeasor's share of the compensation might not be collectible among the remaining parties in the case, i.e., between the regulatory authority and the plaintiff.

In summary, the proposed judicial rule represents a good compromise between two extreme positions: retaining the Rule of Joint and Several Liability absolutely (which imposes an excessive burden on the regulatory authority) and abrogating the rule altogether (which is liable to be unfair towards plaintiffs). This rule attempts to award fair and suitable compensation to plaintiffs while taking a wider view of the concept of "fairness," a view that also takes into account the division of the liability among defendants that may not be comprised of a single unit. Therefore, this alternative approximates the provision of a solution to both groups for important (yet sometimes contradictory) objectives of tort law, namely compensation and distributive justice, compared to fairness, corrective justice and effective deterrence.

