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Apportioning Fault in Business Tort Actions

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Court Decisions Open Door For Nonstatutory Remedies

It is well established that Connecticut law provides the remedy of apportioning "comparative" fault among co-tortfeasors, as well as the plaintiff, in personal injury or property damage actions. Under a provision of the 1986 Tort Reform Act, where co-defendants alleged are each to have caused the plaintiff's injuries, a jury is authorized to assign a "proportionate share" of fault to each co-defendant (as well as to the plaintiff). However, by its express terms, the Connecticut tort apportionment statute, Connecticut General Statutes §52-572h(e), is limited to "negligence action[s] to recover damages resulting from personal injury, wrongful death or damage to property..."

Does this mean that a defendant named in a tort action to recover losses based on theories *other than* "personal injury, wrongful death" or property "damage" is precluded from asking the jury to be instructed to allocate fault among all co-defendants? Did the equitable apportionment remedy available under Connecticut common law survive the 1986 enactment of the Tort Reform Act? Is the remedy of nonstatutory apportionment available against a co-tortfeasor whose misconduct is alleged to have been intentional rather than merely negligent?

For Connecticut practitioners defending business-related tort causes of action such as fraud, professional negligence, libel, or tortious interference with contract, answering these questions is not an academic exercise. This is because in a tort action in which the jury apportions fault among two or more tortfeasors, the liability of each defendant is, in the best instance, "several" rather than "joint and several" —that is, "payment from each defendant can *only* be obtained in the amount of the damages attributed to each defendant." *Reilly v. DiBianco*, 6 Conn. App. 556, 570, cert, denied, 200 Conn. 804 (1986) (Emphasis added).

Fault Allocation

Whether triggered by statute or by common law, if the apportionment remedy is available, the jury will be instructed that it must allocate fault among all of the parties, including the plaintiff. Connecticut's jury instructions include this explanation for jurors: "Our law requires that you [must allocate relative fault]

because a defendant is required to pay damages to an injured plaintiff based the percentage of that defendant' s negligence and no more."

In practice, in tort cases this has meant the jury's interrogatory form includes a section in which the jurors assign, by number, a specific percentage of fault to each party.

Common-Law Remedy

Connecticut unambiguously had recognized the remedy of apportionment under common law prior to the 1986 enactment of the comparative negligence-apportionment statute. In *Reilly v. DiBianco*, decided before the effective date of the 1986 statute, the Connecticut Appellate Court held that there was an exception in Connecticut tort law to the doctrine of joint and several liability among joint tortfeasors in the following circumstances: "where the independent acts of two or more persons combine to bring about one injury *and* one of the actors seeks to isolate his monetary liability by proving the damages arising from his particular harm to a plaintiff."

The holding in the *Reilly* case has never been overruled, More important, no court has declared the holding to be "repealed" by, or otherwise supplanted by, the subsequent enactment of the apportionment statute. The Connecticut Supreme Court does not appear to have directly addressed the precise question of whether the common law or equitable right of apportionment has survived enactment of the apportionment statute. But since the statute took effect in 1986, the court has expressly cited with approval, and relied on, Section 433A of the Restatement (Second) of Torts ("Apportionment of Harm to Causes").

So too have Connecticut trial courts. In *Commissioner of Environmental Protection v. Sergy,* 2010 WL 1508465 (Conn. Super. March 10, 2010), also decided after the enactment of the apportionment statute, co-defendants were each alleged to have caused ground contamination of properly. The trial judge, citing the *Reilly* decision, as well as Section 433A of the Restatement of Torts, concluded as follows: "Generally, where the acts of two or more parties combine to cause a single injury to the plaintiff' if one such alleged tortfeasor "can prove that the injury is capable of apportionment, [that] defendant can, through an apportionment claim, limit the amount that the plaintiff can recover from it to an amount representing that portion of the injury caused by the defendants acts."

Although the court in the *Sergy* case found that the defendant had not met the pleading requirements for a common-law apportionment claim, it did not question that common-law apportionment remained viable under *Reilly*.

In another post-1986 case, *Agnes v. Grew*, 2001 WL 837920 *8 (Conn. Super. Ct. June 29, 2001), a trial court judge, also expressly relying on the *Reilly* decision and Restatement §433A, assumed that although the defendant had not met his burden, Connecticut common law permitted him to request apportionment in a negligence action if there was "a reasonable basis for determining the contribution" of his co-defendant in

causing the "single harm" the plaintiff alleged.

Similarly, in 1990, a U.S. District Court judge, applying Connecticut law, denied a motion to dismiss a common-law apportionment complaint in the context of an underlying professional (medical) negligence claim for conduct predating enactment of the apportionment statute. The court held;

"Where identifiable acts of negligence of the original [claimed] wrongdoer and those occurring subsequently during [the plaintiff-patient's] treatment are separate from each other in nature and time, the damages should be apportioned accordingly .... [The claimant-vaccination provider] should not be precluded from seeking apportionment of [an] injury caused by... [the] negligence of a subsequent [treating hospital], even if the provider had "created the risk of such further negligence" by others. (*United States v. Yale-New Haven Hospital*, 111 F. Supp. 784,788 (D. Conn. 1990)).

The court expressly rejected the argument for "precluding an *equitable* apportionment of the loss between the original and the successive wrongdoer under the facts alleged." (Emphasis added).

Accordingly, the remedy of nonstatutory apportionment remains viable in Connecticut tort actions, even after passage of the apportionment statute, in the event, as pleaded in the underlying complaint, the discrete acts of two or more distinct actors caused the plaintiffs alleged injury and there is a basis for the trier to determine the relative fault of each actor.

Recent Reaffirmation

More recently, a federal judge in a diversity-based Connecticut professional negligence action arising from events that arose after the enactment of the 1986 Tort Reform Act, squarely rejected the following argument: "that because there was no right to contribution at common law, the *only* basis by which [a tort defendant] may assert a claim for contribution is via the apportionment statute." (*O&G Industries v. Aon Risk Northeast*, 2013 WL 4737342 *6 (D. Conn. Aug. 30. 2013) (Emphasis added).

The plaintiffs alleged that defendant insurance broker had negligently failed to procure insurance coverage that met the plaintiff's needs. The plaintiffs' theories of relief were based on breach of contract, professional malpractice, misrepresentation, and simple negligence.

The defendant (Aon), in turn, filed a third-party complaint against plaintiff's outside insurance consultant. In its third-party complaint, Aon sought two forms of relief, both relying solely on common law: indemnification and contribution /apportionment. On the third-party defendant's motion to dismiss for legal insufficiency, the court held that the defendant's indemnification and contribution claims both were legally sufficient.

Citing both the *Reilly* decision and the decision in *United States v. Yale New Haven Hospital*, the court did not hesitate to conclude that Connecticut's equitable apportionment remedy, as recognized in the *Reilly* decision, remains a viable remedy for tort defendants in addition to the apportionment remedy created by the 1986

statute. Accordingly, the court concluded that even though Aon had "no basis to bring an apportionment claim pursuant" to *the statute*, it nonetheless could properly bring its apportionment claim "pursuant to common law!' (Emphasis added.)

An Outlier: 'Enron' Case

There is one reported decision in which a court, without citing the *Reilly* decision, or any of the post-1986 decisions discussed above, and without any detailed analysis, concluded that "... there is no right to file a common-law apportionment claim in Connecticut:" *Newby v. Enron Corp.*, 446 F. 3d 585, 589 (5th Cir. 2006).

The *Newby* decision was on an appeal from a Texas District Court's ruling, in an action relating to the collapse of the Enron Corp. The trial court held that the third-party apportionment complaint of one of the defendants —the law firm of Hawkins Delafield & Wood—was legally deficient under Connecticut law. Without citing any Connecticut case law or statutes, the U.S. Court of Appeals for the Fifth Circuit affirmed. The court based its conclusion on the assumption that the defendant law firms "... theory of [a] common-law apportionment claim is unsupported by the bulk of [Connecticut] state law authority."

Yet as discussed above, the common-law apportionment remedy has in fact been supported by "state law authority."

Unlike the apportionment complaint in the *O&G* case, the apportionment complaint in the *Enron* case relied *solely* on the Connecticut apportionment statute. Accordingly, the law firm defendants apportionment complaint was legally insufficient because it did not meet the threshold requirement for invoking Connecticut's *statutory* remedy: that in the underlying legal malpractice action the plaintiff was *not* seeking a recovery "resulting from personal injury, wrongful death', or damage to property" as required by C.G. S. §52-572h(c). (*In re Enron Corp. Securities Derivative & ERISA Litigation*, 511 F. Supp. 2d 742, 766 (S.D. Tex, 2005) (Emphasis added) Affirmed, 446 F. 3d 585 (5th Cir. 2006).)

In a footnote in the appeals court decision, the court indicated that the law firm's apportionment complaint was "explicitly filed under §§52-572h and 52-102b [authorizing service on, and impleading of, third-party defendants] parties, not under a common-law theory." And, according to the appeals court, Hawkins Delafield & Wood "apparently urged the common-Iaw basis for its [apportionment] claim only after discovering that the statutes bar apportionment in legal malpractice cases."

Intentional Acts

A tort defendant seeking apportionment against another contributing wrongdoer under statute is subject to a significant constraint: under a 1999 amendment to Section 52-572h, 52-572h(o), statutory apportionment is unavailable against an co-tortfeasor whose misconduct is claimed to have been "intentional, wanton or reckless."

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By contrast, a defendant targeting a co-tortfeasors under common law might not be subject to that limitation. In enacting the 1999 amendment to the Tort Reform Act, the legislature specifically meant to overrule the Connecticut Supreme Courts 1998 holding in *Bhinder v. Sun Co*., 246 Conn. 223. In that decision, the court announced it was "extend[ing] the policy of apportionment to permit a defendant in a negligence case to bring in as an apportionment defendant a party whose conduct is alleged to be reckless, willful and wanton."

In the "*Enron* case, one of the grounds for the trial court's rejection of the law firm defendants invocation of statutory apportionment was the post-*Bhinder* statute, and the fact that the plaintiff's underlying complaint was "substantially grounded in intentional fraud" (as well as in breach of contract). Accordingly, the court held that the defendants apportionment allegations were "not properly negligence based."

Thus it appears that as long as there is a reasonable basis for attributing each actor's proportional share of responsibility for the plaintiff's claimed injury, a Connecticut tort defendant, relying on common law, rather than statutory, apportionment, is entitled to have the jury assign a percentage of fault even to a tortfeasor whose conduct is alleged to be intentional.

Conclusion

Litigation arising from business-related or commercial disputes routinely includes causes of action that, while based in tort, are not "negligence" claims for "personal injury, wrongful death or damage to property" within the meaning of the apportionment provision of the Tort Reform Act. Based on U.S. District Court Judge Janet Hall's holding in the *O&G* case, practitioners defending such causes of action should consider their nonstatutory alternative: the doctrine of "equitable" apportionment under common law that has survived enactment of tire Tort Reform Act.

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