The New Joint and Several Law: Has It Impacted Your Practice?

Philadelphia Trial Lawyers Association
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I. Overview of the Changes Act No. 17:

A. History of Act No. 17:

On June 28, 2011 Governor Corbett signed Senate Bill 1131 (Act No. 17) into law. The Act amends Title 42 of the Pennsylvania Judicial Code to essentially eliminate the doctrine of joint and several liability in the Commonwealth of Pennsylvania.

The eradication of joint and several liability came after several years of the legislation being introduced and then re-introduced over several sessions. It had been passed twice by both Chambers of the General Assembly.

First, in 2002 the Law was passed and signed into law, but then declared unconstitutional. Then, in 2005 the law passed, but was vetoed by Governor Rendell who believed that the law, as passed, was much too harsh on injured victims.

In 2011, the law was re-introduced initially in the House as HB 1 and the Senate as SB 2. The House passed its version of the Bill in April 2011 and it was sent to the Senate. Then in June 2011 the Senate introduced SB 1131 which mirrored HB 1 and SB 2 version, but added two important exceptions, one for minors and one for economic damages.

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[1] All materials will be posted for download on the Schmidt Kramer P.C. website at www.schmidtkramer.com.

Ultimately, SB 1131 was voted out of the Senate Judiciary Committee on June 14, 2011. Then Senator Jake Corman (R-Center/Perry Counties) introduced an amendment striking the two exceptions for minors and economic damages. This amendment passed the Senate on June 20, 2011. After this amendment, Senate Bill 1131 became the *same* harsh version as the House and Senate Bills introduced earlier.

Without the exceptions for minors and economic damages, SB 1131 passed the Senate on June 21, 2011. The House passed the Bill on June 27, 2011. It was signed and became law effective June 28, 2011 and is now known as Act No. 17.

Over the several months before its passage, efforts were made In the House, primarily by Democrats, to make the overall language fair to protect injured victims. These proposals that were rejected included: mandatory rollbacks of insurance premiums; exceptions for minors, seniors, economic damages, and Marcellus shale; changing the 60% threshold discussed below to 50%; and establishing a victim compensation fund.

Since June 2011 there has not been any specific insurance company which has reduced an insurance premium in response to the new law. Likewise, there has not been one employer who has stated it hired any additional employees or added any jobs directly as a result of the changes to the law.

B. **Provisions of Act No. 17:**

As stated, Act No. 17 virtually eliminates joint and several liability in the Commonwealth of Pennsylvania with only strict and narrowly tailored exceptions which will seldom apply. Unless the changes to the law are set aside in the future on Constitutional grounds or a narrow exception applies, joint and several liability only applies in a case where a defendant is found liable and a legal cause of 60% or more of the total dollar amount of damages.

Effectively, in a case with two defendants, both 50% at fault, joint and several liability does not apply, even though each defendant is equally at fault and equally a legal cause of the injuries. The Act requires that a jury apportion liability to each defendant for a plaintiff's damages.

Any defendant found to be less than 60% at fault does not pay the full amount of the award unless the plaintiff shows the defendant intentionally injured the plaintiff; made an intentional misrepresentation; a Dram Shop claim exists; or a Toxic Tort exception applies for clean-up. There is no exception for fraud, recklessness/gross negligence or even a

mandate that for the Dram Shop exception to apply the bar must have Dram Shop insurance.

As noted above, there are some exceptions to allow joint and several liability. Two such exceptions are a cause of action that arises out of the release or threatened release of a hazardous substance and for violations of Section 497 of the Liquor Code by dram shops.

The Dram Shop exception does not appear to include claims for social host liability or illegal sales to minors. Therefore, if several children are killed in an alcohol-related motor vehicle accident, under the new law, the rights and recoveries of the Estates of the deceased children and the injured would be severely restricted against an individual who may have furnished the alcohol, such as in a case where a 20-year-old driver responsible for the accident was intoxicated and was provided the alcohol by an adult.

Some examples or situations of cases which, if they occurred under the new Act, joint and several liability would probably not apply and recovery would be limited to several liability are:

1. Tobacco Settlement;
2. Bernie Madoff;
3. MF Global;
4. Priest Sexual Abuse Cases;
5. Penn State Sex Scandal;
6. Social Host Liability;
7. Uninsured Defendants;
8. Bankrupt Defendants;
9. Insolvent Defendants;
10. Economic Damages; and
11. Defendants “Acting in Concert”.

These are just a few examples of cases where joint and several liability has been applied in the past. Also, most states which have changed joint and several liability have several exceptions which allow joint and several liability to apply to many of the above situations.

The joint and several liability amendments clearly apply when the plaintiff timely sues multiple defendants in the same action. Based on a careful reading, these amendments do not apply when an additional defendant is joined after the plaintiff’s statute of limitations expires, however. This may provide a tactical approach that maximizes the plaintiff’s recovery.

Under the Pennsylvania Rules of Civil Procedure, any party may join as an additional defendant any non-party who may be solely liable or "liable to or with the joining party" on any cause of action involving the occurrence on which the underlying cause of action is based. Pa. R.C.P. 2252. The plaintiff can then recover from the additional defendant if the additional defendant is either alone liable to the plaintiff or is jointly liable with the original defendant. The plaintiff recovers as though the additional defendant had been originally sued. PA. R.C.P. 2255(d).

When an additional defendant is joined after the plaintiff's statute of limitations has run, the additional defendant cannot be directly liable to the plaintiff. Dickson v. Lewandowski, 228 Pa. Super. 57, 323 A.2d 169 (1974). Hence, an original defendant and a late-joined additional defendant can never be jointly and severally liable to the plaintiff. An original defendant, however, can always join an additional defendant at any time for a claim of contribution or indemnity. This claim is the original defendant's own separate cause of action. It does not arise until he has been held liable to the plaintiff. Hileman v. Morelli, 413 Pa. Super 316, 605 A.2d 377 (1992).

The joint and several liability amendments, as already noted, limit the liability of a defendant who is less than 60% at fault to his proportionate share of liability. Under the amendments' language, however, this to only applies when the defendants among whom liability is being apportioned are jointly liable to the plaintiff.

The operative subsection of the amended Act, subsection (a.1), is titled "Recovery against joint defendant: contribution". 42 Pa. C.S. §7102(a.1). Although the term "joint tort-feasors" is defined by statute, 42 Pa. C.S. §8322, the term "joint defendant" is not.

Subsection (a.1) (1) provides that where liability is attributed to multiple defendants, each defendant is liable for his proportionate share.

Significantly, subsection (a.1) (2) provides that except as set forth in paragraph (3) (which includes a defendant who is at least 60% at fault):

> A defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.

42 Pa. C.S. §7102(a.1) (2) (emphasis added).

Statutes are not presumed to make changes in the common law or prior existing law beyond what is expressly declared in their provisions.

Krivijanski v. Union R.R. Co., 357 Pa. Super. 196, 205, 515 A.2d 933, 938 (1986). Moreover, a statute of limitations, like all statutes, must be read with reason and common sense. Its application must not be made to produce something that the legislature could never have intended. Fine v. Checcio, 582 Pa. 253, 270, 870 A.2d 850, 860 (2005). Finally, it is presumed that the General Assembly intends the entire statute to be effective and certain. 1 Pa. C.S. §1922(2) (Statutory Construction Act).

The only logical reading of (a.1) (1) and (a.1) (2) is that their provisions only apply to comparative fault among defendants, who can be directly liable to the plaintiff, i.e., defendants who can be jointly liable ("joint defendants"). Under any other interpretation, the court would have to enter a separate judgment for the plaintiff and against an additional defendant found liable even if that defendant was joined after the expiration of the plaintiff's statute of limitations. The legislature could not have intended such an absurd result. Hence, the amendments and their limitations do not apply to an additional defendant joined too late.

Under the amendments, when an additional defendant is joined late, the plaintiff is entitled to a judgment against the original defendant for the full amount of the verdict. The original defendant is then entitled to a judgment against the additional defendant for the amount he pays in excess of his proportionate share.

This analysis suggests a viable but sometimes risky strategy: suing the less culpable defendant at the last possible minute.

This can be best illustrated by an example.

> Assume that P is a passenger in D-1's car. D-1, who is speeding, wrecks into D-2, who has just pulled onto the road without yielding the right of way. P is severely injured.
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> P's damages are $1 million. D-1 has the minimum liability insurance limits of only $15,000.00 while D-2 has liability insurance limits of $1 million. There is no underinsured motorist coverage and D-1 is judgment proof.
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> Assume that a reasonable jury would determine that D-1 is 95% at fault while D-2 is only 5% at fault.
>
> If P timely sues D-1 and D-2, then he can collect up to 95% of his damages from D-1 and his insurer ($15,000.00). Applying the amendments, D-1 can only collect 5% of his damages from D-2 and his insurer ($50,000.00).

> If P is willing to risk losing the recovery of $15,000.00 from D-1, he can sue D-2 alone right before the statute of limitations expires. Then, when D-2 joins D-1 as an additional defendant, D-1 cannot be directly (or jointly) liable to P. As discussed above, subsection (a.1) does not apply. D-2 remains severally liable for the entire verdict even though he is only 5% at fault. P can collect $1 million from D-2 and his insurer. D-2 still has a right to contribution of $15,000.00 from D-1.
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> If the court rejects the above analysis, P still collects $50,000.00 from D-2, but collects nothing from D-1 because D-1 was joined too late. Therefore, this approach must be taken with the client's complete informed consent.
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> If D-1 is uninsured (assuming no applicable uninsured motorist coverage), then this approach may carry little or no risk. P then cannot recover anything from D-1 anyway. The main risk P takes in waiting to sue D-2 alone is losing the opportunity to do discovery to timely identify other viable defendants. A comprehensive investigation should eliminate this risk in most cases.

If the legislature had intended the limitations on joint and several liability to apply even when one or more of the defendants cannot be directly or jointly liable to the plaintiff, then it could have easily said so.

For instance, it could have written § (a.1) (2) using some of the same language from former §7102(b) now repealed, as follows:

> A defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant *against whom the plaintiff is not barred from recovery* for the apportioned amount of that defendant's liability.

Legislative intent controls. When the words of the statute are clear and free from all ambiguity, they are not to be disregarded under the pretext of pursuing its spirit. 1 Pa. C.S. §1921(b).

C. Effect of a Release on a Defendant:

The Act provides that "for purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate request

and proofs by any party." Therefore, liability may still be apportioned to any defendant who is released from a case and is not at trial.

As a result of this provision, a plaintiff will most likely not enter into any joint tortfeasor release in the future unless the defendant being released is a defendant substantially (more than 50%) at fault and has sufficient insurance coverage. The plaintiff may not even entertain an offer to settle with one defendant even in a case where two defendants may be equally at fault. This makes it more difficult for certain defendants to be released from cases.

Importantly, the Act also provides that a non-party defendant whose liability could be determined does not include an employer to the extent that the employer is granted immunity pursuant to the Workers' Compensation Act. Therefore, a defendant cannot argue that an employer immune by workers' compensation is responsible for the incident and should be apportioned damages. Thus, a phantom Defendant argument cannot exist.

The House version of the Bill in 2002, before Senate amendments, actually allowed a defendant to ask a jury to apportion fault to a non-party who was never even a party to the case or to argue the "empty chair defense". Back in 2002, when introducing SB 1089 (as amended by the Senate) on the Senate Floor, Senator Piccola was asked and specifically indicated that SB 1089 (as being amended in the Senate) was amended to eliminate the empty chair defense.

The express intention of the law is not to encourage defendants to place blame on a non-party and ask for an apportionment of liability on an entity that has not been made a party to a suit. In order for liability to be apportioned in any way, shape or form, an entity must have at least been named as a defendant in the case.

There is no definition in the Act as to what the legislature meant by "upon appropriate requests" and "proofs by any party". These will most likely lead to some appellate issues.

D. Applicability:

The Act provides that the changes to joint and several liability apply to all causes of action that accrue on or after the effective date of "this section." The Act is effective the date the Bill was signed into law which is June 28, 2011. Therefore, the changes to joint and several liability apply to causes of action that arise on or after June 28, 2011.

Hence, a person who is injured on June 27, 2011 by multiple tortfeasors who are found to be both negligent and substantial factors in causing injuries is still covered under the old joint and several law whereas, the same person injured by multiple tortfeasors in the same situation on June 28, 2011, will not have the right to compensation from any and all defendants under joint and several liability, even if one or more defendants was insolvent and/or uninsured.

The date of filing a lawsuit is not what controls the effectiveness. Therefore, it is not necessary to file a lawsuit to preserve the old law.

E. Practical Effect of New Law:

The practical effect of the new law is that plaintiffs and their attorneys should try and find out as much information about the insurance coverage on an individual and/or company *before* filing suit. A defendant may certainly have enough insurance coverage to cover any claims. Some trucking companies have insurance coverage information listed on the internet which can be obtained by accessing a web site called Safersys.org. Also, MEA Investigations can discover insurance information on a Defendant for a relatively nominal fee.

Plaintiffs and their counsel will also be required to file causes of action against any and all potential defendants in order to safeguard allocation problems. In some situations, defendants such as truck drivers may not be named at all in a lawsuit if the driver was an agent, servant and/or employee for the trucking company. There would then be only one defendant and no confusion or argument over apportionment.

The effects of Pennsylvania Rule of Civil Procedure 1023.1 need to be kept in mind by both plaintiffs and defendants. Under the new law, defendants may be encouraged to try and file counterclaims and/or third party complaints against any and all potential tortfeasors which, under the new Rules of Civil Procedure, could subject counsel to sanctions.

Joint and several liability traditionally applies to situations where a plaintiff is harmed by more than one defendant. It is designed to protect an injured victim (i.e. child, woman, etc.) to make sure that they recover the total amount of damages from any of the responsible defendants. The defendant under joint and several liability still has protection because a defendant who pays an amount of damages greater than his or her percentage of liability can still seek indemnification from other defendants who are at fault.

Under the new law, the defendants have other places to go for protection, whereas the victim is limited. Under the old law, the protection for the

victim is that a defendant, under joint and several liability, fully compensates a plaintiff if other defendants are insolvent and/or uninsured. Under joint and several liability, the injured victim is the paramount concern even if it results in requiring a reckless corporation to pay more than its share of fault.

Governor Corbett and our legislature have essentially abolished joint and several liability and imposed a system of proportionate liability where a defendant can only be held liable for the percentage of harm caused. Most people would argue that this results in an unjust result to the innocent person who no longer has more rights than defendants who have been found to be substantial factors in causing the victim's harm. The Governor and legislature (unless set aside on constitutional grounds) have made a change to the civil justice system that will limit the rights of women, children and the elderly who are the victims of grossly negligent acts. The ability of the injured victim has been greatly reduced.

One argument made against changing the law is that it is a choice between compensating a victim of negligence and protecting a negligent actor from disproportional liability. When first applied joint and several liability several hundred years ago, the legislature resolved it was more important and paramount to compensate a victim of negligence than it was to have a joint tortfeasor pay only for the percentage of the damages that he or she was responsible for. The current legislature chose the latter.

Joint and several liability reflected interests in deterring tortuous conduct by Pennsylvania residents and ensuring that residents were fully compensated. The new law effectively changes the public interest away from that. Farrell v. David Davis Enterprises, Inc., 1996 WL 21128 (E.D.Pa. Jan. 19, 1996).

However, keep in mind that an argument exists that the new law no longer applies at all if you represent a totally innocent plaintiff who is not negligent. If that is the case then you should argue the old common law joint and several applies to the case.

II. **Prospects of Future Litigation Challenging SB 1131:**

Many people believe that there are several reasons why the new law is not constitutional. As with any new law, there will be challenges which will work their way through the appellate courts. However, until any Court authority to the contrary, SB 1131 will be the law.

Some possible Constitutional arguments are:

a. the new law violates the Commonwealth's Constitution by placing a cap on damages;

b. the new law violates equal protection to the rights of a minor, senior citizen and even a landowner;

c. the new law violates equal protection for a 60% defendant because there is no rational basis for 60% as a threshold.

III. Raising and preserving a challenge to SB 1131:

Since Act 17 is dated June 28, 2011, it impacts causes of action which arose after June 27, 2011. So only look at cases after that date with two or more tortfeasors.

In a New Matter which raises contribution, indemnity, where someone else is responsible, comparative or contributory negligence and there are two or more tortfeasors, one recommendation is to respond that the new legislation was enacted in an improper and unconstitutional fashion and should be set aside in this instance. Also, from the defense side, if there are two or more tortfeasors, it is also recommended that this issue be raised in an Answer, New Matter, Joinder, Cross-claims or in some other fashion in the *original* pleadings.

Also important to preserving the issue is placing the Attorney General on notice of the claim.

> The applicable Rule of Civil Procedure is Pa.R.C.P. 235 which states in pertinent part:
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> > In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional . . . the party raising the question of constitutionality . . . shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice. . . . If the circumstances of the case require, the court may proceed without prior notice in which event notice shall be given as soon as possible; or the court may proceed without waiting action by the Attorney General in response to a notice.

Probably, the safest thing to do is to review files where a challenge is made to the joint and several law and immediately to place the Attorney General on notice as specified by the Rule.

IV. The Future of SB 1131:

Based upon harshness of SB 1131, it is hopeful the law will be found unconstitutional, at some point in the future. *However*, everyone should assume that the law will not be set aside.

Also, in the next session of the Pennsylvania General Assembly it is anticipated that one or more pieces of legislation will be introduced to change provisions of Act 17. Some of them include an outright repeal of the law and, if not amending the law to create exceptions for minors.