Denver Law Review

Volume 49 | Issue 1 Article 8

January 1972

Torts - Apportionment of Damages - Indivisible Injuries - Bruckman v. Pena

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COMMENT

TORTS — APPORTIONMENT OF DAMAGES — INDIVISIBLE INJURIES — *Bruckman v. Pena*, 487 P.2d 566 (Colo. Ct. App. 1971).

ON July 21, 1964, William Pena, the plaintiff, suffered extensive injuries in an automobile accident with defendants. Some 11 months later, plaintiff was involved in a second accident with resultant aggravation of the injuries sustained in the first. The parties involved in the later accident settled the plaintiff's claim against them in return for a covenant not to sue and were therefore not joined in the instant action. In the trial below, a medical expert testified that the plaintiff had suffered permanent brain damage in each of the accidents, but that it was impossible to apportion the injury between the two accidents. The trial judge instructed the jury that if the evidence did not support an apportionment of damages between the two injuries the defendants would be liable for the entire amount of damages.[1] A verdict of $58,063[2] was returned in favor of the plaintiff and judgment was entered thereon. On appeal to the Colorado Court of Appeals, *held*, reversed. The defendants cannot be held liable for the plaintiff's subsequent injury whether or not such damage can be apportioned between the two injuries. Heretofore, the question of whether the first of several tortfeasors can be held jointly liable for an indivisible injury had not been litigated.

Central to an appreciation of the instant case and its implications for Colorado tort law is an understanding of the rule previously laid down in *Newbury v. Vogel*.[3] The court there

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[1] Instruction No. 15:

> If you find that after the collision complained of Plaintiff, William Pena, had an injury which aggravated the ailment or disability received in the collision complained of, the Plaintiff is entitled to recover for the injury or pain received in the collision complained of; but he is not entitled to recover for any physical ailment or disability which he may have incurred subsequent to the collision.
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> Where a subsequent injury occurs which aggravated the condition caused by the collision, it is your duty, if possible, to apportion the amount of disability and pain between that caused by the subsequent injury and that caused by the collision. *But if you find that the evidence does not permit such an apportionment, then the Defendants are liable for the entire disability.* (emphasis added).

[2] It is at least of passing interest to note that the tortfeasor involved in the later accident settled out of court with the plaintiff for a sum of $9,500.00. The wide latitude between the two figures is not indicative of the relative merits of the two causes. But, if the jury found that they could not apportion the injury between the two accidents and therefore made their award for the entire disability (according to Instruction No. 15), the $9,500.00 figure represents a double recovery.

[3] 151 Colo. 520, 379 P.2d 811 (1963).

held that where a pre-existing diseased condition is aggravated by trauma caused by the negligence of the defendant, and no apportionment of the disability between that caused by the pre-existing condition and that caused by the trauma can be made, the defendant is responsible for the entire damage. This is true notwithstanding the fact that a portion of the present and future disability is obviously attributable to the pre-existing condition. In *Hylton v. Wade*[4] this rule was extended to cases where the pre-existing condition was of traumatic origin. Therefore, in a case where damages are proximately the result of more than one causitive agent (including a pre-existing condition), and there is no evidence to support an apportionment between such causes, the plaintiff can recover his entire damage from the tortfeasor who aggravates the pre-existing condition.

Inherent in the principle enunciated in *Newberry* is the requirement that once the plaintiff makes his case, it is incumbent upon the defendant to prove apportionability in order to limit his liability. This position has been adopted by the Restatement[5] and has received judicial expression in the case of *Summers v. Tice*,[6] where the court, in resolving a similar dilemma, said that for "reasons of policy and justice," so that "the innocent wronged party [is] not deprived of his right to redress," the burden should be upon the defendant to absolve himself of liability.

The rule in *Newbury* can be rationalized in several ways. It is said that a tortfeasor takes his victim as he finds him, and if his wrong aggravates an existing disability, and apportionment is not possible, then he should be liable for the entire damage.[7] Another rationale is that when a latent condition itself does not cause pain or disability, then the injury, and not the dormant condition, is the proximate cause of the pain and disability.[8] In yet another approach, the court in *Sutterfield v. District Court*,[9] in explaining *Newbury*, seemingly elevated Rule 20 of the Colorado Rules of Civil Procedure (on permissive

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[4] 29 Colo. App. 98, 478 P.2d 690 (1970).

[5] RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965).

[6] 33 Cal. 2d 80, 199 P.2d 1, 5 A.L.R.2d 91 (1948).

[7] Guillory v. Godfrey, 134 Cal. App. 2d 628, 286 P.2d 474 (1955); *citing*, Harris v. Los Angeles Transit Co., 111 Cal. App. 2d 593, 245 P.2d 35 (1952).

[8] Owen v. Dix, 210 Ark. 562, 196 S.W.2d 913 (1946); Conner v. City of Nevada, 188 Mo. 133, 86 S.W. 256 (1905); Bennett v. Messick, 76 Wash. 2d 474, 457 P.2d 609 (1969).

[9] 165 Colo. 225, 438 P.2d 236 (1968).

joinder)[10] to the status of substantive law when it stated: "[W]e point out that the claims for relief asserted here arise out of a single injury which resulted from the two accidents. Thus it is the injury which is the 'occurrence' giving rise to the claim for relief."[11] Finally, the *Newbury* rule may be explained as a statement of judicial policy.[12] Thus the court in *Holtz v. Holder*[13] asserted rather candidly:

> [I]t is more desirable, as a matter of policy, for an injured and innocent plaintiff to recover his entire damages jointly and severally from independent tortfeasors, one of whom may have to pay more than his just share, than it is to let two or more wrongdoers escape liability altogether, simply because the plaintiff cannot carry the impossible burden of proving the respective shares of causation or because the tortfeasors have not committed a joint tort.[14]

In addition to *Newbury*, also noteworthy is the line of cases arising out of the so-called chain reaction type automobile accident. In *Maddux v. Donaldson*[15] the two successive tortfeasors were held jointly liable for damages arising from an indivisible injury caused by collisions 30 seconds apart. The court said that the fact that one wrong occurs a few seconds after the other is without legal significance. What is significant is that the injury is indivisible.[16] In *Ruud v. Grimm*,[17] where the first accident occurred in the morning and the second occurred in the afternoon of the same day, the court, citing *Maddux*, stated that "where two or more persons acting independently are guilty of consecutive acts of negligence *closely related in point of time*, and cause damage to another under circumstances where the damage is indivisible . . . the negligent actors are jointly and severally liable."[18] Lip service to the time

[10] COLO. R. CIV. P. 20(a). Permissive Joinder. "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, *occurrence*, or series of transactions or *occurrences* and if any question of law or fact common to all defendants will arise in the action." (emphasis added).

[11] 438 P.2d at 239. This reasoning was specifically rejected in Ryan v. Mackolin, 14 Ohio St. 2d 213, 220, 237 N.E.2d 377, 382 (1968) where the court said "their permissive joinder in one action . . . does not *ipso facto* entitle the plaintiff to a joint judgment against them for the entire damages incurred following the second collision." *Accord*, Fitzwilliams v. O'Shaughnessy, 40 Wis. 2d 123, 161 N.W.2d 244 (1968); Caygill v. Ipsen, 27 Wis. 2d 578, 135 N.W.2d 284 (1965).

[12] L. GREEN, RATIONALE OF PROXIMATE CAUSE 142 (1927).

[13] 101 Ariz. 247, 418 P.2d 584 (1966).

[14] *Id.* at 251, 418 P.2d at 588; *accord*, Copley v. Putter, 93 Cal. App. 2d 453, 207 P.2d 876 (1949).

[15] 362 Mich. 425, 108 N.W.2d 33, 100 A.L.R.2d 1 (1961).

[16] *Accord*, Watts v. Smith, 375 Mich. 120, 134 N.W.2d 194 (1965); *see also*, Gulf, C.&S.F. Ry. Co. v. Cities Serv. Co., 273 F. 946 (D. Del. 1921).

[17] 252 Iowa 1266, 1272, 110 N.W.2d 321, 324 (1961).

[18] *Id.* (emphasis added).

element was abandoned in *Treanor v. B.P.E. Leasing,*[19] where, in fixing liability for accidents occurring 2 months apart, the court held that the rule of joint liability for indivisible injuries should not be confined to accidents that occur almost simultaneously. The court stated that the phrase "closely related in point of time" in *Ruud* had been given undue emphasis. In effect, the court held that to find consecutive tortfeasors jointly liable for an indivisible injury the plaintiff must go no further than to prove proximate cause.[20]

Further discussion of the rule of joint liability for indivisible injuries caused by consecutive tortfeasors is not within the scope of this comment. Suffice it to say that in the majority of jurisdictions, joint tortfeasors who have contributed to an injury not susceptible to apportionment would be held jointly liable under one of the foregoing theories. Moreover, in Colorado, with the rule in *Newbury* and *Hylton,* the *subsequent* tortfeasor would be held liable for the entire damage if no apportionment could be made.

As previously noted, *Bruckman* was decided as a case of first impression on the question of whether an injured plaintiff will be allowed to recover his entire damage from the first of several tortfeasors, each of whom was the proximate cause of an indeterminate amount of that damage. The reverse factual situation was found in *Newbury* and *Hylton;* and in cases like *Maddux, Ruud* and *Treanor* it seemed not to matter which of a series of tortfeasors was at bar.

The *Bruckman* court reasoned that the general rule is that one injured by the negligence of another is entitled to recover the damages proximately caused by that negligence, and that the burden of proving such damages is upon the plaintiff. Accordingly, the court found error in the trial judge's instruction permitting the plaintiff to recover damages against the defendants for injuries which the plaintiff received subsequent to any act of negligence on the part of the defendants and from causes for which the defendants were in no way responsible.[21]

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[19] 158 N.W.2d 4, 6 (Iowa 1968). *Contra,* Close v. Matson, 102 Ga. App. 669, 117 S.E.2d 251 (1960); Young v. Dille, 127 Wash. 398, 220 P. 782 (1923).

[20] 158 N.W.2d at 6.

[21] The first hint that the court would refuse to apply *Newbury* came at oral argument when one of the judges asked when a defendant's vulnerability would end if the defendant remained liable for subsequent aggravation. Of course, the answer to that question, if *Newbury* is applied, is that payment and release, *res judicata,* or expiration of the 6-year statute of limitation would terminate the defendant's liability for such subsequent injury. The first tortfeasor would become, in effect, an insurer of the plaintiff's condition until one of the above occurred.

Further, the court found the instruction to be infirm because it placed upon the defendants the burden of proving that the plaintiff's injury could be apportioned between the two accidents in order to limit their liability.

Apparently, the court was not impressed by the plaintiff's "impossible burden of proving"[22] the amount of damage attributable to each of several causes. Neither have been a number of other authorities. McCormick states that:

> When the entire disability sustained by the plaintiff is contributed to both by the injury for which the defendant is responsible and from other causes, such as disease, weakened condition from the use of alcohol, or the like, then the evidence must make clear how much of the disability proceeds from the former source in order for the plaintiff to recover at all, and the jury should be instructed to give damages only for that part of the resulting disability.[23]

Cooley takes a similar view. He states that "[a] tort which is several when committed cannot be made joint by matters occurring subsequently, over which the tortfeasor has no control."[24] Furthermore, because a plaintiff cannot prove the wrong done by one person this is no reason for him to recover his damages from another who did not cause them.[25]

The court's adoption of the strict technical view in *Bruckman* has resulted in the unlovely spectacle of a plaintiff turned away without redress even though he has shown the aggregate amount of the damages that he has suffered at the hands of several tortfeasors.[26] It is submitted that the more modern view is in line with the rule set out in *Newbury*. The Restatement provides that "[w]here two or more causes combine to produce such a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm."[27] Prosser

[22] F. HARPER & F. JAMES, THE LAW OF TORTS 1128 (1956).

[23] C. MCCORMICK, DAMAGES 273 (1935).

[24] 1 R. COOLEY, TORTS 284 (1932).

[25] *Id.* at 285.

[26] It should be noted that in the recent case of *Alexander v. White*, which involved the same facts as *Bruckman*, the court softened the sting of *Bruckman* somewhat by stating:

> On the whole, there is sufficient evidence in the record to support a finding of some damages occurring strictly as a result of the first accident. Plaintiff presented evidence that he suffered pain and underwent medical treatment for the injuries caused by the first accident. The cost of this treatment and related expenses could then be strictly apportioned to this accident, and therefore he would be entitled to recover at least these damages.

[27] RESTATEMENT (SECOND) OF TORTS § 433A, comment on subsection (2) at 440 (1965).

agrees. He states that "[w]here no such basis can be found, and any division must be purely arbitrary, there is no practical course except to hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it."[28] This is not to say that this theory is of very recent origin. Wigmore essentially stated this principle in 1922.[29]

Practically speaking, *Bruckman,* operating with *Newbury,* will produce some startling results. Assuming facts similar to those in the instant case, consider what would happen if, instead of the first, the second tortfeasor were sued. In proving damages, the plaintiff would have only to show the aggregate amount of his damages from both accidents and that those damages could not be apportioned between the two accidents.[30] He would then be entitled to the *Newbury* instruction,[31] and would recover his entire damages.[32] In other words, the mere substitution of the second tortfeasor for the first, would have compelled a different result in *Bruckman.* Even more startling, if both tortfeasors were named as co-defendants, the parties would be entitled to instructions on the law of both *Bruckman* and *Newbury* with the result that the first tortfeasor would escape liability completely while the second would be liable for the entire amount.[33]

Fortunately, there exists a viable alternative to these inconsistent principles, and the inequitable results they tend to produce. In *Loui v. Oakley,*[34] the Supreme Court of Hawaii, when confronted with facts similar to those faced by the Colorado court in *Bruckman,* held that where the jury cannot determine by a preponderance of the evidence the extent to which the

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[28] W. PROSSER, LAW OF TORTS 314 (4th ed. 1971).

[29] Wigmore, *Joint-Tortfeasors and Severence of Damages; Making the Innocent Party Suffer Without Redress,* 17 ILL. L. REV. 458 (1922).

[30] McDonald v. United Airlines, Inc., 365 F.2d 593, 594 (10th Cir. 1966).

[31] COLO. JURY INST. § 6:8.

> If you find that before the accident plaintiff, (*name*), had a physical ailment or disability, and because of the accident this ailment or disability was aggravated, the plaintiff is entitled to recover for any disability or pain caused by such aggravation; but he is not entitled to recover for any physical ailment or disability which may have existed prior to the accident, or for any ailments or disabilities from which plaintiff may now be suffering which were not caused or contributed to by the accident.
>
> Where a pre-existing condition exists which has been aggravated by the accident it is your duty, if possible, to apportion the amount of disability and pain between that caused by the pre-existing condition and that caused by the accident. But if you find that the evidence does not permit such an apportionment, then the defendant is liable for the entire disability.

[32] Alexander v. White, 488 P.2d 1120 (Colo. Ct. App. 1971).

[33] *Id.*

[34] 50 Hawaii 260, 438 P.2d 393 (1968).

damages are due to the defendant's negligence, then it may make a rough apportionment; and if it is incapable of even making a rough apportionment, it must apportion the damages equally among the various causes.[35] In apportioning the damages under this rule, each accident is considered, regardless of the possibility that the plaintiff may not be able to recover the damages attributable to a given cause.[36]

In adopting the foregoing rule, the Hawaiian court was concerned primarily with steering "a careful course between the Scylla of denying the plaintiff any remedy and the Charybdis of imposing on one defendant all the damages, at least some of which would not have occurred without the independent acts of other persons."[37] The court accomplished its objective by rejecting the rule adopted in *Bruckman* and by limiting the Hawaiian version of the *Newbury* rule[38] to the situation where a latent pre-existing condition is aggravated by the defendant's negligence.

The approach of the Hawaiian court in *Loui* finds support, albeit by analogy, in the well-settled principle that "where the cause and existence of damages has been established with requisite certainty, recovery will not be denied because such damages are difficult of ascertainment."[39] The obvious rationale for this rule is that a plaintiff who has met his burden of proving damages and has established the requisite proximate cause should not be denied redress. This same rationale is equally applicable to the situation involving damages which cannot be accurately apportioned among several different causative agents. Clearly, in such a situation the plaintiff should not be denied recovery altogether. This is not to say, however, that he should be entitled to recover his entire damages from a single defendant where some undefined portion of such damages is attributable to other causes. Hence the Hawaiian court's arbitrary apportionment rule.

Based on the foregoing, it is submitted that the court in *Bruckman* should have taken the approach adopted by the Hawaiian court in *Loui*. The *Loui* rule, correctly applied, would have the effect of limiting the application of *Newbury* to cases involving the aggravation of a pre-existing *latent* condition.[40]

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[35] *Id.* at 264-65, 438 P.2d at 397.

[36] *Id.*

[37] *Id.*

[38] Kawamoto v. Yasutake, 49 Hawaii 42, 410 P.2d 976 (1966).

[39] C. McCormick, *supra* note 23, at 102.

[40] Bachran v. Morishige, 469 P.2d 808 (Hawaii 1971); Matsumoto v. Kaku, 484 P.2d 147, 151 (Hawaii 1971) (dissenting opinion).

In all other instances, the damages would be apportioned among the various causes, either strictly or arbitrarily.[41] That this approach is more equitable and doctrinally consistent than that taken by the *Bruckman* court is obvious. It can only be hoped that the Colorado Court of Appeals will recognize this and take steps to replace the *Bruckman* rule with the approach taken in *Loui*. Such a change is one of the "felt necessities of the time,"[42] and should not be postponed beyond the next opportunity to effect it.

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[41] Cases cited note 39 *supra*.

[42] O. HOLMES, THE COMMON LAW 1 (1881).