The (un)Fair Share Act – Will Different Damages Rules for Different Plaintiffs Stand?

By: Robert G. Devine and Kimberly M. Collins
Litigation Alert
6.2.21

A decision by a two-judge panel of the Superior Court this March *sua sponte* announced that there are different rules for allocating liability among multiple tortfeasors solely based on whether or not a plaintiff contributed to the injury. The decision was *Spencer v. Johnson* 2021 WL 1035175 (Pa. Super. Ct. Mar. 18, 2021), and the Superior Court has decided not to allow re-argument on the decision.

In *Spencer,* the plaintiff was catastrophically injured after a vehicle struck him while crossing the street. The vehicle was a company car issued to its employee for business use. The car was being operated by the husband of the employee at the time the plaintiff was injured, without the presence or express consent of the employee, and while the employee was at a non-work-related family gathering. The plaintiff filed suit against the company, the employee, and the husband-driver under various direct negligence and vicarious negligence theories. Importantly, the parties did not dispute two facts, central to the court's analysis: 1) the pedestrian was not at fault; and 2) the driver was negligent.

The jury found all three defendants negligent, and apportioned liability among all three as follows: company was 45% liable, the driver was 36% liable and the employee was 19% liable.

By way of legal context, The Fair Share Act, 42 Pa.C.S. § 7102, was passed in 2011 and generally provides that when multiple tortfeasors are involved, "each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ration of the defendant's liability to the amount of liability attributed to all defendants" or other liable persons. 42 Pa.C.S. § 7102(a)(1)(2). In other words, defendants are not subject to joint and several liability. Rather, a defendant is only responsible for the amount of damages a jury finds the specific defendant was at fault. However, joint and several liability still applies where a defendant is 60% or more responsible for a plaintiff's damages, allowing a plaintiff to seek the whole award from that defendant. § 7102(a)(1)(3)(iii).

The allocation of fault in *Spencer* was not 60% or greater for any one party, so at straightforward application of the Act would mean each party is only liable for its proportion of fault, determined by the jury. Among several arguments raised on post-trial motion, the plaintiff argued the company was joint and severally liable for the entire award of damages because it was liable for employee's negligence under principles of agency and vicarious liability. Therefore, the employer's liability should be the sum of its and the employee's respective liability. Because that figure is over 60%, the argument was that the Fair Share Act permits joint and several liability, and the plaintiff could collect the entire judgment from the company.

The trial court rejected the argument reasoning the jury did not make a specific finding of fact that employee was in the course and scope of her employment at the time, and the court concluded its view of the issue did not support such a finding. Stated another way, employee was not in the course and scope of her employment when she was at a social event, unrelated to work. Therefore, each party remained liable only for its percentage of fault.

On appeal, a two-judge panel of the Superior Court reversed the trial court on that point in a published opinion, noting in part, that it was uncontested that employee and her husband were attending a family gathering when the incident occurred, the use was deemed personal by employee, and her actions were not actuated in any part to serve the purpose of the company. *See Spencer*, at 42-43.

Notwithstanding, the panel explained it viewed the fact that employee "was on-call 24/7" as favoring the factual conclusion that employee was "in the course and scope of her employment when she drove the company car to her mother's house[.]" *Id.* Based on that reasoning, the panel concluded the facts could support a finding that employee was in the course and scope of employment while visiting her mother's and by extension, when her husband operated the car outside of her presence.

After the panel concluded a jury could have inferred vicarious liability, based on the "on-call" nature of employee's job, it continued to conclude the lack of special interrogatories to the jury, did not preclude the plaintiff from recovering under that theory. The panel noted the verdict slip included a "generalized jury determination," asking the jury only whether a party was negligent and whether the negligence was a factual cause of the harm to the plaintiff.

Next, and importantly, the two-judge panel engaged in a *sua sponte* discussion of the Fair Share Act's application in the context of a case where the plaintiff's negligence is not at issue. The panel made a sweeping claim that the Fair Share Act, and its damage-allotment formula, does not apply at *all* in cases where a plaintiff's own negligence is not argued to have contributed to his or her damages. *See Spencer*, at 64.

Essentially, the two-judge court created different rules in multi-tortfeasor cases depending on whether an argument can be made that a plaintiff has had some role in causing damages. Although this new interpretation was announced in dicta, meaning it was an analysis the court undertook on its own and it was not necessary to resolve the case, the publication of the decision implies the court considers the opinion beneficial to the bench and bar in clarifying the contours of the law.

As it stands today, the decision is published but only establishes binding precedent on the lower courts with respect to the analysis necessary to the disposition of the case. There is still opportunity for the decision to be reviewed. On May 24, 2021, the Superior Court denied a request for re-argument. The parties are still afforded 30 days from that date to file a petition for allowance of appeal to the Pennsylvania Supreme Court. Given the novel interpretation of the law in the decision and the enormous implication it has for determining liability, it seems likely a petition will be filed. Accordingly, the *Spencer* decision may not be the final word on the Superior Court's decision. Likewise, given the Supreme Court's criteria for granting allowance of appeal, this decision and its potential to create an inconsistent paradigm regarding damages across trials and its broad proclamation of the interpretation of a statute, stands a fair shot of being accepted for review.

White and Williams will continue to monitor the status of the proceedings and any impact on the law of damages and liability. For questions or further information, please contact Robert G. Devine (deviner@whiteandwilliams.com; 856.317.3647), Kimberly M. Collins (collinskm@whiteandwilliams.com; 856.317.3655) or another member of the Litigation group.