THE JOINT TORTFEASOR MAZE

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Georgia's statutes and case law regarding joint tortfeasors, apportionment of liability, and contribution have always been challenging. When the Georgia Legislature amended O.C.G.A. §§ 51-12-31 and 51-12-33 in 2005, new rules created a whole new playing field for tort lawsuits involving multiple parties. It may appear that the amendments and non-amendments to these Code sections are inconsistent. An understanding of the history of the numerous legal concepts encompassed by these statutes and the seemingly endless scenarios they cover allows the practitioner to recognize that these provisions attempt to provide a framework that eliminates joint and several liability, and to maintain other important rights. Joint tortfeasors still exist, but the allocation of fault and payment responsibilities has changed. This article analyzes several common joint tortfeasor issues and how the new amendments apply to them.

THE PAST

Joint Tortfeasors

Defendants are joint tortfeasors if their separate and distinct acts of negligence concur to proximately cause an injury. [1] Concert of action among defendants is not required to be considered joint tortfeasors.[2] The fact that a plaintiff's injuries would not have been sustained had only one defendant's act of negligence occurred did not make another's act of negligence the sole proximate cause.[3] Plaintiffs could sue whoever was liable for damages, together or separately. However, where one defendant is the sole

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[1] St. Paul Fire Ins Co. v. MAG Mutual Ins. Co., 209 Ga. App. 184, 185 (1993).
[2] See Gilson v. Mitchell, 131 Ga. App 321, 327 (1974).
[3] See Central Truckaway System v. Harrigan, 79 Ga. App. 117(3) (1949); Stern v. Wyatt, 140 Ga. App. 704, 705, 231..

proximate cause of an injury, there are no joint tortfeasors.[4] The doctrine of joint tortfeasor liability has not been changed by the Tort Reform Act of 2005 or the amendments to O.C.G.A. §§ 51-12-31 and 51-12-33.[5]

Joint and Several Liability

Before 2005, joint and several liability was the law in Georgia for more than 100 years.[6] If the negligence of two persons combined to produce an injury, either could be sued for the entire amount of damages. There was no accounting of comparative negligence between the two negligent parties causing the injury and either of them could be held liable for all the damages even though one was more negligent than the other.[7] Leaving policy arguments aside, it was well-established that joint and several liability benefited Plaintiffs. Moreover, even if the injury would have happened regardless of the defendant's negligence, the Plaintiff could still recover.[8] Joint and several liability was allowed despite different duties being owed to a plaintiff by different defendants.[9]

The percentage of culpability did not matter, "[w]here one is injured by the concurring negligence of two tortfeasors, each is liable for the whole injury although the other defendant may have contributed thereto in greater degree."[10] Even where the negligence of one tortfeasor was only 3% and the other was 97%, both were jointly and

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[4] See State Auto Mutual Ins. Co v. Relocation & Corporate Housing Services, Inc., 287 Ga. App. 575 (2008)

[5] In fact, O.C.G.A. §9-10-31(c), enacted as part of the Tort Reform Act of 2005, expressly referred to joint tortfeasors in this venue statute. (Declared unconstitutional on other grounds in EHCA Cartersville, LLC v. Turner, 280 Ga. 333 (2007).

[6] See Central Railway Company v. Brown, 113 Ga. 414 (1901).

[7] Fields v. Jackson, 102 Ga. App. 117, 131(7) (1960); City of Atlanta v. Harris, 52 Ga. App. 56 (1935).

[8] See generally Hicks v. Talbott Marsh et. al. 196 F.3d 1226, 1242-43 (11th Cir. 1999), (affirmed trial court's decision not to charge jury on proximate cause or intervening cause with respect to non-defendant's concurrent cause of injury).

[9] McBerry v. Ivie, 116 Ga. App 808, (1967).

[10] Isom v. Schettino, 129 Ga. App. 73, 75(1).

severally liable for the entire verdict.[11] The effect of these principles was to allow recovery of an entire verdict against any defendant. Except in limited cases, that defendant would be required to pay an entire verdict regardless of the percentage of fault. Defendants with minimal responsibility for an injury could be held liable for entire verdicts. The most dramatic examples of this took place in product liability lawsuits and third-party criminal act lawsuits against property owners.

Apportionment

In causes of action for personal injuries arising prior to February 16, 2005, unless a jury under O.C.G.A. § 51-12-33 (as amended July 1, 1987) chose to apportion fault in a case where the Plaintiff was found to be at fault to some degree, a verdict was split evenly among defendants included in the verdict who were joint-tortfeasors. This apportionment did not apply to defendants who were vicariously liable for the acts of another defendant.[12]

Contribution

Often confused with rights of indemnification, contribution has undergone a tortured history in the Georgia appellate courts and progressive expansion by the General Assembly prior to 2005. Generally, the right of contribution exists between parties who are jointly liable where one party has paid more than their share.[13] The right of contribution is often cited in support of joint and several liability because it allows a party who pays an entire verdict, or more than its share, to pursue other parties who have not paid their share. Proponents of joint and several liability believe that the right of

[11] Gates v. L. G. DeWitt, Inc., 528 F.2d 405, 413 (5th Cir.1976).
[12] See Travelers Indem. Co. v. Liberty Loan Corp., 140 Ga. App. 458; St. Paul Fire & Marine Ins. Co. v. MAG Mut. Ins. Co., 209 Ga. App. 184.
[13] See Weller v. Brown, 266 Ga. 130.

contribution eliminates the inequities of joint and several fault. Contribution allows the tortfeasors to sort out any disproportionate payments among themselves. However, the risk of an insolvent or under-insured party was on the defendant, not the plaintiff. The amendments have shifted this risk from solvent defendants to the plaintiff, so that no defendant will pay more than its share, as determined by the jury.

THE PRESENT

The Current Statutes (as amended effective February 16, 2005)

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. § 51-12-32

> (a) Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.
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> (b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.
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> (c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

O.C.G.A. § 51-12-33

(a) 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.

(b) 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.

(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 percentage of fault of named 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.

(g) 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.

PURPOSE OF TORT REFORM ACT OF 2005

There was no specific purpose given for the amendments to O.C.G.A. §§ 51-12-31 and 51-12-33, except the general language of the purpose of the Act as a whole:

> The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. **The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act.**

2005 Ga. Laws Act 1 (emphasis added).

As a result, litigants and courts considering these amendments do not have a specifically stated purpose for the amendments which are not limited to medical liability actions and would be considered "general reforms". Another interesting aspect of these amendments is that there is no expression that the General Assembly was abolishing joint and several liability. However, the absence of such a declaration is not dispositive of the intent of the amendments; we need only to look at the language of O.C.G.A. § 51-12-33 to recognize that joint and several liability has been eliminated.

THE FUTURE

Following these amendments, several questions remain about the state of the law in joint tortfeasor cases. Here are a few of the questions we will have to confront:

Is the Plaintiff's contributory negligence still a complete defense?

Yes. Under O.C.G.A. § 51-12-33(g) "notwithstanding the provisions of this Code section and any other provisions of law … 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."

Although this is a codification of the common-law contributory negligence rule in Georgia, its inclusion appears to clarify that the changes in apportioning fault under O.C.G.A. § 51-12-33 were not intended to eliminate this defense. Without the inclusion of subsection (g), subsection (a) could be read to allow a recovery by the plaintiff regardless of the percentage of the plaintiff's fault.

Does the jury have to find the Plaintiff to be at fault to apportion damages among multiple Defendants ?

No. Prior to the 2005 amendment, a jury could apportion fault among multiple defendants only when it determined a plaintiff was also at fault.[14] The 2005 amendment to O.C.G.A. § 51-12-33 (b) provides:

> 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.

(Emphasis added).

[14] O.C.G.A § 51-12-33 (a) (As enacted, 1987)

The use of shall mandates that the jury apportion its award of damages. This language requires that trial courts provide an appropriate verdict form for the jury to assign percentages of fault and charge the jury on its obligation to apportion an award of damages.

Although section 33(a) provides that the jury shall determine the percentage of fault for the plaintiff and the judge shall reduce the damages accordingly, it in no way mandates apportionment only when the plaintiff is at fault. Section 33(b) clearly and unambiguously allows apportionment if there are multiple defendants, regardless of the plaintiff's fault.

There has also been some discussion about whether the amendment to O.C.G.A. § 51-12-33 conflicts with the language of O.C.G.A. § 51-12-31, which provides:

> 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. [Emphasis added].

Some commentators have suggested that the permissive language of section 31 conflicts with the mandatory language of section 33, making it unclear whether a jury can or must apportion fault among multiple defendants. This argument ignores the history and purpose of both statutes.[15]

Section 31 has been in the Georgia Code since 1863. It was a codification of the common law, and the permissive apportionment language contained in this section has

[15] See Adams, Georgia Law of Torts, 2008 Update, § 15-5 Concurrent Proximate Cause (The General Assembly's abolishment or limiting of joint liability appears to be limited to cases in which the Plaintiff is to some degree at fault).

been repeatedly held to apply to actions for trespass to property, not personal injuries.[16] Section 33 was enacted in 1987, and when it was enacted, section 31 was amended to limit its application to situations "except as provided in Code Section 51-12-33. . ." Ever since its enactment, section 33 has superseded section 31.

Moreover, section 31, in addition to providing apportionment in trespass cases, defines joint tortfeasors. It sets forth the general common law principle that where separate and independent acts of negligence produce one indivisible injury, the actors are joint tortfeasors. The significance of this common law principle is that individual defendants that cause one injury may be sued separately or together, and the concurrent negligence of one defendant is not a defense to the other.[17] Section 31 preserves joint tortfeasors and the various options for personal injury plaintiffs, but it is subject to the newly created apportionment under section 33. For example, a plaintiff may elect to sue one of two defendants whose acts caused the plaintiff's injuries. The named defendant will not be able to assert as a defense that the injury would have happened anyway due to the non-party's negligence. However, section 33 will allow the jury to apportion fault among the parties who caused the injuries, even if not named in the suit.

It has also been argued that the retention of the right of contribution in section 32 also supports the concept that an entire verdict for an injury can be recovered from one defendant.[18] This is a misreading of section 32 that ignores its plain language that it is subject to the provisions of section 33. Commentators argue that if section 33 is to be read literally, then section 32 would be surplusage, a statutory construction our appellate

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[16] See Gazaway v. Nicholson, 190 Ga. 345.
[17] See Coweta County v. Adams, 221 Ga. App. 868.
[18] See Wells, *Joint Liability Rules*, Georgia's New Battleground, Five Georgia Law Professors examine the state's new tort legislation. (2005) (Presented at the 2005 Joseph Henry Lumpkin Society Educational Seminar; and Mason, *Are Joint Liability and the Right to Contribution Dead ?*, Georgia Defense Lawyers Journal (2005).

courts would avoid. This argument is incorrect because section 32 is not a nullity and is intended to preserve the right of contribution, subject to section 33. (particularly subjection 33(b) and 33(f)(2), which are explained in detail in subparts J & K of this article).

Although plaintiffs likely will cite to the heading of section 33, "Apportionment of damages in actions against more than one person where plaintiff is to some degree responsible for injury or damages claimed," for the proposition that apportion does not apply if the plaintiff was not "to some degree at fault," that heading was selected by the editor, not by the Legislature, and it has no effect. [19] Furthermore, that heading had been applied when section 33 was originally amended in 1987 to allow apportionment only when the plaintiff was at fault, and the heading did not get changed when the section was amended in 2005.

Under what circumstances can the jury assign fault to a non-party at trial?

The most revolutionary amendment to O.C.G.A. § 51-12-33 is the procedure for the jury to assign fault to non-parties. There are two categories of non-parties discussed in the amended statute, and the procedure for seeking an assignment of fault differs significantly. The pertinent subsections of the code section are:

> (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.
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> (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.

[19] O.C.G.A. § 1-1-7.

> (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.

As a preliminary matter, there is a threshold question of whether a single defendant sued by a plaintiff can utilize the non-party notice and apportionment provisions of O.C.G.A. § 51-12-33. Interestingly, the language of subsection (b) suggests that the action must be against more than one person for non-party liability apportionment to occur. However, if we assume that eliminating joint and several liability was the purpose of these amendments, then they would not apply to a single party case. If the purpose of the amendments was to ensure that defendants pay no more than their percentage share of damages, then limiting section 33 (c) and (d) to multi-defendant cases would be inconsistent with this purpose. Moreover, nothing in subsection (c) or (d) limits the application of these provisions to multi-defendant cases. In fact, it could pose a constitutional equal protection challenge if defendants in multi-defendant cases could seek non-party apportionment, but a sole defendant could not.

Settled or Dismissed Parties

Based on the language of subsection (d)(1), the negligence or fault of a non-party who entered into a settlement agreement with the Plaintiff shall be considered by the jury automatically. No requirement of notice is required for apportionment to a settled party. Strictly speaking, a party that was named in an action and dismissed without a settlement agreement would not appear to be a non-party that would automatically be considered by the jury. It is easy to envision abuse of this subsection under this strict construction. A named defendant who was dismissed without a settlement agreement shortly before trial

could evade inclusion on a verdict form because there was no settlement agreement and notice could not be given within 120 days of trial. There is no requirement that any defendant identify another defendant as a potential non-party in order to avoid this odd circumstance and this would appear to be contrary to subsection (c).

Nonparties

Notice must be given at least 120 days prior to trial that a defendant contends that a non-party is wholly or partially at fault. The notice must be given in a pleading, with the identity and last known address of the party along with a brief statement of the basis for why the non-party is believed to be at fault.

Of particular interest in professional malpractice actions is the issue of whether the notice regarding a non-party at fault must be accompanied by an expert affidavit if the non-party is one of the professionals listed in O.C.G.A. § 9-11-9.1. Since non-party notice is not an action, and under subsection 33(f) any apportionment of fault to a non-party does not create any liability for the non-party, an expert affidavit would not need to accompany the notice. Nevertheless, the appellate courts of Georgia will have to determine whether expert testimony will be needed for the issue of a non-party professional's fault to be considered by the jury. In order for a non-party to be "at fault", all the elements of a prima facie case would appear to be necessary.

Certainly, expert testimony will be needed to explain a professional duty and how it was breached so that the jury would be able to determine whether a professional was at fault. For example, if a defendant gave notice that a non-party physician was negligent and caused or contributed to the plaintiff's injuries, could evidence of the physician's care and treatment be submitted to the jury without expert testimony that the physician

violated the standard of care and without evidence of how such a violation caused the plaintiff's injuries? Does "fault" under this subsection also require proof of causation in fact and proximate causation?

Certainly under all other circumstances regarding the fault of a professional, expert testimony would be required. The case law on this topic is from cases where a physician was being sued directly or was being sued in a third-party action. Nothing in O.C.G.A. § 51-12-33 equates the jury's consideration of a non-party's fault with the burden of proof in a professional negligence case. Liberal identification of non-parties, unusual verdicts, and uncertainty will result from a relaxation of proof necessary to establish fault against non-party professionals and other non-parties. There would be nothing to deter a car-wreck defendant from identifying all the plaintiff's medical providers in the hopes that the jury will assign some fault to them without the necessity of proving they were at fault.

The California Experience

In considering these issues, California law provides some meaningful guidance. In 1986, the voters of California adopted Proposition 51, which modified the doctrine of joint and several liability for non-economic damages in California. Cal.Civ.Code § 1431.2 was created by the passage of Proposition 51 and it provides:

> **Several liability for non-economic damages**
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> (a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

Since 1986, numerous California cases have addressed many of the arguments that Georgia courts will soon begin to face. In considering the fault of non-parties, California allows defendants to reduce their share of liability for non-economic damages by showing the fault of non-parties. However, unless there is "substantial evidence that an individual is at fault, there can be no apportionment of damages to that individual."[20]

In Wilson v. Ritto, the California Court of Appeals upheld the trial court's refusal to add a subsequent treating physician on the verdict form in a medical malpractice case for purposes of apportioning liability. During the trial, the defendant, a podiatrist, presented expert testimony that the plaintiff's subsequent treating orthopaedist's actions were responsible for some of the plaintiff's subsequent surgeries, being claimed as damages. At the close of the evidence, the defendant moved to have the orthopaedist's name added to the verdict form. The trial court denied the motion, and the plaintiff obtained a verdict. On appeal, the defendant argued that all that was required to add the orthopaedist to the verdict form was evidence that he contributed to the plaintiff's injury.[21] The California Court of Appeals disagreed and held that the defendant needed to show that the non-party was at fault. The court evaluated California case law and the dictionary definitions of fault and held:

> Fault, although not the equivalent of liability, connotes wrongdoing or culpability. And wrongdoing or culpability in the context of medical treatment is measured by the standard of care within the medical community. "Mere error of judgment, in the absence of a want of reasonable care and skill in the application of his medical learning to the case presented, will not render a doctor responsible for untoward consequences in the treatment of his patient."
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> Apportionment among doctors under Civil Code section 1431.2 requires evidence of medical malpractice, not only as to named defendants, but

[20] Wilson v. Ritto, 105 Cal.App.4th 361, 129 Cal.Rptr.2d 336 (2003).
[21] Id. at 366-367.

> also as to nonparty doctors. The burden of proof in apportioning noneconomic damages among joint tortfeasors should not be contingent upon whether a joint tortfeasor is a named defendant. The same burden of proving fault applies regardless of whether a joint tortfeasor is a defendant or nonparty.[22]

This holding seems consistent with Georgia case law which requires proof of malpractice through expert testimony to find a physician at fault. Georgia uses a similar definition to California. "Fault" is not a term of art but is a word of general use; it is to be given its "ordinary and everyday meaning."[23] Webster's Third New World Dictionary defines "fault" as "failure to have or do what is required" or "something done wrongly." Similarly, "fault" is defined by Black's Law Dictionary as "negligence; an error or defect of judgment or of conduct; any deviation from prudence, duty, or rectitude."[24] There is very persuasive authority and legitimate policy reasons for requiring proof of fault against a non-party to include them on the verdict form. With respect to professional non-parties, that proof would require expert testimony.

Are there categories of non-parties to whom a jury cannot assign fault as a matter of law?

Georgia law provides numerous defenses and immunities that limit or eliminate a defendant's liability. These same defenses do not appear to apply prevent a defendant from asking the jury to assign fault to a non-party. O.C.G.A. § 51-12-33(c) provides the answer to this question:

> 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.

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[22] Id. at 369.
[23] Risser v. City of Thomasville, 248 Ga. 866. See also OCGA § 1-3-1(b) ("In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter.").
[24] A.A. Professional Bail v. State, 265 Ga. App. 42.

Would Georgia allow proof of the fault of a non-party who has a legal defense or bar to being sued directly as a party? The apparent language of subsection (c) would be to allow the trier of fact to consider the fault of others, regardless of whether a suit could be legally brought against that party or not. Subsection (d)(1) supports this interpretation because the trier of fact can consider the fault of a settled party despite the settling party's defense of settlement and release. Likewise, subsection (f)(2), which eliminates the consequences of any finding of fault against a non-party, would be consistent with this interpretation. Allowing the trier of fact to assign fault to a non-party that would be immune from suit or barred by the statute of limitations would not create new liabilities, because the assignment of fault would have no consequences to the non-parties. Included in the list of potential non-parties would be the plaintiff's employer, the plaintiff's spouse, a minor plaintiff's parent, governmental entities, parties barred by the statute of limitations or statute of repose, parties who would be entitled to pre-emption, parties where the court has no jurisdiction, and other immune parties.

Examples are endless. A commercial property owner in a premises liability case involving a third-party criminal attack would certainly ask the trier of fact to assign liability to the criminal attacker. If the criminal had a prior criminal history, the defendant could seek to have the trier of fact assign fault to the police who failed to arrest and prosecute the criminal who committed the crime or generally failed to protect the plaintiff from harm.

Defendants in car accident cases could seek to assign fault to governmental non-parties for the design of intersections and roadways.

All parties involving on-the-job injuries will seek to add the plaintiff's employer to have the trier of fact assign fault to the employer, a party that has never been in the "fault" arena.

Another provision of O.C.G.A. § 51-12-33 is also potentially relevant to this discussion:

> (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.

The interpretative question regarding this subsection is whether it refers to defendants' defenses and immunities or to non-party defenses or immunities. There is considerable evidence that subsection (e) applies to defendants and not to non-parties. First, the fault of non-parties is set forth in subsection (f), and nothing in that subsection addresses the immunities and defenses of non-parties. That subsection specifically states that the fault of non-parties is only pertinent to the determination of a defendant's fault. Second, an interpretation of (e) that allows defense and immunities to non-parties would be inconsistent with subsection (c) and would make the statute internally inconsistent. Third, the language of subsection (e) is commonly used by the legislature to clarify the scope of a particular statute that has changed the law.

California's Proposition 51, codified at Cal Civ. Code § 1431.2 is silent with respect to the fault of non-parties. Nevertheless, the California appellate courts have allowed apportionment of fault to non-parties who could not have been sued as defendants.[25]

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[25] DaFonte v. Up-right, Inc., 2 Cal. 4th 593, 828 P.2d 140 (1992) (fault can be allocated to a entity that is immune from paying for its tortuous acts, and plaintiff's employer could receive an allocation); Richards v. Owens-Illinois, Inc., 14 Cal. 4th 985, 928 P.2d 1181 (1997) (asbestos manufacturer could not assign fault to non-party cigarette manufacturer for lung injuries because California statute provided that tobacco

Assignment of fault to a plaintiff's employer will implicate numerous legal issues in Georgia. Although California allowed the assignment of fault to an employer, immune from suit under workers compensation laws,[26] California's joint and several statute applies only to non-economic damages. O.C.G.A. § 51-12-33 applies to economic and non-economic damages. Georgia allows an employer to seek recovery of amounts it paid in workers compensation from a third-party tortfeasor.[27] Countless issues will arise in the allocation of fault to employers of plaintiffs and arguments about allocation, particularly with respect to economic damages will be challenging.

A different perspective on non-party fault can be found in the case of Billings v. Aeropres Corp.[28] Arkansas enacted a Civil Justice Reform Act in 2003 and enacted A.C.A. § 16-55-202, which is identical to subsections (c) through (f) of O.C.G.A. § 51-12-33. In Billings, an injured worker brought a product liability suit against a supplier of odorless propane gas that allegedly caused the explosion and fire that injured the plaintiff. The defendant gave notice that the plaintiff's employer, a co-worker and the manufacturer of other equipment should have fault apportioned to them. The plaintiff objected, arguing that his employer and co-employee were immune from suit under workers compensation laws. The plaintiff also challenged the CJRA's apportionment statute as being unconstitutional to the extent it allowed apportionment to an immune employer. The district court upheld the statute but held that it could not constitutionally allow apportionment of fault to an immune non-party.[29]

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suppliers commit "no tort" against smokers); Munoz v. City of Union City, 148 Cal. App. 4th 173, 55 Cal. Rptr. 3d 393 (2007) (city was entitled to sovereign immunity, and no portion of fault could be assigned to it).

[26] DaFonte, supra

[27] O.C.G.A. § 34-9-11.1.

[28] 522 F. Supp. 1121 (E.D. Ark. 2007).

[29] Id. at 1126-27.

The Billings analysis of the procedural due process shortcomings of apportioning fault to non-parties is instructive. There are practical difficulties with assigning non-party liability with respect to immune parties. Compulsory process and the right to a fair trial were important factors in denying apportionment to these non-parties. Ensuring jurisdiction and compulsory process over a non-party was critical to the Billings court. Without the application of the federal rules to the non-parties, allowing apportionment denied the plaintiff procedural due process. Although the fault of these non-parties could be considered as a superseding proximate cause, apportionment could be obtained only if a third-party complaint was filed in accordance with the federal rules.

Finally, the language of subsection 33(c) leaves open the argument that an unidentified person or entity could be included on the verdict form. The language "regardless of whether the person was, or could have been named as a party to the suit" could indicate that even unidentified persons or entities, so unknown as not to be named, could be included on the verdict form. This would include hit-and-run vehicles, unknown product manufacturers, and other describable, but not nameable, non-parties.

What is the procedure at trial for apportionment?

Trial courts and trial counsel will need to prepare very detailed instructions and complex verdict forms to comply with the amended laws. It would appear to be a two-step process that begins with a determination of whether the plaintiff has proven his case against the defendant(s). If the jury determines the plaintiff has proven his case, then the jury must determine if the plaintiff was at fault and in what percentage. Of course, if the plaintiff is at least 50% at fault, the case is over. If the plaintiff is 0-50% at fault, then the

jury assigns percentages of fault against the defendants and non-parties. Based on the language of O.C.G.A. § 51-12-33(a) & (b), the trial court will be actively involved:

> (a) 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.
>
> (b) 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. …

The trial court will need to utilize a verdict form that will allow for the correct calculation of damages following a plaintiff's verdict so that the proper allocation and ensuing judgments can be entered.

Do non-settling defendants still receive a set-off of amounts paid by settled defendants?

No. Because these amendments were enacted to eliminate joint and several liability, the concept of a set off would appear to be eliminated.[30] In its place is the actual apportionment of fault by the trier of fact pursuant to O.C.G.A. § 51-12-33 which contains the mandatory shall language in subsection (b). Accordingly, a defendant does not appear to have the option of choosing apportionment of fault from a settling party or a set off. This is consistent with the language of subsection 33(d)(1), which states that

[30] See Allison v. Patel, 211 Ga. App. 376; King Cotton, Ltd v. Powers, 190 Ga. App. 845.

"[n]egligence of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty . . . ."[31]

How does the jury's apportioned verdict relate to liability and payment?

A defendant's apportioned share of liability as determined by the jury, and applied to the amount of the verdict, is the amount that a defendant pays to the plaintiff. If an individual defendant is found 10% at fault for a $100,000 verdict, then judgment should be entered against that defendant in the amount of $10,000, regardless of the other parties' or non-parties' ability to pay their portion of the verdict. This is directly stated in O.C.G.A. § 51-12-33(b): "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."

Can a single defendant who settles a case or receives a plaintiff's verdict seek contribution from a third party?

Yes. In my view this was the reasoning behind the retention of the language of O.C.G.A. § 51-12-32 despite the amendment to section 33. Of course, § 51-12-32 is subject to the provisions of § 51-12-33, but that section only applies to cases of apportionment. A single defendant who settles a case or receives a plaintiff's verdict may still pursue an action for contribution against a third party. Preserving this right of contribution is not mere surplusage.

Can any defendant in an apportioned verdict seek contribution from another party in the verdict?

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[31] The California appellate courts have rejected a set-off of non-economic damages paid by settling parties under Cal Civ. Code § 1431.2. See Espinoza v. Machonga, 9 Cal. App. 4th 268 268 (1992); Markel Ins. Co v Kaiser Foundation Health Plan, 2008 WL 188051 (Cal. App. 1 Dist. 2008); In re Piper Aircraft, 792 F. Supp. 1189 (1992).

No. O.C.G.A. § 51-12-33(b): "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." Under this provision of subsection (b), the apportionment of fault by a jury shall not be subject to a right of contribution. It appears that once a jury apportions fault against a defendant, the defendant has paid its "fair share" and has no further liability to the plaintiff or any other party.

Can a settled defendant seek contribution from a defendant who was assigned fault in a verdict?

No. O.C.G.A. § 51-12-33(b): "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." Under this provision of subsection (b), the apportionment of fault by a jury shall not be subject to a right of contribution. It appears that once a jury apportions fault against a defendant, the defendant has paid its "fair share" and has no further liability to the plaintiff or any other party.

CONCLUSION

Eliminating the perceived inequities of joint and several liability was the goal of the amendments to O.C.G.A. §§ 51-12-31 and 51-12-33. Without question, the goal of these amendments was to hold defendants financially liable only for their share of fault, and not for the shares of other joint or concurrent tortfeasors. This understanding is made clear in section 33, and as the language at the beginning of sections 31 and 32 makes clear, section 33 governs. Proponents of the jury system should be in favor of placing

further responsibility in the hands of the jury to allocate fault among responsible parties and non-parties.