CPLR Article 16—The Case for Meaningful Limitation of Liability

By Howard S. Shafer and Alicia A. Foy

At common law, a joint tortfeasor would be jointly liable for the plaintiff's full economic and non-economic damages. The New York State legislature, as part of its tort reform legislation, enacted CPLR Article 16 to "remedy the inequities created by common law joint and several liability on low fault, deep pockets defendants."[1] Essentially, Article 16 of the CPLR modifies common law joint and several liability.

Pursuant to CPLR 1601, a joint tortfeasor whose share of fault is 50% or less, is only liable to the extent of that tortfeasor's share of the plaintiff's total non-economic loss. Additionally, the joint tortfeasor whose liability share of fault is more than 50% is jointly liable for the plaintiff's total non-economic loss.[2] As per the distinguished David Siegal, "whatever its literary merit, it has in practical application engendered difficulty centered on section 1602(5)."[3]

Certain actions, such as those "requiring proof of intent," are exempt from the apportionment limitation delineated in CPLR 1601.[4] Therefore, a plaintiff who is injured by an intentional tortfeasor is able to recover the full amount of the plaintiff's economic and non-economic damages from that tortfeasor. However, the Appellate Divisions were divided as to whether this exemption is applicable to "hybrid situations." A typical hybrid situation involves joint tortfeasors, one of whom is a landowner, who exhibited some form of negligence, and the other a non-party who acted intentionally.

Nearly twenty years after the enactment of Article 16, the Court of Appeals, in *Chianese v. Meir,*[5] finally resolved the issue and concluded that apportionment is permissible between negligent tortfeasors and non-party tortfeasors because the 1602(5) exemption does not apply to an action as a whole but only to the tortfeasor who acted with intent.[6] In effect, a negligent tortfeasor in a negligence action is not precluded from seeking the benefits of CPLR 1601 apportionment of liability with a non-party intentional tortfeasor.[7]

In *Chianese*, the plaintiff brought a personal injury action against the building owner and management agency, alleging that inadequate building security led to her attack by a third party. The jury found that the attacker gained entry to the premises through a negligently maintained entrance, which was a substantial factor in causing the plaintiff's injuries. The jury apportioned liability 50-50 between the negligent defendant and non-party intentional tortfeasors. The trial court granted the plaintiff's motion to set aside the apportionment and the Appellate Division affirmed and found the negligent defendants liable for the entire amount of the plaintiff's non-economic loss pursuant to CPLR 1602(5). On appeal, the Court of Appeals affirmed the jury's apportionment and concluded that a pure negligence action does not fall within the scope of 1602(5). The Court notes that the neither the plain language nor the legislative history of 1602(5) "was intended to create what would amount to a broad exception to the apportionment at the expense of the low fault, merely negligent landowners and municipalities."[8]

Exploring Apportionment

The Appellate Divisions of the First and Second Departments have addressed the issue of apportionment five times since *Chianese*. With only one exception, the Appellate Divisions rejected a jury apportionment of liability of more than 50% on a negligent tortfeasor.

In *Cabrera v. Hirth,*[9] an apartment dweller assaulted a repairman. After trial the jury apportioned fault at 50% against the landlord and 50% against the perpetrator. The First Department affirmed the trial Justice's denial of a motion to reduce the apportionment against the landlord to one-third.

A review of two pre-*Chianese* cases revealed a similar result.[10] In fact, in one, the Appellate Division First Department substituted a 60%-40% apportionment in favor of the Transit Authority for that of 75%–25% against the Transit Authority rendered by the jury.

In *Roseboro v. New York City Transit Authority,*[11] the First Department firmly rejected the jury's apportionment of liability of 80% against negligent defendant and 20% against the non-party intentional tortfeasors, holding that such apportionment has ignored the weight of the evidence. In *Roseboro,* the plaintiff brought suit against the defendant, New York City Transit Authority, for personal injury and wrongful death stemming from an early morning attack on the decedent by drug addicts in the course of a robbery on the defendant's subway platform. During the attack, the decedent was thrown from the platform, chased onto the tracks, battered into a daze and eventually struck by an approaching train. These events occurred while the defendant's employee, a station token booth clerk, slept at his post with the attack displayed on a monitor in front of him. The jury found the defendant, New York City Transit Authority, negligent based on the fact that the station token booth clerk was asleep and failed to call the police for assistance. The plaintiff re-

quested, and the trial court granted, to refuse to allow the jury to apportion liability between the defendant and the non-party attackers.

On remand, pursuant to *Chianese*, the jury was charged to resolve the issue of apportionment. The defendants were allowed to argue that the attackers were largely responsible for the decedent's injury. The jury subsequently apportioned 80% against the defendant and 20% against the non-party attackers. On appeal, the First Department held that the jury's apportionment couldn't stand because it is against the weight of the evidence presented. The court reasoned that regardless of how culpable the sleeping clerk might have been, the defendant's share of responsibility cannot approach the degree of culpability of the perpetrators of the crime underlying the lawsuit.[12]

Similarly, in *Stevens v. New York City Transit Authority*,[13] the Second Department also concluded that a negligent tortfeasor could not approach the culpability of an intentional tortfeasor. The action stemmed from the injuries sustained by the plaintiff after being pushed by an assailant from the subway platform onto the subway tracks, where an oncoming train subsequently struck her. The train operator activated the emergency brake but was unable to stop in time to avoid striking the plaintiff. The issue at trial was whether the train operator could have averted the accident if he was traveling at a slower rate of speed. The jury returned a verdict apportioning 40% responsibility for the accident to the defendant, New York City Transit Authority, and 60% to the non-party intentional tortfeasor. On appeal, the court upheld the finding of liability against the defendant but found that the apportionment of 40% was against of the weight of the credible evidence. The court reasoned that any negligence by the train operator cannot approach the culpability of the perpetrators of the crime underlying the lawsuit. Furthermore, the court concluded that the circumstances warranted no more than a 20% allocation of responsibility.

In *Cintron v. New York City Transit Authority*,[14] an infant was hit by a subway train. After trial a jury apportioned 70% against the Transit Authority and 30% against the plaintiff and the trial Justice set aside the jury finding and dismissed the complaint. On appeal, the First Department reversed the dismissal and remanded for a new trial on apportionment unless the plaintiff agreed to a 50%–50% apportionment.

However, there is one instance where a court concluded that the negligent tortfeasor culpability might approach the culpability of the perpetrators of the crime underlying the lawsuit. In *Nash v. Port Authority of New York and New Jersey*,[15] the First Department, affirmed a jury's apportionment of 68% to the negligent defendant and 32% to the non-party intentional tortfeasor. The court acknowledged that the case is neither one of ordinary negligence nor a coincidental intentional act, thus distinguishing it from the average hybrid situation.[16] More specifically, the court considered the negligence of the station token booth clerk in *Roseboro*, or the train operator in *Stevens*, to be Lilliputian in scale.[17]

In *Nash*, terrorists drove a bright yellow rental van, loaded with explosives, into the underground public parking garage of the World Trade Center. The terrorists parked the van near vital utility and communications systems, lit a ten-minute fuse and safely left the premises. The existing security measures were inadequate; there was neither a gate nor any parking attendants to screen for explosives. The explosion killed six people, injured hundreds and cause significant damage, such as the severance of essential services to the tenants of the World Trade Center.[18] The jury found that the defendant had been negligent in failing to maintain the premises in a reasonable and safe manner, and that negligence was a substantial cause for the terrorist attack.

On appeal, the First Department concluded that the apportionment assigned to the negligent defendant was justified by the negligence and circumstances under which the negligence contributed to the terrorist attack.[19] The court further explained that the jury was entitled to conclude that the defendant's negligence was, if not gross, then dramatically out of the ordinary.[20] The evidence showed that, several years prior to the terrorist attack, the defendants were put on notice that the World Trade Center was vulnerable to terrorist attack, specifically through its public parking garage. Outside consultants and internal security consultants, warned the defendants, of the precise manner in which the vulnerability could be exploited,[21] specifically noting that the parking lots are highly susceptible to car bombings.[22] In one report, the consultant expressed the view that that it was not merely possible but probable that there would be an attempt to bomb the World Trade Center through the parking lot. The consultant recommended an immediate improvement of surveillance and screening measures at the parking garage.[23] In fact, the terrorists duplicated the exact scenario that had been foreseen by the security consultants.[24] As such, the evidence presented at trial supported the conclusion that this particular defendant was not the low fault defendant that the Legislature intended to benefit when it enacted CPLR article 16.[25]

Conclusion

It is well established that if a plaintiff is injured by joint tortfeasors, one who acted with intent and the other negligently, the intentional tortfeasor will be liable for the full amount of the plaintiff's economic and non-economic damages. However, the negligent tortfeasor may assert the apportionment benefits of CPLR Article 16. Although

release from joint and several liability is not automatic, a review of the recent First and Second Department Appellate Division cases suggests that the limited liability protections of CPLR Article 16 are real. In the one exception, the First Department went to great lengths to distinguish the Port Authority case from the earlier cases limiting the liability of negligent tortfeasors. That, coupled with the noting of the legislative history of 1602(5) and the intention to limit the liability of "the low fault, merely negligent landowners and municipalities" suggests that the limitation of liability was intended to be meaningful.

Endnotes

1. *Chianese v. Meir,* 98 N.Y.2d 270, 275 (2002).
2. N.Y. CPLR 1601.
3. *Chianese v. Meir,* 98 N.Y.2d 270, 275 (2002).
4. N.Y. CPLR 1602(5).
5. 98 N.Y.2d 270 (2002).
6. *Id.* at 275.
7. *Id.*
8. *Id.*
9. 8 A.D.3d 196 (1st Dep't 2004).
10. *Robinson v. New York City Transit Authority,* 105 A.D.2d 614 (1st Dep't 1984).; *Mena v. New York City Transit Authority,* 238 A.D.2d 159 (1st Dep't 1997).
11. 10 A.D.3d 524 (1st Dep't 2004).
12. *Id.*
13. 19 A.D.3d 583 (2d Dep't 2005).
14. *Cintron v. New York City Transit Authority,* 22 A.D.3d 248 (1st Dep't 2005).
15. 51 A.D.3d 337 (1st Dep't 2008).
16. *Id.* at 356.
17. *Id.*
18. *Id.* at 339.
19. *Id.*
20. *Id.* at 355.
21. *Id.* at 340.
22. *Id.*
23. *Id.*
24. *Id.* at 343.
25. *Id.* at 358.

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