I. Introduction

The nationwide tort reform movement finally reached Arkansas in 2003. Similar in many respects to laws recently adopted in other states but with a few unique twists, the Civil Justice Reform Act of 20031 will profoundly affect tort law practice in Arkansas.

The new legislation was largely promoted as aimed at protecting health care providers from increases in liability premiums. In the forefront of the proponents of the bill were the Arkansas Medical Society and the Arkansas Hospital Association.2 The chief effects of the Arkansas edition of tort reform, however, are not likely to be confined to the health care liability arena. Rather, the effects will be felt throughout tort law practice, in personal injury and property damage litigation of all sorts. Health care providers were the poster children of the tort reform campaign, but the chief beneficiaries will be defendants generally, and their liability insurers.

The most significant aspect of the legislation is the abolition of traditional joint and several tort-feasor liability as developed by common-law courts, and its replacement by a new system whereby in most cases defendants are liable for only their own share of responsibility for a plaintiff’s harm as determined by the trier of fact.3 A crucial change from prior law is that the finder of fact may now allocate responsibility for the plaintiff’s injury to persons not before the court.4 The new rule creates powerful new incentives for defendants to point accusing fingers at the “empty chair.” This article will explore the consequences of this historic shift in the allocation of liability for tortious conduct.

The article first briefly sets out the traditional rule of tortfeasors’ joint and several liability as it has been developed in the common-law courts in Arkansas and elsewhere, and notes the problems of fairness sometimes associated with the traditional rule. The article then explores how Arkansas courts have addressed the interaction between the doctrines of joint and several liability and comparative fault. The article discusses the modifications of joint and several liability promulgated in 2002 by the National Conference of Commissioners on Uniform State Laws in the Uniform Apportionment of Tort Responsibility Act (UATRA). The article next analyzes selected provisions of the new Arkansas law and their effects on the apportionment of legal responsibility, and the ways they promote the use of the “empty chair” tactic by defendants. The article spotlights a particular way the “empty chair” tactic creates injustice: when the “emptiness of the chair” is itself attributable to defendants’ acts or omissions. Finally, the article recommends consideration of UATRA as a model for future corrections of inequities created by the new law.

II. Joint and Several Liability and Comparative Fault in Arkansas

At common law, if two or more tortfeasors contributed to a plaintiff’s indivisible injury, each tortfeasor was liable for the full judgment, though the plaintiff could collect it but once. In cases of defendants acting in concert, or defendants where one of which was vicariously liable for the other’s wrong, each defendant was likewise responsible for the entire judgment, whether or not the plaintiff’s injury was indivisible. The effect was that if one tortfeasor lacked sufficient assets and insurance to satisfy a judgment, the plaintiff could recover full satisfaction from other tortfeasors with greater resources.

Objections have been raised to the operation of joint tortfeasor liability on the ground that a defendant only slightly at fault may be charged with liability far out of proportion to its fault, when another tortfeasor whose fault is far greater is unable to pay. “Deep pocket” defendants, in this view, are easy targets for jury findings of (for example) merely five percent negligence on slim evidence of culpability, and those rich but minimally culpable defendants may wind up bearing full responsibility for plaintiffs’ injuries. This specter may impel asset-rich defendants to settle marginal cases for fear of crushing liability. Additionally, it has been argued that if the law serves to protect some tortfeasors with effective tort immunities, such as the negligent driver with only the statutory minimum liability insurance or the negligent employer afforded tort immunity by the workers’ compensation system, it is “unfair to saddle other solvent tortfeasors with the full brunt of damages substantially caused by conduct which society immunized.”

Strong arguments have been raised in defense of traditional joint tortfeasor liability, particularly when the plaintiff is without fault, but most states have now altered the traditional rule, at least for many classes of cases and types of damages.


6. This article does not address a number of controversial aspects of the Civil Justice Reform Act. Some parts of the Civil Justice Reform Act may be subject to constitutional challenge under, for example, article 5, § 32 of the state constitution or under the constitution’s separation of powers doctrine. Cf. Ark. Att’y-Gen. Op. 2001-058 (Mar. 7, 2001) (opining that § 13 of HB 1382 of 2001, setting damage caps on actions by nursing home residents, is unconstitutional); Nancy A. Costello, Note, Allocating Fault to the Empty Chair: Tort Reform or Deform? 76 U. DET. MERCY L. REV. 571, 580-95 (1999) (surveying constitutional challenges to analogous legislation in various states). Other issues have been raised about the propriety of aspects of Arkansas’s new law relating to special protections for health care defendants and other provisions. Such matters are outside the scope of this article.


9. See, e.g., DOBBS, supra note 7, at 1086-87.

10. Id. at 1087.
Both the doctrine of joint and several liability of tortfeasors and the doctrine of comparative fault have a long history in Arkansas. Judicial recognition of joint and several tortfeasor liability dates back at least to 1895, while explicit legislative recognition of the concept came in 1941. Arkansas was among the nation’s leaders in adopting comparative fault in 1955, rejecting the former rule of contributory negligence whereby plaintiffs at fault were, with some exceptions, totally barred from recovery.

The adoption of comparative fault required our courts to sort out the interaction between that doctrine and joint tortfeasor liability. The Arkansas Supreme Court did so in two multi-tortfeasor cases, Walton v. Tull and Riddell v. Little. In both cases the court held that Arkansas’ equal-fault-bar modified comparative fault rule would not prevent a plaintiff whose fault was less than 50% from recovering against even a joint tortfeasor whose fault was less than or equal to the plaintiff’s, since defendants’ combined fault exceeded plaintiff’s. In Riddell, for example, a farmer hired an improperly licensed pilot to spray his fields; the cropduster, swooping low, hit and killed a flagman, whose estate sued the pilot and the farmer. The jury found the pilot 70% at fault, for flying too low; the farmer 10%, for poor pilot selection; and the flagman 20%, for not ducking. The court’s 1972 decision upheld the judgment against the farmer despite his relatively minimal fault, ensconcing Arkansas among the jurisdictions taking a traditional view of joint and several liability.

A closely divided court limited Riddell’s reach, without overruling it, in the 2001 case of NationsBank v. Murray Guard. In NationsBank the court held that in comparing a plaintiff’s fault to the combined fault of defendant joint tortfeasors for purposes of assessing plaintiff’s entitlement to recovery under the equal-fault-bar comparative fault rule, the fault of a joint tortfeasor with whom the plaintiff had settled out before trial should be excluded from the comparison. The court reasoned that under a post-Riddell revision of the Arkansas comparative fault statute, a tortfeasor


17. Id.


19. The settling tortfeasor was brought back into the case through a third-party complaint by another defendant, and thus received an assessment of fault by the jury.


(a) In all actions for damages for personal injuries or wrongful death or injury to property in which recovery is predicated upon fault, liability shall be determined by comparing the fault chargeable to a claiming party with
that settled with plaintiff before trial was not a “party from whom the claiming party seeks to recover damages”\(^\text{21}\) and that therefore “the statute in its current form no longer provides for a comparison of fault among all those responsible for the harm.”\(^\text{22}\) While the court’s reasoning may have been, as the dissent suggested, somewhat tortured,\(^\text{23}\) nevertheless the decision had the effect of preserving the doctrine of joint and several liability in the face of substantial criticism, while somewhat restricting the scope of the doctrine’s operation.

### III. The Uniform Apportionment of Tort Responsibility Act and Its Reception in the 2003 General Assembly

Mindful of the criticisms noted above of the traditional joint and several liability doctrine, and wishing to advance the idea of fair reallocation of responsibility for an unreachable tortfeasor’s fault, the National Conference of Commissioners on Uniform State Laws in 2002 promulgated the Uniform Apportionment of Tort Responsibility Act (UATRA).\(^\text{24}\) UATRA solves the problem of the insolvent or effectively immune tortfeasor in the following way.

UATRA requires the court to consider the fault of the parties to the action as well as the fault of “released persons.”\(^\text{25}\) Joint and several liability of tortfeasor defendants is restricted to five situations: (1) parties acting in concert\(^\text{26}\) or (2) acting intentionally;\(^\text{27}\) (3) parties liable for failing to prevent intentional injury;\(^\text{28}\) (4) parties with a vicarious liability relationship;\(^\text{29}\) and (5) parties otherwise made jointly and severally liable by statute (typically in the area of environmental harm).\(^\text{30}\) In all other situations, defendants’ liability is several only.\(^\text{31}\)

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21. *Id.*

22. *NationsBank*, 343 Ark. at 443, 36 S.W.3d at 295.

23. *NationsBank*, 343 Ark. at 448, 36 S.W.3d at 298 (Thornton, J., dissenting). *See also Tessaro, supra* note 13 (criticizing *NationsBank*).


25. UATRA § 4(a)(2) and comments thereto, 12 U.L.A. 13 (Supp. 2003). “Released persons” are defined as those who are legally free from tort liability to claimants either through settlements or by virtue of their status as employers protected by workers’ compensation with subrogation rights in employees’ third-party actions. *Id.* § 2(3) and comments thereto, 12 U.L.A. 10-11 (Supp. 2003).


27. *Id.*

28. *Id.* § 6(2).

29. *Id.* §§ 4(c) & 6(3) and comments thereto, 12 U.L.A. 13-14, 16-17 (Supp. 2003).

30. *Id.* § 6(4) and comment thereto, 12 U.L.A. 16-17 (Supp. 2003).

Under UATRA, if the court finds that the several share for which any party is liable is not reasonably collectible, the court is to reallocate that uncollectible share among the other parties and released persons in accordance with their respective percentages of responsibility. For example, suppose P settles with R for $5,000 pretrial, releasing R from liability. The factfinder at trial determines that P was injured in the amount of $100,000, and that responsibility should be allocated 20% to P, 10% to R, 50% to D1, 10% to D2, and 10% to D3. The court determines that D1 is insolvent and its $50,000 share is uncollectible. The court would reallocate D1's $50,000 among P, R, D2, and D3 in a 2/1/1/1 proportion in accordance with their respective fault shares: $20,000 to P, and $10,000 each to R, D2 and D3. The ultimate result would be that of the $80,000 damages for which P herself was not responsible, P would collect $20,000 each from D2 and D3 ($10,000 for their direct shares and $10,000 for their shares reallocated from D1), nothing from R since she has already released R in a $5,000 settlement, and nothing from D1 (although P, D2 and D3 could seek to recover their reallocated shares from D1 should D1 later become solvent). In this fashion, unlike traditional joint and several liability, under UATRA plaintiffs who are at fault share with asset-rich defendant tortfeasors the burden of uncollectible judgments against tortfeasors lacking assets.

The UATRA approach, balanced though it may seem, did not fare well in the 2003 General Assembly. In hearings on the originally proposed tort reform bill (HB 1038) before the 20-member House Judiciary Committee, the seven attorney members of that committee proposed a bipartisan amendment to HB 1038 based on UATRA. In some what might regard as a display of the anti-lawyer sentiment prevailing on that committee, the attorney members’ proposal gained the support of only one other committee member and was defeated by a vote of 11-8.

IV. Allocation of Responsibility under the Civil Justice Reform Act

The Civil Justice Reform Act of 2003 goes much farther than UATRA in restricting the scope of joint tortfeasor liability and in permitting shares of fault to be assessed against nonparties. These features of the new law are likely to have the most impact on future tort litigation in Arkansas.

The fundamental principle of the new law is stated in section 1:

(a) In any action for personal injury, medical injury, property damage, or wrongful death, the liability of each defendant for compensatory or punitive damages shall be several only and shall not be joint.

(b) Each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant’s percentage of fault, and a sepa-

34. Id. § 5(c), 12 U.L.A. 14 (Supp. 2003).
35. A comparison of the results of the application to this suppositious case of (a) traditional common law, (b) UATRA, and (c) the Civil Justice Reform Act is set out in Part V-D infra.
36. The attorneys on the committee were Mike Hathorn (D), chair; Sam Ledbetter (D), vice-chair; Chaney Taylor, Jr. (R); John Paul Verkamp (R); Marvin Childers (R); Chris Thyer (D); and Michael Lamoureux (R). In their daily practices, some predominantly represent plaintiffs and others defendants.
rate several judgment shall be rendered against that defendant for that amount.\textsuperscript{38}

Joint tortfeasor liability is preserved in only two situations (in contrast to the five situations in which it is preserved under UATRA\textsuperscript{39}). Under the new law, a party is responsible for another’s fault only (1) when there exists a vicarious liability relationship such that the other person or entity is “acting as an agent or servant” of the party, or (2) when the party is “acting in concert” with the other person or entity.\textsuperscript{40} “Acting in concert” is defined more strictly than at common law, as “entering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort.”\textsuperscript{41} Negligent or even reckless conduct cannot subject a party to joint tortfeasor liability for “acting in concert” with an intentional or negligent tortfeasor, nor can substantial assistance to the tortfeasor absent conscious agreement to commit an intentional tort.\textsuperscript{42}

The new act also transforms Arkansas law by requiring the fact finder to consider assessing fault against “all persons or entities who contributed to the alleged injury . . . regardless of whether the person or entity was, or could have been, named as a party to the suit.”\textsuperscript{43} This provision permits the attribution of fault to settling tortfeasors, as previously allowed in Arkansas.\textsuperscript{44} The provision also permits the attribution of fault to negligent employers, who are immune from tort liability for workplace injuries under the workers’ compensation laws but who retain subrogation rights in employees’ third-party actions against non-employer persons (such as product manufacturers) proximately contributing to employees’ injuries.\textsuperscript{45} This attribution of fault to negligent employers was not previously allowable under Arkansas law,\textsuperscript{46} but is recognized under UATRA.\textsuperscript{47} More radically, the

38. 2003 Ark. Acts 649 § 1(a)-(b), ARK. CODE ANN. § 16-55-201 (a)-(b) (Michie Supp. 2003). The new law does not apply to tort cases not involving personal injury or property damage, such as cases brought on theories of defamation, privacy violation, trespass, nuisance, interference with contractual relationships, malicious prosecution, abuse of process, fraud or deceit, conversion, nonmedical professional malpractice, slander of title, and unfair competition, to name a few. Whether the law applies to claims of outrage, breach of warranty, false imprisonment, and other actions bordering on personal injury may depend on the facts of the case and will require judicial interpretation.

39. See supra notes 26-31 and accompanying text.


43. Id. § 2(a), ARK. CODE ANN. § 16-55-202(a) (Michie Supp. 2003).

44. See Giem v. Williams, 215 Ark. 705, 711, 222 S.W.2d 800, 804 (1949); HENRY WOODS & BETH DEERE, COMPARATIVE FAULT §§ 13:15 at 285-86 (3d ed. 1996); id. § 13:19 at 300-01 (describing Arkansas practice). The new law must be read alongside the part of the Arkansas version of the Uniform Contribution Among Tortfeasors Act that provides for a pro tanto reduction in the amount of defendants’ liability by “the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.” ARK. CODE ANN. § 16-61-204 (Michie 1987). See generally Douglas Lee, Case Note, McDermott, Inc. v. AmClyde: Arkansas’s Wake-Up Call in Accounting for Settlements in Multi-Defendant Litigation? 48 ARK. L. REV. 1027 (1995) (helpful discussion of problems of settlements and contribution).

45. See ARK. CODE ANN. § 11-9-410 (Michie 2002 Repl.) (third-party actions by employees and employers’ subrogation rights).

46. See id.; Robertson v. Norton Co., 148 F.3d 905, 909-10 (8th Cir. 1998) (interpreting §§ 11-9-410 and 16-64-122(a) to prohibit attributing fault to employer due to exclusivity of workers’ compensation remedy).

new act permits the attribution of fault to other nonparties: foreign entities that cannot be sued for lack of personal jurisdiction, persons or entities protected by sovereign, charitable, or intrafamily immunities, persons or entities without assets from which a recovery might be obtained, and apparently even criminals on the lam whose identity and location are unknown.48

Like UATRA, the Civil Justice Reform Act has a mechanism by which fault attributed to an insolvent tortfeasor defendant can be reallocated to other defendants, although the fault percentage to be reallocated is generally less than under UATRA. If the court determines after entry of judgment that a defendant’s several share of liability will not be reasonably collectible, the court is to increase the share of a defendant found to be at least 50% at fault by up to 20%, and the share of a defendant found to be more than 10% but less than 50% at fault by up to 10%. The fault share of a defendant found to be 10% at fault or less is not to be increased.49

This reallocation of uncollectible fault shares, however, applies only to the fault shares of “defendants,” not to fault shares attributed to nonparties.50 Tortfeasor defendants, even if their fault is substantial, will not have their liability increased if the factfinder attributes fault to a nonparty settling tortfeasor, a negligent employer, or a person or entity beyond the reach of judicial process or otherwise immune.

Beyond question, the Civil Justice Reform Act creates powerful new incentives for defendants to dilute their potential liability by claiming that nonparties are responsible for some or all of plaintiffs’ injuries. Blame shifting has always been a favored tactic in tort litigation. But under the new law, that art form is raised to a new level. The targets of the attempted blame shifts are limited only by defendants’ counsels’ imaginations. Those targets – the “empty chairs” – will not be present in the courtroom to defend themselves. The only one in the courtroom to whom the new law gives an incentive to minimize those targets’ fault is someone who may in fact have been injured by the very targets she must defend, and who may not even know who or where the targets are: the plaintiff.

V. The Odd Practical Consequences of the Civil Justice Reform Act

To illustrate the strange workings of the Civil Justice Reform Act of 2003, consider the following four situations. The first is a classic torts hypothetical; the second and third are based on cases recently litigated in other parts of the country that

48. The fault of such nonparties must be considered if a defending party gives notice at least 120 days prior to the trial that a nonparty was wholly or partially at fault. The notice is to set forth “the nonparty’s name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.” 2003 Ark. Acts 649 § 2(b), Ark. Code Ann. § 16-55-202(b) (Michie Supp. 2003). Even a skimpy description of an unknown assailant might be viewed as sufficing to constitute a proper notice under the statute. See Pedge v. RM Holdings, Inc., ___ P.3d ____, 2002 WL 31834684 (Colo. App. 2002), cert. denied, 2003 WL 22038816 (Colo. 2003) (allowing apportionment of fault to unknown assailant). But see Field v. Boyer Co., 952 P.2d 1078 (Utah 1998) (contrary result based on statutory interpretation); Plumb v. Fourth Judicial Dist. Ct., 927 P.2d 1011, 1016-21 (Mont. 1996) (striking part of analogous statute on state and federal due process grounds); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19, comment f (2000) (“A nonparty who is not sufficiently identified to be either subject to service of process or discovery ordinarily should not be submitted to the factfinder for assignment of responsibility.”).

The new law is not explicit about who bears the burdens of production and persuasion regarding the fault of nonparties, but § 6 will probably be read as placing those burdens on defendants. That section states: “This act does not amend the existing law that provides that the burden of alleging and proving fault is upon the person who seeks to establish fault.” Ark. Code Ann. § 16-55-206 (Michie Supp. 2003). Defendants will be the persons seeking to charge nonparties with fault.


50. Id. The new law is not explicit with regard to whether an uncollectible fault share is to be reallocated if attributed to a plaintiff against whom a counterclaim is filed by a defendant. Since in such a case the plaintiff may functionally be considered also to be a defendant for purposes of fault allocation, the law should be interpreted to reallocate such a plaintiff’s uncollectible fault share in the same fashion as defendants’ uncollectible fault shares.
could easily occur in Arkansas; and the fourth is the suppositious case posed above. In each of these situations, under the new law defendants are likely to escape substantial liability that would clearly be fixed upon them under generally accepted principles of traditional tort law.

A. The Drag Racers

A staple of first-year torts is the illustration of the joint and several liability of two drag racers. “A and B engage in an automobile race on a public street and A runs over the plaintiff. B will be liable to the plaintiff just as much as A, although B did not actually hit the plaintiff.” Every law student understands the essential justice of this result: both A and B have engaged in negligent or reckless conduct that endangers the general public, and if a member of the public is injured as a result but A has no assets or insurance, it is proper for B to compensate the injured plaintiff. The innocent party recovers her loss from a culpable defendant, and would be drag racers are in theory deterred from engaging in such conduct in the future.

The Civil Justice Reform Act appears to reverse this result. Under the act, B is not jointly liable for the injury of the plaintiff hit by A’s car, unless A was either “acting in concert” with B or “acting as an agent or servant” of B. The latter is implausible in this situation. Under the new law’s strict definition of “acting in concert,” B’s negligence or recklessness is not enough; A and B must “enter[] into a conscious agreement to pursue a common plan or design to commit an intentional tort.” But neither A nor B intended to harm the plaintiff, so B is not jointly liable for the injury A caused. To be sure, under standard negligence principles, it is within the realm of possibility that B might be directly liable to P (as opposed to jointly liable for A’s negligence) if B’s negligent or reckless driving was itself a proximate cause of P’s injury. But that inquiry involves often-vexed questions of proximate causation, which are easily avoided by simple application of the principle of joint and several liability.

B. The Immolated Infant

Suppose an Arkansas retailer purchases children’s sleepwear from a Chinese manufacturer for resale to Arkansas consumers. The sleepwear meets the lax flammability standards of the federal Flammable Fabrics Act. The child of a purchaser, wearing the sleepwear, comes into accidental contact with an open flame and is badly burned when the sleepwear catches on fire. The Chinese manufacturer is not subject to personal jurisdiction in Arkansas courts.

Under standard products liability law, the retailer is strictly liable to the injured child and family if the product is found to have been sold while in a “defective condition unreasonably dangerous to the user or consumer.” (The fact that the product met federal safety standards is non-conclusive evidence of nondefectiveness, but the factfinder may still find the product defective.) The retailer, in addition to any contractual indemnity rights it may have against the manufacturer, also has a statutory right of indemnity for its lia-

51. See supra notes 32-35 and accompanying text.


53. Id. § 5(a), ARK. CODE ANN. § 16-55-205(a) (Michie Supp. 2003).


56. ARK. CODE ANN. § 4-86-102(a) (Michie 2001 Repl.).

57. Id. § 16-116-105(a) (Michie 1987).
bility to the plaintiffs.\textsuperscript{58} This is a sensible arrangement: if the product is found defective, the injured child receives compensation (with a deduction for plaintiff fault, if any) from the retailer; the retailer, which has a contractual relationship with the manufacturer, is in a good position to recoup its liability, less costs of collection from the manufacturer; and both the retailer and the manufacturer have an incentive to deal in clothing products with safer flammability characteristics in the future.

The Civil Justice Reform Act changes the calculus. Under the new law, the factfinder is required to consider the fault\textsuperscript{59} not only of the retailer for selling an allegedly defective product and of the plaintiff for possibly using the product unsafely, but also the fault of the foreign manufacturer for improper selection of fabric, design, and so on. A factfinder might well consider that the retailer had received assurance that the product met federal safety standards, and might assess the absent foreign tortfeasor with the lion’s share of the responsibility for the accident. That share is uncollectible, but under the new law the retailer shoulders no part of the uncollectible damages since the manufacturer is not a defendant.\textsuperscript{60} The retailer benefits at trial from pointing to the empty chair.

In effect, under the new regime, by choosing to contract with a foreign manufacturer not subject to the jurisdiction of Arkansas courts – by bringing in an “empty chair” – the Arkansas retailer will have shifted the responsibility for the lion’s share of plaintiff’s damages in such a case from the defective product’s distributive chain to the plaintiff herself. This is so whether the plaintiff has contributed to her own injury or not. The effect is to give an advantage to foreign manufacturers at the expense of injured Arkansas citizens, while diminishing incentives for providing safe products – perhaps not exactly what the General Assembly had in mind in passing the Civil Justice Reform Act.

C. The Rape in the Mall Parking Lot

Suppose a privately owned Arkansas shopping mall maintains an inadequate security force, despite knowledge of numerous recent assaults and robberies on the premises. A customer leaving the mall one night is raped in the parking lot. The perpetrator is never apprehended. The rape victim brings an action against the mall owner and the private security firm with which the mall has contracted, alleging that their negligent failure to protect customers was a proximate cause of her injury.

A trend is evident among state supreme courts to recognize that owners of businesses, apartment complexes, and the like have a duty to implement reasonable measures to protect their patrons and tenants from foreseeable criminal acts.\textsuperscript{61} Although the Arkansas Supreme Court has not yet explicitly joined these courts in recognizing such a duty, it has indicated that if the business were aware of numerous recent prior similar incidents such that criminal acts to patrons are reasonably foreseeable, the business might be found liable for not taking reasonable measures to prevent harm to its patrons.\textsuperscript{62}

\begin{itemize}
\item \textsuperscript{58} Id. § 16-116-107 (Michie 1987).
\item \textsuperscript{59} “Fault” in this context includes non-negligent breach of legal duty, such as breach of warranty and supplying of a product in a defective condition. See id. § 16-64-122(c) (Michie 1987).
\item \textsuperscript{60} 2003 Ark. Acts 649 § 3, Ark. Code Ann. § 16-55-203 (Michie Supp. 2003). Nor would joint and several liability apply, since the foreign manufacturer would not likely be viewed as an “agent or servant” of the retailer, and the retailer and manufacturer were not “acting in concert.” Id. § 5, Ark. Code Ann. § 16-55-205 (Michie Supp. 2003).
\item \textsuperscript{61} See, e.g., Sturbridge Partners, Ltd. v. Walker, 482 S.E.2d 339, 341 (Ga. 1997); Delta Tau Delta v. Johnson, 712 N.E.2d 968, 973 (Ind. 1999); Posecai v. Wal-Mart Stores, Inc., 752 So.2d 762, 766 (La. 1999); Doe v. Gunny’s Ltd. Partnership, 593 N.W.2d 284, 289 (Neb. 1999); McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891 (Tenn. 1996); Timberwalk Apts. v. Cain, 972 S.W.2d 749, 756 (Tex. 1998); RESTATEMENT (SECOND) OF TORTS § 344 & comment f (1965); David A. Roodman, Note, Business Owners’ Duty to Protect Invitees from Third Party Criminal Attacks, 54 Mo. L. Rev. 443 (1989).
\end{itemize}
If, in our parking lot rape case, the plaintiff established a prima facie case of breach of duty on the part of the mall owner and the private security firm, under the Civil Justice Reform Act the jury would be instructed to apportion liability among nonparties as well as the parties. Assuming that the party defendants gave proper notice under the statute “setting forth the nonparty’s name and last known address, or the best identification of the nonparty which is possible under the circumstances,” the unknown perpetrator of the rape might be one of those persons whose “fault” the jury would be required to consider. Since the heinousness of the perpetrator’s intentional act would typically seem to outweigh by far the merely negligent culpability of the mall and security firm, it is likely that the jury would assess a substantial share of responsibility to the rapist — in whose share of responsibility neither the mall nor the security firm would be required to participate, since the rapist is not a defendant. Thus, despite the fact that the failure to provide adequate security was a sine qua non of the rape, the mall and security firm would likely escape liability for most of the plaintiff’s damages. Instead, she would bear the “empty chair” rapist’s share of responsibility herself.

This perversive result, that the rape victim and not the negligent mall owner and security firm shoulders the responsibility for most of her own damages even though the “emptiness of the chair” is in a sense attributable to the defendants’ negligence, has been condemned by the great weight of modern authority. The National Conference of Commissioners on Uniform State Laws determined that “joint and several liability should be retained where a defendant breaches a duty to protect another person from an intentional tort of a third party,” since the incentives of owners of commercial premises to protect those on their premises “would be significantly undercut were liability to be apportioned on a several only basis.” Likewise, the new Restatement of Apportionment proposes to solve the problem in this fashion:

A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and several liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person.

Professor Dobbs, viewing the escape from significant liability of the premises owner who negligently fails to protect against foreseeable criminal attacks as “a morally unacceptable result,” favors the new Restatement’s position. But it seems doubtful that an Arkansas court could adopt this expanded view of joint and several liability, however meritorious it may be, in light of the specific language of §§ 1 and 5 of the Civil Justice Reform Act.

64. Id. § 2(b), Ark. Code Ann. § 16-55-202(b) (Michie Supp. 2003).
65. See supra note 48. A separate issue, beyond the scope of this article, is whether it is proper under our comparative fault law to compare the intentional acts of a nonparty with the negligent acts of a party for purposes of assessing fault. Some courts refuse to do so, while others permit it. See generally Ellen M. Bublick, The End Game of Tort Reform: Comparative Apportionment and Intentional Torts, 78 Notre Dame L. Rev. 355 (2003). Two Arkansas decisions have held it improper to diminish a plaintiff’s recovery for a defendant’s intentional tort by reference to the plaintiff’s own negligence: Whitlock v. Smith, 297 Ark. 399, 762 S.W.2d 782 (1989), and Kellerman v. Zeno, 64 Ark. App. 79, 89, 983 S.W.2d 136, 141 (1998). However, these cases do not address the problem of diminishing a plaintiff’s recovery for a defendant’s negligent tort by reference to a nonparty’s intentional tort.
67. UATRA § 6(2) and comment thereto, 12 U.L.A. 16-17 (Supp. 2003).
69. See Dobbs, supra note 7, at 937.
D. Differences Among Traditional Joint and Several Liability, UATRA, and the Civil Justice Reform Act: An Example

To illustrate the practical differences among traditional joint and several liability, the Uniform Act (UATRA), and the Civil Justice Reform Act, let us return to the supposititious case posed in Part III of this article: P has suffered $100,000 in harm. P settles with R for $5,000 pretrial, releasing R from liability. The factfinder at trial determines that responsibility should be allocated 20% to P, 10% to R, 50% to D1, 10% to D2, and 10% to D3. The court determines that D1 is insolvent and its $50,000 share is uncollectible.

Under traditional common-law principles of joint and several liability as established in Riddell v. Little70 and Watson v. Tull,71 P would be entitled to recover all of her damages except the 20% for which she herself was responsible and the 10% allocated to R.72 D1's uncollectible fault share would be absorbed by D2 and D3. P's recovery would be $70,000, in addition to the $5,000 she received in the pretrial settlement with R.

Under UATRA's intermediate position, as explained above,73 D1's uncollectible fault share would be reallocated among P, R, D2, and D3 in proportion to their respective fault shares. P's recovery would total $40,000, plus the $5,000 received in the settlement with R.

Under the Civil Justice Reform Act, defendants' liability is several only. Presumably Riddell v. Little and Walton v. Tull still live, in the sense that P can recover something from the available defendants D2 and D3, even though each of their individual fault shares is less than P's, since all defendants' aggregated fault shares exceed plaintiff's.74 But D1's uncollectible fault share is not reallocated in any part to D2 or D3, since neither D2's nor D3's fault exceeds the 10% threshold for participating in a reallocation.75 As a result, P winds up absorbing the full burden of D1's insolvency. P's recovery is limited to $20,000 – $10,000 each from D2 and D3 – plus the $5,000 received in settlement.

VI. Conclusion

The aspects of the Civil Justice Reform Act addressed in this article are entirely one-sided, moving Arkansas tort law decidedly in the direction of protecting tortfeasor defendants and their insurers from liability. Whether some movement, at least, in that direction was advisable is a matter upon which reasonable people can disagree. But as the examples set out in this article illustrate, in many cases the new law's drastic restrictions on joint and several liability and its provisions allowing responsibility for injury to be shifted to persons not before the court create serious inequities and undercut important safety incentives.

The full implications of the new law remain to be worked out over the course of time. But as cases of injustice accumulate, legislators should be alert to the importance of revising the most troublesome provisions of the law. In that regard, the Uniform Apportionment of Tort Responsibility Act is a suitable model for reference.

70. 253 Ark. 686, 488 S.W.2d 34 (1972). See supra notes 16-17 and accompanying text.


72. See Woods & Deere, supra note 44, at 285-86. This assumes the nonsettling tortfeasor defendants crossclaimed against R, who thereby received an apportionment of fault. Had they not done so, or had R been dismissed from the case, the nonsettling defendants would receive credit only for the $5,000 paid by R for his release. Id. at 286; Woodard v. Holliday, 235 Ark. 744, 361 S.W.2d 744 (1962).

73. See supra notes 32-35 and accompanying text.

74. See 2003 Ark. Acts 649 § 7, Ark. Code Ann. § 16-55-207 (Michie Supp. 2003) (preserving 50% equal-fault-bar comparative fault rule). If the legislature had intended to overturn this aspect of Riddell and Walton it could have done so explicitly in this provision, but it did not.

D1's, D2's, and D3's fault shares are aggregated for purposes of the equal-fault-bar comparative fault rule, since all three defendants are "parties from whom the claiming party seeks to recover damages." Ark. Code Ann. § 16-64-122 (Michie 1987); NationsBank v. Murray Guard, 343 Ark. 437, 443, 36 S.W.3d 291, 295 (2001). See supra notes 18-22 and accompanying text.