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State's fault scheme evolution shows collision of law, politics

By Donald P. Eckler and David H. Levitt
Donald "Pat" Eckler is a partner at Pretzel & Stouffer focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of the Illinois Association of Defense Trial Counsel. David H. Levitt is a partner in the Chicago office of Hinshaw & Culbertson LLP. He is a past President of the Illinois Association of Defense Trial Counsel, and chair of DRI's Task Force on Third Party Litigation Funding. Their views are their own and not those of their firms or their clients.

This is the second of a two-part column. The first part published April 29.

Last week, we articulated the fundamental unfairness in the current system of fault apportionment in Illinois that allows the plaintiff to take advantage of all possible contributions to total fault when determining the plaintiff's amount of fault, but does not do the same for the determination of the defendant's fault, and requires that the jury be advised of the consequences of finding the plaintiff more than 50% at fault.

To arrive at a just result in cases of comparative fault, this system must change. But how did Illinois law evolve to such a situation? This story is instructive as the evolution of Illinois' fault scheme shows the collision of law and politics.

In *Alvis v. Ribar*, 85 Ill.2d 1 (1981), the Illinois Supreme Court abandoned the common law contributory fault scheme, in which a plaintiff that was at fault at all was barred, and adopted a pure comparative negligence regime for Illinois. In 1986, the Illinois legislature superseded *Alvis* by statute and enacted Public Act 84-1431 which created, among other sections of the Code of Civil Procedure, relevant to our discussion, 735 ILCS 5/2-1116, 735 ILCS 5/2-1117, and 735 ILCS 5/2-1107.1.

That statute took the following steps:

- Adopted a modified form of comparative negligence in which the plaintiff would not be able to recover only if the plaintiff was more than 50% at fault.

- Provided that defendants found to be less than 25% at fault would be severally liable only, except as to medical expenses, for which all defendants found liable would remain jointly and severally liable.
- In deciding the defendants' percentages of fault, the statute allowed the trier of fact to consider "fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third-party defendant who could have been sued by the plaintiff."

In 1995, the Illinois legislature amended Section 2-1117, adopting pure several liability. The amended version was declared unconstitutional in *Best v. Taylor Machine Works*, 179 Ill.2d 367 1997). The effect of that ruling was to leave the law in force as it was before the adoption of the amendment, meaning that the 1986 version was reinstated. *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 71, n.1 (2002). In *Unzicker*, the Illinois Supreme Court upheld the constitutionality of the 1986 version of the statute, and interpreted it to include the fault of the plaintiff's employer in the percentage calculation. The employer, the Supreme Court ruled, was a "third-party defendant who could have been sued by the plaintiff."

Since *Unzicker*, the law and statute have developed to strip away the effect of that decision. First, the Illinois legislature amended Section 2-1117 to overrule Unzicker and remove the employer's fault from consideration in the percentage calculation.

Second, in *Ozik v. Gramins*, 345 Ill.App.3d 52 (1st Dist. 2003) (overruled on other grounds), and then in *Ready v. United/Goedecke Services Inc.*, 232 Ill.2d 369 (2008), the courts have held that the fault of a settling party is not to be included in the percentage calculation.

Just as contributory negligence led to unjust results adverse to plaintiffs, so too does the current scheme unjustly punish minimally culpable, but deep pocket, defendants as it has removed the protection that Section 2-1117 was designed to provide. The scheme does this by giving the plaintiff the ability to manipulate the parties to emasculate this legislative purpose.

Ozik presents a perfect example. The plaintiff's decedent was a passenger in a vehicle driven by Goldberg, which was involved in a one-car crash. The plaintiff sued Goldberg, and also sued the Village of Skokie and its police officers for allowing Goldberg to drive his vehicle after they had stopped him and determined he was intoxicated. Goldberg was covered by an automobile liability policy with limits of $20,000. The plaintiff settled with Goldberg for those policy limits. The trial court refused to instruct the jury to include Goldberg's fault in its consideration of the defendants' relative percentages of fault. The jury found that the plaintiff was 35% at fault, and entered a joint and several liability finding against the village for $1.14 million. Thus, the minimally at fault village was left holding the bag for the shallow-pocketed drunk driver.

The entire purpose of the original 1986 statute, as recognized by the Supreme Court in *Unzicker*, was "that minimally responsible defendants should not have to pay entire damage awards." *Unzicker*, 203 Ill.2d at 78. Yet, the current scheme leaves a minimally responsible defendant jointly and severally liable if a major at-fault party happens to be a dismissed or settled defendant, or is the plaintiff's employer. The statute has been rendered meaningless by allowing the plaintiff, in its sole discretion, to simply settle with or dismiss a defendant.

It hardly achieves the end of justice to have the jury evaluate fault without the presence, or the ability to even consider, all of the potentially at fault persons when assessing fault. Illinois stepped away from contributory fault nearly four decades ago. The system

has evolved into a system that is manifestly unfair to defendants. To restore fairness to the civil justice system and the possibility of justice being achieved, SB 3148 should be passed to restore the intention of the original 1986 modified comparative negligence scheme.
