The Liability Relationship Between Initial and Successive Tortfeasors

When the independent conduct of two or more persons results in an indivisible injury to another party, each defendant is considered a joint tortfeasor and is both jointly and severally liable for damages. Restatement (Third) of Torts: Apportionment of Liability §E18 (2000). In that situation, the plaintiff may recover the full amount of his damages from any one defendant found liable. Restatement (Third) of Torts: Apportionment of Liability 10 §. The question then arises as to whether there is a difference in liability between the original tortfeasor and successive tortfeasors. Does the original tortfeasor truly “buy the negligence” of the subsequent conduct of another party? As with most legal questions, it depends.

In general, when it is determined that the plaintiff suffered separate injuries, the original tortfeasor will be liable for the initial injury as well as any aggravation to that injury, while subsequent tortfeasors will typically be liable only for the damages they caused and not for the original tort. Gertz v. Campbell, 55 Ill. 2d 84 (1973). In medical malpractice cases, the same rule applies. Kolakowski v. Voris, 94 Ill. App. 3d 404, 412 (1st Dist. 1981). This is based upon the premise that tortfeasors will be liable for reasonably foreseeable consequences of their own negligence, which includes subsequent medical malpractice. Erickson v. Baxter Healthcare, Inc., No. 1:99CV00426, 2001 WL 36275328, at *14 (N.D. Ill. Sept. 28, 2001). If the plaintiff’s injury is indivisible, the defendants generally will be found to be joint tortfeasors and contribution applies. Patton v. Carbondale Clinic, S.C., 161 Ill. 2d 357 (1994).

Gertz v. Campbell is the primary cited authority on subsequent tortfeasors in medical malpractice actions. Gertz v. Campbell, 55 Ill. 2d 84 (1973). There, a minor pedestrian was standing on the shoulder of a road when he was struck by a car and was injured. He was taken to the emergency room where it was determined that immediate surgery was needed to repair his leg. Gertz, 55 Ill. 2d at 86. Pedestrian’s mother filed suit only against the driver. Id. at 85. The defendant driver then filed a third-party action against the physician who treated the minor’s injuries alleging that the physician was negligent in waiting 17 hours to perform leg surgery, resulting in necrotic tissue and leg amputation. Id. at 86. Describing the law in Illinois, the court stated that “a person injured through another’s negligence can recover from the original tortfeasor not only for the original injury but for any aggravation of the injury caused by a physician’s malpractice, assuming that there was no want of ordinary care by the injured in the selection of the physician.” Id. at 88. Further, the court affirmed the trial court’s ruling that the driver and physician were not joint tortfeasors, as there was no concert in the two’s actions, and neither had control over the others’ actions. Id. at 89. Therefore, the physician was not liable for the negligence by the original tortfeasor. Id.

Gertz, however, was decided prior to the adoption of contribution in Illinois. Solich v. George & Anna Portes Cancer Prevention Ctr. of Chicago, Inc., 273 Ill. App. 3d 977 (1st Dist. 1995), and today, original and successive tortfeasors may have the right to contribution if they are found to be joint tortfeasors. Patton v. Carbondale Clinic, S.C., 161 Ill. 2d 357 (1994). Under the Joint Tortfeasor Contribution Act, Illinois defendants have a right to obtain contribution whenever two “or more persons are subject to liability in tort arising out of the same injury.” 740 ILCS § 100/2 (1990) (emphasis added). Contribution applies equally to joint tortfeasors and concurrent or successive tortfeasors. Patton, 161 Ill. 2d at 369. Whether defendants have a right to contribution from joint tortfeasors is not determined by the timing of each party’s
negligence but whether liability arises from the same injury. 740 ILCS § 100/2. The proper analysis for determining whether the tortfeasors committed the “same injury” does not depend on the timing of the tortfeasors’ conduct, but the injury itself. People v. Brockman, 148 Ill. 2d 260, 269 (1992). For example, in Brockman, the State initiated an action against defendants alleging that their drilling created a water pollution hazard. Brockman, 148 Ill. 2d at 269. The defendants in turn alleged that a third-party defendant contributed to the same water pollution hazard by drilling through garbage cells. Id. Although the two drilling incidents were separated in time by five years, the court found that a trier of fact could find the conduct of the defendants and the third-party to have produced the same injury to which the Contribution Act would apply. Id. at 270.

The right to contribution for joint tortfeasors, whether subsequent or concurrent, exists even if no judgment has yet been entered against any defendant. 740 ILCS § 100/2. In medical malpractice cases where the plaintiff claims separate injuries, which, if found, would eliminate the possibility of contribution, settling parties must be cautious in drafting the release in order to ensure that appropriate consideration was allocated to support the discharge of multiple claims. Patton, 161 Ill. 2d at 374. In Patton, a minor suffered a transected jejunum following a car accident, which led to peritonitis and caused her to die of septic shock. Id. at 360. The administrator of the estate filed suit against the driver of the car, the manufacturer of the car, and, among others, the medical clinic where the decedent was treated. Id. at 360, 362. Prior to trial, the plaintiff executed a settlement with both the driver and the manufacturer. Id. at 361. Prior to trial, the clinic filed an affirmative defense asserting it was entitled to a setoff from the driver and manufacturer settlements. Id.

At trial, the court entered a directed verdict on liability against the clinic for failing to diagnose the transected jejunum, and the jury awarded damages accordingly. Id. The trial court found that there were two separate and distinct injuries: (1) the car accident resulting in transected jejunum; and (2) the failure of the doctors to diagnosis transected jejunum. Id. at 363-364. The trial court further found that the clinic was not entitled to a setoff and reduction in judgment based on the settlements with the driver and manufacturer because there was not an indivisible injury. Id. at 363.

On appeal, the clinic argued that there were not two distinct injuries, but instead that the three parties were joint tortfeasors, and thus the clinic was entitled to a setoff. Id. The appellate court affirmed. Upon further appeal, the Illinois Supreme Court agreed that the decedent had suffered two distinct injuries, thus, the parties were not joint tortfeasors, but rather successive tortfeasors. Id. at 364. The clinic was therefore liable for the second injury (failure to diagnose) and the driver and manufacturer liable for both injuries (the transected jejunum and failure to diagnosis). Id. at 366. Consequently, because the driver and manufacturer were also liable for the second injury (failure to diagnose) the clinic was entitled to contribution for the damages from the second injury. Id. The court found that the driver’s release properly released the driver from fault for both the first and second injury, and thus the clinic was entitled to a setoff for the settlement amount because the release was executed for the second injury. Id. at 372. The court also found that the manufacturer’s release indicated that compensation was only provided for the first injury, but the manufacturer was released from both injuries, thereby entitling the clinic to a setoff for the amount paid. Id. at 373. The court instructed that when attorneys should be cautious to draft the settlements to allocate the appropriate consideration to support the release of multiple claims when two separate injuries exist. Id. at 374.
Conclusion

An initial tortfeasor will be liable for the injuries it causes as well as any separate injuries caused by successive tortfeasors. Conversely, if it is determined that the negligence of different parties resulted in the same injury, the defendants are then joint tortfeasors and have the right to contribution. *Patton*, 161 Ill. 2d at 364. Defendants who seek setoff from the plaintiff’s prior settlements should review and possibly challenge the release to determine whether the settling party was released from liability for all injuries.

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