



## I'M RESPONSIBLE FOR THE WHOLE VERDICT?

### *The Changing Face of Joint and Several Liability in Pennsylvania in the Aftermath of the Spencer Decision*

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In March 2021, Pennsylvania's Superior Court issued a decision in *Spencer v. Johnson*, 249 A.3d 529 (Pa. Super. 2021), that reinterpreted the Fair Share Act and significantly expanded the application of joint and several liability in Pennsylvania. A year later, it appears that the *Spencer* decision is here to stay.<sup>1</sup> As such, individuals and companies who are or may become involved in multi-defendant tort litigation in Pennsylvania now face increased costs and financial liability, requiring a change in how those cases are investigated, evaluated, and defended.

To illustrate the consequences of *Spencer*, consider the following scenario: Plaintiff is traveling at night in a passenger vehicle on a main roadway near a warehouse complex owned by Defendant A. As Plaintiff approaches the exit from the warehouse complex, he is struck by a truck owned and operated by Defendant B, who fails to see and stop at a stop sign at the exit from the complex. Defendant B claims that

he failed to stop because the overgrown landscaping on Defendant A's property obstructed his view of the stop sign and oncoming traffic on the main roadway. After the collision between Plaintiff and Defendant B, Defendant C, who is operating another passenger vehicle, fails to observe Plaintiff's disabled vehicle in the roadway and collides with Plaintiff as well.

Plaintiff brings a lawsuit against Defendants A, B and C, asserting claims of negligence against each Defendant. At trial, the jury finds no negligence on the part of Plaintiff and apportions liability amongst the Defendants as follows: Defendant A – 10%; Defendant B – 45%; Defendant C – 45%. The jury awards Plaintiff \$100,000 for his injuries.

Before *Spencer*, the Fair Share Act limited defendants' liability in multi-defendant litigation. Unless a defendant was found to bear 60% or greater liability, the principle of joint and several liability did not apply. Accordingly, a defendant could be held

liable only to the extent of the proportionate share of liability as assessed by the jury. For example, in the above illustration, Defendant A's liability to Plaintiff would be limited to 10% of the verdict, or \$10,000. If Plaintiff could not collect the remaining \$90,000 from Defendants B and C due to a lack of insurance, assets, or the like, Plaintiff was out of luck.

In *Spencer*, the Superior Court reinterpreted the Fair Share Act, holding that the Act does not apply in cases *where a plaintiff bears no comparative fault for his injuries*, reinstating the application of joint and several liability to such cases. With joint and several liability applicable, a plaintiff can recover the entire verdict from any defendant who is found to *bear any causal negligence* for the plaintiff's injuries. Thus, using the above illustration as an example, Plaintiff would be able to recover the entire \$100,000 verdict from Defendant A, despite Defendant A bearing only 10% liability for the accident. Essentially, *Spencer* increased Defendant A's

exposure by \$90,000. Defendant A is then left to chase Defendants B and C for contribution for the amounts Defendant A paid to Plaintiff in excess of its proportionate share of the verdict (which, if Defendants B and C lack sufficient insurance or assets, is likely to be a fruitless endeavor).

In cases in which plaintiffs bear no fault for their injuries, *Spencer* shifts the risk from plaintiffs to the defendant or defendants who can satisfy the verdict. As long as a plaintiff has one deep-pocket defendant against whom the plaintiff can obtain some finding of liability – regardless of how nominal that finding of liability is – the plaintiff is protected in recovering on any verdict that is obtained.

From a plaintiff's perspective, *Spencer* encourages counsel to employ a "shot-gun" approach to identifying and naming potential defendants in a lawsuit. Other than increasing the cost and complexity of prosecuting a case, there is little downside to naming as many potential defendants as possible in cases where it appears that a plaintiff will not bear any comparative fault and where the likely principal tortfeasor has insufficient coverage. Doing so only increases a plaintiff's likelihood of achieving full compensation, especially where a primarily liable defendant has questionable or inadequate insurance coverage or assets.

From a defendant's perspective, *Spencer* changes the way in which multi-defendant cases must be investigated, evaluated and defended.

### INVESTIGATING AND ARGUING A PLAINTIFF'S COMPARATIVE NEGLIGENCE

The easiest way to avoid the ramifications of *Spencer* is to obtain a finding that a plaintiff was comparatively negligent in causing his injuries. If a plaintiff is found even 1% comparatively negligent, the Fair Share Act and its apportionment rules apply. Thus, from the outset of a claim or lawsuit, it is imperative to evaluate whether the facts support an argument that the plaintiff was negligent. Witnesses to the incident should be interviewed, a statement should be obtained from the plaintiff (if possible), and appropriate experts should be engaged to evaluate potential liability arguments. Although attempting to shift responsibility for an incident to the plaintiff can be a risky strategy in some cases, it is one that could ultimately result in a significant reduction in a defendant's exposure if the ramifications of *Spencer* can be avoided.

### INVESTIGATING CO-DEFENDANTS' INSURANCE COVERAGE AND SOLVENCY

The application of joint and several liability – and a plaintiff's ability to recover

an entire verdict from one defendant – is most likely to occur in situations where one or more of the defendants do not have adequate insurance coverage or assets to satisfy a verdict against them. Thus, it is important early in a claim or lawsuit to determine the insurance coverage available to the other defendants, either informally among the defendants or through formal discovery procedures. It is also important to conduct due diligence on co-defendants to evaluate their ability to satisfy a verdict if their insurance coverage is inadequate. Even if a co-defendant is solvent and has sufficient liquidity or assets to satisfy a verdict against it, a lack of adequate insurance coverage will likely lead to a plaintiff looking elsewhere to recover the verdict, as it is far easier to recover from an insurance company than it is to execute on another defendant's assets.

### SHIFTING THE FOCUS AWAY FROM A DEFENDANT'S PROPORTIONATE LIABILITY WHEN EVALUATING A CASE

Before *Spencer*, one of the key considerations in evaluating a case, and determining the strategy that would be employed in defending a case (whether it be staffing the case, hiring of experts, the extensiveness with which discovery is pursued, etc.), was a consideration of how much liability a defendant was likely to bear in relation to the other defendants. Although that consideration is still relevant, its importance has been diminished in light of *Spencer*. If there is a possibility that a plaintiff will not bear any comparative negligence, then a defendant has to assume that it may be responsible for an entire verdict in evaluating a case and making strategic defense decisions. Such an assumption is even more important if, as noted above, some or all of the other defendants have inadequate insurance coverage or if a particular defendant finds itself with the highest level of insurance coverage or the deepest pockets amongst the defendants.

### RESERVING DEFENSE COSTS AND INDEMNITY

Because of the potential for more significant exposure in the event a plaintiff attempts to recover an entire verdict from one defendant, and because of the additional work that is necessary in investigating and litigating claims, reserves for defense costs and indemnity likely need to be increased in cases where a plaintiff may not bear any comparative negligence and, thus, *Spencer* may apply.

### CONSIDERATION OF SETTLEMENT THROUGH PRO RATA JOINT TORTFEASOR RELEASES

One way a defendant can mitigate against the risk presented by *Spencer* and the application of joint and several liability is to enter into a *pro rata* joint tortfeasor release. In a *pro rata* joint tortfeasor release, the plaintiff agrees that any recovery against the non-settling defendants will be reduced by the proportionate share of liability that is attributed to the settling defendant. Such an agreement, in turn, extinguishes any claims for contribution that the non-settling defendants would otherwise have against the settling defendant. Accordingly, by entering into a *pro rata* joint tortfeasor release, a defendant not only gains certainty as to its liability exposure by eliminating the possibility that it is held jointly and severally liable for the entire verdict, but also eliminates the possibility of being pursued for contribution by non-settling defendants who pay more than their proportionate share of any verdict that is rendered.

In summary, as it appears the holding in *Spencer* is here to stay, defendants must adapt the way in which they investigate, evaluate and defend multi-defendant cases where the possibility exists that no comparative negligence will be attributed to the plaintiff.



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<sup>1</sup> There is an argument that the Superior Court's reinterpretation of the Fair Share Act in *Spencer* is dicta, which could provide for future challenges to the Court's decision. However, until that occurs, or until another panel of the Superior Court rules otherwise, the *Spencer* decision will likely continue to be followed by Pennsylvania courts.