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Justice requires a change to fault apportionment in Illinois

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This is the first of a two-part column. The second part will publish May 6.

Fairness and justice can be difficult to discern, but understanding the difference is essential as justice often depends on the degree of fairness afforded.

A story from a philosophy professor at the University of Chicago is helpful to illustrate the concepts. The professor was walking to class in the late 1960s when a protest had turned violent on one of the Quads. The police arrived and started whacking everyone on the head. Was it just that the professor got whacked on the head? No, he was only trying to get to class and was not being violent. Was it fair that the professor was whacked on the head? Yes, everyone there was being whacked on the head.

Justice is what a person deserves, while fairness is equal treatment for all involved. Something can be fair, but not just, but it is very difficult to achieve justice without fairness.

In any kind of case, in order to determine what each party deserves, equal treatment is necessary. At the trial of a negligence case, a jury determines what each party deserves by weighing the evidence and applying the law to determine fault, and, if appropriate, award damages. The jury's task is determine what is deserved, while the judge's task is to ensure fairness in the jury's determination and then to ensure justice by entering judgment based upon the verdict in accordance with the law. If the jury is not instructed properly, then a verdict may be overturned because it is recognized that justice could not have been achieved without fair and accurate jury instructions.

The current language of section 2-1117 of the Code of Civil Procedure, following the Illinois Supreme Court's decision in *Ready v. United/Goedecke Services Inc.*, 232 Ill.2d 369 (2008), has for too long codified a fundamental unfairness to defendants in cases in which comparative fault is an issue. In *Ready*, the court held that the meaning of "defendant" did not include settled or dismissed defendants and so they are not to be included in the apportionment of fault by the jury. *Ready*, 232 Ill.2d at 389.

By contrast, in connection with the language of section 2-1116 (which addresses the fault to be attributed to the plaintiff), the footnote to IPI B45.03.A states: "[u]nder *Bofman v. Material Service Corporation*, 125 Ill.App.3d 1053, 1064 (1st Dist. 1984), and *Smith v. Central Illinois Public Service Company*, 176 Ill.App.3d 482 (4th Dist. 1988), in a case where there is a potential finding of comparative fault by the plaintiff, the jury should evaluate the fault of non-parties because 'it is essential for determining liability commensurate with degree of total fault.' The fault of the settling parties, however, should be disregarded for purposes of the 2-1117 calculation."

In short, under current law, when calculating the plaintiff's relative fault, the jury compares fault among the plaintiff and remaining defendants, employer, dismissed defendants, settled defendants, and non-parties because, as the *Bofman* court held, it is "essential for determining liability commensurate with the degree of total fault."

In contrast, when calculating a defendant's relative fault, the jury only considers the fault of the remaining defendant; apparently, the fault of others besides the remaining defendant(s) is no longer "essential." The plaintiff thus obtains significant and unjustifiable advantage by the increased number of entities including in the comparison to the plaintiff's degree of fault, while the defendant is afforded no similar comparison that could reduce its fault.

Compounding this unfair discrepancy regarding whose fault is considered in the calculations, the jury is instructed, pursuant to 735 ILCS 5/2-1107.1, of the consequence of a finding that the plaintiff was more than 50% at fault for the claimed injury. This instruction encourages juries to consider the legal effect of their factual finding and adjust their finding to achieve a particular result. As to defendants, however, no similar instruction is given with regard to the 25% threshold for joint and several liability for defendants and the consequence if a defendant is found 25% or more at fault for the plaintiff injuries.

Unlike as to plaintiffs, juries considering the defendants' percentages of fault do not know the impact of their finding — and may well be fooled into thinking they are protecting a minimally at-fault defendant where they are actually harming it.

This treatment of plaintiffs and defendants in a fundamentally disparate fashion with regard relative apportionment of fault should end. In order to achieve justice, plaintiffs and defendants should be treated the same for all purposes, including for the purpose of fault apportionment. SB 3148 would change the law so that the same persons and the same jury instructions would be considered as to the fault of both plaintiffs and defendants. It would correct the unbalanced unfairness and provide a level playing field for defendants in cases in which comparative fault is an issue.

Fairness is insufficient, by itself, to ensure justice is served in a given case, but without it, justice cannot be achieved. So long as the current system persists, justice in the civil justice system is lacking.

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