

The Turbulent Teen Years of Apportionment in Civil Cases
Daniel Webster-Batchelder American Inn of Court—Table 2
Game Show Questions

- 1.) You have been retained as conflict counsel in a particularly difficult medical malpractice case—the hospital, which you have represented many times before, has separate counsel, but has retained you to represent its emergency room physician. The ER doctor is adamant that the hospital’s nursing staff was “grossly negligent” in their care and treatment of the patient, and that a.) he was not negligent in any way, and b.) even if he was, the negligence of the nursing staff presents a very strong superseding cause defense. You have completed your investigation, and it appears your client is correct—the nursing staff’s negligence should serve as a total defense to the action. Your DeBenedetto disclosure deadline is tomorrow, and you need to decide whether to
 - a. Obtain informed consent confirmed in writing from the Hospital to name them as a DeBenedetto defendant;
 - b. Obtain informed consent confirmed in writing from your client to *not* disclose the Hospital as a DeBenedetto defendant;
 - c. Name “all other parties, named and unnamed, who may have caused or contributed to the Plaintiff’s injuries” as DeBenedetto defendants; or
 - d. Call opposing counsel to obtain an extension of the DeBenedetto disclosure deadline while you help your client find replacement counsel.

- 2.) You have been hired as replacement counsel in a commercial case—your client was party to an airtight noncompete with a former business partner, which she entered as part of a nasty business divorce. Your client was solicited by several very suave salesmen from competing firms, and promptly entered into unwritten consulting agreements with 3 of the business partner’s biggest competitors. Two of these competitors have each made several million dollars in the past year by capitalizing on the business partner’s trade secrets. The third competitor recently declared bankruptcy, before they could commercialize the ill-gotten trade secrets. As a result of the actions of the two most successful competitors, the former business partner has lost most of its market share in a very hot new product market. The former business partner did not name any of the competitors in the lawsuit, which consists of only one count: breach of contract (the noncompete agreement). You should do the following to make sure your client is best protected, financially speaking:
 - a. Disclose the most culpable of the competitors as DeBenedetto parties, and seek to have a jury apportion damages to them on the verdict form;
 - b. Disclose all of the competitors as DeBenedetto parties, and seek to have the jury apportion fault to all of them on the verdict form;
 - c. Amend your answer to assert a failure to mitigate damages claim against the former business partner on account of their not naming the competitors; or
 - d. Advise your client to engage bankruptcy counsel.

- 3.) You are working as a 2nd-year associate in a large Manchester firm. A notoriously surly partner of a certain age calls you on Friday afternoon and tells you “The DeBenedetto disclosures are due on Monday in an aviation crash case I am defending. The plaintiffs are the surviving family members of the 8 people who died when the dumb shit pilot flew a helicopter into the side of a mountain in the middle of a snowstorm. Their knuckle-dragging lawyer is trying to blame the whole thing on a computer glitch instead of the pilot. I need to disclose the pilot and his employer as DeBenedetto defendants on Monday. Just grab a form disclosure from the doc management system and slap the pilot’s name on it. I don’t want this to be more than 2 sentences long—we can’t tip our hand too much this early in the case!” You should spend your weekend:
- Playing Frisbee golf after you take 20 minutes to modify a form disclosure that says that “On all relevant dates the aforementioned [NAME OF PARTY] did cause or contribute to the injuries complained of by the Plaintiff and as such should be apportioned fault on the jury verdict form in this matter pursuant to *Nilsson v. Bierman*.”
 - Combing through the discovery material you have so far to understand the case so you can provide a couple of paragraphs of allegations to explain what the pilot or his employer knew about the weather conditions, the terrain, the way the helicopter was stored and maintained, and the pilot’s training and experience, all to explain the standard of care and how the pilot and employer breached it.
 - Calling opposing counsel to see if you can extend the DeBenedetto deadline until after your expert disclosure.
 - Polishing up your curriculum vitae while you dream of owning a helicopter like all the bigshot plaintiffs’ lawyers.
- 4.) You are defending a winter slip and fall where the plaintiff alleges that she tripped over a curbstop that was obscured from view because of a fresh 4” coat of snow. You are defending the company that owns the parking lot. The curbstop was designed and installed by BigCo., a large excavation contractor in the area. The curbstop was 2 inches too low to comply with code, was not painted in the manner it should have been, and had been bumped out of place by the careless plow truck driver (who had slept in, again, after a night of drinking on the day of the accident, and so had failed to clear the lot of snow by 10:00am when the accident occurred). You need to decide on a DeBenedetto strategy. Should you:
- Name the Plow Truck Driver;
 - Name the Construction Company;
 - Name both the Plow Truck Driver and Construction Company; or
 - Argue the fault of both the plow truck driver and construction company without expressly seeking to apportion fault to either of them?
- 5.) You are defending a very complex tax malpractice case for a Certified Public Accountant—he has been sued by some very wealthy former clients after a gruesome audit where the IRS invalidated an indefensible tax shelter and issued several million

dollars of penalties. The former clients are represented by a prominent plaintiffs firm; that same firm provided a significant amount of advice in the course of setting up the tax shelter at issue, while the CPA just filed the returns taking the position that the shelter was valid. What is the best way to protect your client (the CPA's) interest in this matter?

- a. Hire an independent attorney to determine if the law firm's advice fell below the standard of care, and caused the damages at issue?
 - b. Name opposing counsel on the DeBenedetto disclosure in hopes that it will scare them away from the case?
 - c. Name opposing counsel on the DeBenedetto disclosure because it is common sense that the lawyers who advised on a tax shelter that ended up being invalidated have acted negligently?
 - d. File a grievance with the Attorney Discipline Office because your opponent has committed a grave ethical lapse by representing the former client despite their obvious exposure?
- 6.) You are representing one of the three hospitals who have been named in a very high-stakes medical malpractice claim involving a failure to appreciate a dissecting aortic aneurysm. The plaintiff was in a snowmobile crash in Northern New Hampshire, and a chest x-ray was performed (showing a broken sternum and a punctured lung) at the small regional hospital where he went first. They shipped him to your client, the large teaching hospital 3 hours south, where a further chest x-ray confirmed these findings. There, the patient receives a call from his wife, who is a well-known lawyer. She insists that he be medflighted to Boston for any surgery. The patient makes it through the flight without any change in condition, and further x-rays at the large Boston Hospital confirm the nature and scope of his injuries. He dies 15 minutes later while they are prepping him for surgery, due to a previously undetected aneurysm.

Initially, all of the hospitals worked together to defend the lawsuit, on the theory that the radiology studies did not clearly show any AAA, and that the care provided was all within the standard of care. None of the defense experts point fingers at each other. The DeBenedetto deadline has passed many months ago, and now you are on the verge of trial. The night before opening, both of your codefendants settle out without consulting you, and the plaintiff's lawyer calls to tell you that they intend to move forward at trial with your client, because it was the most culpable of the three defendants.

What should your strategy be regarding apportionment?

- a. Immediately file a motion to amend your DeBenedetto disclosure to name the settling defendants?
- b. Immediately file a motion to continue the trial, so that you can make updated expert disclosures and make any necessary DeBenedetto disclosures in light of the unanticipated settlement of the other defendants' claims?

- c. Argue that the “catch-all” language in the form DeBenedetto disclosure that you provided at the deadline is sufficiently specific to cover the settling defendants?
 - d. Argue to the jury that plaintiffs’ own expert accused the other two hospitals of negligence, and hope that any verdict will be reduced significantly by the amount of the codefendants’ settlement payments?
- 7.) You are a first-year associate at a high-volume plaintiffs’ personal injury firm. You have just been given your very first case to handle on your own. Your client was a pedestrian, and he was struck by a motor vehicle after that vehicle was involved in a 4-car accident and was sent careening through a red light and into the crosswalk. Your client suffered two fractured femurs, soft tissue injury, and a closed head injury. He required many surgeries to be able to walk again and has permanent cognitive impairments. You diligently file suit 30 months after the accident, and are getting ready to negotiate the case structuring order with opposing counsel, a grizzled veteran of the insurance defense bar. You initially propose a DeBenedetto deadline that is 90 days out. Defense counsel explodes in rage, asking how he can possibly be expected to make a DeBenedetto disclosure so far in advance of his expert disclosure deadline. What should you do in response?
- a. Insist on your original deadline to show opposing counsel that you are tough and cannot be intimidated;
 - b. Negotiate a DeBenedetto deadline no later than 120 days out from your filing date;
 - c. Negotiate a DeBenedetto deadline that is as late as defense counsel needs it to be so long as he agrees that you can amend your expert disclosure to contend with any DeBenedetto allegations; or
 - d. Go along with defense counsel on this relatively minor point and keep your powder dry for more important disputes.