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A Review of Recent NJ Cases Involving Allocation, With Food for Thought From the Appellate Division

The allocation cases raise some important points in dealing with joint tortfeasors. In particular, problems arise when a settling defendant attempts to pursue contribution from a non-settling person or entity.

By Fredric Paul Gallin

There have been some recent cases that involve allocation and contribution. These concepts are intricately intertwined. The cases raise some important points in dealing with joint tortfeasors. In particular, problems arise when a settling defendant attempts to pursue contribution from a non-settling person or entity.

When looking at contribution and allocation issues, the key statutes are the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1, et. seq. and the Comparative Negligence Act, N.J.S.A.:15-5.1, et. seq. The underlying principle of these acts is that a tortfeasor should only have to pay its "fair share" of responsibility and to alleviate what was felt to be the harshness of "joint and several" liability, through which a tortfeasor whose acts contributing to the happening of an accident were only a minor factor in what occurred could end up bearing the entirety of a verdict.

In *Maison v. New Jersey Transit*, 245 N.J. 270 (2021), the plaintiff was injured while riding on a Transit bus. She was being harassed by a group of unknown teenagers. The bus driver did nothing to help. When the teens were exiting the bus one of them hit plaintiff in the face with a bottle, causing serious injuries. The trial court refused to charge allocation and the verdict was $1.8 million.

The bulk of the case dealt with issues relating to New Jersey Transit's obligations as a common carrier and addressed issues beyond the scope of this article. However, the Supreme Court upheld the Appellate Division's decision that the trial court erred in not allowing for allocation. The court noted that allocation was specifically directed by the Tort Claims Act, N.J.S.A. 59:9-3.1, even when the tortfeasor was unknown or was not a party to the case. In order to prevent unfairness to the plaintiff, and considering the heightened duty of a common carrier, the court directed that the following was to be incorporated into the jury charge, 245 N.J. at 308:

Specifically, in addition to the model common-carrier charge, Model Jury Charges (Civil), 5.73(A), the jury should be instructed that in

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determining allocation of fault it should consider the following:

The apportionment of liability should reflect the extent to which defendants' failure to discharge their common-carrier duties exposed plaintiff, as a passenger in their care, to the intentional misconduct of another passenger.

The apportionment of liability should not diminish the duty of defendants, as common carriers, to protect their passengers from foreseeable negligent or intentional torts by co-passengers.

In apportioning liability, consideration may be given to whether NJ

Transit promulgated effective policies for training its bus drivers in dealing with misconduct by passengers and whether the bus driver in this case was trained in those policies.

Weight may be given to whether defendants' breach of their duty has contributed to the inability to identify the bottle thrower.

Important to the allocation question involving the unknown tortfeasor in *Maison* is the role of the Tort Claims Act. As to non-governmental defendants, there is authority for the proposition that one may not allocate responsibility to a non-party. *Benecivenga v. J.J.A.M.M.*, 258 N.J. Super. 399 (App. Div. 1992). In *Benecivenga* plaintiff was injured by an unidentified assailant in a bar.

Our courts have allowed a "John Doe" on the verdict sheet in auto cases. *Krzykalski v. Tindall*, 232 N.J. 525 (2018). However, an auto case like *Krzykalski* can be differentiated from *Benecivenga* because of the existence of UM coverage which would be protecting the plaintiff by standing in for the "John Doe" tortfeasor. Based on cases like *Benecivenga*, defense counsel's best practice would be to try and identify any "John Doe" and try and get them served. The assumption is that even if they default, they will be on the verdict sheet and the viable defendant has the ability to seek allocation.

In *Glassman v. Freidel*, 249 N.J. 199 (2021), the Supreme Court addressed the issue of what occurs when there is a partial settlement and successive tortfeasors. This case presented a classic successive tortfeasor situation. Plaintiff's decedent fell at a restaurant and fractured her ankle. A month later she died of a pulmonary embolism. Her estate claimed that the embolism was related to the initial injury and was also the subject of subsequent malpractice. Plaintiff settled with the restaurant. The case then involved the allocation issues as against the medical malpractice defendants.

In the court's decision Justice Patterson reviewed the history of both the Joint Tortfeasors Contribution Act and the Comparative Negligence Act. The net result of those acts was that allocation was neither pro rata nor pro tanto. Instead it was based on each party's fair share of responsibility. A settling tortfeasor is insulated from future contribution claims arising out of the same incident.

As a collateral practice point, it is useful to remember the advantages plaintiffs can sometimes get by settling with one of the tortfeasors. *Kiss v. Jacob*, 138 N.J. 278 (1994). When the plaintiff settles with a defendant, that defendant becomes an "empty chair." The burden of proving a settling defendant's negligence, in order to get an apportionment of that defendant's share, rests on the remaining defendant. If the jury does not assess any negligence against the settling defendant, the court would not apply a set-off. In effect whatever the plaintiff obtains from the settling defendant becomes "free money," and it is possible for a plaintiff to obtain damages greater than the overall value of the claim.

In *Glassman* Justice Patterson went over the rules to be followed in a successive tortfeasor situation where the initial tortfeasor has settled. The first step involves trying to determine how much of the damages to apportion to the first event. Any damages specific to the first event cannot be attributed to the subsequent tortfeasor. In addition, it is not necessary to address any liability questions as to the first event. The jury would then determine the additional damages caused by the subsequent medical practice and also allocate liability amongst the medical malpractice defendants.

Importantly, in the absence of a settlement, the initial tortfeasor would bear responsibility for the entire event, including the subsequent malpractice. In that case the negligence defendant would have an interest in trying to attribute the bulk of the damages to the health care providers to lessen its own burden.

This brings us to the June 20, 2022, Appellate Division decision in *Hoelz v. Bowers*, involving a settling initial defendant who wished to pursue contribution from a subsequent tortfeasor.

On March 28, 2014, plaintiff was a patient at Virtua Health/Memorial Hospital of Burlington County when she was diagnosed with a right ankle fracture and a left lateral malleolus fracture. The defendant/third-party plaintiff, Dr. Bowers, ordered that a short-leg cast be placed on both of plaintiff's ankles. Plaintiff was subsequently discharged and admitted to third-party defendant Lutheran Crossings Enhanced Living, a rehabilitation facility. Dr. Bowers continued to treat her.

While at Lutheran Crossings, plaintiff was treated by an internist, Dr. Comiskey. She stayed in the rehabilitation facility until May 7, 2014, when she was readmitted to Virtua with bilateral gangrene. As a result of the gangrene, she required

partial amputation of her left leg and surgery on her right foot.

The plaintiff filed a complaint against Bowers and her employer, Burlington County Orthopedic Specialists, for negligence. Bowers filed a third-party complaint against Comiskey and Lutheran Crossings, alleging that their subsequent actions contributed to the injuries suffered by the plaintiff. The plaintiff never amended her complaint to include the third-party defendants as direct defendants.

The plaintiff subsequently died, but the estate received a significant settlement from Bowers. Bowers attempted to continue her third-party action in an effort to recoup her losses.

Bowers settled with Lutheran Crossings but not with Dr. Comiskey. Just before the September 2021 trial date Comiskey filed a motion in limine seeking to dismiss the third-party complaint because Bowers' settlement with the plaintiff was never reduced to a judgment.

The trial court denied Comiskey's motion to dismiss for procedural reasons, as it was not returnable more than 30 days before the scheduled trial date. The court viewed the motion to dismiss as time-barred in violation of Rule 4:46-1 because it was not returnable more than 30 days before the scheduled trial date.

On appeal, the Appellate Division ruled that Comiskey did not violate Rule 4:46-1 because at the time he filed a formal motion to dismiss there was no trial date on the calendar. The Rule does not require that a dispositive motion be made returnable before the first trial date; it need only be filed in time to be returnable 30 days before the next scheduled trial date. As Bowers had ample opportunity to be heard in opposition to the motion, she should not have been permitted to avoid the motion on the merits.

Regarding the substantive issue of contribution following settlement, the *Hoelz* court discussed the history of the New Jersey Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-2, and followed the New Jersey Supreme Court decision in *Young v. Steinberg*, 53 N.J. 252 (1969), to rule that Bowers abandoned her ability to seek further contribution by failing to commit to judgment her settlement with the plaintiff.

The basic rule on contribution is that a settling defendant gets contribution protection. In exchange, s/he cannot pursue a contribution claim without a judgment. In *Young v. Steinberg*, the Supreme Court held that if a settlement is reduced to a consent judgment then the contribution claim can proceed. The mistake made in the *Hoelz* case is the failure of the settling tortfeasor to reduce the settlement to a consent judgment.

Had plaintiff brought a direct action against Dr. Comiskey, the rules set forth in *Glassman* would have applied after the settlement with Dr. Bowers, and no judgment would have been necessary.

In dicta the *Hoelz* court raised, but did not answer, concerns over application of the holding in *Young* regarding consent judgments and their interplay with the Comparative Negligence Act N.J.S.A. 2A:15-5.1, et seq. Several scenarios were discussed about what could have happened in *Hoelz* and its interaction with *Young v. Steinberg* if this settlement had been properly reduced to a consent judgment. For example, since Comiskey did not agree to the settlement, should Comiskey be permitted to challenge the settlement even if it had been reduced to a consent judgment?

Issues also arise as to who would determine what would be a fair settlement. What result would follow if a jury decided that the damages were worth less than the settlement? How would it be determined whether Bowers had paid more than her fair share and by how much?

The Appellate Division noted that it was bound by the decision in *Young*. Because the settlement by Bowers was not reduced to a consent judgment, the court's hypotheticals became a non-issue. However, practitioners should be mindful of *Hoelz* in the event of a settlement by a joint tortfeasor who wishes to pursue contribution against a remaining defendant, both from the perspective of the defendant seeking contribution and the non-settling defendant who may wish to contest the quantum of the agreed-upon settlement.

Our courts have sought to harmonize the Joint Tortfeasors Contribution Act and the Comparative Negligence Act for decades. As these cases show, new issues continue to arise and practitioners should keep an eye out for complications that can occur between settling and non-settling defendants.

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