Drifting Towards Proportionate Liability: Ethics and Pragmatics

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The uneven, but striking rise of proportionate liability across the common law world exemplifies many aspects of the conference theme. The common law baseline of joint and several liability has been eroded and reformed in several jurisdictions. Often this has been justified as a fair and principled development, more appropriate to a modern law of tort. In the United States it has been linked to the rise of ‘comparative’ negligence (the proportionate form of contributory negligence). The Third Restatement (Torts) treats comparative negligence and proportionate liability together in a volume on ‘Apportionment of Liability’, even though comparative negligence does not involve an apportionment of liability, only a reduction in damages. It has been suggested in the US that the rise of comparative negligence and proportionate liability represents a ‘paradigm shift’ in modern tort law, and indeed the two have tended to develop together. Several Australian jurisdictions have also introduced important elements of proportionate liability and further reform is debated. Yet the United Kingdom, which has had a proportionate form of contributory negligence since 1945, has not reformed its joint and several liability principle and the courts themselves have reversed the judicial development of a specific form of proportionate liability in Barker v Corus. New Zealand has resisted proportionate liability until now, though reform is again being debated. Closer analysis shows wide divergence in the nature of proportionate liability in different jurisdictions, applying for example to diametrically opposed forms of damage or in entirely different circumstances; and dealing with immune parties or non-parties to the action in entirely different ways. We suggest that there is no shared basis in fairness or principle that would explain a ‘paradigm shift’ to proportionate liability. The comparison with contributory negligence does not stand scrutiny and often involves a misstatement of the nature of comparative forms of that defence. Rather, the introduction of proportionate forms of liability is closely associated with ‘tort reform’ agendas and with considerations that are highly specific to different common law legal cultures. The role of juries in the United States and the existence of very fine divisions of responsibility in that jurisdiction are highlighted and contrasted with the UK and Australia; the reluctance of courts in some jurisdictions to deny duties of care on the part of peripheral parties is also identified. The rise of proportionate liability can be approached as a compromise, or even a deal, on a grand scale. Compromises are specific to their context and caution – at least – is required in replicating them elsewhere. Finally, and having questioned principled endorsements of proportionate liability, we investigate and critically question remaining claims, that proportionate liability is to be seen as preferable on pragmatic grounds. In fact, we notice a range of counter-arguments to this claim.