Comparative Negligence Unaffected By Settlement

Jury Does Not Consider Third Party's Fault

BY LISA K. BRUNO

A jury attempting to calculate comparative negligence could not consider the actions of a tortfeasor with whom the plaintiff had settled prior to trial, the Supreme Judicial Court has held.

The jury found that the plaintiff, a barn owner, was 60 percent negligent and that the defendant contractor was 40 percent negligent in causing a fire that destroyed the barn.

The plaintiff had argued that under G.L.c. 231, §85 — the state's comparative negligence statute — negligence should have been apportioned among all tortfeasors, and thus that the settling party's fault should have been factored in. But the SJC disagreed, affirming the trial judge's exclusion of the settling tortfeasor from the verdict slip.

"Our reading of the language in G. L.c. 231, § 85, in light of our previous interpretations of the Massachusetts statutory schemes governing liability of multiple tortfeasors, persuades us that the statute applies only to named parties who participate in the trial," stated Justice Francis X. Spina, writing for the court.

The 16-page decision is *The Shantigar Foundation v. Bear Mountain Builders*, Lawyers Weekly No. 10-040-04. The full text of the ruling can be found on our website, www.masslawyersweekly.com.

JOSEPH T. DOYLE JR. and MATTHEW W. PERKINS
Defense counsel call decision significant

Practice Clarified

Joseph T. Doyle Jr. of Boston, who together with Matthew W. Perkins represented the defendant contractor, said the ruling is significant in clarifying the procedure for allo-

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cating negligence in cases involving absent tortfeasors.

He noted that while the predominant practice had been to exclude from apportionment those tortfeasors who had already settled, there was no uniform practice being followed in the trial courts.

"It was those justices who had been Superior Court judges who were concerned that the procedure be laid out in a very direct way and that the position they took be justified," Doyle observed.

In addition to being the more customary methodology, he said the approach endorsed by the court was supported by a more persuasive rationale. "It was consistent with the statute itself and with the legislative regime established for joint and several liability," he explained.

Doyle expressed some surprise that this issue of comparative liability had not been addressed earlier. He suggested this was because the predominant practice of including only parties participating at trial was considered to be fair by both the plaintiffs' and defense bars.

"If the fact-finder is going to have to make a finding as to the percentage of negligence, the fact that one of the parties being evaluated is not present means, from a strategic standpoint, that there will not be a lot of evidence directed to that absent party," Doyle noted.

He described as "purely speculative" the contention that the ruling would discourage settlements among parties.

"It was merely an assertion with no basis in experience or fact," Doyle said. "There was nothing cited from other jurisdictions to support that there was any change in the conduct of litigants."

Anthony R. Zelle of Boston, who along with John E. O'Brien Jr. appeared for the plaintiff, agreed that the decision clarified an issue that was the subject of inconsistent treatment by the trial courts and had presented a "complex variable" in a plaintiff's lawyer's assessment of settlement with less than all of the defendants.

"Now lawyers know that defendants that settle prior to trial will not be on the jury slip," he said. "[A]lthough the court left unanswered the question of whether a defendant who settles after trial has commenced, and potentially after the jury has been charged, will be included on the jury slip."

Zelle speculated the ruling might discourage settlements not involving all defendants and could lead to an increase in "Mary Carter" agreements.

"In addition, because the comparative fault statute requires the total fault to add up to 100 percent and the SJC has construed the statute to require the allocation of fault among the plaintiff and only those defendants remaining at the time of trial, jurors will be required to engage in the highly artificial process of apportionng all of the negligence among fewer than all the parties whose negligence contributed to the plaintiff's injury," he said.

Burning Issue

On Jan. 26, 2000, a fire destroyed a 19th-century barn owned by the plaintiff, the Shantigar Foundation, an organization founded by Jean-Claude van Itallie. The barn was in the process of being renovated for use as a spiritual learning center at the time of the fire.

Shantigar had contracted to have some of the work performed by the defendant Bear Mountain Builders, a sole proprietorship run by Joseph Kayan with one employee working on the project, Brandon Boucias. Bear Mountain, in turn, subcontracted work to Cove Building Co., a sole proprietorship run by Jeffrey Stone.

Kayan was listed on the building permit as the construction supervisor.

There was testimony that although van Itallie recognized that the barn was a fire hazard, he opted not to install a sprinkler system because it was not required by law.

During the renovation, van Itallie requested that the contractors use "natural" products. Although Kayan and the architect recommended using polyurethane on the floors, van Itallie preferred the use of BioShield, a linseed-oil-based product.

Van Itallie testified that he was familiar with the concept of spontaneous combustion and knew that "oily rags left around do cause a fire."

There was one incident in which workers discovered oily rags in the initial stages of combustion. Following the incident, Kayan and Stone discussed the hazard with the workers and instructed them on the safe disposal of the rags.

On the day of the fire, Boucias oiled and buffed a small portion of the main floor, while Stone and his employee oiled and buffed the remainder.

Once the work was completed, Stone left the lamb's wool mop used to apply the oil wrapped in a plastic bag on the second floor and hung the rags used to wipe his hands and feet over a stanchion in the first-floor hallway.

Shantigar's expert testified that the fire started in the hallway where the rags had been left. He determined the cause to be spontaneous combustion of the linseed oil, rags and other materials in the hall.

Shantigar filed suit against both Bear Mountain and Cove for negligence and breach of contract. Cove subsequently settled with the plaintiff, and its unopposed motion for entry of separate and final judgment and to dismiss Bear Mountain's cross claim for contribution was allowed.

The claims against Bear Mountain proceeded to trial before a jury. Although the jury concluded Bear Mountain did not breach its contract and was not negligent in the performance of its work, it found the contractor was negligent "in the supervision of others" on the project. It also found the plaintiff negligent.

Instructed to allocate percentages of fault between Shantigar and Bear Mountain totaling 100 percent, the jury found Shantigar to be 60 percent and Bear Mountain to be 40 percent at fault.

Shantigar consequently filed a motion to amend the judgment, for judgment notwithstanding the verdict and for a new trial. The motion was denied and Shantigar appealed from both the judgment and the denial of the motion.

Statutory Construction

Having determined that the plaintiff had preserved the issue for appellate review, Spina noted that no Massachusetts case had squarely resolved the question of whether a tortfeasor who had settled should be included as a "defendant" under G.L.c. 231, §85 for purposes of apportioning liability.

The plain language of the statute supported the position that the plaintiff's negligence should be compared only with that of the active participants at trial, he stated.

"The statute does not direct the jury to apportion negligence among all tortfeasors who may have caused the injury, only those against whom recovery is sought," Spina reasoned. "Having settled its claim against Cove, Shantigar was not seeking recovery against Cove at the time the case was submitted to the jury."

He dismissed the plaintiff's claim that omitting Cove from consideration produced a result at odds with both the jury's findings and the statute's language in that the jury implicitly found Cove negligent and that, consequently, the combined total of the negligence of Shantigar, Bear Mountain and Cove exceeded 100 percent.

Even assuming the jury referred to Cove when they found the defendant negligent in the supervision of "others," Spina stated, "[t]he clause on which Shantigar relies ... must be read in conjunction with the clause that directs a comparison of the plaintiff's negligence to that of 'all persons against whom recovery is sought.'"

The judge described as speculative the contention that Cove's inclusion in the negligence calculus would have resulted in a verdict in which the plaintiff's fault fell below that attributable to both tortfeasors, enabling the plaintiff to recover against Bear Mountain.

"We do not know how the jury might have allocated negligence had they been instructed to allocate negligence among Shantigar, Bear Mountain, and Cove," he said. "Moreover, allocating negligence to someone who was not actually litigating the question at trial does not provide a sound basis to make such an allocation."

Spina also rejected the claim that the exclusion of settling parties would negate the Legislature's intent of alleviating the harsh result of the contributory negligence rule. Removal of absent tortfeasors from the jury's consideration, he said, was consistent with Massachusetts statutory schemes of joint and several liability and contribution, under which an injured plaintiff may sue any or all tortfeasors for full damages.

"Significantly, Massachusetts has declined previous opportunities to eliminate joint and several liability (a system, we note, that favors plaintiffs because it places the risk of insolvent defendants on codefendants rather than on the injured party) in favor of imposing fault-based liability on all parties," Spina wrote.

The plaintiff also maintained that omitting a settling defendant from the verdict slip would discourage plaintiffs from settling with any defendant, since the jury's allocation might not reflect the plaintiff's proportionate fault.

"Just because the system is imperfect does not mean it is unjust," Spina countered. "Plaintiffs who wish to avoid the potential pitfalls of settling with one tortfeasor need not settle with any."

Interpreting G.L.c. 231, §85 in "lockstep" with other jurisdictions requiring apportionment of negligent to absent tortfeasors would "undermine the balance of equities" achieved by Massachusetts' statutory scheme, he stated.

"By requiring the fact finder to apportion one hundred percent of the negligence among only those who participate in the trial, the parties equally shoulder the burden of persuading the fact finder as to how to allocate fault," he reasoned.

Although the inclusion of absent tortfeasors in the negligence calculus might result in a more accurate apportionment of liability, Spina remarked, the court was precluded from undercutting the legislative system in the name of equity.

"Changes in the law are for the Legislature," he concluded.

Spina ruled there was no error in the admission of evidence of the plaintiff's decision not to install a sprinkler system as the jury reasonably could conclude that van Itallie was aware of a particular danger of fire. MLW

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