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Feature Article

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The New Math: Allocating Fault and Calculating Liability

Developments in Illinois tort law have made life difficult for those of us that became lawyers because we were told there would be no math. Determining the liability exposure or recovery of a party may require multiple calculations after the jury allocates fault. In some cases, the assigned fault of a party may bear little resemblance to its actual liability. One reason for this is that settled parties may be included on the verdict form to diminish the plaintiff's contributory fault, but then excluded for purposes of the joint and several liability of the defendants. An understanding of how the verdict forms and principles of contributory fault, joint and several liability and contribution fit together is essential to accurately assess the true exposure of a defendant.

Calculating Comparative Negligence

The contributory fault of the plaintiff reduces her damages on a proportionate basis up to 50 percent. 735 ILCS 5/2-1116(c). If the plaintiff's fault is greater than 50 percent, she is barred from recovery. By statute, the fault "chargeable to the plaintiff shall be compared with the fault of *all tortfeasors* whose fault was a proximate cause" of the damages. 735 ILCS 5/2-1116(c)(emphasis added). All tortfeasors includes parties that have settled. Under *Bofman v. Material Services Corp.*, 125 Ill. App. 3d 1053, 1064 (1st Dist. 1984) and *Smith v. Central Ill. Public Serv. Co.*, 176 Ill. App. 3d 482 (4th Dist. 1988), the jury is to evaluate the fault of non-parties where contributory negligence is involved because "it is essential for determining liability commensurate with degree of total fault." I.P.I. p. 228 (Civil 2011 Ed.)

The *Ready v. United/Goedecke Services, Inc*., 232 Ill.2d 369, 385 (2008) decision held that the fault of settling parties is not to be considered in determining joint and several liability. But *Ready* "did not reduce the vitality of *Bofman* or *Smith*," according to the Illinois Pattern Jury Instructions Committee. I.P.I. p.230 (Civil 2011 Ed.)

> If the jury hears evidence to suggest fault on the part of settled parties and if contributory negligence is claimed, the settled parties should be listed on the verdict form to correctly determine the percentage contributory fault of the plaintiff. The fault of the settling parties, however, should be disregarded for purposes of the 2-1117 calculation. *Id*.

As a result, a distinction must be made between the parties included on the verdict form for determining the plaintiff's contributory fault percentage and those necessary to calculate joint and several liability. The purpose for this distinction "is not… to limit [a] defendant's share of responsibility, but to determine the extent of plaintiff's responsibility for his own injuries." *Bofman*, 125 Ill. App. 3d at 1064.

The pattern verdict forms are designed to eliminate the need for the jury to perform separate calculations for comparative negligence, joint and several liability and contribution. I.P.I. p.230 (Civil 2011 Ed.) Instead,

the jury will allocate fault only once among the plaintiff and all tortfeasors, including settled parties *if* the plaintiff's fault is at issue. The contributory fault percentage of the plaintiff will be obtained directly from this allocation. I.P.I. p.199 (Civil 2006 Ed.) Assume a case involving a plaintiff, two defendants, a settling defendant and the employer of the plaintiff. The jury finds damages in the amount of $1,000,000.00, including $200,000.00 in medical expenses, with the following fault allocation:

Plaintiff:.....20%
Defendant A: 20%
Defendant B:.....10%
Settling Defendant: 20%
Employer: 30%

Total:.....100%

Under this hypothetical, the plaintiff's contributory fault is 20 percent and she is entitled to recoverable damages in the amount of $800,000.00. *See* I.P.I. p.203 (Civil 2006 Ed.) for a slightly varied illustration and additional discussion. The inclusion of the settling defendant and employer helps spread the fault that may otherwise be incurred by the plaintiff. This, in turn, increases the recovery of the plaintiff and avoids a potential finding of fault greater than 50 percent, which would bar her recovery entirely.

The next step requires the court to take the jury's allocated percentages of fault and perform a separate calculation to determine judgments on joint and several liability and contribution. I.P.I. p.199, 200, 205, 208 (Civil 2006 Ed.).

Calculating Joint and Several Liability and Contribution

Illinois adopted modified joint and several liability, where any defendant whose fault is less than 25 percent is "severally" or proportionately responsible for the non-medical damages. 735 ILCS 5/2-1117. Those defendants whose fault is 25 percent or greater are jointly and severally liable for all damages. All defendants found liable to any extent are jointly and severally liable for medically-related expenses.

The employer of the plaintiff is excluded from the joint and several equation by statute. 735 ILCS 5/2-1117. As noted earlier, the *Ready* decision ruled that settled parties must be removed as well. *Ready*, 232 Ill.2d at 385. In the hypothetical above, the settling defendant and employer must be set aside to determine whether Defendant A and Defendant B are jointly and severally liable. The fault of the remaining parties must be re-calculated on a proportional basis.

	Total Fault	Joint & Several Liability		Potential Medical Liability	Potential Liability for Other Damages
Plaintiff:	20%				
Defendant A:	20%	20/50	40%	$160,000.00	$640,000.00
Defendant B:	10%	10/50	20%	$160,000.00	$80,000.00
~~Settled Defendant~~:					
~~Employer~~:					
Total:	50%				

Defendant A is 40 percent at fault and Defendant B is 20 percent at fault for purposes of joint and several liability. Defendant A, therefore, is jointly and severally liable for the entire $800,000.00 verdict despite only being found 20 percent at fault by the jury. I.P.I. p.208 (Civil 2006 Ed.). Defendant B remains severally liable for the non-medical damages and jointly liable for 80 percent of the medical.

Defendants A and B have the right of contribution from the other tortfeasors. Illinois allows a tortfeasor to recover contribution when it has paid more than its *pro rata* share of the common liability. 740 ILCS 100/2(b). The contribution liability of the defendants will be determined by redistributing the fault of the contribution parties on a proportional basis. I.P.I. p.199 (Civil 2006 Ed.) This will help reduce Defendant A's bottom line exposure in many cases. In addition, both Defendants A and B would be entitled to setoffs for any amount paid by the settling defendant and the full amount of the workers' compensation lien, if waived by the employer. 740 ILCS 100/2(c); *Wilson v. Hoffman Group, Inc.*, 131 Ill. 2d 308 (1989); *Eastman v. Messner*, 188 Ill.2d 404, 412-13 (1999); *Thies v. Korte-Plocher Constr. Co., Inc.*, 268 Ill. App. 3d 217, 219 (5th Dist. 1994).

There are situations where simply redistributing the fault among the contribution defendants will not work. This would be the case where an employer/third-party defendant's liability is limited by the *Kotecki* cap, resulting in an "uncollectible" amount. *Illinois Tool Works, Inc. v. Ind. Machine Corp*., 354 Ill. App. 3d 645 (1st Dist. 2003). The uncollectible cases require yet another distinct calculation to determine the parties' contribution liability. In other cases, it may be necessary to include settled parties to determine the contribution liability of the defendants. *Truszewski v. Outboard Motor Marine* Corp, 292 Ill. App. 3d 558, 564 (1st Dist. 1998)(holding that consideration of both parties and non-parties was essential to determining liability of tortfeasors under the contribution statute, relying in part on *Bofman*). But the point remains that the potential exposure of peripheral parties like Defendants A and B can be deceiving until the judgment calculations are run.

Conclusion

Assessing a defendant's liability exposure or a plaintiff's likely recovery is not an intuitive process under Illinois law. Estimating the likely damages and fault allocation is only the first step. Counsel must carefully consider when parties will be included on the verdict form and for what purpose, and then review the applicable judgment calculations. Only then can the true potential liability of a party be known. The best practice is to continually evaluate the case with the pattern verdict forms in one hand and a calculator in the other because whoever told us there would be no math lied.

About the Author

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