Apportionment of Damages

In Chianese -v- Meier, 2002 WL 1291324 (June 13, 2002), the Court of Appeals resolved an issue which had sharply divided the First Department, namely whether article 16 permits a negligent landlord to apportion damages against a non-party intentional tortfeasor. The court held that Article 16 permits such an apportionment.

In Chianese, the plaintiff noticed that upon arriving home from work her apartment's front doors and interior security doors were open. She entered and walked up to the third floor where she saw a stranger, Eugene Adger, on the staircase leading to the fourth floor. As she entered her third floor apartment, Adger pushed her in, grabbed her around the throat and dragged her into her bedroom where he tied her up and proceeded to rob her. As Adger was rummaging through the apartment, the plaintiff freed herself and yelled for help, causing Adger to flee. Adger was ultimately apprehended and convicted of a series of crimes, including the attack on the plaintiff.

The plaintiff brought a bodily injury action against the building owner and managing agent. The case eventually went to trial where the jury found that Adger had gained entrance to the premises through a negligently maintained entrance which was a substantial factor in causing the plaintiff's injuries and awarded the plaintiff $1.1 million. The jury also apportioned liability 50/50 between the defendants and Adger.

The plaintiff moved to set the verdict aside, arguing that the defendants had breached a "nondelegable duty" and thus came within an exception to Article 16. If the owner and managing agent had breached their nondelegable duty, Article 16 would not apply. The trial court granted the plaintiff's motion and the defendants appealed. The First Department affirmed the decision. On the same day however, it decided two other cases which differed and conflicted

with the decision in Chianese.

The Court of Appeals begins by examining the history of Article 16 and notes that one of its primary purposes was to remedy the inequities created by joint and several liability on low-fault, deep pocket tortfeasors. The result was that generally, low-fault, deep pocket tortfeasors are liable only for their actual assessed share of responsibility, rather than the full amount of plaintiff's non-economic damages.

The court also notes that Article 16 is riddled with exceptions, including "actions requiring proof on intent." That exception prevents defendants who have committed an intentional tort from invoking the benefits of Article 16. The issue before the Court however, and the one that split the First Department, was the effect of the exception in a hybrid situation. The plaintiff argued that its negligence action, because it necessarily includes Adger's intentional act, is an "action requiring proof of intent.", thus precluding apportionment amongst or between the defendants.

The Court of Appeals held that the exception to Article 16 should not apply. Three reasons were given. First, the plaintiff's complaint speaks only of negligence. The plaintiff argued that in order to prevail, Adger's intentional act must be proven. The court dismissed that by noting that Adger's state of mind was irrelevant and that, the plaintiff need only had to prove that she was injured as a result of the defendant's negligence. (That a nonparty tortfeasor acted intentionally does bring a pure negligence action within the scope of the exclusion.)

Second, the Court examines the legislative history and finds that the Governor's Memorandum of Approval indicates that Article 16 preserves joint and several liability for "instances in which the *defendant's* acts upon which liability is based are willfully performed or intentionally performed, in concert with others. Conversely, there was no indication the

legislature wanted to create a broad exception which would hurt the very defendants the law was enacted to help.

Finally, under the plaintiff's reading of the statute, the right of a low-fault defendant to apportion would depend entirely on the culpability of the third party. A negligent defendant could apportion with a negligent or reckless third-party tortfeasor, but not an intentional one. The Court felt such a result was not only illogical, but also inconsistent with the purposes of Article 16.

Clearly, Chianese has resolved the conflict in the First Department and is good news to all building owners and managing agents. In closing, it should also be noted that the Second Department had previously held that Article 16 permits apportionment in such situations in Siler v. 146 Montague Associates, N.Y.S.2d (2d Dep't 1997).

Dog Bite

Two recent cases explore two different areas of liability in dog bite cases. The first, Colarusso v. Dunne, 732 N.Y.S.2d 424 (2d Dep't 2001)examines whether a plaintiff may recover where there is no evidence that the dog exhibited vicious propensities. The second, Young v. Selar Corporation (New York Law Journal, May 21 2002), looks at whether an out of possession landlord can be held liable for injury committed by a tenant's dog.

Generally, a dog owner will not be liable unless it is shown that the owner knew, or should have known, that the dog had previously exhibited vicious propensities. This is what is commonly known as the "one bite" rule. While it is not required that a dog must have previously bitten someone before liability can be imposed, it is necessary that there is some evidence that the dog exhibited vicious propensities. This may be done through various types of circumstantial evidence. For example, the courts have held that where the owner deems it

necessary to chain and muzzle a dog, that is some evidence that dog has vicious propensities. In Colarusso, however, there was no evidence at all that the dog exhibited vicious propensities. Nevertheless, the court held that case should go to the jury on a common law negligence theory.

Colarusso arose out of an incident that occurred at a day care center operated by the defendants out of their home. The plaintiff, age 3 at the time, was bitten by the defendants' 75 pound labrador retriever, Daisy. On the day of the incident, the plaintiff walked up to Daisy and "bear hugged" her around the neck. One of the defendants told the infant plaintiff to leave the dog alone, at which point, Daisy moved and the plaintiff began crying. The defendant later noticed a cut above the plaintiff's eye. The defendant further testified that there had been no prior incidents with Daisy concerning anyone on the premises, and that although Daisy would bark at strangers at the door, she did not growl or jump on people.

Ultimately, the defendants moved for summary judgment arguing that, as a matter of law, Daisy did not possess vicious propensities, and that such proof was necessary for the plaintiff to prevail on any theory.

The court acknowledges that there was no proof that Daisy possessed or demonstrated vicious propensities. However, the court held that proof of vicious propensities is not required in all cases to recover for injuries arising from a dog bite. Rather, where the conduct at issue, although not vicious, results in a reasonably forseeable injury, there is a right to recover for common law negligence.

The court then does a typical analysis of the elements of a common law negligence claim. The court found that the defendants did owe the plaintiff's a duty, the duty being the same duty of care owed by a reasonably prudent parent under the circumstances. The real question was whether the action of the plaintiff and Daisy's response were sufficiently forseeable to put the

defendants on notice that such an encounter might be anticipated. The court held that there was an issue of fact and as such, summary judgment was not warranted.

This case, while clearly holding that proof of vicious propensities is not always necessary, does not expose most dog owners to greater potential liability. In most cases where there is no proof of vicious propensities, the plaintiff will not be able to establish that the defendant owed the plaintiff a duty. Colarusso is an exceptional case given the special relationship between the plaintiff and the defendants. Nevertheless, when confronted with a dog bite case, practitioners should remember that the "one bite" rule is not necessarily the end of the story.

Turning to Young, it was admitted by all parties that vicious propensities were present. The only issue raised is the potential liability of the landlord for an injury caused by a dog owned by the tenant. Defendant/owner Selar Corporation alleged in its moving papers that it had no knowledge of a dog at the premises. In addition, the defendant contended that assuming knowledge of the dog's presence, they had no possessory interest in the premises.

The court began by citing the Court of Appeals decision in Strunk v. Zoltanski, 479 N.Y.S. 2d 175 (1984), which held that where a tenant has exclusive possession of the premises, "the landlord is not liable for attacks by an animal kept by the tenant ... where the landlord had no knowledge of the animal or its dangerous proclivities." The court never even reached the question of the owner's knowledge, focusing instead on the possession of the premises. From a review of the relevant lease agreements, the court held that Selar was an out of possession landlord when the attack occurred, and as such, could not be held liable. While the decision makes sense in that there should be no liability where there is no possession, it appears, based on the language in Strunk, that an out of possession landlord might be liable if he has knowledge of

a vicious dog owned by the tenant. As such, it appears that the court should have addressed both possession and knowledge.

Admissibility of MRI Reports

In our April, 2002 issue we discussed the recent case of Wagman -v- Bradshaw, 739 N.Y.S.2d 421 (2d Dep't, 2002), which we felt rectified the unfair practice of permitting a medical expert from testifying as to the contents of an MRI report, which is hearsay. We assumed that Wagman would settle this issue, at least for the forseeable future. Now along comes Bako v. DeCaro, (New York Law Journal, June 4, 2002), a Civil Court, Richmond County case, which interprets Wagman as permitting such testimony under certain circumstances.

In Bako, the plaintiff sought to elicit testimony from the treating chiropractor about the contents of the MRI reports. The defendant objected, and, in light of Wagman, one would have expected the court to sustain the objection. The court however found a way to admit the testimony.

The one major difference between Wagman and Bako is that the plaintiff in Bako served a Notice of Intention pursuant to CPLR 4532-a thus permitting the MRI films themselves in evidence. As we pointed out in our prior newsletter, that should solve any hearsay problems. However, as we noted, we assumed that once the films were in evidence, they would be read by a neurologist, orthopedist, or even a physiatrist. We stated that since chiropractors were not medical doctors they would not be found qualified to interpret MRI films before a trial court and/or jury. The court in Bako held a hearing outside of the presence of the jury to determine the witnesses qualifications. It was learned that while the chiropractor did not take any courses about MRI's in chiropractic school, he had taken several post-graduate seminars in that area.

Based upon that, the court concluded that the chiropractor had the ability to interpret the MRI films.

While that result seems highly questionable, the court could have limited the chiropractor's testimony to his reading of the actual films and precluded any testimony about the contents of the reports. Nevertheless, the court went on to permit the witness to testify as to the contents of several of the MRI reports.

The court touches upon the fact that Wagman acknowledge that there are situations where it is permissible for an expert to rely on hearsay materia. One thing that is necessary is that there is evidence to establish the reliability of the hearsay material. The court held that since Article 131-A of the Education Law considers it professional misconduct to "willfully make or file a false report", and since the Department of Education has promulgated a similar rule, there is a presumption that the MRI report is reliable. By that logic however, it would seem that any report prepared by a health care provider would have to be deemed reliable.

The court acknowledged that there was no evidence about the qualifications of the person who took the MRI, but gets around this by stating that since a person would have his licensed revoked if he or she were not actually qualified to perform the test, the requisite training can be presumed. Again, that would mean that any health care provider would be deemed qualified.

The court also notes that the MRI report should be deemed reliable because it was addressed to another physician and not to a lawyer. While there is always some skepticism about findings in a report addressed to a lawyer, the court ignores the fact that MRI reports are always addressed to another physician, as it is always a physician and not a lawyer who refers the patient to the MRI facility.

While Bako contains a lengthy analysis about whether or not the MRI reports are

reliable, it appears that applying the court's reasoning to any case would produce the same result, i.e., the witness would be allowed to testify about the contents of the MRI reports. This seems to be directly contrary to Wagman, and it would not be surprising to see this case in the Appellate Term in the near future.

As this newsletter is being edited on July 3, 2002, we take this opportunity to wish you all a safe and happy summer; and may God Bless America.