
But Compared to What? Comparative Fault, Contribution, and Joint and Several Liability in Illinois

By Thomas A. Demetrio and Michael T. Reagan

A review of the parties, conduct, and damages that must be compared in calculating comparative negligence, contribution and joint and several liability.

I. Introduction

Illinois first entered the world of comparative fault with the release of the supreme court's opinion in *Skinner v Reed-Prentice Division*,¹ which adopted contribution among joint tortfeasors. The legislature codified the *Skinner* decision in the Contribution Act,² which applied to all causes of action accruing on or after March 1, 1978. Comparative fault in Illinois was extended further by the supreme court in *Alvis v Ribar*,³ which adopted the pure form of comparative negligence for assessing a plaintiff's conduct.

Five years later, the 1986 tort reform legislation,⁴ embodied in large part in 735 ILCS 5/2-1107.1, 1116, 1117 and 1118, substituted a 50 percent rule of modified comparative negligence and a 25 percent rule of several liability for causes of action accruing on and after November 25, 1986.

Massive changes in the tort liability system, on a scale not previously seen in a single legislative enactment, were mandated by the Civil Justice Reform Amendments contained in PA 89-7. Significant changes were made to sections 2-1116 (comparative negligence) and 2-1117 (several liability) of the Code of Civil Procedure. Section 2-1118, governing exceptions to the prior joint and several liability provision, was repealed. However, the Illinois Supreme Court held the entire act void in *Best v Taylor Machine Works*.⁵

Comparative fault, in a very broad sense, is designed to make every person responsible for his or her own conduct when compared to the other causes of

the injury and/or damages at issue. However, even the simplest cases give rise to questions of whose conduct is to be included in the comparative equation for the purpose of each distinct legal issue involved. Answering this threshold question — “which parties are included in the comparison?” — will in turn help answer the questions of whether, and to what extent, various parties are liable for misconduct.

It is deceptively easy to say we have a system of comparative fault. This article explores the vital question, “But compared to what?” It will look at the categories of parties to be included in each comparison, review the types of conduct that can be compared, and touch briefly on the impact of types of injuries and damages involved. It will not encompass the myriad issues in a comparative fault system, but rather focus on the methods of comparison. The treatment of the cases will be illustrative, not exhaustive.

II. Comparative Negligence

The statute, at 735 ILCS 5/2-1116, provides that for cases arising on and after November 25, 1986 the plaintiff is barred from recovery if found to be “more than 50% of the proximate cause” of his or her injury. At or below 50 percent, the plaintiff can still recover,

1. 70 Ill 2d 1, 374 NE2d 437 (1977).

2. 740 ILCS 100/0.01-5.

3. 85 Ill 2d 1, 421 NE2d 886 (1981).

4. PA 84-1431.

5. Nos 81890 et al (Dec. 18, 1997).

but that recovery will be diminished by the percentage of his or her fault. The statute offered no explanation of whose fault must be included in calculating the plaintiff's percentage of fault.

A. Settled Parties

As a general rule, the plaintiff's fault is calculated with reference to the fault of the defendants found liable and any other person or entity that proximately caused the plaintiff's injury, regardless of whether they are parties to the lawsuit. For the purpose of computing the plaintiff's comparative negligence, the fault of a settled tortfeasor, *Bofman v Material Service Corp.*,⁶ or a non-party, *Smith v Central Illinois Public Service Co.*,⁷ is to be included in the equation. Including the settled party's negligence does not reduce the responsibility of the defendants but does lessen the plaintiff's percentage of comparative negligence.

Bofman dramatically illustrates the differences in outcome that result depending upon whether settled parties are included in the calculation. *Bofman* was a passenger in a small boat driven by Votava, which entered a gravel pit operated by MSC near the Illinois River. A corner of a sunken barge in the pit was near the surface of the water. Votava, with *Bofman* and another passenger on board, drove his boat into the pit after dark, striking the corner of the submerged barge at approximately 30 miles an hour. Prior to trial, *Bofman* settled with the boat driver. At the trial against MSC, the jury found the two passenger plaintiffs to be each 82 percent at fault with respect to their own injuries.

The appellate court reversed the verdict, concluding that the jury's finding that the passenger plaintiffs were 82 percent of the "total combined negligence" was unsupportable "when Votava's conduct is considered." The court stated that the plaintiff passengers could not possibly have been more negligent than the boat's pilot. The case was remanded for trial to reconsider the fault of all parties, including the settled boat pilot, whose fault probably eclipsed that of the other parties.

B. Wilful and Wanton Misconduct

There have been few controversies over the types of comparison that may be made to determine a plaintiff's comparative negligence. One question that did occupy much of the Illinois

Supreme Court's time was whether a defendant responsible for wilful and wanton misconduct may reduce his or her liability by the percentage of a plaintiff's ordinary negligence. In *Burke v 12 Rothschild's Liquor Mart*,⁸ the court described wilful and wanton misconduct as different in kind than ordinary negligence, thereby preventing the wilful and wanton defendant from taking advantage of the ordinary negligence of the plaintiff. The supreme court's opinion in *Ziarko v Soo Line Railroad*,⁹ however, signaled a potential change in that result.

In *Ziarko*, which will be considered at greater length later in this article, the court analyzed wilful and wanton misconduct for the *contribution* issues it presented. The court concluded that Illinois has historically recognized at least two types of wilful and wanton misconduct — recklessness, which approaches negligence, and intentional behavior. The court, retreating from its *Burke* opinion, held that wilful and wanton misconduct that is "merely" reckless should be treated differently than intentional wilful and wanton misconduct.

The court's analysis on this issue was completed in *Poole v City of Rolling Meadows*.¹⁰ In *Poole*, the court was once again presented with the *Burke* issue of whether a defendant guilty of wilful and wanton misconduct could reduce its liability by the percentage of fault attributable to the negligence of a plaintiff. The court held that a "reckless" defendant could take advantage of the plaintiff's comparative negligence but an "intentionally" wilful and wanton defendant could not.

C. Strict Liability and Other Issues

In *Coney v J.L.G. Industries, Inc.*,¹¹ the court extended the doctrine of comparative fault to strict liability cases for certain purposes. The *Coney* court held that the defenses of misuse and assumption of the risk would no longer bar recovery but instead would be compared in the apportionment of damages. However, the court further stated that a consumer's inattentive failure to discover or guard against a defect should not be compared as a damage-reducing factor.¹² The supreme court reaffirmed its holding in *Coney* in *Simpson v General Motors Corp.*,¹³ again limiting consideration of the plaintiff's comparative fault in a strict liability

case to misuse of the product and assumption of the risk.

In *Simmons v Union Electric Co.*,¹⁴ the supreme court declined to apply

6. 125 Ill App 3d 1053, 466 NE2d 1064 (1st D 1984).

7. 176 Ill App 3d 482, 531 NE2d 51 (4th D 1988).

8. 148 Ill 2d 429, 593 NE2d 522 (1992).

9. 161 Ill 2d 267, 641 NE2d 402 (1994).

10. 167 Ill 2d 41, 656 NE2d 768 (1995).

11. 97 Ill 2d 104, 454 NE2d 197 (1983).

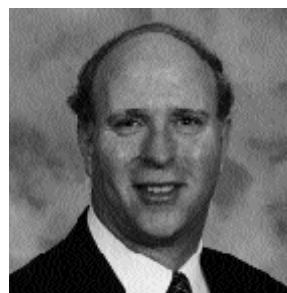
12. *Coney*, 97 Ill 2d 104, 454 NE2d 197, 204 (1983).

13. 108 Ill 2d 146, 483 NE2d 1 (1985).

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the doctrine of comparative fault in a Structural Work Act case. The court characterized the Structural Work Act as a “safety statute” for this analysis.

The recovery of a spouse suing for loss of consortium is to be reduced by the comparative negligence percentage of the physically injured spouse,¹⁵ as well as by the consortium plaintiff’s own negligence.

Even after the adoption of comparative negligence in Illinois, at least one case held that a negligent wrongful death beneficiary was completely barred from recovery rather than suffering only a percentage reduction.¹⁶

The negligence of a child under age seven is still not to be compared to the negligence of a defendant.¹⁷

III. Contribution

The amount of a defendant’s contribution liability, or potential recovery, is cryptically defined in the Contribution Act as “his *pro rata* share of the common liability” based on his “relative culpability.”¹⁸ Many litigants have attempted to define and refine those terms. As with comparative negligence, whether or not a given tortfeasor is included in the contribution equation can dictate enormous swings in the outcome of the case.

The contribution parties can be joint, concurrent, or successive tortfeasors. “[T]he sole requirement for application of the Contribution Act is that the plaintiff’s claim must be premised upon the same injury or occurrence under which the contribution action arises.... Tortfeasors need not be joint in the strict sense (that their acts are simultaneous or that they act in concert) in order for the Contribution Act to apply.”¹⁹ Generally speaking, the contribution parties can be found at fault on differing theories of liability and yet still be compared. Parties who violate a statute, are negligent, or manufacture an unreasonably dangerous product can all be compared in a common equation.²⁰

The goal of the comparison of fault for contribution purposes is to determine the rights of the contribution parties (defendants and third-party defendants) relative to each other. The contribution percentages do not diminish the liability of any original defendant to the plaintiff. The plaintiff’s right to recover the full amount of the verdict is not affected by the contribution per-

centages.²¹

A. Third-Party Defendants

In most instances, the percentages assigned to the contribution parties will total 100 percent after appropriate recalculation from the jury verdict, which assigns fault to all persons who proximately caused the injury. In some cases, however — primarily where con-

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tribution is sought from a person who is not directly liable to the plaintiff on a judgment — non-parties’ fault may have to be accounted for in determining the *pro rata* share of the parties.

In *Truszewski v Outboard Motor Marine Corp.*²² the two defendants settled with the plaintiff. One of the settling defendants then pursued a contribution action against the third-party defendant employer. The resulting contribution verdict was reversed because the fault of the second settled defendant, who was not a party to the contribution action, was not included on the appropriate verdict form (I.P.I. 600.16) as a non-party tortfeasor.

The court stated that because a party cannot be forced to pay more than his or her *pro rata* share of the common liability, and because the common liability is the sum of both the original and the third-party defendants’ fault (a percentage that must equal 100), the third-party defendant’s *pro rata* share of the common liability cannot be fairly assessed without reference to the second settled defendant’s *pro rata* share.²³

B. Multiple Verdict Forms

In asking the jury to determine the contribution percentages, it is important to guard against inconsistent results. The applicable verdict forms (I.P.I. B45.03.A, 600.14, 600.16) ask the jury to report all of its findings of fault in a single table which must add up to

100 percent. The trial judge must then calculate the necessary percentages for each legal issue.

Giving the jury multiple verdict forms presents the risk of inconsistency, which has been recognized in the case law. In *Hackett v Equipment Specialists, Inc.*²⁴ the jury found the sole defendant to be 55 percent at fault with respect to the plaintiff. The jury was given a separate verdict form for the defendant’s action against the third-party defendant. There, the jury found the third-party defendant 100 percent at fault. The verdict was reversed. The court held that the 55 percent fault of the defendant for comparative negligence purposes could not simply have disappeared from the contribution equation.

*Truszewski v Outboard Motor Marine Corp.*²⁵ rejected the approach used in *Harnischfeger Corp. v Gleason Crane Rentals*,²⁶ where the jury was given multiple verdict forms for comparing fault between multiple third-party plaintiffs and a single third-party defendant. *Truszewski* states that *Harnischfeger* “illustrate(s) the gross inequity an improvidently drawn verdict form can yield.”

C. The “Common Liability”

In certain cases, it is of vital interest to determine the amount of the “common liability.” In *Mallaney v Dunaway*,²⁷ defendant A settled with the plaintiff and obtained a release not only in his own favor, but also for the protection of defendant B. Defendant A then sought to obtain contribution against

14. 104 Ill 2d 444, 473 NE2d 946 (1984).

15. *Blagg v Illinois F.W.D. Truck*, 143 Ill 2d 188, 572 NE2d 920 (1991).

16. *Ralston v Plogger*, 132 Ill App 3d 90, 476 NE2d 1378 (4th D 1985).

17. *Chu v Bowers*, 275 Ill App 3d 861, 656 NE2d 436 (3d D 1995).

18. 740 ILCS 100/2(b), 3.

19. *Berard v Eagle Air Helicopter*, 257 Ill App 3d 778, 629 NE2d 221, 223 (3d D 1994). See also *Kozak v Moiduddin*, ___ Ill App 3d ___, 689 NE2d 217 (1st D 1997).

20. *Wilson v Hoffman Group Inc.*, 131 Ill 2d 308, 546 NE2d 524 (1989), *Skinner v Reed-Prentice Division*, 70 Ill 2d 1, 374 NE2d 437 (1977).

21. 740 ILCS 100/4.

22. 292 Ill App 3d 558, 685 NE2d 992 (1st D 1997).

23. *Truszewski*, 685 NE2d at 996.

24. 201 Ill App 3d 186, 559 NE2d 752 (1st D 1990).

25. 292 Ill App 3d 558, 685 NE2d 992 (1st D 1997).

26. 223 Ill App 3d 444, 585 NE2d 166 (1991).

27. 178 Ill App 3d 827, 533 NE2d 1114 (3d D 1988).

defendant B. Defendant B wished to defend by attempting to establish that the plaintiff's injuries were far in excess of the sum paid by A, and to then draw the conclusion that A had not yet paid his pro rata share of "the common liability." The appellate court rejected that effort, holding that the amount of the settlement paid by A would be regarded conclusively as "the common liability." Accordingly B, if found at fault, would always have to pay some percentage of what A paid, even if A initially paid far less than its own "true" liability.

That same reasoning was followed in *Ziarko v Soo Line Railroad*.²⁸ In *Ziarko*, the plaintiff obtained a verdict against two defendants. One defendant settled the plaintiff's entire case for less than the verdict and obtained a release in favor of both defendants. The settling defendant then attempted to collect contribution from the non-settling defendant.

The trial court initially found that because the settling defendant had paid, by virtue of the reduced settlement amount, less than its liability under the verdict, it could not obtain contribution because it had not paid more than its pro rata share of "the common liability." The supreme court reversed, saying that the new settlement amount defined "the common liability" and that the settling defendant was entitled to recover the non-settling defendant's percentage of fault of the settlement amount.

D. Wilful and Wanton Misconduct

Ziarko also took up the question of whether a defendant found guilty of wilful and wanton misconduct can obtain contribution against a defendant who was only negligent. The appellate court had ruled, based upon *Burke v 12 Rothschild's*,²⁹ that wilful and wanton misconduct was so reprehensible that contribution would not be permitted. The supreme court reversed that conclusion. As was discussed earlier in this article, the court noted that wilful and wanton misconduct can be both "reckless" and "intentional." The court held that a defendant found guilty of "reckless" wilful and wanton misconduct can obtain contribution, but one guilty of "intentional" wilful and wanton misconduct cannot.

A defendant found guilty of an

intentional tort cannot seek contribution.³⁰

E. Group Liability

The Contribution Act states that "[i]f equity requires, the collective liability of some as a group shall constitute a single share."³¹ This statutory provision acknowledges that in certain joint tortfeasor situations, it is more equitable to treat two or more parties as a unit for purposes of comparing fault — members of the distributive chain under a strict product liability theory, for example, or an employer sued only for the vicarious liability attributable to the actions of an employee. In those and similar situations, fault should not be separately assigned to the members of the "unit" when compared to the other parties to the comparative fault equation. The members of the unit might have rights against each other, such as actions for implied indemnity, but the "unit" should be assigned a single percentage of fault relative to the other parties.

Although the quoted section of the act deals with contribution, this concept is applicable to all aspects of comparative fault. "Where two or more parties are treated as one party for purposes of determining the fair shares of a judgment, that application of the unit rule or concept should apply for purposes of comparative fault, contribution and the rule of joint and several liability."³²

F. Immunities and Other Issues

If an entity is not a "tortfeasor" with respect to the original plaintiff, then it cannot be held liable for contribution.³³ (A landowner does not owe a "duty" to a firefighter with respect to the cause of the fire, and therefore is not a tortfeasor within the meaning of the Contribution Act.) Dramshop liability is never included in the contribution equation. A dramshop defendant is not "subject to liability in tort" within the meaning of the Contribution Act.³⁴

Various cases have weighed the policy underlying contribution against immunities that would defeat a direct action by the plaintiff. In some circumstances, the contribution action takes precedence over the immunity. The Illinois Supreme Court has recently summarized the approach of the courts to this problem in holding that a co-employee's immunity from suit under the Workers' Compensation Act pre-

vails over a third party's right to contribution:

The right to contribution, however, will occasionally clash with an immunity from direct suit possessed by the party from whom contribution is sought.... The right of contribution will not always prevail over the competing immunity. Rather our courts balance the policy considerations supporting contribution against those supporting immunity to determine which doctrine should prevail in a particular case."³⁵

The opinion in this case, *Ramsey v Morrison*, catalogs many of the cases concerning the treatment of immunity.

A contribution action cannot be maintained against an entity protected by a statute of repose.³⁶ The result is different for an entity protected by a statute of limitation.³⁷

IV. Joint and Several Liability

In *Coney v J.L.G. Industries, Inc.*,³⁸ the court was asked to answer the certified question of whether the doctrine of comparative negligence or fault eliminates joint and several liability. The court answered that question in the negative, holding that the adoption of comparative negligence in *Alvis*³⁹ did not change the doctrine of joint and several liability. In *Best v Taylor Machine Works*,⁴⁰ the court recently restated its conclusion in *Coney* that "[a] concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage."⁴¹

The 1986 tort reform amendments constituted the first erosion of the rule of joint and several liability. Those amendments provided that "[a]ny defendant whose fault...is less than

28. 161 Ill 2d 267, 641 NE2d 402 (1994).

29. 148 Ill 2d 429, 593 NE2d 522 (1992).

30. *Gerill Corp v Jack L. Hargrove Builders, Inc.*, 128 Ill 2d 179, 538 NE2d 530 (1989).

31. 740 ILCS 100/3.

32. *Joint and Several Liability Minnesota Style*, 15 William Mitchell L R 969, 988 (1989).

33. *Vroegh v J&M Forklift*, 165 Ill 2d 523, 651 NE2d 121 (1995).

34. *Hopkins v Powers*, 113 Ill 2d 206, 497 NE2d 757 (1986).

35. *Ramsey v Morrison*, 175 Ill 2d 218, 676 NE2d 1304, 1307 (1997).

36. *Cornett v Gromann Service*, 227 Ill App 3d 148, 590 NE2d 1013 (3d D 1992).

37. *Ballweg v City of Springfield*, 114 Ill 2d 107, 499 NE2d 1373 (1986).

38. 97 Ill 2d 104, 454 NE2d 197 (1983).

39. *Alvis v Ribar*, 85 Ill 2d 1, 421 NE2d 886 (1981).

40. Nos 81890 et al, (Dec 18, 1997).

41. *Best*, slip op at 46 (italics omitted).

25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be severally liable for (all damages other than medical expenses).⁴² This unique equation, to be used to determine whether a defendant can be found only severally liable for its own share of the fault, creates a number of troublesome issues which are only now finding resolution in the case law.

A. Settled Defendants

The second component of the equation — “the defendants sued by the plaintiff” — may appear to be easy to determine, but the experience in the case law is to the contrary. Should tortfeasors who were never actually sued, and who may have even paid money in settlement, be included? What about tortfeasors who were named as defendants in the case, but who settled before the case went to the jury?

In *Alvarez v Fred Hintze Construction*⁴³ and *Lannom v Kosco*⁴⁴ the courts were faced with objections to the dismissal of an employer as a third-party defendant following a “good faith” settlement. Both opinions affirmed the dismissal and held that it did not impair the remaining defendant’s right to assert that it was less than 25 percent at fault and thus only severally liable. However, neither case presented the further question of whether the fault of the settled employers should be included in the joint and several liability calculation. The supreme court stated:

[T]he defendant’s rights under section 2-1117 are not abolished simply because a defendant or third party settles or is dismissed from an action. The jury may still assess the remaining defendants’ relative culpability, and if the degree of fault attributable to one or more defendants is less than 25%, those defendants’ liability is several only.⁴⁵

The supreme court clearly was saying that the determination of joint and several liability could proceed. However, it was still unclear whether fault could be assigned to the settled parties.

Two conflicting answers were given to this question by the fifth appellate district. In *Blake v Hy Ho Restaurant*,⁴⁶ the court held that the fault of the settled party may not be included in the equation. *Banovz v Rantanen*⁴⁷ came to the opposite conclusion.

The Seventh Circuit Court of Appeals recently held that “the term ‘defendants sued by the plaintiff’ means only those defendants who remain in the case when it is submitted to the fact finder.”⁴⁸

B. Third-Party Defendants

The last component of the several liability equation — “any third-party defendant who could have been sued by the plaintiff” — has also resulted in several case decisions. The meaning of this phrase merits an exploration that is beyond the scope of this article. Parties protected by a statute of limitations or by an immunity, such as family members, could arguably fit within that phrase. However, the only case law on point has been in response to the question whether an employer should be included.

Both *Lannom* and *Alvarez*, cited above, involved the dismissal of employers. However, neither court expressly addressed the question of whether employers should be included in the equation. Although strong arguments can be made that an employer “could have been sued by the plaintiff” based upon the fundamental nature of an employer’s contribution liability as found in *Skinner* and *Doyle*, the fifth district in *Blake v Hy Ho* and, more recently, *Lilly v Marcal Rope and Rigging*,⁴⁹ and the seventh circuit in *Freislinger* have expressly held that the employer is not to be included.

C. Structural Work Act Cases

An additional limitation on the availability of several liability was recently found in *Branum v Slezak Construction Co.*⁵⁰ Section 2-1117 applies, by its terms, to “actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict liability.” *Branum* holds that a defendant sued under the Structural Work Act cannot seek to be severally liable because such an action is not within the listed categories of claims.

D. Tortfeasors Acting in Concert

*Woods v Cole*⁵¹ provides an interesting example of a group of tortfeasors being treated as a single unit for joint and several liability determinations. The sole defendant allegedly entrusted a gun to an intoxicated person. The plaintiff’s decedent, with the defen-

dant and two others, traveled to a farm to shoot. The plaintiff’s decedent fell asleep during the drive to the farm. The defendant “hatched a plan to scare” the plaintiff’s decedent. All concerned

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simultaneously fired their guns at the ground. Three persons then pointed their weapons at the plaintiff’s decedent and pulled the triggers. The gun in the hands of the intoxicated person discharged, killing the decedent.

The defendant sought to apportion fault for several liability purposes to the other persons who were participants in the tragic prank. The defendant was attempting to be found less than 25 percent responsible, so that he would only have to pay his percentage of fault. The plaintiff successfully objected. The fourth district held that all of the persons with guns were “persons acting in concert” within the meaning of the Restatement of Torts. The court held that each person was responsible for the entirety of the damages and that the conduct of one could not be compared to the conduct of

42. 735 ILCS 5/2-1117.

43. 247 Ill App 3d 811, 617 NE2d 821 (3d D 1993).

44. 158 Ill 2d 535, 634 NE2d 1097 (1994).

45. *Lannom v Kosco*, 158 Ill 2d 535, 634 NE2d 1097, 1101 (1994).

46. 273 Ill App 3d 372, 652 NE2d 807 (5th D 1995).

47. 271 Ill App 3d 910, 649 NE2d 977 (5th D 1995).

48. *Freislinger v Emro Propane Co.*, 99 F3d 1412, 1419 (7th Cir 1996).

49. 289 Ill App 3d 1105, 682 NE2d 481 (5th D 1997).

50. 289 Ill App 3d 948, 682 NE2d 1165, 1179 (1st D 1997).

51. 285 Ill App 3d 721, 675 NE2d 132 (4th D 1996), petition for leave to appeal allowed June 4, 1997.

another. The dissenting opinion presents a contrasting view on the issue.

E. Statutory Exceptions

735 ILCS 5/2-1118 provided two express exceptions to the several liability provisions. Persons involved in most environmental discharge cases could not take advantage of several liability, nor could defendants in medical malpractice actions. Two seventh circuit opinions hold that defendants who were liable for bodily injury caused by asbestos in buildings could not assert their several liability under the first of the exceptions in 2-1118 because their liability arose from a "discharge" of asbestos.⁵²

The "25 percent equation" is used solely for the "test" to determine whether a defendant is only severally liable. A severally liable defendant's percentage of liability to the plaintiff might be different than that generated by the statutory equation.⁵³

V. Damage-Related Issues

All of the cases discussed above relate to comparison problems associated with either the identity of the tortfeasor or the nature of his or her conduct. Some "compared to what" cases focus on the subtle but important nature of the damages that the plaintiff seeks or obtained through settlement.

A defendant cannot obtain contribution for its liability for punitive damages.⁵⁴

Many problems arise in multiparty litigation when a settlement by one tortfeasor is not expressly allocated among multiple claims or causes of action that the plaintiff might have. A complete treatment of these "allocation" cases is beyond the scope of this article. Review of a few of the cases serves to illustrate the looming presence of the "compared to what" problem.

Many of the cases in this area involve successive tortfeasors — typically a defendant who caused an initial injury, followed by medical malpractice. The primary focus in these cases is whether "the same injury" is involved within the meaning of 740 ILCS 100/2(a), (c).

[F]or purposes of contribution[, the initial tortfeasor is] liable for both injuries while the [successive tortfeasor is] liable only for the second injury....An initial tortfeasor can properly restrict its

settlement agreement to the first injury only and allocate the amount received by the plaintiff to the first injury only, thereby eliminating a setoff for the second injury. [Citation omitted.] Failure to draw the settlement in this fashion, however, entitles the nonsettling tortfeasor to a setoff.⁵⁵

The operation of these principles was explained by the Illinois Supreme Court in *Patton v Carbondale Clinic*.⁵⁶ Patton was involved in an automobile accident. It was alleged that the initial injuries were not fatal but that subsequent medical malpractice in the treatment of the non-fatal injuries led to the plaintiff's death. Separate lawsuits were filed against the automobile driver (Zieba), the manufacturer of the car (Ford) for alleged seat belt problems, and the medical defendants. The plaintiff arrived at settlements with the driver and Ford. The case went to trial against the medical malpractice defendants, resulting in a verdict for the plaintiff. The court found the existence of two separate injuries — the original injury and the medical injury resulting in the death. The medical defendants were liable only for the second injury, while the driver and Ford were liable for both injuries. The court reasoned as follows:

With contribution, however, damages from the second injury may now be apportioned amongst the first and successive tortfeasors....

Defendant relies on (the Restatement of Torts) and argues that only one injury occurred, a wrongful death, which is a single injury, incapable of division.... Here, however, Susanne's injuries are divisible.

Having found two separate injuries, we now turn to the issue of setoff....the Act applies to not only joint tortfeasors, but to concurrent and successive tortfeasors as well....

In order to determine whether defendant is entitled to any setoff, we must look to the settlement agreements and determine what plaintiff recovered in each. If plaintiff recovered any amount for the second injury from Zieba and Ford, plaintiff's judgment against defendant must be reduced by that amount....

A review of the Zieba settlement reveals that plaintiff settled with Zieba for both injuries, not simply the first.... Thus, defendant is entitled to set-off the amount from the settlement with Zieba in the amount of that portion of the settlement which was attributable to the second injury, or the consideration paid

for the release, whichever is greater, pursuant to the Act....

[T]he Zieba settlement did not apportion the settlement proceeds in any manner. Plaintiff argues that no setoff may now be granted because no apportionment can be made. We agree with plaintiff that it is now impossible to apportion the settlement with Zieba, but disagree as to whether a setoff may now be granted....

We believe, however, that under the facts of this case, where a plaintiff recovers for several injuries in a previous lawsuit and fails to apportion damages accordingly, a subsequent defendant should not bear the burden of proving what portion of the plaintiff's previous settlement should be set-off or be denied a setoff.

We conclude that defendant is entitled to a setoff of both the Zieba and Ford settlements. We further caution and advise that settlements in this area be properly drafted so as to avoid a set-off of the entire settlement.⁵⁷

The supreme court again took up this problem in *Pasquale v Speed Products Engineering*.⁵⁸ The court stated:

The Contribution Act permits contribution (or setoff) where co-tortfeasors are concurrent or successive as long as the "same injury" or wrongful death is involved....Generally, the party seeking the setoff bears the burden of proving what portion of a prior settlement was allocated or is attributable to the claim for which he is liable.... This court, however, has found that where a plaintiff recovers for several injuries in a previous lawsuit and fails to apportion damages accordingly, a subsequent defendant may be relieved of this burden....The Contribution Act, however, provides little guidance as to what constitutes the "same injury."... It is clear, however, that the entire amount of a settlement which compensated for a single indivisible injury can be set off against a recovery based on that injury, notwithstanding the plaintiff's assertion of two distinct theories of recovery....It is also clear that a setoff

52. *Tragarz v Keene Corp*, 980 F2d 411 (7th Cir 1992); *Barnes v Keene Corp*, 67 F3d 626 (7th Cir 1995).

53. See Illinois Pattern Jury Instructions, Civil, Comment, B45.03A.

54. *Hall v Archer-Daniels-Midland Co.*, 122 Ill 2d 448, 524 NE2d 586 (1988).

55. *Evans v Tabernacle No. 1*, 283 Ill App 3d 101, 669 NE2d 697, 703-04 (1st D 1996).

56. 161 Ill 2d 357, 641 NE2d 427 (1994).

57. 641 NE2d at 431-433, 435 (1994).

58. 166 Ill 2d 337, 654 NE2d 1365, 1382 (1995) (italics in original).

is inappropriate where sought to be applied against a recovery for injuries “separate and distinct” from those for which the plaintiff was already compensated through settlement.

As noted at the outset of this section, review of these cases is not exhaustive, but is rather a brief introduction to the considerations involved in evaluating

the impact of the nature of the damages sought.

VI. Conclusion

The answer to the question “but compared to what?” continues to evolve. In any case in which more than one party is at fault, it is important to consider the impact of each person’s

fault on the outcome of the case. Who is, and is not, included in a particular comparison of fault will vary greatly, depending upon the legal issues, the conduct, the damages claimed, and the date of the occurrence. Achieving the right result requires selecting the proper analytical framework well prior to the trial.

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