A Primer on Apportionment Law in New Jersey

by David A. Mazie and David M. Estes

Apportionment of fault between joint tortfeasors remains an unpredictable and evolving area of New Jersey law.[1] Depending on a jury's apportionment, a decision to settle with a party can significantly alter the amount ultimately paid—or received by—a party. This article flags the apportionment issues that should be considered by an attorney.

The Statutory Context

"The Comparative Negligence Act and the Joint Tortfeasors Contribution Law comprise the statutory framework for the allocation of fault when multiple parties are alleged to have contributed to the plaintiff's harm."[2] The Joint Tortfeasors Contribution Law "was enacted to promote the fair sharing of the burden of judgment by joint tortfeasors and to prevent a plaintiff from arbitrarily selecting his or her victim."[3] "In practice, the Comparative Negligence Act requires the factfinder to assign to each party on the verdict sheet a percentage of fault, with the percentages assigned to each party adding up to 100%."[4]

Who is a Party for Apportionment?

Because the statutory framework requires apportionment to each "party," the threshold consideration is whether a dismissed or absent defendant nevertheless remains a 'party' whose fault is subject to apportionment by the jury.

"The guiding principle of our State's comparative fault system has been the distribution of loss in proportion to the respective faults of the parties causing that loss."[5] In *Young v. Latta*, "the Court implicitly recognized 'that a defendant who settles and is dismissed from the action remains a 'party' to the case for the purpose of determining the non-settling defendant's percentage of fault.'"[6]

The plaintiff in *Young* settled his malpractice claim against one physician for $20,000 and proceeded to trial against another.[7] The jury awarded the plaintiff $150,000 in damages, but apportioned 80 percent of fault to the settling physician and only 20 percent to the non-settling defendant.[8] Under *Young*, the remaining defendants receive a full credit for the percentage allocated to the settling defendant, while the plaintiff receives the amount paid through the settlement. Thus, the plaintiff in *Young* only recovered a third of the judgment: $20,000 from the settling defendant and $30,000 (20 percent of the $150,000 verdict) from the non-settling defendant.[9]

Young teaches that any settlement decision in a multi-defendant case requires careful estimation of the total damages award and the relative fault of the settling and non-settling defendants (as well as consideration of any comparative fault of the plaintiff). Prior to accepting or rejecting a settlement offer, an attorney must understand the total value of the case and have reviewed the evidence with an eye toward how fault will be allocated between the parties. Underestimating the amount of fault a jury will likely allocate to the settling defendant can severely undercut a plaintiff's recovery, such as in *Young* where the plaintiff was unable to collect on two-thirds of his award. It can also lead to a windfall for the plaintiff if the monies collected from a settling defendant exceed the amount ultimately apportioned to that settled party. Likewise, when rejecting a settlement offer, defense counsel must be wary not to underestimate the degree of fault a jury may allocate to the client. In evaluating how the jury will apportion fault, an attorney should also be mindful that counsel is permitted to suggest to the jury a *specific* percentage of apportionment. So unlike the jury's quantification of money damages, its apportionment of fault is more susceptible to direct advocacy from opposing counsel.[10]

In contrast to a settling defendant, a defendant dismissed as a matter of law for statutory immunity does not remain a 'party' for apportionment. In *Town of Kearny*, the New Jersey Supreme Court recognized that "our courts have barred apportionment where, as a matter of law, defendant could not under any circumstances be a joint tortfeasor[,]" that is, the alleged joint tortfeasor had "complete immunity."[11] The leading example is *Ramos v. Browning Ferris Industries*, where the Supreme Court held that a defendant manufacturer could not obtain an apportionment credit against an employer where the plaintiff was injured on the job because an employer is "statutorily immune" and "cannot be a party to a negligence action and

thus can never be considered a joint tortfeasor subject to the Comparative Negligence Act."[12] While the precise parameters of *Town of Kearny*'s bar on apportionment to an immune codefendant are undeveloped, it appears that in cases involving public and non-public defendants, the non-public defendant will not obtain an apportionment credit against a public defendant who is dismissed for complete immunity under the Tort Claims Act.[13]

An open question in New Jersey is whether a defendant is ever entitled to an apportionment credit against an unidentified or unjoined tortfeasor. Two Appellate Division panels have held that a defendant is not entitled to an apportionment credit in such circumstances, while another panel has permitted it. In *Bencivenga v. J.J.A.M.M.*, the court barred a defendant in a premises liability case from obtaining apportionment against an unidentified intentional tortfeasor who had attacked the plaintiff.[14] Similarly, in *Higgins v. Owens-Corning Fiberglas*, the appellate court held it was reversible error to add an unjoined manufacturer to the verdict sheet and to permit the jury to apportion fault because including "a non party who [i]s not liable...artificially inflate[s] the liability of the alleged tortfeasor[]...and thereby cause[s] an inaccurate apportionment of liability."[15] More recently, however, the Appellate Division in *Cockerline v. Menendez* held that a defendant was entitled to apportion fault to "phantom" defendants who may also have contributed to a deadly automobile accident.[16]

Who is a 'party' for purposes of apportionment remains an evolving area of law and will continue to be the subject of appeals. It is clear, however, that a settling defendant remains a party for apportionment, and an accurate appraisal of the total damages award and the relative fault the jury is likely to assign to each party is a prerequisite to a reliable settlement recommendation to a client.

The Shifting Burden of Proof

Another common pitfall related to apportionment is overlooking the shifting burden of proof. Once a codefendant settles, the burden of proof generally shifts from the plaintiff to the remaining defendant to establish the settling defendant's fault and proximate cause.[17] As the court in *Mort v. Besser* explained:

> Clearly, a non-settling defendant has the right to have a settling defendant's liability apportioned by the jury.... However, that liability must be proven. The fact of settlement does not prove the settlor's liability. [I]f no issue of fact is properly presented as to the liability of the settling defendant, the fact finder cannot be asked...to assess any proportionate liability against the settler.[18]

While a non-settling defendant has a "low" burden of proof for apportionment, the shifting burden of proof can be especially problematic in cases where a codefendant settles on the eve of or during trial, and the remaining defendant lacks the necessary expert to prove the settling defendant's responsibility.[19] "A defendant who produces no expert report (whether its own or that of another party) and fails to allege well before trial the causative fault of a co-defendant may be precluded from asserting at trial that co-defendant's fault in the event of a settlement."[20]

Accordingly, an attorney for a defendant must consider from the outset of the case, and especially as discovery deadlines approach, whether he or she will be able to prove the fault of a codefendant if that defendant settles. Conversely, a plaintiff's attorney who anticipates settling with one defendant must be judicious in the timing of the settlement and submitting expert evidence of that defendant's fault because the non-settling defendant may be able to rely on the plaintiff's evidence to shift fault to the settling defendant, as occurred in *Young v. Latta,* where the non-settling defendant "proved the negligence of [the settling physician] on the basis of the testimony and written report of *plaintiff's own expert*."[21]

Another Wrinkle: Differing Theories of Liability

Another consideration when evaluating a settlement is how different theories of liability may alter the apportionment credit. In *Ryan v. KDI Sylvan Pools*, the plaintiff was injured diving into a pool.[22] During trial, he settled with the property owner defendant, against whom the plaintiff alleged negligence.[23] The case went to the jury against the pool manufacturer, against whom the plaintiff asserted a strict liability claim.[24] The jury apportioned 50 percent fault to the non-settling, strict-liability defendant, 35 percent fault to the negligence settling defendant, and 15 percent fault to the plaintiff.[25] Because comparative negligence is not a defense to the strict liability claim, the trial court assessed to the strict-liability defendant "sixty-five percent of the damages, reflecting the total minus thirty-five percent—the share attributed to...the settling defendants."[26]

The Supreme Court held that under these circumstances the non-settling defendant is entitled to an *additional* apportionment credit to account for a plaintiff's comparative negligence and to ensure the non-settling defendant received a "fair" credit, even though a product user's comparative negligence is generally not a defense to strict liability claim.[27] In such a case, the "plaintiff's fault is best dealt with by (1) apportioning his percent [of comparative] fault between the two defendants based on their relative fault as the jury determined, then (2) increasing the damages for which the strict-liability defendant... is responsible by the assigned amount, while (3) leaving undisturbed the amount for which the 'negligence' defendants are responsible."[28] Applying this formula, the Court held the manufactur-

er liable for 59 percent of the award, instead of 65 percent.[29]

In short, when faced with different theories of liability, a strict-liability defendant is entitled to an extra apportionment credit to account for the plaintiff being found to be comparatively at fault.

Timely Notice

Another aspect of apportionment is the notice requirement. To protect the right to an apportionment credit, a non-settling defendant must provide the plaintiff timely notice of the intent to pursue the credit.[30] The fail-safe approach to preserving the right to an apportionment credit is to assert a claim for contribution against the codefendant.[31] However, "[t]here may be strategic reasons for declining to prosecute a claim for contribution."[32]

When there is no contribution claim, "fair and timely notice" requires that "a plaintiff should know as early in the case as possible whether a defendant will seek to prove the fault of a co-defendant."[33] The New Jersey Supreme Court has instructed trial courts to "enforce strictly the Rules setting forth the time prior to trial within which answer to interrogatories may be amended to set forth a settler's fault" because apportionment "tactics cannot be allowed to foil discovery."[34] Therefore, at the latest the defendant should provide notice of intent to apportion by the deadline to amend interrogatories, or risk waiving the apportionment credit.[35]

A Red Herring: Plaintiff's Inability to Recover

An oft-litigated apportionment issue is the impact of a plaintiff's inability to recover from a defendant on a remaining defendant's right to apportionment against that party. However, the New Jersey Supreme Court recently clarified that a non-settling defendant's right to an apportionment credit "does not turn on whether the plaintiff is in a position to recover damages" from the defendant, and a plaintiff's "failure to conform to a statutory requirement for asserting claims against a given defendant does not necessarily bar apportionment...."[36]

For instance, in *Town of Kearny* a defendant architecture firm was entitled to an apportionment credit against dismissed engineering firms because the plaintiff "had the opportunity to assert a cause of action against the [dismissed] defendants during the ten-year statutory period," and those defendants "were not statutorily immune from a negligence suit at the time of the accident," even though the plaintiff's claims were time-barred.[37] The "jury's assessment of the [dismissed] defendants' fault promotes fair allocation of responsibility and avoids creating an incentive for a plaintiff to strategically target only one of a range of culpable defendants."[38]

In the same vein, in *Burt v. West Jersey Health Systems*, the Appellate Division held that the remaining defendants were entitled to an apportionment credit against the codefendants, who had been dismissed as a result of the plaintiff's failure to comply with the affidavit of merit statute.[39] Otherwise, "plaintiff's failure to comply with the Affidavit of Merit... [would] deprive the Hospital defendants, through no fault of their own, of the opportunity to shift some, if not all, of the blame for plaintiff's injuries to the Anesthesiology defendants."[40]

Going forward, "[w]hen an actual defendant is properly named in the case,...statutory constraints on the plaintiff's recovery against that defendant do not preclude apportionment."[41] Courts will, therefore, be less likely to accept a plaintiff's inability to recover from a particular defendant as a legitimate ground to deny a remaining defendant an apportionment credit. Accordingly, attorneys must identify any unjoined joint tortfeasors—defendants who are bankrupt, for whom the statute of limitations has run, etc.—and assess their potential degree of fault in order to plot their potential settlement strategies and to accurately assess the value of a case.

Conclusion

Apportionment issues in New Jersey trial practice may involve complex issues that practitioners should closely consider prior to entering into a settlement. Understanding these issues will eliminate common missteps and should result in more predictable results for plaintiffs and defendants alike. ⚖

Endnotes

1. *Young v. Latta*, 123 N.J. 584, 589 (1991) (Justice Clifford observed that the Legislature has left many aspects of apportionment to be gradually resolved by the courts); *accord Brodsky v. Grinnell Haulers, Inc.*, 181 N.J. 102, 113 (2004) (Albin, J.).
2. *Town of Kearny v. Brandt*, 214 N.J. 76, 97 (2013).
3. *Id.* (internal quotation marks and citation omitted).
4. *Id.* (*citing* N.J.S.A. 2A:15–5.2(a)(2)).
5. *Brodsky*, 181 N.J. at 114 (internal quotation marks and citation omitted); *Town of Kearny*, 214 N.J. at 102 ("Given the impact of a defendant's percentage of fault on the scope of its liability, the statutes' objectives are best served when the factfinder evaluates the fault of all potentially responsible parties.").
6. *Town of Kearny*, 214 N.J. at 100 (*quoting Brodsky*, 181 N.J. at 113); *see* Rule 4:7-5(c).
7. *Young*, 123 N.J. at 585, 587.
8. *Id.* at 587.
9. *Id.* at 587-88.
10. *Brodsky*, 181 N.J. at 123-25 (holding attorney may argue in opening and closing that jury allocate a certain percentage of liability to a party as long as argument is based on the evidence).
11. *Town of Kearny*, 214 N.J. at 99, 102.

12. *Brodsky*, 181 N.J. at 115; *Ramos v. Browning Ferris Indus. of S. Jersey, Inc.*, 103 N.J. 177, 184, 193-94 (1986). *But cf. Bolz v. Bolz*, 400 N.J. Super. 154, 160–62 (App. Div. 2008) (permitting apportionment of fault to a public employee defendant who was *partially* immune to damages under the Tort Claims Act).
13. *See also* N.J.S.A. 59:9-3.1 (limitation on contribution for public defendant found to be a joint tortfeasor).
14. *Bencivenga v. J.J.A.M.M., Inc.*, 258 N.J. Super. 399, 406–08 (App. Div.) ("A truer verdict is more likely to be returned where the fact finder's attention is ultimately fixed on the conduct of the parties who will be affected by the verdict....[T]here is no more reason to have a fact finder assign a percentage of negligence to someone who is not affected by the verdict than to assign a percentage of negligence to acts of God or a myriad of other causative factors that may have contributed to the happening of the accident."), *certif. denied*, 130 N.J. 598 (1992). *See Town of Kearny*, 214 N.J. at 101, 103 (citing affirmatively to *Bencivenga* for the proposition that "a fictitious defendant who had not been identified in an amended complaint or served with process was not subject to apportionment").
15. *Higgins v. Owens-Corning Fiberglas*, 282 N.J. Super. 600, 608-609 (App. Div. 1995).
16. *Cockerline v. Menendez*, 411 N.J. Super. 596, 617-19 (App. Div.), *certif. denied*, 201 N.J. 499 (2010).
17. *Green v. Gen. Motors Corp.*, 310 N.J. Super. 507, 547 (App. Div.), *certif. denied*, 156 N.J. 381 (1998).
18. *Mort v. Besser Co.*, 287 N.J. Super. 423, 431-32 (App. Div.) (internal quotation marks and citations omitted), *certif. denied*, 147 N.J. 577 (1996).
19. *Boryszewski ex rel. Boryszewski v. Burke*, 380 N.J. Super. 361, 384 (App. Div. 2005) ("The law favors apportionment even where the apportionment proofs are imprecise, allowing only for rough apportionment by the trier of fact."), *certif. denied*, 186 N.J. 242 (2006).
20. *Young*, 123 N.J. at 597.
21. *Id.* at 598 (emphasis added); *see id.* at 587.
22. *Ryan v. KDI Sylvan Pools, Inc.*, 121 N.J. 276, 278 (1990).
23. *Id.* at 278-79.
24. *Id.*
25. *Id.* at 293.
26. *Id.* at 291.
27. *Id.* at 292.
28. *Id.* at 293.
29. *Id.* at 294.
30. *Town of Kearny*, 214 N.J. at 100, 100 n.7; *Young*, 123 N.J. at 596-97.
31. *See Town of Kearny*, 214 N.J. at 101-02.
32. *Young*, 123 N.J. at 596 ("For example, defendants in a like profession...may choose to defend charges of malpractice by denying that there was any negligence at all because finger-pointing among the defendants would accrue only to the benefit of the plaintiff.").
33. *Id.* at 597.
34. *Id.* at 597-98.
35. *E.g.*, *Newman v. Isuzu Motors Am., Inc.*, 367 N.J. Super. 141, 153 (App. Div. 2004) (A defendant "filed neither a crossclaim for contribution nor any other document that would provide notice to [the plaintiff] that he was asserting a right to a credit based upon the settlements reached in the matter. Thus his right to an apportionment of damages was waived.").
36. *Town of Kearny*, 214 N.J. at 103.
37. *Id.* at 104 (internal quotation marks and citation omitted).
38. *Id.*
39. *Burt v. W. Jersey Health Sys.*, 339 N.J. Super. 296, 305, 307 (App. Div. 2001).
40. *Id.*
41. *Town of Kearny*, 214 N.J. at 101-02.

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