
Plaintiff,
Vs.
Defendant.

The Evolution of "Pro Rata" Contribution and Apportionment Among "Joint" Tort-Feasors

By M. Natalie McSherry

Maryland tort lawyers may need to re-think their understanding of joint tort-feasor liability under a recent decision from the Court of Special Appeals. The Maryland Uniform Contribution Among Joint Tort-Feasors Act, Md. Code Anno., Cts. & Jud. Proc. §3-1401 et seq., defines joint tort-feasors as "two or more persons jointly or severally liable in tort for the same injury to person or property . . . ." Under the statute, one who meets that definition, and who discharges the common liability or pays more than a pro rata share of the common liability, has a claim against the other(s) for contribution. And, of course, where one "joint tort-feasor" pays a sum to the injured person and obtains a release from the injured person, that "reduces the claim against the other tort-feasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid." Cts. & Jud. Proc. §3-1404. It also relieves that settling joint tort-feasor from liability for contribution, if the release "provides for a reduction, to the extent of the pro rata share of the released joint tort-feasor, of the injured person's damages recoverable against all other tort-feasors." Md. Cts. & Jud. Proc. §3-1405. Historically, in Maryland, under its concept of joint and several liability, "pro rata" has meant: in equal shares, depending on the number of actual tort-feasors (not counting those who are only vicariously liable for the negligence of others).

For those who do tort work, although apportionment of cause or damages among one or more defendants may be argued in settlement or mediation, it has not been thought that there was an avenue for such an argument at trial. So, the least liable is always encouraged to pay more, because all will otherwise go down together. A recent decision of the Maryland Court of Special Appeals, however, has raised questions about this understanding.

To set the stage, one must first recall the opinion in *Swigert v. Welk*, 213 Md. 613 (1956), where a passenger injuried in a motor vehicle accident settled with Welk, the driver of the other car, and then sued Swigert, the driver of the car in which the plaintiff was riding. Swigert impleaded Welk, who promptly moved for summary judgment based on the release he had obtained from the Plaintiff passenger. In that release, the Plaintiff had consented to a pro-rata reduction of any damages awarded to her in any action against Swigert. The Court of Appeals, however, held that, because the release denied joint tort-feasor status, Swigert still had a right of contribution. If the jury determined that Welk was a joint tort-feasor, then the release would provide for reduction of the verdict. The court commented, in dicta, that, if pro-rata reduction was applied, the judgment would be reduced by one-half, based on the number of joint tort-feasors. 213 Md. 613, 619.

A little over 20 years later, the Court of Special Appeals considered the case of *Lahocki v. Contee Sand & Gravel Co., Inc.*, 41 Md.App. 579, 398 A.2d 490 (1979). In that case, an injured passenger sued the driver of the van in which he was riding, a road contractor, and General Motors (GM), the manufacturer of the van, for injuries suffered when the van ran off the road in a construction zone and the roof came off of the van, resulting in serious injuries to the plaintiff. Plaintiff claimed, with respect to GM, that there were insufficient welds on the roof of the van. Plaintiff settled with the driver for $300,000 before trial. At trial, there was a directed verdict in favor of the road contractor, but the jury returned a verdict against GM of $1.2 million for the passenger and

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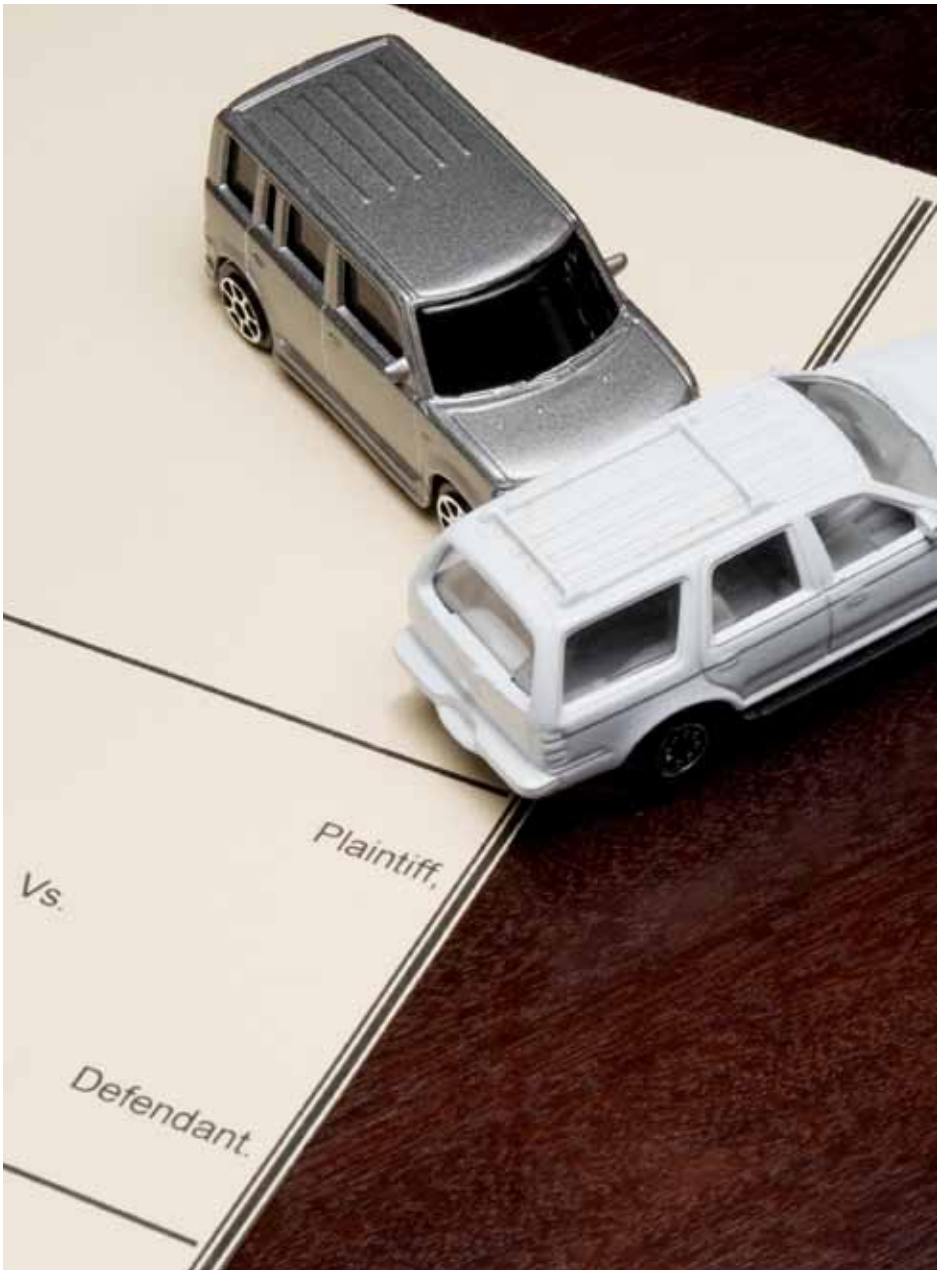
$300,000 for him and his wife on a loss of consortium claim.

This was an enhanced injury claim: the claim was not that GM had caused the accident but that it was responsible for the fact that the plaintiff's injuries were "enhanced." The court had before it the question of the effect of the release of the driver on the verdict against GM. The Court referenced the *Restatement of Torts (2nd)* § 433B(2), which states that, "where the tortious conduct of two or more actors has combined to bring about the harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor." With regard to the effect of the joint tort-feasor release with the driver, the court acknowledged that the driver could not be responsible for the defective roof since the jury had been instructed that, if Mr. Lahocki would have suffered the same injuries in the accident in any event, irrespective of the defective roof, GM would not be liable at all. Therefore, the court concluded, the jury verdict against GM reflected its conclusion that the injury resulting from GM's defective van was $1.5 million. But, said GM, if the driver was a joint tort-feasor because he was responsible for all foreseeable consequences of his negligence, it should get the benefit of "pro rata" reduction as provided in the release.



The court began by pointing out that "pro rata" was not defined in the Uniform Act, but in an attempt to interpret it, the court engaged in a lengthy discussion of legislative history and other sources. The court relied heavily on a paper read before the Barristers Club of Baltimore in 1948 by Wendell D. Allen of the Baltimore Bar, entitled "Joint Tortfeasors; Contribution, Indemnity and Procedure." Mr. Allen's "Paper," which appears to have been historically the only source of interpretation available to the Maryland Bar following adoption of the Uniform Act, proclaims that:

> "We all agree, however, that pro-rata share as used in the 1941 Act means that the burden is distributed among joint tortfeasors in numerical shares or proportions based on the actual number of tortfeasors, regardless of whether the plaintiff originally sued two or more defendants or whether a single defendant impleads a third party, for example, 50 percent Each as to two tortfeasors, or 33 1/3 percent Each as to three tortfeasors." W. Allen, Supra at 10.

The court, after acknowledging that Mr. Allen cited absolutely no authority for this interpretation

other than common practice, referenced the dicta to the same effect found in *Swigert* and said:

> "Apparently, then, the Court of Appeals fell into the 'We' that Mr. Allen proclaims 'all agree' and the definition of per person, despite the Commissioner's Notes to the Uniform Act that it was intentional not to define 'pro rata' . . . although it might be helfpul to define this phrase, the draftsmen of the Act feel that in view of the difficult in stating a concise definition and because of its well-established meaning in various contexts, the attempt of statutory definition would prove more harmful than otherwise." 41 Md.App. 579,618.

The court then discussed how those "well-established meanings in various contexts" vary from the per person meaning given the term by Mr. Allen and by the Court in *Swigert*. The opinion eventually falls back to the *Black's Law Dictionary* definition:

> "proportionately; according to certain rate, percentage, or proportion. According to measure, interest or liability."
> 41 Md.App. 579, 619.

Therefore, said the court, the use of the generic term comprehends either the expressly defined proportionate dollar formula or any other amount or proportion by which the release provides the total claim shall be released, incorporating §3-1404.

After this lengthy discussion of statutory interpretation, however, because the case involved a release, the court said that the real question was not what the legislature intended, but what the parties intended in their release, and held that the parties had clearly "intended to convey an express unquestioned understanding of the numerical proportion which 'we all agree' the term pro rata meant." 41 Md.App. 579, 621. The court said that it was doing so to avoid "unfairness of a sudden, unexpected change of definition after long and obvious public reliance upon *Swigert* dicta despite our recognition that such dicta is not binding upon us." 41 Md. App. 579, 621. Having already said that it did not need to reach a holding regarding statutory interpretation because the document here was a contract, the court nonetheless held that "the term 'pro rata share' as used in section 20 does, and will continue to mean that which *Swigert* exemplified it to be, *i.e.*, in numerical shares or proportions based on the number of tortfeasors." 41 Md. App. 579, 621.

That interpretation had been followed to the present but may have been called into question in a recent decision of the Court of Special Appeals in *Wallace & Gale v. Carter*, 211 Md.App. 488 (2013). That case involved several asbestos claims, including one by a Mr. Hewitt, who worked at Bethlehem Steel from 1946 to 1978, where he was exposed to asbestos in pipe insulation supplied or installed by Wallace & Gale (W&G). He was also a longtime smoker (one-half to one pack per day for 65 years.) He suffered from smoking-related emphysema and died from lung cancer in 2008 at the age of 81. His survivors brought a claim alleging that his illness and death were caused by his exposure to asbestos. At trial, it was not disputed that asbestos exposure was a substantial contributing cause to Mr. Hewitt's lung cancer or that smoking was also a cause of his lung cancer. Plaintiff's expert testified that he could not differentiate "which caused what" because the two exposures are not just additive, they are synergistic. At trial, W&G requested that the circuit court permit apportionment of damages and proffered the testimony of its expert, who was prepared to express the opinion that apportionment of damages was possible based on epidemiologic and other scientific studies. The circuit court did not allow the testimony. The Court of Special Appeals reveresed the circuit court and held that the testimony on apportionment should have been allowed.

The opinion begins by stating that the issue of apportionment concerns causation, not comparative negligence. Comparative fault or comparative negligence involves determination of the relative percentages of fault between joint tort-feasors. Maryland, of course, has explicitly rejected adopting comparative fault or comparative negligence in favor of maintaining contributory negligence. Apportionment of damages, on the other hand, involves instances where there are two or more causes and a reasonable basis exists for determining the contribution of each cause to a single harm. Apportionment of damages, said the court, involves looking at the causes of the injury, not the duties and breaches of the tort-feasors. *Restatement (Second) of Torts, Section 433A(1)(b).* Under this apportionment, the relative fault of the parties is not considered.

Indeed, the Restatement provides as follows:

> (1) Damages for harm are to be apportioned among two or more causes where
> (a) there are distinct harms, or
> (b) there is a reasonable basis for determining the con-

tribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

Comment a to Section 433A states:

> The rules stated in this Section apply whenever two or more causes have combined to bring about harm to the plaintiff, and each has been a substantial factor in producing the harm, as stated in §§ 431 and 433. They apply where each of the causes in question consists of the tortious conduct of a person; and it is immaterial whether all or any of such persons are joined as defendants in the particular action. The rules stated apply also where one or more of the contributing causes is an innocent one, as where the negligence of a defendant combines with the innocent conduct of another person, or with the operation of a force of nature, or with a pre-existing condition which the defendant has not caused, to bring about the harm to the plaintiff. The rules stated apply also where one of the causes in question is the conduct of the plaintiff himself, whether it be negligent or innocent.

This Restatement concept of apportionment had been cited with approval in *Mayer v. N. Arundel Hosp. Ass'n Inc.*, 145 Md.App. 235, 249–50, 802 A.2d 483, cert. denied, 371 Md. 70, 806 A.2d 680 (2002).

In this case, Hewitt suffered a single harm – death from lung cancer. According to the defendants' proffer, had their expert been permitted to testify, he would have expressed the opinion that occupational exposure to asbestos and cigarette smoking was a substantial contributing factor to Hewitt's lung cancer and death and that, based on epidemiologic literature and science, his cigarette smoking contributed 75 percent toward his lung cancer and his occupational exposure to asbestos contributed 25 percent. Excluding this testimony, said the Court of Special Appeals, was error, and the case was remanded for a new trial.

On remand, if the case is affirmed by the Court of Appeals (which heard oral argument on May 5, 2014), it will be interesting to see if there is a hearing in the trial court on a Frye-Reed or Rule 5-702 challenge to this expert testimony. With advances in science and medicine, it is very likely that experts will be able to offer competent opinions regarding causation of injuries or conditions previously considered indivisible. The court recognized this in *Gress v. AC&S, Inc.*, 150 Md.App. 369 (2003.) However, the admissibility of this particular testimony has not yet been addressed under these tests in this case.

Will this concept of apportionment of causation of damages end the law of joint and several liability? It should not, as that law applies only to indivisible injuries. In *Consumer Protection v. Morgan*, 387 Md. 125 (2005), the Court of Appeals accepted the Restatement's demarcation that "the necessary condition for concurrent tortfeasors to be held jointly and severally liable is that they caused a single injury incapable of apportionment." 387 Md. 125, 178. Apportionment, therefore, is the converse of joint and several liability.

Indeed, this concept of apportionment is entirely separate from many claims for contribution under the Joint Tort-Feasor statute because that statute defines joint tort-feasors as "two or more persons jointly or severally liable in tort for the same injury." §3-1401(c). Common liability exists where two or more actors are liable to the injured party for the same damages. A right to contribution does not arise until a joint tort-feasor discharges a "common liability."

Where apportionment is proven, one defendant would have no right of contribution from the other, as no common liability would exist. However, where this is no basis on which to apportion the cause(s) or the injury, contribution would be available. For example, in an asbestos case, where smoking is an issue as in *Carter*, presumably there would be a right of contribution among the asbestos defendants – unless, that is, they can produce experts who can apportion based on nature or length of exposure or some other factors.

Another potential application of apportionment arises in a crashworthiness case, like *Lahocki*, where the negligent driver settles all claims with the injured party and then files a claim for contribution against the manufacturer of the vehicle based on an alleged defect's causing enhanced injuries. Can the negligent driver claim under §3-1405 that he should be able to recover more than one-half of the damages paid, on the argument that the jury should be allowed to apportion the damages? It is unclear whether the *Carter* opinion, if affirmed, would overrule the dicta in *Swigert* and *Lahocki* and allow for an interpretation of the statutory right of "pro rata" contribution based on the Restatement concepts of apportionment, in those cases where testimony supports something other than per person apportionment.

Addendum

The Court of Appeals recently reversed the Court of Special Appeals' decision (*Carter v. The Wallace & Gale Asbestos Settlement Trust*, slip opinion 7/21/14), and held that "apportionment of damages is appropriate only where the injury is reasonably divisible and where there are two or more causes of the injury." (slip op. at 15 and 18) The Court also held that, in that case, as a matter of law, the injury was not divisible. In support of that holding, as a matter of law, that the injury was not divisible, the Court cites to several passing comments in opinions and commentaries that some harms, such as death, are not divisible, but there is no indication that there was a proffer of evidence in any of those instances on which the cause of the injury could be divided.

The Court also commented on the testimony of plaintiff's expert and a treatise on asbestos that indicated that the causal effects of tobacco and asbestos exposure were "multiplicative in nature, which we are satisfied is indicative of an indivisible injury." (slip op. at 24) Judge Irma S. Raker and Judge Lynne A. Battaglia dissented and said that they would have remanded this issue to the circuit court for a Frye-Reed hearing to determine whether the defense expert's theory that the injury was capable of apportionment was generally accepted in the scientific community, and disagreed with the majority that, in all cases, death is an indivisible injury as a matter of law. Ms. McSherry is a Principal in the Baltimore law firm of Kramon & Graham, P.A.

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