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Can Defendants Use Plaintiffs' Evidence To Show Fault of Third Parties? The Apportionment of Liability Under Article 16

By Daniel M. Sullivan and Evan H. Stein | April 28, 2020

With respect to the defendant's burden of proof—and what evidence it may use to meet that burden—the question arises: Must the defendant make its own, affirmative showing of non-parties' potential liability? Or can it rely instead on evidence introduced by the plaintiff?

CPLR Article 16, §§1600-1603, was the last major reform of principles of comparative fault in New York law. Statutory and judicial changes in the 1970s eliminated the rigid contributory negligence regime for plaintiffs. What remained, however, was highly problematic. As Justice Dillon of the Appellate Division, Second Department, explained, "defendants found to be at fault for only a minor portion of joint tortfeasors' negligence could still be required to satisfy 100% of the judgments to which plaintiffs were entitled, and subject only to the payors' uncertain right to receive post-payment contribution from other co-tortfeasors." Mark C. Dillon, *The Extrapolation of Defendants' Liabilities Under CPLR Article 16 Where the Plaintiff Is Contributorily Negligent: An Update Toward Resolving a Perceived Ambiguity Of CPLR 1601*, 73.1 Alb. L. Rev. 79, 86 (2009). Article 16 was designed to "nudg[e] the loss allocation pendulum to a middle ground between plaintiffs and defendants," by requiring that, under certain conditions, a defendant responsible for 50% or less of noneconomic damages would be required to pay only his "equitable share" of such damages." Id.

But the precise position of the pendulum is always subject to the push and pull of litigation. According to a burgeoning theory being advanced by the tort plaintiffs' bar, defendants who seek to apportion liability among multiple tortfeasors under CPLR Article 16 cannot, in making the showing required by that rule, rely *at all* on evidence introduced by the plaintiff. Instead, some plaintiffs have argued, a defendant in that scenario must make its own, independent, affirmative showing that others are liable for half or more of the damages. This theory, not yet squarely addressed by the Appellate Divisions or Court of Appeals (but accepted by at least one trial court), would significantly shift the "middle ground" Article 16 was supposed to occupy. Especially in cases where the plaintiff's own proof rests on evidence of liability that is largely general, rather than specific to any particular tortfeasor, the acceptance of this new theory would undermine the protections Article 16 was intended to provide.

Adopted in 1986, Article 16 "sets forth the criteria for the apportionment of liability among multiple tortfeasors." *Siler v. 146 Montague Assocs.*, 228 A.D.2d 33, 38 (2d Dept. 1997). It "modifies the common-law rule of joint and several liability by limiting a joint tortfeasor's liability in certain circumstances" as to a plaintiff's noneconomic damages. *Rangolan v. Cty. of Nassau*, 96 N.Y.2d 42, 46 (2001). Rather than holding a joint tortfeasor "liable for the entire judgment, regardless of its share of culpability," id., Article 16 requires that a defendant pay only its "equitable share" of the plaintiff's noneconomic damages according to its "relative culpability," CPLR §1601(1). Practically speaking, the rule allows a defendant to add non-parties to the verdict form in the hopes that the jury might (if it finds for the plaintiff) apportion some liability to those non-parties.

To obtain the benefit of Article 16, however, the defendant must meet certain requirements. We discuss two here. First, the defendant's liability must ultimately be found to be "fifty percent or less of the total liability assigned to all persons liable." CPLR §1601(1). Otherwise, the traditional rule will apply and the defendant will be on the hook for all of plaintiff's noneconomic losses. Second, the defendant has "the burden of proving by a preponderance of the evidence its equitable share of the total liability." CPRL §1603. (There are several other textual limitations on liability: For example, in seeking to add non-parties to the verdict form, only those parties over whom the plaintiff could have obtained jurisdiction may be considered. CPLR §1601(1). And apportionment will not apply "to actions requiring proof of intent." CPLR §1602(5).)

With respect to the defendant's burden of proof—and what evidence it may use to meet that burden—the question arises: Must the defendant make its own, affirmative showing of non-parties' potential liability? Or can it rely instead on evidence introduced by the plaintiff? That issue was briefed to the First Department in *Corazza v. Amchem Prod., Inc.*, 2019 WL 1387270, at *1 (1st Dept. March 28, 2019), but the court decided the case on different grounds. (Full disclosure: The authors, along with co-counsel, represented defendant-appellant Caterpillar in the *Corazza* appeal.) On post-trial motions below, Supreme Court had held that because evidence of certain non-parties' potential liability had been introduced only by the *plaintiff*, the defendant could not meet its burden under Article 16 to seek apportionment of liability or the addition of those entities to the verdict form. See N.Y. Cty. Sup. Ct. Index No. 190028/14.

That formalistic approach to Article 16, however, has no basis in the statute. CPLR §1601(1) provides that a defendant's liability for non-economic loss "shall not exceed that defendant's equitable share *determined in accordance with the relative culpability* of each person's causing or contributing to" the liability (emphasis added). While the defendant "shall have the burden of proving by a preponderance of the evidence its equitable share," nowhere does the statute limit the evidence to which the defendant may point in meeting that burden. CPLR §1603.

The trial court's decision in *Corazza* appears, thus far, to stand alone. There is division among the Appellate Division departments as to whether a defendant must *plead* Article 16 as an affirmative defense. Compare *Ryan v. Beavers*, 170 A.D.2d 1045 (4th Dept. 1991) (Article 16 is an affirmative defense that must be pleaded), *with Palmatier v. Mr. Heater Corp.*, 159 A.D.3d 1084, 1085 (3d Dept. 2018) ("CPLR article 16 applies automatically, even if a defendant does not plead it as an affirmative defense."), and *Marsala v. Weinraub*, 208 A.D.2d 689 (2d Dept. 1994) (same). But no Appellate Division decision supports the notion that a defendant cannot ultimately rely, in meeting its evidentiary burden, on evidence introduced by the plaintiff. Indeed, it is hard to square the decision in *Corazza* with the Third Department's decision in *Zalinka*, in which it recognized that a defendant "may rely upon any evidence in the record" when making an apportionment argument. *Zalinka v. Owens-Corning Fiberglass*, 221 A.D.2d 830 (3d Dept. 1995).

Common sense dictates the same result. A party typically can employ all the evidence in the record to meet his evidentiary burdens, whether introduced by that party or not. *Gibson, Dunn & Crutcher v. Glob. Nuclear Servs. & Supply*, 280 A.D.2d 360, 361 (1st Dept. 2001) ("The proposition is well settled that the proponent of evidence does not in any sense own or have exclusive title to it, and the court must consider the implications of all the evidence, regardless of its source."); *Aragones v. State*, 247 A.D.2d 657, 658 (3d Dept. 1998). Further, the notion that a party can satisfy an evidentiary burden only through evidence it introduces, and not through evidence—however compelling—introduced by the opposing party, would seem to serve little purpose other than to increase the expense and time of discovery and trials. In addition, as a policy matter, "Article 16 was intended to remedy the inequities created by joint and several liability on low-fault, 'deep-pocket' defendants." *Rangolan*, 96 N.Y.2d at 46; see also Siegel, N.Y. Prac. §168A (6th ed.) (recognizing the "injustice" of the traditional, pre-Article 16 rule); Dillon, 73.1 Alb. L. Rev. at 86 ("The purpose and intent of CPLR Article 16 was to reign in unjust circumstances where 'minor' deep-pocket defendants were required to satisfy entire judgments, including the portions of those judgments attributable to the fault of 'major' codefendants."). That sound legislative policy should not be subverted by technicalities such as who introduced what evidence. See *Morales v. Cty. of Nassau*, 94 N.Y.2d 218, 225 (1999) (describing the "careful balance struck by the Legislature" in Article 16).

The arguments in favor of our interpretation of Article 16 are even more compelling where a plaintiff has relied exclusively on general evidence—i.e., evidence that shows a broad range of defendants, as opposed to any particular defendant, could potentially be liable—in making his case. For instance, the plaintiff in *Corazza* introduced evidence tending to show that as many as seven entities, including Caterpillar, could have been responsible for the decedent's injuries. We argued (and the First Department agreed) that this general evidence failed to show specific causation of injuries by Caterpillar. See 2019 WL 1387270, at *1. However, *if* that evidence *had been* sufficient to show liability against Caterpillar, *then* it must logically *also have been* sufficient to show liability against the six other entities, to whom the same evidence applied equally. A plaintiff who builds a case upon general evidence must be prepared to accept the risk that such evidence exculpates a defendant from half or more of the liability.

Of course, in cases where even general evidence tends to show that the defendant is particularly responsible for a plaintiff's injuries—such that a jury finds it more than 50% liable—Article 16 already protects the plaintiff's right to full recovery from that defendant. But where multiple entities are equally implicated by

general evidence, such that each is less than 50% liable, Article 16—as well as the important public policy goal it vindicates—requires apportionment.

Properly construed, Article 16 allows a defendant to use any evidence in the record to satisfy its burden. And the many explicit restrictions on apportionment contained in Article 16's text—it applies to only noneconomic damages, the defendant must be less than 50% liable, the action must not involve allegations of intent, and the plaintiff must have been able to obtain jurisdiction over the non-party added to the verdict form, among others—counsel against further limiting (on a non-textual basis) defendants' ability to seek apportionment under the rule. See *Morales*, 94 N.Y.2d at 224 ("Relying on the standard canon of construction of *expressio unius est exclusio alterius* … the expression of these exemptions in [Article 16] indicates an exclusion of others."). If and when the issue is addressed by New York's appellate courts, we believe they are likely to so hold.

Daniel M. Sullivan *is a partner at Holwell Shuster & Goldberg, where he focuses his practice on complex commercial litigation, appeals and transnational litigation.*

Evan H. Stein, *an associate at the firm, has a broad-based commercial litigation practice, drawing on his extensive exposure to both trial and appellate matters in federal courts*