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Who's to Blame? Apportioning Liability in Civil Jury Trials

When one person negligently causes an accident, the law is clear about their responsibility. But when negligence acts on the part of a number of different parties combine to create a single accident, how should responsibility for that accident be apportioned between them? This was recently addressed by the Ontario Court of Appeal in its recent decision in *Parent v Janandee Management Inc.*

On a windy day in 2002, the plaintiff and her husband were walking in Toronto's financial district when she was knocked to the ground by a flying, 40-pound wooden A-Frame sign.

Having suffered a broken nose, fractured orbit and traumatic brain injury, the plaintiff sued Janandee Management Inc. ("Janandee"), the advertiser, and T.S. Contracting Ltd. operating as "Upright Signs" ("Upright Signs") for negligence. Upright Signs had been contracted by Janandee to install A-Frame signs at designated intersections in the area.

After a 15-day jury trial, both defendants were found liable. On instructions from the trial judge, the jury awarded the plaintiff \$2.9 million, and apportioned the liability 94% to Janandee and 6% to Upright Signs. Though the appeal was ultimately dismissed on all issues raised, the Court of Appeal took the opportunity to clarify a few key points in the law of negligence, most importantly as to how liability should be apportioned between joint tortfeasors.

Apportioning Liability Based on Fault, Not Causation

On appeal, Janandee submitted the trial judge erred by conflating causation and fault in instructing the jury on apportionment. Janandee's concern was that the trial judge, in his instruction on apportionment and later in answering a question from the jury on apportionment, referred to degrees of fault without distinguishing the determination of fault from the determination of causation.

The Court of Appeal reiterated the plain reading of the *Negligence Act* that it had adopted in its 2008 decision of *Rizzi v Mavros*, which held that it would be an error to apportion liability on the degree to which the appellant or respondent caused the damages. Rather, apportionment of liability should

focus on the blameworthiness of the actions and an analysis of which of the defendants failed most markedly to live up to the expected standards of care.

The Court of Appeal found that it would have been better if the trial judge had explained to the jury that, when they came to the apportionment question, they must consider fault, in the sense of blameworthiness, and not causation. The Court also observed that it would have been helpful at that point to draw to the jury's attention the evidence that related to that determination.

Having said this, however, the Court found that the "room for confusion" created by the references to causation in the instruction and answer to the jury's question on apportionment did not meet the high threshold for interference with a jury verdict, also noting that counsel failed to object at the time.

Parent v Janandee Management Inc reiterates the important distinction between fault and causation, especially when dealing with multiple tortfeasors. Though both defendants failed to take reasonable care in their respective roles and collectively caused the harm, one party's departure from the standard of care was more substantial. Put another way, the jury found that both Upright Signs and Janandee in this case *caused* the harm by failing to meet the standard of care, but must have concluded that Janandee's conduct represented a much bigger departure from the standard of care.

Judges, in their charges on apportionment, should carefully explain the distinction between the two approaches. On the one hand, causation goes to whether the defendant's departure from the standard of care caused the harm. Once causation is determined, apportionment considers the question of relative fault: in other words, the relative degree to which the defendants departed from the applicable standard of care. A given defendant may be found to have caused or contributed to the harm, but to have a very high or very low degree of fault relative to the actions of a co-defendant. Given the high threshold for interference with jury awards, counsel must be alert to any potential confusion and object if a charge is confusing on this issue to ensure appeal rights are preserved.

With notes from Sarah Spitz.