CONTRIBUTION, NOT INDEMNITY: A REPLY TO ED COOPER

William Powers, Jr.

CONTRIBUTION, NOT INDEMNITY: A REPLY TO ED COOPER

William Powers, Jr.¹

Ed Cooper clearly and forcefully presents a thorny problem. Section 24 of the new Restatement (Third) of Torts: Apportionment of Liability (Proposed Final Draft (Revised)) provides for joint and several liability when a tortfeasor is liable for negligently failing to protect a plaintiff from the specific risk of an intentional tort, even in a jurisdiction that has otherwise abandoned joint and several liability. Cooper’s examples are illustrative. Section 24 would make a hotel that negligently fails to provide adequate security jointly and several liable for the intentional tort of an intruder, even in a jurisdiction that has otherwise abandoned joint and several liability. Section 24 would not, however, make a supermarket jointly and severally liable for a slip and fall merely because someone put a banana on the floor intentionally to cause the injury.

Section 24 itself raises interesting questions, but they are not the questions Cooper raises. He assumes the basic provision of Section 24 and then asks whether the negligent hotel should be able to obtain indemnity, not merely contribution, from the intentional intruder. Conversely, should the intentional intruder be able to obtain any contribution from the negligent hotel. Cooper would say yes to the hotel’s indemnity and no to the intentional tortfeasor’s contribution.

There is much to be said in favor of Cooper’s position, and Cooper has said it very well. (Indeed, Cooper was extremely helpful in the entire process leading up to the adoption of the new Restatement. He was extremely helpful as a proceduralist and for his insights about tort law, notwithstanding his typically modest disclaimer about not being “learned” in tort theory.) Nevertheless, there are good reasons, better reason I think, for rejecting Cooper’s suggestion.

First, I should highlight an important point on which Cooper and I agree. In the early days, the shift to comparative responsibility seemed simple. Rather than barring recovery altogether, a plaintiff’s negligence just reduced his or her recovery. In fact, comparative responsibility changed everything, as the plethora of issues addressed in the new Restatement indicates. The old regime emphasized a tort-by-tort approach to tort law. Comparative responsibility suggested an injury-based approach, under which a fact finder might be asked to allocate the responsibility of all tortfeasors, regardless of the theory of liability. Comparative responsibility might also affect basic, first-order issues of liability, such as duty or legal cause. For example, a court might be more willing to find a duty or legal cause when the resulting liability is merely proportional, rather than joint and several. Because comparative responsibility often transcends traditional tort boundaries, it sometimes challenges conventional wisdom and doctrines based on the old regime. This is not the forum to explore all of these issues, but Cooper is absolutely right when he says that a “central message of apportionment theory” is that we should move “beyond the old conceptualism.”

¹ University Distinguished Teaching Professor and Hines H. Baker and Thelma Kelley Baker Chair in Law, The University of Texas School of Law. Professor Cooper’s essay also appears in Legal Essays.
Having said that, however, the choice of contribution rather than indemnity for a “Section 24” defendant is not supported only by conceptual elegance drawn from the old regime. It is supported by the structure of apportionment theory itself as embodied in the new Restatement.

On the issues of contribution and indemnity, the new Restatement starts with the basic rule that, when two tortfeasors are independent and merely negligent—such as when two drivers collide at an intersection and injury a pedestrian—each is entitled to contribution from the other, not indemnity. There are two potential lines of distinction by which other cases might differ from this paradigm case.

First, one of the independent tortfeasors might be intentional rather than negligent, such as when one defendant batters the plaintiff and a doctor then negligently treats the injury. A plausible argument can be made that, in such a case, the negligent tortfeasor should always be entitled to indemnity, not just contribution, from the intentional tortfeasor. The new Restatement, however, rejects that rule, and Cooper does not seem to disagree.

Second, instead of having two independent negligent tortfeasors, one tortfeasor might be negligent merely for failing to prevent the other negligent tortfeasor from injuring the plaintiff, such as in a case of negligent entrustment. Some old cases provided for indemnity in such cases, often using the rubric that the negligent tortfeasor seeking indemnity was only “passively” or “secondarily” negligent. After the adoption of comparative responsibility—and thus comparative contribution—nearly all courts have abandoned that approach. The “passively” or “secondarily” negligent tortfeasor is entitled only to contribution, with the factfinder giving appropriate weight to the nature of each tortfeasor’s negligence when assigning percentages. The new Restatement reflects the new cases by providing only for contribution.

Each of those decisions is itself open to argument. Maybe negligent tortfeasors should always get indemnity from intentional tortfeasors. Maybe “passively” or “secondarily” negligent tortfeasors should always get indemnity from “actively” or “primarily” negligent tortfeasors. Those issues, however, are water under the bridge, and Cooper does not challenge them. The question, then, is whether, given those two decisions, it makes sense to switch over to indemnity just in the case where both lines of distinction are present, that is, when the tortfeasors are not independent and one is intentional. That is Cooper’s example: the hotel is “passively” or “secondarily” negligent for failing to prevent an intentional intruder from injuring the plaintiff.
Graphically, the two potential lines of distinction present a four-box matrix:

<table>
<thead>
<tr>
<th></th>
<th>Both Tortfeasors</th>
<th>One Tortfeasor</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Negligent</td>
<td>Intentional</td>
</tr>
<tr>
<td>Independent Tortfeasors</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>One Tortfeasor Negligent for Failing to Prevent the Other from Injuring the Plaintiff</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

There may be good reasons to have indemnity in boxes 3 and 4 but not 1 and 2. Or there may be good reasons for having indemnity in boxes 2 and 4 but not 1 and 3. That is just another way of saying each of the two lines of distinction is plausible. *Having rejected those solutions, however, it is not at all clear why there should be indemnity in box 4 but not in boxes 1, 2, and 3. Thus, the decision in the new Restatement to reject Cooper’s suggestion harmonizes with the decisions already made about contribution and indemnity—that is, about apportionment theory—that are reflected in boxes 2 and 3. Cooper’s suggestion, on the other hand, is inconsistent with those decisions unless he can demonstrate some special synergy for the combination of these two lines of distinction when they appear together in box 4.*

This analysis might call into question the basic rule in Section 24. In a jurisdiction that otherwise rejects joint and several liability, why should a tortfeasor who has a specific duty to protect the plaintiff from an intentional tortfeasor be jointly and severally liable? After all, that jurisdiction has already rejected joint and several liability for two independently negligent tortfeasors (box 1). The new Restatement does not make any exception to that rule for a negligent tortfeasor who joins with an independent intentional tortfeasor (box 2)\(^2\) or for a negligent tortfeasor who fails to prevent another negligent tortfeasor from injuring the plaintiff (box 3). So why have a special exemption from joint and several liability for a negligent tortfeasor also has a special duty to prevent an intentional tortfeasor from injuring the plaintiff (box 4)? Or, conversely, doesn’t the special rule in box 4 for *joint and several liability* also argue for a special rule in box 4 for *indemnity rather than contribution*?

No. The reason for the special rule in Section 24 for *joint and several liability* is that intentional tortfeasors are especially likely to be insolvent. A *special* duty to protect plaintiffs against intentional tortfeasors is likely to be motivated, at least in

\(^2\) Section 22 does provide that the *intentional* tortfeasor is always jointly and severally liable.
part, but a desire to provide recovery in spite of the intentional tortfeasor’s insolvency. *That* rationale, whatever one thinks of it on the merits, is limited to the problem of insolvency and joint and several liability. It does not affect the defendants’ rights between each other, that is, their rights of contribution and indemnity.

Note that none of these arguments depends on direct reference to goals of efficiency or corrective justice. Instead, they are more traditionally analogical. Certain decisions about efficiency and corrective justice lead us to prefer contribution over indemnity in boxes 1, 2, and 3. Given those decisions, there is no good reason to change our minds in box 4.

This point raises its own interesting issues about the usefulness of applying norms like efficiency and corrective justice *directly* to narrow points of law. I am inclined to think that doing so is not very useful. The point also raises interesting questions about legal analysis’ need to be underwritten by a “deeper” moral theory. I am inclined to think that there is no such need. This is not the place to debate those issues, however. My point here is that the decision to reject Cooper’s suggestion does not depend on any fancy footwork with respect to efficiency or corrective justice. It just depends on quotidian analogies, which are the bread and butter of legal reasoning.

Cooper also raises an extremely interesting and important point about how the doctrines of contribution and indemnity—or any legal doctrines for that matter—should work. He suggests that we should be “free to address questions in smaller bites.” He then goes on to implement that suggestion by making more a “fact-bound” examination of the nature of the intentional tortfeasor’s conduct. The intruder in his example acts “for the purpose of causing injury without any colorable justification.” Other intentional tortfeasors might act merely knowing harmful or offensive contact will occur, and *with* a colorable justification. Cooper argues that we shouldn’t lump these cases together.

Cooper might be right, but that is a different point. The question of how fine-tuned and fact specific legal rules should be is always up for grabs. Maybe tort law, including the rules in the new Restatement, should use more fine-tuned categories. Maybe it should use more broad-based categories. Maybe we have it about right in the new Restatement. We can debate that issue elsewhere. But we *already* have decided to lump all intentional tortfeasors together as a group. Section 22 provides that all intentional tortfeasors are *always* jointly and severally liable. Maybe we should have done that only for *purposeful* tortfeasors *without* any colorable justification. Maybe we should have provided that negligent tortfeasors are entitled to indemnity, not just contribution, from any *purposeful* tortfeasor *without* a colorable justification, even though the negligent tortfeasor would have been entitled only to contribution from other intentional tortfeasors. The only point here is that, once we decided *not* to fine tune those issues to the degree Cooper suggests (and I think these are good reasons for not doing so), there is no apparent special reason for making a more fine-tuned analysis under Section 24.

Finally, Cooper makes a very nice point about restitution. If Intruder *stole* the $100,000 and still had it, and if Hotel had to pay the plaintiff, Hotel ought to get the entire $100,000 back from Intruder. But wouldn’t that also be true if “Recipient” *negligently* caused $100,000 of a plaintiff’s money to end up in
Recipient’s bank account and “Bank” was negligent for allowing that to happen? If Bank had to pay the plaintiff, surely restitution would permit Bank to get the entire $100,000 back from Recipient. The difference here is between contribution and restitution. It does not depend on Intruder being an intentional tortfeasor who Hotel had a special duty to prevent from injuring the plaintiff. Cooper’s point is a very nice one, but it is not uniquely applicable to cases governed by Section 24.

In the end contribution, not indemnity, is my story. I’m sticking to it.