

# CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG

## Alternative Dispute Resolution

❖ Resolution Arts Building ❖

2630 J Street, Sacramento, CA 95816

ph: (916) 442-6739 • fx: (916) 442-4107

elong@ernestalongadr.com • www.ernestalongadr.com

### *Bayer-Bel v Litovsky (01/25/08)*

#### **Proposition 51; Allocation of Economic and Noneconomic Damages**

Sixteen year old defendant Litovsky and her friend cut class and met co-defendants Mosley and Green. Mosley drove the foursome to a party. Litovsky realized people were drinking and taking drugs and asked to be returned to school. Mosley refused because he had been drinking and gave the keys to Green, but he too had been drinking and declined. Eventually Litovsky's friend drove Litovsky, and Green accompanied them.

Upon arriving at school, Litovsky's friend exited, but Green asked Litovsky to drive him back to the party and she agreed. Litovsky did not have a driver's license or a learner's permit. On the way, Litovsky drove on the wrong side of the street, striking the plaintiff head-on. Plaintiff then sued Litovsky, Mosley and Green.

At trial, the jury allocated fault (60% to plaintiff for not wearing her seatbelt and of the remaining 40%, assessed 40% against Litovsky, 20% to Mosley and 20% to Green) and awarded damages to plaintiff (\$39,000 for past and present medical expenses and wage loss, plus \$ 150,000 for noneconomic damages). The trial court then refused to apply Proposition 51 (Civil Code section 1431.2(a)), and entered a judgment making Litovsky, Mosley and Green all jointly and severally liable for the entire amount of the judgment (\$75,600).

Litovsky appealed on the basis her liability on the noneconomic damages was several, and limited to her proportionate share.

Section 1431(a) provides:

In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

Noneconomic damages are allocated to each defendant in direct proportion to that defendant's percentage of fault. (Marina v Emergency Medical Group v Superior Court (2000) 84 Cal.App.4<sup>th</sup> 435; Espinoza v Machanga (1992) 9 Cal.App.4<sup>th</sup> 268.)

Two of the defendants, Litovsky and Green, were independently acting tortfeasors who have some fault to compare. Green, as Mosley's permissive user, negligently entrusted the vehicle to an unlicensed minor, leading to the collision. Green and Litovsky cannot be jointly liable. Mosley, on the other hand, is liable only by reason of a non-delegable duty as a vehicle owner. His liability is secondary (vicarious) to that of the actor and he is not entitled to the benefits of Proposition 51.

Here, two of the independently acting defendants' liability is primary, Litovsky because she was negligently driving the car and Green because he negligently entrusted the car to an unlicensed driver. It follows that Litovsky's liability for plaintiff's noneconomic damages is several, and not joint, and she is liable only for the amount of noneconomic damages allocated to her by the jury.

The judgment is reversed as to Litovsky and the trial court is ordered to enter a new judgment in which she is jointly and severally liable for plaintiff's economic damages, but severally liable for only 40% of the 40% of plaintiff's noneconomic damages.