

May 3, 2002

Dear Senator or House Member:

I recently learned that the Pennsylvania legislature is considering a bill that would, among other changes, abolish joint and several liability and compare intentional and negligent torts. As a professor whose academic research focuses on comparative apportionment, I would like to share my deep concern about this type of legislation and strongly encourage the legislature to thoroughly and carefully review such a proposal. In particular, I would encourage the legislature to study the bill's effect on the legal rights of the victims of rape and other crimes.

Let me first outline my qualification to give an opinion on this matter. As a professor of Tort law at the University of Arizona's James E. Rogers College of Law, I have researched and written a number of articles on the subject of comparative apportionment. My article *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUMBIA LAW REVIEW 1413 (1999) examines courts' widespread acceptance of victim fault defenses, such as the defense recently raised by Cardinal Law claiming that a six-year-old victim of sexual assault was guilty of comparative negligence. My article recommends limits on these comparative fault defenses in both comparative fault and comparative apportionment jurisdictions. As a result of this research, I served as an invited guest to the consultative committee on the Restatement Third of Torts Apportionment of Liability. In addition, my conclusions have been cited with approval in the leading treatise on Tort law.

My current article, *The End Game of Tort Reform: Apportionment and Intentional Torts* examines recent state controversy over including intentional torts within comparative apportionment systems. The article, which has been accepted for publication this November, examines the questions about comparing intentional and negligent torts that have recently emerged on court dockets in nearly half the states in this country. The article also examines the comparative apportionment recommendations offered by the Restatement Third of Torts and the system likely to be recommended by the National Commissioners on Uniform State Laws, at a conference in which I will participate this August.

In addition to my apportionment research, I have been an active advocate of the rights of crime victims. I currently serve on the board of directors of the National Victims' Rights Law Center, I wrote an amicus brief in a rape case before the Massachusetts Supreme Court on behalf of the National Coalition Against Sexual Assault, and I have spoken at a national conference on the issue of legal approaches to rape prevention.

Unfortunately, in the short period of time before you vote on whether to hold hearings on this legislation, I do not have time to fully examine the pending legislation or convey all of my many concerns about comparative apportionment systems that abandon joint and several liability. Nevertheless, let me briefly identify a few concerns about the impact of comparative apportionment

legislation on victims of rape and other crimes.

One alarming prospect raised by comparative apportionment systems is the possibility that an intentional tortfeasor, like a rapist, can diminish his legal responsibility to the victim by blaming her for the rape. For example, when the state of Louisiana enacted a comparative apportionment system, a 13-year-old rape victim was found 12% liable for her own gang rape, with respect to the rapists, because she went with the group of boys to drink some beer. *See Morris v. Yogi Bear's Jellystone Park Camp Resort*, 539 So. 2d 70 (La. Ct. App. 1989).

The possibility of victim blaming is a concern even when the rapist himself is not the party invoking the victim fault defense. For example, in one recent case, a 16-year-old foreign exchange student from Germany was held 41% responsible for the damage done to her when she was repeatedly raped by the father of the U.S. family that sponsored her. *See Beul v. ASSE International, Inc.*, 233 F.3d 441 (7<sup>th</sup> Cir. 2000).

Perhaps the most significant practical concern that rape victims face in jurisdictions that abolish joint and several liability and allow comparison of intentional and negligent fault is that they will be left without any effective tort remedies. The case of *JoAnn Brandon v. The County of Richardson* 624 N.W.2d 604 (Neb. 2001) is illustrative. In that case, the facts of which formed the basis for the academy award-winning movie *Boys Don't Cry*, Brandon Teena, a woman who presented herself to others as a man, was raped by two men who also threatened to kill her. She reported the rape to the Richardson County Sheriff's Department. After conducting a series of emotionally abusive interviews of the victim (which are well chronicled in the Nebraska Supreme Court's opinion), the Sheriff's department took *no* efforts to protect Brandon from the men who had raped her. Within the week, Brandon had been murdered. While the murderers were prosecuted in the criminal courts, Brandon's mother filed a civil suit against Richardson County for its negligent failure to make reasonable efforts (or any efforts) to protect her daughter. In a landmark ruling, the Nebraska Supreme Court held that the county had a duty to protect Brandon after she reported the rape to the sheriff's department. The case was then tried in the lower court. The court concluded that the County was negligent, however, it then apportioned damages between the County, the murder victim and the murderers. Not surprisingly, eighty-five percent of the responsibility for the plaintiff's \$80,000 noneconomic damage award was assigned to the imprisoned murderers. On appeal to the Nebraska Supreme Court, the court rejected the county's attempt to avoid responsibility for its conduct because of the murderers' additional fault. Had the Nebraska Supreme Court permitted the Sheriff's Department to compare its negligence with the murderer's homicide, JoAnn Brandon would have been able to recover only \$18,000 for the Sheriff's Department's adjudicated and legally recognized negligence which caused her daughter's death.

When jurisdictions do not retain joint and several liability for negligent tortfeasors, comparison of intentional and negligent torts can dramatically reduce rape victims' ability to recover damages from negligent defendants. For example, because of intentional-negligent fault comparisons in a several liability system, a woman who had been sexually assaulted by a doctor she was required to see despite her insurance company's knowledge of previous accusations of sexual assault against the doctor, the assault victim received 60 percent less of her compensatory damage award – reducing her compensatory damages award against the insurer from \$46,000 to \$18,400. *See Slack v. Farmers Insurance Exchange*, 5 P.3d 280 (Col. 2000). Similarly, a woman who was murdered when her apartment complex security guard let her agitated ex-boyfriend past security without telling

her it had done so received no compensatory damages to her estate despite the apartment complex's adjudicated negligence. See *Ozaki v. Association of Apartment Owners of Discovery Bay*, 954 P.2d 652 (Haw. 1998). This is because the jury held the exboyfriend 92% responsible for his deliberate act of murder, the complex 3% responsible and the victim 5% responsible for her own murder (because she cursed at the murderer and tried to get inside her apartment before she was killed). Given Hawaii's modified comparative fault system the apartment complex had no responsibility to pay even its assigned 3% because the victim had been assigned a higher fault share than the apartment complex.

Given the effects of comparative apportionment and several liability on rape victims' ability to recover compensation from negligent defendants, advocates for sexual assault victims have opposed this type of legislation. When the Connecticut Supreme Court decided to compare intentional and negligent fault, groups including the Connecticut Sexual Assault Crisis Services Inc., and the Legal Assistance Resource Center of Connecticut Inc. (a low income advocacy organization) successfully appealed to that state's legislature to overturn the Court's decision. Thomas Scheffey, *Lawmakers Unmake Bhinder*, THE CONN. L. TRIB., May 10, 1999.

The concern with diminishing if not eliminating tort recoveries is not simply a question of compensation for rape victims, although that is an important component. It is also a concern about deterring defendants from creating, ignoring, or disguising safety hazards. For example, after a door-to-door vacuum cleaner sales company was held liable for damages in a case in which an employee with a prior history of sexual assault convictions raped a customer in her home, the company instituted the employee background checks that it had previously maintained it was unable to institute. See *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 736 n.1 (Tex. 1998). Similarly, liability may persuade companies to introduce inexpensive security measures that can produce "outstanding results. For instance, Wal-mart found that inexpensive parking lot security could substantially reduce the 80% of its crimes that occurred in the parking lot or outside perimeter of its stores. See *McClung v. Delta Square L.P.*, 937 S.W.2d 891, 904 n.13 (Tenn. 1996). In addition, questions of accountability are critical. For example, in one case a motel in a high crime area had provided alarms to protect its television sets though not its guests. See *Wassell v. Adams*, 865 F.2d 849 (7<sup>th</sup> Cir. 1989).

The issue of apportionment of responsibility is an issue of genuine importance to crime victims as well as those of us who hope to reduce their number. As important as the issue is, it is equally complex. Consequently, I hope that you will take the time to carefully consider the issues involved, and that you will not hesitate to call on me if I can be of any assistance to you in that endeavor.

Sincerely,

Ellen M. Bublick

The opinions in this letter are the opinions of its author and do not represent the views of the University of Arizona or its Board of Regents.