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1998 Survey of Rhode Island Law: Cases: Civil Procedure/Tort Law

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Civil Procedure/Tort Law. *Shepardson v. Consolidated Medical Equipment, Inc.*, 714 A.2d 1181 (R.I. 1998). In a medical malpractice action where one of three joint tortfeasors settles with the plaintiffs prior to the end of their case-in-chief, the trial justice must instruct the jury that the liability of the remaining defendants is to be reduced by the settlement amount.

In *Shepardson v. Consolidated Medical Equipment, Inc.*,¹ the Rhode Island Supreme Court addressed the issue of whether a trial justice must charge a jury regarding a settlement that took place between the plaintiff and one of the joint tortfeasors prior to the end of the plaintiff's case-in-chief.² If a plaintiff settles with one joint tortfeasor prior to the conclusion of the trial, the remaining joint tortfeasors are entitled to a jury charge that properly allocates the amount of liability to the settling joint tortfeasor, thus reducing the amount of total liability of the remaining joint tortfeasors.³

FACTS AND TRAVEL

In 1990, Billy Shepardson (Billy), a three year old child, had been suffering from repeated ear infections.⁴ After being diagnosed by his pediatrician, Billy had surgery to insert tubes in his ears and have his tonsils and adenoids removed.⁵ Dr. Zaki performed the surgery at St. Joseph Hospital on January 16, 1990.⁶ The intended part of the procedure had gone well; however, Dr. Zaki informed Mr. and Mrs. Shepardson that, in the course of the procedure, something had gone wrong.⁷ The Shepardsons were informed that their son had been severely burned⁸ by the grounding pad of the electrosurgical unit⁹ used during the operation.¹⁰

1. 714 A.2d 1181 (R.I. 1998).

2. *See id.* at 1183.

3. *See id.*; *see also* R.I. Gen. Laws §§ 10-6-2, -3, -7 (1956) (1994 Reenactment) (defining joint tortfeasors, depicting the right of contribution from joint tortfeasors based on their pro rata degrees of liability, and illustrating the effect of release of one tortfeasor on the liability of the other tortfeasors).

4. *See Shepardson*, 714 A.2d at 1182.

5. *See id.*

6. *See id.*

7. *See id.*

8. Billy had "suffered second- and third-degree burns on his right anterior thigh." *Id.*

9. The court explained that:

Mrs. Shepardson stated that, when she first saw Billy's wound, it looked like raw flesh.¹¹ Billy Shepardson and his parents then filed suit against Dr. Zaki, the hospital and the electro-surgical unit's manufacturer, Consolidated Medical Equipment, Inc.¹² Billy filed suit for injuries suffered as a result of the burns, and his parents sued for loss of consortium.¹³ At trial, Mrs. Shepardson testified about the extent of her sons injuries and the care that was necessary.¹⁴ Mrs. Shepardson told the court that the severity of the burns required that Billy's bandages be removed and redressed two to three times a day.¹⁵ This ritual lasted for several weeks.¹⁶ The changing of the bandages was extremely painful, causing Billy to scream each time.¹⁷ Billy became fearful of his parents, which forced them to place him under sedation prior to changing his bandages.¹⁸

Mrs. Shepardson further testified that Billy's pain did not end after the burn had healed.¹⁹ There was scarring from the burns, which caused Billy to become extremely self conscious, refusing to wear any clothing that would not completely cover the scar.²⁰ In addition, the Shepardsons had to watch their three year old son suffer as a result of these burns.²¹

Prior to the end of plaintiffs' case-in-chief, St. Joseph Hospital settled with the Shepardsons for ninety thousand dollars in ex-

An electrosurgical unit, which is similar to a generator, is plugged into an electrical outlet in the operating room to provide an electrical current for use by the surgeon. This unit uses high-frequency electrical current to heat the tissue where the surgeon is working in order to cut the tissue or to cause coagulation. One of the attachments to the unit is for a grounding pad that is placed on the patient so that the electrical current may be dispersed and travel back to the machine.

Id. at 1182 n.1.

10. *See id.* at 1182.

11. *See id.*

12. *See id.*

13. *See id.* at 1182-83.

14. *See id.* at 1182.

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.* at 1182-83.

20. *See id.* at 1183.

21. *See id.*

change for a release from liability.²² An order relating to the settlement was entered by the trial justice which stated that the remaining defendants were entitled to any benefits afforded by the joint tortfeasor statute.²³ At the end of the trial, the justice failed to instruct the jury that it must "consider and determine the extent of the negligence . . . attributable to the hospital and thereafter apportion liability among [the remaining] joint tortfeasors accordingly."²⁴ The trial justice failed to make the instruction despite the aforementioned order and a request that was made by each of the remaining defense counsels at the end of the jury charge.²⁵ The trial justice stated that there was no need to instruct the jury pursuant to the joint tortfeasor statute because the hospital was no longer a party to the action.²⁶

The jury ruled in Consolidated Medical Equipment's favor, but ruled against Dr. Zaki.²⁷ The jury awarded the plaintiffs \$125,000 to Billy and \$25,000 to each of Billy's parents for loss of consortium.²⁸ The trial justice denied Dr. Zaki's motion for new trial and motion to vacate, alter, or amend the judgment. Subsequently, Dr. Zaki appealed the verdict, relying on the argument that the trial justice erred in not instructing the jury on the hospital's negligence, pursuant to the Uniform Contribution Among Tortfeasors Act.²⁹

22. *See id.*; *see also* R.I. Gen. Laws § 10-6-7 (1956) (1994 Reenactment) (stating the effect of a release upon the settling tortfeasor and the remaining tortfeasors).

23. *See Shepardson*, 714 A.2d at 1183. The trial justice stated that it was the "intention of this Court to give the remaining defendants the full benefit of the joint tortfeasor statute, so called." *Id.*

24. *Id.*

25. *See id.* The trial justice refused the request made by the remaining joint tortfeasors, Dr. Zaki and Consolidated Medical Equipment, Inc., because defense counsel had failed to make their request *prior* to the justice's instructions to the jury. *See id.*

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.*

ANALYSIS AND HOLDING

Uniform Contribution Among Tortfeasors Act

Under Rhode Island General Laws section 10-6-2, Dr. Zaki and St. Joseph Hospital are considered joint tortfeasors.³⁰ The release of the hospital from liability did not subsequently release the liability of Dr. Zaki because the settlement did not expressly state this as a term.³¹ The liability of Dr. Zaki and Consolidated Medical Equipment, Inc. is to be reduced by the amount of consideration paid by the hospital for its release.³² The Rhode Island Supreme Court stated that the failure to instruct the jury regarding this reduction of liability constitutes reversible error.³³

The Shepardsons maintain that the defendants waived their right to such an instruction because they failed to submit their request prior to the trial justice charging the jury.³⁴ The supreme court ruled that there was no merit to this claim citing Rule 51(b) of the Superior Court Rules of Civil Procedure.³⁵ Rule 51(b) states that:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law set forth in the requests. No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating

30. See *id.* (citing R.I. Gen. Laws § 10-6-2 (1956) (1997 Reenactment)); see also *Cooney v. Molis*, 640 A.2d 527, 528 (R.I. 1994) (providing for the right of contribution among joint tortfeasors and the effect of release on liability). Section 10-6-2 states that the term joint tortfeasors means "two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgement has been recovered against all or some of them; provided, however, that a master and servant or principal and agent shall be considered a single tortfeasor." R.I. Gen. Laws § 10-6-2 (1956) (1997 Reenactment).

31. See *id.* (citing *Cooney*, 640 A.2d at 529); see also R.I. Gen. Laws § 10-6-7 (1956) (1997 Reenactment) (stating that the discharge of one tortfeasor does not discharge the other tortfeasors).

32. See *Shepardson*, 714 A.2d at 1183-84; see also R.I. Gen. Laws § 10-6-7 (1956) (1997 Reenactment) (illustrating that the plaintiffs' claim is to be reduced by the amount paid by the tortfeasor in consideration for their release from liability).

33. See *Shepardson*, 714 A.2d at 1184.

34. See *id.*

35. See *id.*

distinctly the matter to which the party objects and the grounds of the party's objection.³⁶

The supreme court ruled that the request made by Dr. Zaki, although preceding the jury instruction, was sufficient to make the trial justice aware that the jury should be instructed on the negligence of the hospital.³⁷ Thus, the failure of the trial justice to instruct the jury on the negligence of the hospital and the terms of the release pursuant to the language of the Uniform Contribution Among Tortfeasors Act was a reversible error.³⁸

Damages

After ordering a new trial, the supreme court decided to address the issue of damages raised by Dr. Zaki.³⁹ Dr. Zaki claimed that he was entitled to a judgment as a matter of law against Billy and his parents. First, Dr. Zaki claimed that Billy was not entitled to recover for the scars on his leg and the future medical expenses necessary for concealing those scars at a later date.⁴⁰ Second, Dr. Zaki claimed that Billy's parents could not recover because the evidence presented did not support an award for loss of society damages.⁴¹ The supreme court ruled against Dr. Zaki on both issues advanced by this section of the appeal.

With regard to Billy's future damages, the plaintiffs presented Howard S. Sturim, M.D.⁴² Dr. Sturim testified that Billy would likely have to undergo six to twelve procedures on his leg to alleviate the scarring effects.⁴³ At trial the defendants vehemently objected to this testimony. The defendants believed that an economist would be a much better witness to testify to the present day value of the procedures, and that Dr. Sturim could not testify with precision as to the value of the future procedures.⁴⁴ The supreme court rejected this argument, stating that the court had never denied a plaintiff entitlement to future medical damages when the value of those future damages was not calculated with

36. *See id.* (citing R.I. Super. Ct. R. Civ. P. 51(b)).

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

"mathematical precision."⁴⁵ Reasonably foreseeable damages have always been awarded in negligence actions.⁴⁶ The supreme court ruled that it was reasonably foreseeable that a three-year-old child such as Billy, who has scarring, would have corrective surgery at some time in the future.⁴⁷ The court was satisfied that the testimony from the doctor was adequate to support an award of future damages to Billy.⁴⁸

Next, Dr. Zaki claimed that Mr. and Mrs. Shepardson had presented no evidence for their claim of loss of consortium.⁴⁹ The supreme court once again disagreed with Dr. Zaki, determining that since the parents had to care for their son's burns, endure the pain they inflicted on him while caring for the burns, and watch their son suffer and inflict the pain, they were entitled to damages for the injuries suffered.⁵⁰

CONCLUSION

The Rhode Island Supreme Court interpreted the Uniform Contribution Among Tortfeasors Act to provide that when a settlement is reached between the plaintiff and a lone tortfeasor, the remaining tortfeasor is entitled to a jury instruction stating that his or her liability is reduced in proportion to the liability released in the settlement agreement. In addition, the court ruled that a trial justice need not receive an actual request for the "liability reducing jury instruction." Thus, it is reversible error if the trial justice does not give the required instruction.

Tyler J. Savage

45. *Id.* (citing *Pescatore v. MacIntosh*, 319 A.2d 21, 26 n.5 (R.I. 1974); *Labree v. Major*, 306 A.2d 808, 819-20 (R.I. 1973)).

46. *See id.*

47. *See id.* Dr. Sturim testified that it would be necessary to perform six to twelve procedures, and that the cost of each of the procedures could be approximated. Although he did not testify as to the exact cost of each procedure, he did state that these numbers could be estimated quite readily. *See id.*

48. *See id.*

49. *See id.* at 1184-85.

50. *See id.*