

LIABILITY OF INITIAL TORTFEASOR FOR SUBSEQUENT INJURY

by Ted Babbitt

Long ago Florida adopted the principle that where there are two successive accidents, the jury should attempt to apportion the damages suffered by the plaintiff in each but if that cannot reasonably be done, the second tortfeasor will be held liable for the entire injury. C.F. Hamblen, Inc. v Owens, 127 Fla. 91, 172 So.2d 694 (1937), Washewich v LeFave, 248 So.2d 670 (Fla. 4th DCA 1971).

But, what happens when plaintiff has two successive accidents and chooses to sue only the tortfeasor who caused the first accident? Does the same rule apply? That question was answered by the Supreme Court in Gross v Lyons, 25 F.L.W. S386 (Fla. May 18, 2000).

That case involved a plaintiff who suffered injuries as a result of a rear end collision and three months later was involved in a second automobile accident. The trial court instructed the jury that the plaintiff was not entitled to recover any damages caused by the second accident since she sued only the tortfeasor in the first accident. The Fourth District reversed in Gross v Lyons, 721 So.2d 304 (Fla. 4th DCA 1998) concluding that the rule enunciated in Hamblen and Washewich, supra, applied both to a suit against the tortfeasor who caused the first accident as well as the tortfeasor who caused the second. The Supreme Court agreed and adopted, for the first time in Florida, the so called Arizona Rule

that “when the tortious conduct of more than one defendant contributes to one indivisible injury, the entire amount of damages resulting from all contributing causes is the total amount of damages recoverable by the plaintiff. Piner v Superior Court, 962 P.2d 909, 915-16 (Ariz. 1998).

Florida adopted the indivisible injury rule in Hamblen and Washewich, supra, in order to prevent a wrongdoer from escaping responsibility when his conduct caused an inability to apportion damages between the accident caused by that wrongdoer and a prior accident or pre-existing condition. Hawaii, on the other hand, adopted the so called “rough apportionment” rule. That rule states that in a situation where the plaintiff suffers an injury from one of two accidents and it is difficult to determine which accident caused the injury, the jury is instructed that if they cannot make a precise determination of the apportionment of the injury, they are to make a rough apportionment and if that cannot be done the damages are split evenly between the two accidents. Loui v Oakley, 438 P.2d 393, 397 (Haw. 1968).

In Gross v Lyons, supra, the Supreme Court declined to adopt the Hawaii principle on the grounds that it was contrary to accepted Florida law that a jury determine by the preponderance of the evidence the extent of damages suffered by the plaintiff and that it allowed the tortfeasor to pay less than the plaintiff’s full damages where there are two successive accidents. Instead, the Supreme

Court adopted the Hamblen and Washewich principles and extended them to the scenario where plaintiff sues only the individual who caused the first accident.

In the present case, we have the reverse of *Hamblen* and *Washewich*, i.e., the prior tortfeasor is sued, but the concerns are the same. In keeping with the *Hamblen's* principle of making the plaintiff whole, we conclude that where the plaintiff sues the first of two successive tortfeasors and establishes liability, but the jury cannot apportion the injury between the two after both parties have had the opportunity to present evidence on the issue, the first tortfeasor will be liable for the entire injury.

It is important to note that in this case the Court discusses in detail the effect of Fla. Stat. 458.81(3) and Fabre v Marin, 623 So.2d 1182 (Fla. 1993). The Court concluded that its interpretation of the law with respect to successive accidents is entirely consistent with the Fabre doctrine because the sole legal cause of the initial accident rests with the tortfeasor who caused that accident. The fact that that accident caused an indivisible injury is what results in that defendant being responsible for the entire damage.

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