

Comparative Causation

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**Hidalgo County Bar Association
Crash Course in Personal Injury Litigation
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Comparative Causation

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2003 Proportionate Responsibility

- Any DTPA Or Cause Of Action Based In Tort
- Cases Filed On Or After **July 1, 2003**
- Does Not Apply To:
 - Exemplary Damage Awards
 - Worker's Compensation Actions
 - Exemplary Damage Claims Against An Employer Arising Out Of An Employee Death



New Responsible Third Party Practice

- Limitations On Who Can Be A (RTP) Are Removed
- Procedures Created
 - Motion
 - Objecting To The Designation
 - Striking Designation Of (RTP)
 - Procedures For Criminally Responsible Third Parties
 - Submission Must Be Support By The Evidence



RTP: No Limitations

- **1995 Limitations**
 - “Joinder” Contemplated
 - Court Could Exercise Jurisdiction Over (RTP)
 - Plaintiff Could Have, But Did Not Sue (RTP)
 - RTP Is Or Maybe Liable To Plaintiff
 - Not An Employer Maintaining Worker’s Comp. Insurance
 - Not If (RTP) Enjoys Bankruptcy Protection
 - Not A Seller Eligible For Indemnity Under Chapter 82



RTP: No Limitations

- **2003 Limitations**

- ~~— “Joinder” Contemplated~~
- ~~— Court Could Exercise Jurisdiction Over (RTP)~~
- ~~— Plaintiff Could Have, But Did Not Sue (RTP)~~
- ~~— RTP Is Or Maybe Liable To Plaintiff~~
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 - Not A Seller Eligible For Indemnity Under Chapter 82



RTP: Procedures

- **Motion To Designate**
 - On or before the 60th day before trial, unless good cause shown
 - May be filed after limitations runs on claimant's cause-of-action
 - Claimant may join RTP 60 days after designation despite limitations
 - Shall be granted unless objection filed



RTP: Procedures

- **Objection To Designation**
 - Filed on or before the 15th day after motion is filed
 - Objecting party must show:
 - Defendant did not plead facts sufficient to satisfy the TRCP
 - After leave to replead, defendant still did not plead facts sufficient to satisfy the TRCP



RTP: Procedures

- **Striking a Designation**
 - Must allow sufficient time for discovery
 - Move to strike on “No Evidence” grounds
 - Defendant must produce sufficient evidence to raise a genuine issue of fact
 - **This is a no evidence MSJ**



RTP: Procedures

- **Unknown Criminal**
 - Can add an unknown person “**John Doe**” who allegedly committed a criminal act
 - Motion must be filed within 60 days after filing of defendant’s original answer.
 - Court shall grant motion if:
 - Defendant plead facts that demonstrate in reasonable probability the acts of the unknown person were criminal
 - Defendant has stated all identifying characteristics
 - Allegations satisfy the pleading requirements of the TRCP

1995 RTP Example

P	v.	D1	45%
		D2	55%

- P's Employer not submitted
- John Doe Criminal not submitted
- Bankrupt Defendant not submitted
- Foreign Corp. without "minimum contracts" not submitted

1,000,000 Verdict ▶ D1 pays \$450,000
 ▶ D2 pays \$550,000

2003 RTP Example

P	v.	D1	15%
		D2	10%
		P's Employer	25%
		John Doe Criminal	25%
		Bankrupt Defendant	15%
		Foreign Corp.	
		No Jurisdiction	10%

1,000,000 Verdict

- ▶ D1 pays \$150,000
- ▶ D2 pays \$100,000



2003 RTP : Cases Most Effected

- | | |
|--------------------------|----------------------------|
| • Third Party Cases | - Employer with Comp. Ins. |
| • Security/Sex/Rape | - John Doe Criminal |
| • Speeding Phantom Car | - John Doe Criminal |
| • Bankrupt Liable Entity | - Bankrupt |



Settlements & Credits

- **Non-Health Care Liability Claims**
 - Reduce by the percentage of fault assigned to the settling person
 - Eliminates dollar-for-dollar and sliding scale credits
 - Eliminates *Drilex* issues
 - Defendants can not rely on automatic credit; now Defendants must try to increase settling party's percentage of responsibility.
 - Creates potential for over or under recovery
 - Plaintiff's counsel should inform clients of under recovery potential before entering a partial settlement

51% Bar Rule

No Changes

(Rule since 1995 Proportionate Responsibility Statute)

Plaintiff vs. D1 (any cause of action based on tort)
D2 (any cause of action based on tort)

Damages of \$100,000

Example

P = 50%

D1 = 25%

D2 = 25%

***P collects 50%
or \$50,000***

Example

P = 51%

D1 = 24%

D2 = 25%

***P is barred and
collects nothing***

The Statutory Scale

Applies only to cases filed prior to July 1, 2003

5% of first \$200,000 in damages	\$10,000
10% of next \$200,000 (201,000- 400,000) in damages	\$20,000
15% of next \$100,000 (401,000-500,000) in damages	\$15,000
20% of any amount in excess of \$500,000 in damages	

VERDICT FOR \$100,000

P	vs.	D1	*	
		D2	*	
			*	<i>settling D3 pays \$15,000</i>

Under Statutory Scale Reduction

P's recovery reduced by \$5000
(5% of \$100,000)

Section 33.012(b)(2)

Under Dollar-for-Dollar Reduction

P's recovery reduced by \$15,000

Section 33.012(b)(1)

The Statutory Scale

Applies only to cases filed prior to July 1, 2003

5% of first \$200,000 in damages	\$10,000
10% of next \$200,000 (201,000- 400,000) in damages	\$20,000
15% of next \$100,000 (401,000-500,000) in damages	\$15,000
20% of any amount in excess of \$500,000 in damages	

VERDICT FOR \$1,000,000

P	vs.	D1	*	
		D2	*	
			*	<i>settling D3 pays \$150,000</i>

Under Statutory Scale Reduction

P's recovery reduced by \$145,000

Under Dollar-for-Dollar Reduction

P's recovery reduced by \$150,000

Non-Health Care Liability Credits: Percentage Required

P 10% v. D1 60%
D2 15%
S1 15% (Settled 250,000)

Verdict for \$1,000,000

P's Contrib. Reduction	<100,000>
S1's Settlement Credit Reduction	<u><150,000></u>
Recovery Cap	750,000

D1 Pays (60% of 1,000,000)	600,000
D2 Pays (15% of 1,000,000)	150,000
Settlement	<u>250,000</u>
Total Collected by Plaintiff	1,000,000
Overcompensation	100,000

Non-Health Care Liability Credits: Percentage Required

P 10% v. D1 60%
D2 15%
S1 15% (Settled 50,000)

Verdict for \$1,000,000

P's Contrib. Reduction	<100,000>
S1's Settlement Credit Reduction	<u><150,000></u>
Recovery Cap	750,000

D1 is J&S (60% of 1,000,000)	600,000
D2 is (15% of 1,000,000)	150,000
Settlement	<u>50,000</u>
Total Collected by Plaintiff	800,000
Under compensation	<100,000>



Health Care Liability Claims

- Defendant has election for credit of:
 - Dollar-for-dollar credit; or
 - Percentage of fault assigned to the settling person
- Other Election Rules:
 - Must elect before submission to jury
 - One election is binding on all defendants
 - No election or conflicting elections, then dollar-for dollar
- *Drilex* issues still exist



Health Care Liability Credits

- If you are J&S Defendant and elect percentage reduction
 - You will never pay more than your percentage
- If you are J&S Defendant and elect dollar-for-dollar credit
 - Risk paying more than your percentage if settlement is too low (*see Sugarland Properties as example*)
 - Benefit from paying less if the settlement is too high

Health Care Credits: Percentage Election

P 10% v. D1 60%
D2 15%
S1 15% (Settled 50,000)

Verdict for \$1,000,000

P's Contrib. Reduction	<100,000>
S1's Settlement Credit Reduction	<u><150,000></u>
Recovery Cap	750,000

D1 pays (60% of 1,000,000)	600,000
D2 pays (15% of 1,000,000)	150,000
Settlement	<u>50,000</u>
Total Collected by Plaintiff	800,000

Same Result as for Non-Health Care Case where settlement percentage credit is only choice.

Health Care Credits: Dollar-for-Dollar Election

P 10% v. D1 60%
D2 15%
S1 15% (Settled 50,000)

Verdict for \$1,000,000

P's Contrib. Reduction	<100,000>
S1's Settlement Credit Reduction	<u><50,000></u>
Recovery Cap	850,000

D1 is J&S therefore pays more than 60%	700,000
D2 pays (15% of 1,000,000)	150,000
Settlement	<u>50,000</u>
Total Collected by Plaintiff	900,000

Health Care Credits: Percentage Election

P 10% v. D1 60%
D2 15%
S1 15% (Settled 250,000)

Verdict for \$1,000,000

P's Contrib. Reduction	<100,000>
S1's Settlement Credit Reduction	<u><150,000></u>
Recovery Cap	750,000

D1 pays (60% of 1,000,000)	600,000
D2 pays (15% of 1,000,000)	150,000
Settlement	<u>250,000</u>
Total Collected by Plaintiff	1,000,000

Health Care Credits: Dollar-for-Dollar Election

P 10% v. D1 60%
D2 15%
S1 15% (Settled 250,000)

Verdict for \$1,000,000

P's Contrib. Reduction	<100,000>
S1's Settlement Credit Reduction	<u><250,000></u>
Recovery Cap	650,000

D1 pays (60/75 of \$650,000)	520,000
D2 pays (15/75 of 650,000)	130,000
Settlement	<u>250,000</u>
Total Collected by Plaintiff	900,000



Drilex Issues

- All family members seeking recovery for damages arising out of the injury or death of one person are considered a single “claimant.”
- All settlement dollars paid are deducted as a credit against the whole family, even if some family members received no settlement
- Family members divide the remaining award based on their percentage of the total award



Drilex: Problems For Plaintiffs

- Multiple Plaintiffs, Represented By Multiple Plaintiff's counsel for claims arising from a single injury or death
- One Plaintiff Group settles. This leaves the other group with no benefit from the settlement, but the burden of a credit



Utts

- One plaintiff settled, then non-suited claims
- Presumption that all plaintiff's benefited from the settlement
- Remaining plaintiffs can rebut the presumption and reduce the credit by showing they received no benefit from the settlement



2003 Tort Reform: Back to *Drilex*

- Definition of “claimant” modified to codify the *Drilex* rules
- *Drilex* problems eliminated in non-health care claims
- *Drilex* problems remain in health care claims where the dollar-for-dollar credit applies




Plaintiff's Counsel

- Inform client of Drilex Rules and obtain consent before settlement
 - The reduction applied to individual plaintiffs is dependent upon amount of money awarded to the Plaintiff and not the amount received from a partial settlement.

Greater Than 50% Rule for Joint and Several Liability

*Now includes Toxic Tort Cases
filed July 1, 2003 forward*



P vs. D1
D2

Example

P = 0%

D1 = 50%

D2 = 50%

D1 is not J & S

D2 is not J & S

Example

P = 0%

D1 = 51%

D2 = 49%

D1 is J & S

D2 is not J & S

Toxic Tort Joint & Several Rules

(15% or Greater Rule)

*Applies only to Cases filed
prior to July 1, 2003*

**P vs. D1 (toxic tort negligence)
D2 (negligence)**



Example

P = 0%

D1 = 15%

D2 = 85%

Both D's have joint and several liability



Double Dipping Not Allowed

Roberts v. Williamson Nos. 01-0765, 01-0766, 2002 WL 32126137 (Tex. 2003)

The issue is whether the trial court properly applied the settlement credit statute in calculating the liability of a non-settling defendant that was not jointly and severally liable.

Verdict:

\$3,010,001

Plaintiff (0%)

vs.

D1 (hospital/2 doctors) = 85% paid \$468,750

full/final

settlement

D2 (non-settling doctor) = 15%

Judgment:

\$451,500.15 (15% of total damages)

D2 argued that the \$468,750 settlement should have been deducted from D2's total liability (\$451,500.15) on the dollar-for-dollar basis as elected under section 33.012(b) of the Texas Civil Practice and Remedies Code.

D2's liability:

$(.15 \times \$3,010,001) = \$451,500.15$



Double Dipping Not Allowed

Roberts v. Williamson Nos. 01-0765, 01-0766, 2002 WL 32126137 (Tex. 2003)

In the alternative, D2 argued that the trial court should have reduced the total amount of damages by the settlement amount prior to multiplying the 15% liability.

Settlement credit: $(\$3,010,001 - \$468,750) = \$2,541,251$

D2's liability: $(.15 \times \$2,541,251) = \$381,187.65$

Judgment: $\$381,187.65$

The court rejected D-2's arguments and multiplied D2's percentage of liability by the total amount of damages and only allowed the settlement credit to act as a cap on D2's liability.

D2's liability: $(.15 \times \$3,010,001) = \$451,500.15$

Settlement credit: $(\$3,010,001 - \$468,750) = \$2,541,251$ (cap on D2's damages)

Judgment: $\$451,500.15$

The court reaffirms that a non-settling defendant who is not jointly and severally liable is liable for no more than the percentage of liability found by the jury.



Kirby v. Amerigas

892 S.W.2d 179 (Tex.App. - Houston [14th Dist.]1995,___)

Verdict

Judgment

Plaintiff = 1%

Settled D-1 = 80% Settled for \$20,000

D-2 = 19%

Damages \$389,896

**\$74,080
(19% of 389,896)**

Plaintiff argued since he settled with D-1, D-1's percentage of fault should be disregarded and D-2 liable for 19/20 (95%) of the damages instead of the 19% found by the jury.

D-2's liability is limited to the percentage of liability found by the jury as per §33.013(a) because D-2 is not jointly and severally liable.



Sugarland Properties, Inc. v. Becnel

26 S.W.3d 113 (Tex.App. - Houston [1st Dist.] 2000)

The issue is whether a defendant whose responsibility is greater than 50% is jointly and severally liable for the amount remaining after that defendant has received a dollar for dollar credit for all settlements. We hold that it is.

Verdict

Judgment

0% Plaintiff

30% D-1 settled for \$12,500 prior to verdict

70% D-2

\$52,730 damages

\$40,230

The recoverable damages were the total damages of \$52,730 minus the elected dollar for dollar credit for the \$12,500 settlement therefore \$40,230. **D-2 argued it should pay no more than 70% of \$52,730 damages (\$36,911). Judgment is for more than the percentage of liability found by the jury because D-2's is jointly and severally liable (greater than 50% negligence).**

§ 82.002. Manufacturer's Duty to Indemnify

(a) A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, **except for any loss caused by the seller's negligence**, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.

(b) For purposes of this section, "loss" includes **court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages.**

(c) Damages awarded by the trier of fact shall, on final judgment, be deemed reasonable for the purposes of this section.

(d) For purposes of this section, a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer's instructions shall be considered a seller.

§ 82.002. Manufacturer's Duty to Indemnify

(e) The **duty to indemnify** under this section:

(1) **applies without regard to the manner in which the action is concluded;** and

(2) is in addition to any duty to indemnify established by law, contract, or otherwise.

(f) A seller eligible for indemnification under this section shall give reasonable notice to the manufacturer of a product claimed in a petition or complaint to be defective, unless the manufacturer has been served as a party or otherwise has actual notice of the action.

(g) A seller is entitled to recover from the manufacturer court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages incurred by the seller to enforce the seller's right to indemnification under this section.

Added by Acts 1993, 73rd Leg., Ch. 5, § 1, Eff. Sept. 1, 1993.



*Written Indemnity Agreements
and the
Texas Express Negligence Rule*

Failed the Express Negligence Test



Contractor shall indemnify and hold Owner harmless against any loss or damage to persons or property **as a result of operations growing out of the performance of this contract** and caused by the negligence or carelessness of Contractor, Contractor's employees, subcontractors, and agents or licensees.

Ethyl Corp. vs. Daniel Construction Co., 725 S.W.2d 705 (Tex. 1987)

Failed the Express Negligence Test



Contractor agrees to . . . indemnify . . . owner . . . from and against **any and all claims** . . . of every kind and character whatsoever, . . . for or in connection with loss of life or personal injury . . . directly or indirectly arising out of . . . **the activities of contractor** . . . excepting only claims arising out of accidents resulting from the sole negligence of owner.

Singleton vs. Crown Central Petroleum Corp., 729 S.W.2d 690 (Tex. 1987)

Failed the Express Negligence Test



Contractor agrees to indemnify and save owner harmless from **any and all loss sustained by owner** . . . from any liability or expense on account of property damage or personal injury . . . sustained or alleged to have been sustained by any person or persons . . . **arising out of . . . the performance or nonperformance of work hereunder** by contractor . . . or by any act or omission of contractor, its subcontractors, and their respective employees and agents while on owner's premises.

Gulf Coast Masonry, Inc. vs. Owens-Illinois, Inc., 739 S.W.2d 239 (Tex. 1987)

Passed the Express Negligence Test



Contractor agrees to hold harmless and unconditionally indemnify **Company** against and for all liability, cost, expenses, claims and damages which **Company** may at any time suffer or sustain or become liable for by reason of any accidents, damages, or injuries either to the persons or property of both, of **Contractor**, or of the workmen of either party, or of any other parties, or to the property of **Company**, in any matter arising from the work performed hereunder, **including but not limited to any negligent act or omission of Company**, its officers, agents or employees. . .

Atlantic Richfield Co. vs. Petroleum Personnel, Inc., 767 S.W.2d 724 (Tex. 1989)

Passed the Express Negligence Test



[Christie] assumes entire responsibility and liability for any claim or actions based on or arising out of injuries, including death, to persons or damages to or destruction of property, sustained . . . in connection with . . . the performance of this contract by [Christie], . . . **regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of [Enserch], [Enserch's] representative, or the employees, agents, invitees, or licensees thereof.**

Ensearch Corp. vs. Parker, 794 S.W.2d 2 (Tex. 1990)

Passed the Express Negligence Test



... arising out of ... the acts or omissions ... of [Payne & Keller] or its ... employees ... in the performance of the work ... **irrespective of whether [P.P.G.] was concurrently negligent** ... but excepting where the injury or death ... was caused by the sole negligence of [P.P.G.].

Payne & Keller vs. P.P.G. Industries, Inc., 793 S.W.2d 945 (Tex. 1990)

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