

How Tort Reform Is Likely to Change Trial Practice: Apportionment of Damages

Pre Tort Reform Law:

- ** Joint tortfeasors were held jointly liable. Where the plaintiff was without fault, he could recover the entire award from any defendant found liable. O.C.G.A. § 51-12-31 (former)
- ** In 1987, the General Assembly changed the rule of joint liability in actions where “the plaintiff is himself to some degree responsible for the injury or damages claimed.” O.C.G.A. § 51-12-33 (former). In that case, the jury was allowed to apportion its award of damages among the liable defendants whose degree of fault was greater than the plaintiff according to the fault of each defendant.

Post Tort Reform Law

- ** The General Assembly amended O.C.G.A. §§ 51-12-31 and 51-12-33 to abolish joint and several liability in all cases and to mandate apportionment of damages.
- ** O.C.G.A. § 51-12-31: Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.
- ** O.C.G.A. § 51-12-33(a) – Comparative negligence: Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.
- ** O.C.G.A. § 51-12-33(b) – Apportionment: Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.
- ** O.C.G.A. § 51-12-33(c)-(f) – Nonparties:
 - (c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

- (d)
 - (1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.
 - (2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.
 - (e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.
 - (f)
 - (1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentages of fault of the parties.
 - (2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.
3. Notwithstanding the provisions of this Code section and any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

Potential Consequences for Trial Practice:

A. Potential issues regarding the language of the new statutes:

- 1. O.C.G.A. § 51-12-33(b), the apportionment section, applies only where an action is brought "against more than one person." Where does this leave the possible apportionment against nonparties in cases where there is only one defendant?
- 2. There is an argument that the permissive language of O.C.G.A. § 51-12-31 may conflict with O.C.G.A. § 51-12-33(b)'s requirement of mandatory apportionment. O.C.G.A. § 51-12-31 states that the jury "may" apportion damages and "in such a case" the judgment must be entered severally.
- 3. O.C.G.A. § 51-12-33(b) requires the jury to apportion the damages award "among the persons who are liable". Does "persons who are liable" only include parties? If so, where does this leave apportionment against nonparties?

4. O.C.G.A. § 51-12-33(c) tells the jury to “consider” the fault of all contributing persons or entities, including nonparties. But the statute does not tell the jury what “consider” means or what to do with its consideration of the fault of nonparties.
5. The statute does not address whether vicariously liable defendants are to be treated as a single entity for purposes of apportionment.

B. Practical Issues for Trial Practice:

1. Plaintiffs will be unable to collect the full damages award in cases where a defendant does not have sufficient insurance or is insolvent, or if the jury is permitted to apportion part of the damages award to a nonparty who could not have been made a defendant (for example ambulance services who do not receive remuneration enjoy statutory immunity).
2. Plaintiffs will be less likely to settle with less than all defendants for fear that the remaining defendants will aggressively blame the settled parties who are no longer present to defend themselves.
3. Apportionment eliminates one of the plaintiff’s greatest leverages for settlement.
4. Trials will become much more complex when juries consider the potential fault of non-parties.
5. This is not all good news for medical malpractice defendants. It may be difficult to maintain a united defense. Further, physicians who are not sufficiently insured may face a plaintiff’s counsel who has no choice but to go after their personal assets.
6. Cases should be filed early and discovery completed to determine if there are any potentially responsible nonparties. Plaintiffs should ask whether the defendants contend that nonparties contributed to the injury often – in interrogatories, requests for admissions, and depositions.
7. Under the old law, a plaintiff could not recover from a defendant whose degree of fault was less than that of the plaintiff. O.C.G.A. § 51-12-33 (former). Under the new law, it appears that a plaintiff can recover from a defendant even though the defendant’s percentage of negligence is less than that of the plaintiff.