Scribbles Squibs[1] # 72 (March 18, 2019)

"GENERAL CONTRACTOR LIABILITY FOR JOBSITE ACCIDENTS INVOLVING CLAIMED NEGLIGENT SUPERVISION"[2]

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I. INTRODUCTION

This Squib deals with a very difficult issue: a general contractor's liability for claimed negligent supervision claims as brought by a subcontractor's injured employees. It's a difficult issue because, as we will see, a general contractor can have the same share of liability for a plaintiff's awarded damages as have other defendants, even where the general contractor's causation of the harm is as little as only 1% of the total causation of the harm and the percentage of liability for other defendants is significantly larger.

We'll discuss two recent cases dealing with this subject matter, which were reported on in the Massachusetts lawyers' newspaper, MASSACHUSETTS LAWYERS WEEKLY.

It should be noted that the money paid by the general contractor in each case was paid as a *settlement* and not as the result of a jury verdict.

II. CASE ONE

This case lacks an identification of the parties, and of what court the case was brought in, and of in which county the action was brought and the name of the Defendant's attorney.

This is because plaintiffs' attorneys want to get their case verdicts publicized in MASSACHUSETTS LAWYERS WEEKLY, the only statewide lawyers' newspaper. And, possibly out of some concern for embarrassing defendant lawyers, all of this information, including who the defendants' lawyer was, is not given. I have often wondered if the real reason for this is that a plaintiff/plaintiff's counsel, who may have done *very* well in either a settlement or in a trial, doesn't want to risk an appeal, which might be motivated, even if only in a minor way, because the attorney for the defendant was embarrassed publicly by the other side. There was no trial in either of these two cases. There could have been some kind of confidentiality agreement in one or both cases, which precluded a greater identification of who the parties are, etc. Another possible reason for the lack of this information is that the plaintiff's attorney may have or will have other cases with the defendant's attorney in the future, the conduct of which could be negatively affected by the defendant's attorney's sensibilities being offended with regard to the current case.

The facts of the case, however, are given.

A fairly inexperienced roofer was working at a renovation of a mill project in central Massachusetts. He was not tied off while working at the edge of the building. He fell forty feet and suffered an aortic injury and a variety of different fractures.

The project manager for the general contractor admitted in his deposition that on several occasions, he had observed the roofing subcontractor violating various OSHA regulations. But, the superintendent had not taken any action to correct that situation.

The general contractor and the subcontractor had been on similar projects together previously and each had been cited on one occasion by OSHA for failing to have fall protection.

The general contractor, most likely at least partially paid through its insurer, settled this case with a payment to the plaintiff of $5,350,000.[3]

III. CASE TWO

This case also lacks the form of identification of the parties, the court, the county, the name of the Defendant's attorney, quite likely for some of the reasons as stated above.

A construction laborer began working at the defendant's property in Norwell. This individual – the plaintiff in this case - was working on the roof of the property without fall prevention equipment. Working with another worker, they were taking measurements of the trim to be installed when the plaintiff lost his step and fell about 15 to 17 feet. As a result of that fall, he suffered wrist fractures, an ACL tear and facial lacerations, which injuries required multiple surgeries.

The property was owned by the defendant and his wife. The defendant was the only licensed construction supervisor and, in actuality, was the general contractor at the site. The defendant had prepared a written contract with the plaintiff's employer which explicitly required that during roof trimming work, anchors were to be secured and connected to full body vests worn by the workers.

The defendant was present on site on the day of the fall and had allegedly seen the plaintiff working without fall protection for four preceding work days but had said nothing.

The plaintiff's position was that the defendant, as the supervisor and general contractor, failed to maintain safety precautions, including ensuring that onsite workers were using proper fall protection and safety equipment.

Defendant's counsel's position was that the plaintiff's comparative negligence (more on this follows) would result in a defense verdict. Also, where the plaintiff had prior experience in construction work and with the use of fall protection equipment, the argument was made that it was up to the plaintiff to inquire about access to such equipment at the job site.

Notwithstanding defense counsel's expressed reservations, this case was settled for $600,000.

IV. COMPARATIVE NEGLIGENCE/CONTRIBUTION/INDEMNITY/PRO RATA SHARES

In looking at a general contractor's potential for liability for claimed faulty supervision, a very brief understanding of these topics is necessary. I know the title makes this look complicated. And, it *is* complicated if one gets into the very particulars. However, after setting forth three relevant statutory sections governing this area of the law,[4] I'll very broadly summarize what they mean. And, the basic ideas are not too complicated.

Here are the three statutes:

1. M.G.L.A. 231 § 85. Comparative negligence; limited effect of contributory negligence as defense

> "Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made. In determining by what amount the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought. The combined total of the plaintiff's negligence taken together with all of the negligence of all defendants shall equal one hundred per cent."

2. M.G.L.A. 231B § 1. Right of contribution; subrogation

> "(a) Except as otherwise provided in this chapter, where two or more persons become jointly liable in tort for the same injury to person or property, there shall be a right of contribution among them even though judgment has not been recovered against all or any of them.
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> (b) The right of contribution shall exist only in favor of a joint tortfeasor, hereinafter called tortfeasor, who has paid more than his pro rata share of the common liability, and his total recovery shall be limited to the amount paid by him in excess of his pro rata share. No tortfeasor shall be compelled to make contribution beyond his own pro rata share of the entire liability.
>
> **(c) A tortfeasor who enters into a settlement with a claimant shall not be entitled to recover contribution from another tortfeasor in respect to any amount paid in a settlement which is in excess of what was reasonable.**
>
> (d) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, shall be subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision shall not limit or impair any right of subrogation arising from any other relationship.

(e) **This chapter shall not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee shall be for indemnity and not contribution, and the indemnity obligor shall not be entitled to contribution from the obligee for any portion of his indemnity obligation."** (Emphasis added)

3. M.G.L.A. 231B § 2. Pro rata shares of tortfeasors in entire liability; determination

"In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered; (b) if equity requires, the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply." (Emphasis added)

In Zeller v. Cantu, 395 Mass. 764, 78 N.E.2d 930 (1985) the Supreme Judicial Court said, in this regard:

"Thus, neither the language of G.L. c. 231, § 85, its interpretation by our courts, nor the decisions of other jurisdictions regarding the impact of comparative negligence on § 2 of the Uniform Contribution Among Tortfeasors Act support Cantu's argument for implied repeal. We are sympathetic to the proposition that where joint tortfeasors bear different degrees of responsibility for a plaintiff's injuries, it is more equitable to apportion their liability on the basis of comparative fault. However, it is the Legislature's prerogative to make such a change in our law, not ours. We therefore agree with the judge below that G.L. c. 231B, § 2, bars any consideration of the relative fault of a codefendant in assessing his or her pro rata share of the damages."

What does all of this mean?

'Comparative negligence' is how the Massachusetts legal system determines liability for negligence. I'll provide a kind of *possible* philosophical underpinning for what this law is, largely drawn by myself through inferences, and which is my supposition only.

On the one hand, the civil justice system[5] wants to try to make sure that those who are injured in some form of accident get compensated. But, on the other hand, Massachusetts, as a governmental entity, wants to make sure that wherever possible, injured persons don't unnecessarily become a burden on the state in terms of requiring state benefits, housing, medical care, welfare, etc.

Other laws show a similar (sort of) balancing of interests, which directly benefit the party claiming the benefit who might otherwise become a burden on the state.

One of the best governmental benefit 'buys' one can obtain is that for the munificent sum of $35.00, one can declare a homestead on a home that person resides in and owns and get debt protection against creditors for up to $500,000.[6] Except for higher end homes and/or homes in higher end communities, when one adds to this amount the amount of an outstanding mortgage balance, both figures come ahead of a judgment creditor trying to collect a judgment against the debtor. As such, a great many debts will not be collectible against the debtor's home which, in

the absence of a declaration homestead, might be the case. For most of us, our homes are the largest single asset we have.

The state's interests? Sure, creditors should be able to collect on debts owed to them. But, on the other hand, if one has to balance that right against the possibility of the state's having to put people up in housing financed by the state, the state figures its own interests come first, ahead of possible creditors.[7]

Our comparative negligence system favors the rights of claimants as compared with the rights of defendants. And, this is because Massachusetts does not have '*comparative* comparative negligence'. Under a usual comparative negligence system, a defendant would only be liable for damages to the extent of its contribution to the incident causing the harm. The Massachusetts system doesn't make any attempt to determine the degree of causation of the harm by any one defendant. Rather, each defendant gets a *pro rata* share of the liability to the plaintiff. After all, having defendants liable for more than their actual contribution to the injury improves a plaintiff's chances of recovering damages. My own thought is that one of the possible reasons explaining this anomaly in comparative negligence is that to the extent an injured party receives compensation from someone else, there is less of a likelihood of that party's turning to the state for assistance.

This is how the Massachusetts system works. Under the Massachusetts system – absent issues of contribution and indemnity, described more fully later – presumably, in a case with two defendants, each defendant would be liable for 50% of the damages the plaintiff recovers irrespective of either party's degree of fault causing the harm. Is this fair to the defendant contributing only 2% to the harm to have to pay 50% of the damages to the plaintiff? Hardly. But, it is what it is.

Now a jury will determine the degree of negligence on the part of the plaintiff in causing his/her own injury.

It used to be that 'contributory negligence' or 'assumption of the risk' on the part of the plaintiff would preclude a plaintiff's being able to recover any damages. Comparative negligence changes that. As long as the plaintiff is not more than 50% liable in negligence for his/her own injury, s/he will be able to recover damages. But, the amount of the recovery will be reduced by the percentage of negligence on the part of the plaintiff.

So, let's assume that a jury awards a plaintiff two million dollars in damages. And, let's assume that the jury finds that the plaintiff was 50% negligent in causing his injury. In that situation, the most the plaintiff would recover is one million dollars.

If, however, the plaintiff is found to be 51% (or more) liable for contributing to his injury, then s/he will be entitled to no recovery in negligence whatsoever.

The comments in the *Zeller* case, above, address this ostensibly unfair anomaly as contained within Massachusetts law.

Negligence claims do not depend on an underlying contract. They are obligations imposed as a matter of law. Such claims are '*torts*', which are also called 'civil wrongs'. Keep in mind the highlighted language in the second referenced statute above that nothing that is said with regard to comparative negligence limits a party's right to provide for and seek indemnity from appropriate parties, which indemnity may be in excess of the *pro rata* share a general contractor may owe to the subcontractor's employee.

'Contribution' is a tort concept. As per the second referenced statute above, should one defendant have to pay the plaintiff in excess of its pro rata share, it can (try to) recover from other defendant(s) the amount in excess of the pro rata share. However, through contribution, the only thing that can be recovered is the *excess* above the pro rata share and not any portion of the pro rata share itself.

'Indemnity', on the other hand, is a *contractual* concept, being something that the parties to a contract agree to. The indemnity paragraph is one of the most important paragraphs in any contract and is the subject of a great deal of litigation and appeals. Through indemnity, the party seeking to be indemnified might be entitled to recover everything it had to pay to the plaintiff, even its attorneys' fees in defending itself, to resolve its *tort* liability. So, while a defendant has to pay to the plaintiff subcontractor employee its *pro rata* share of damages based on the law of negligence, if there is a contract between the general contractor and the subcontractor with a good indemnity clause, the general contractor might be entitled to recover whatever damages it sustains as a matter of contract.

So, the obligations a defendant might owe a plaintiff based in tort might be changed, when all is said and done, because of an applicable indemnification provision, which might result in that defendant's coming out of the matter having paid less than its *pro rata* share.

V. HOW LIKELY IS IT THAT A GENERAL CONTRACTOR IS GOING TO BE HELD LIABLE FOR DAMAGES BASED ON A CLAIMED SAFETY DEFECT/NEGLIGENT SUPERVISION IT SHOULD HAVE PREVENTED/BETTER HANDLED, WHICH IS CLAIMED TO HAVE CONTRIBUTED TO A PLAINTIFF'S GETTING INJURED?

Based on the foregoing analysis, it seems unlikely to me that a general contractor will *ever* be able to escape being held at least 1% liable for any kind of jobsite accident involving safety and supervision issues. And, that is all that seems to be necessary to have that general contractor be liable for its *pro rata* (equal to the shares owed by other defendants) share of all the damages.

And, the principal reason for this is that the general contractor owns (as to owner) the work of and responsibility for the entire project. Almost without exception, whether intended by the general contractor or not, a general contractor supervises all of the work of the project and

its supervisor is charged with administering the entire construction, which will necessarily involve making sure that basic safety mechanisms are in place for the protection of the workers on site, including, but not limited to, any fall protection mechanisms contained within or required by OSHA regulations.

As to the plaintiff, it is meaningless for a general contractor to have within its subcontracts language stating that: (a) it will be providing no supervision of the subcontractor's work whatsoever; and/or (b) the subcontractor is exclusively responsible for the safety of its own employees.

Such provisions are useless – as to any particular plaintiff – because no injured worker is a party to such provisions because that worker never signed the contract containing them. They neither even saw such provisions nor agreed to be bound by them. And, as discussed above, the obligations with regard to negligence claims aren't dependent in any way on a contract. They are imposed by operation of tort law, which, in Massachusetts, favors claimants over defendants because of the lack of considering a defendant's actual participation in the causing of the harm that led to the incident in which the plaintiff was injured.

Here's a key thing to keep in mind. Once a subcontractor's employee has received workmens' compensation benefits from his/her employer, as a matter of law, that employee has no further *direct* rights to sue his/her employer for damages associated with the industrial accident.

That employee and his/her counsel will be very aware of the fact that the subcontractor may have significant insurance potentially available to cover property damage and personal injury claims, probably in amounts well in excess of the amounts that the employee has previously received through workmens' compensation. But, that employee has no way to directly proceed against that insurance.

However, if a general contractor has strong and comprehensive indemnity provisions in its subcontract with the injured employee's employer, for all intents and purposes, this allows that employee to proceed against such subcontractor insurance *indirectly* through making claims against the general contractor that the subcontractor will have to indemnify the general contractor for.

VI. SOME IDEAS AS TO HOW GENERAL CONTRACTORS CAN PROTECT THEMSELVES AS TO NEGLIGENCE CLAIMS

No one has ever said that life is fair. And, general contractors have to be concerned with claims from all directions, including claims originating through subcontractors and claims originating through owners. Traditional military logic is that it is a great mistake for anyone to fight a war on multiple fronts. But, on a daily basis, that is what a general contractor may potentially have to deal with.

Here, then, are some ideas as to how a general contractor might protect itself, in whole or in part:

1. First, it is important that a general contractor and its lawyer understand the legal issues involved with potential accidents, including an obligation to properly supervise the work, and, of course, familiarity with contribution and indemnity obligations only briefly described above.

2. This includes understanding the mechanisms involved with contribution and a right for reimbursement if a defendant is forced to pay more than its 'pro rata share'.

Applying these principles sometimes seems to be almost an art form. As stated above in the discussion of statutory sections, should one party settle its liability with a plaintiff in excess of what its reasonable *pro rata* share *should* have been, it can't recover that excess from the other defendants. How, then, can a defendant unilaterally attempt to determine what its *pro rata* share *should* be when that defendant is the only party settling the plaintiff's claim against it at that time and the amount of damages the plaintiff will ultimately receive has yet to be determined?

On the other hand, should a defendant settle with a plaintiff for an amount which, ultimately, is significantly lower than what its *pro rata* share would have been had the matter progressed to judgment, the other defendants potentially could attempt to challenge/set aside that settlement, at least with regard to that's being the *pro rata* share the settling defendant *should* have paid.

3. Have an *extremely* comprehensive indemnity provision in your subcontracts.

Here are some ideas to be considered:

Such a provision should probably include language to hold harmless, defend and indemnify the general contractor as to claims made against the general contractor by third parties/injured employees based on the acts and omissions of the subcontractor. This language might include a provision that the subcontractor owes indemnity to the general contractor, providing that the general contractor is not *solely* liable with regard to the causation of the plaintiff's injury.[8]

In addition, your indemnity provision - and, for that matter, several other contract provisions - should specifically provide that your company is entitled to be reimbursed for its attorneys' fees/court costs as to your company's efforts to protect its interests with regard to its contract rights.

Ordinarily, in Massachusetts litigation, absent such provisions, each side has to pay its own legal and court fees and expenses, even when it wins the case.

4. Of course, you will want your company listed as an additional named insured on all of your subcontractors' insurance certificates. In most cases, a general contractor will want the owner and design professional(s) to also be so listed.

And, the indemnity provision needs to be clear that notwithstanding the general contractor's having its own insurances, with regard to the subcontractor's obligation to indemnify, the subcontractor's insurance will be seen as primary and exclusive with the general contractor's insurance being non-contributory.

5. Strongly reinforce with your supervisors/project managers their obligations to review safety issues and concerns at the job on a daily basis. This may include taking frequent pictures and videos of safety mechanisms in place on the job. As the Coach from Foxboro would say, make sure that your superintendents/project managers know that they should 'do their job', which includes making the job as safe as is possible, this being a big part of their job.

6. Conduct periodic safety meetings on site and produce comprehensive minutes.

7. Make sure your subcontracts have extensive language concerning safety and safety procedures that the general contractor requires of all subcontractors. Part and parcel of this might be your developing an extensive safety manual which is incorporated into your subcontracts for all of your projects.

8. Discuss with your insurance agent the appropriate insurances your subcontractors should have, including, without limitation, contractual liability insurance and umbrella coverages. Generally speaking, a subcontractor should have, at minimum, at least the same insurance requirements that the general contractor has to have as to the owner. It goes without saying that no subcontractor should ever be allowed to work on site until it has provided you with the appropriate certificate of insurance.

9. In all likelihood, the subcontractor's employee's case will settle prior to the conducting of a complete trial. Particularly when your company settles its own liability separately and before other defendants have settled out, consider whether or not the damages you agree to pay are consistent with what a fair *pro rata* share might be of the entire damage award the plaintiff will receive against all defendants. This becomes complicated when both the claimant and the general contractor see the general contractor's involvement with the injury to be very minor, thus settling with a sum that may not be consistent with what ultimately the damages will be found to be against other defendants. This can become, ultimately, at least partially academic when you have strong indemnity language in your subcontracts.

10. Of course, it goes without saying that a general contractor should have significant insurances of its own, based on the advices of its insurance adviser.

Real estate developers talk about building projects with "other peoples' money". A general contractor's potential share of damages in a negligence case should also be paid with other peoples' money, those other people being insurance companies and subcontractors.

11. Be sure that whoever advises you as to what should be in a subcontract is a true contracts attorney and that this work is something that such an attorney does on a regular basis.

VII. CONCLUSION

If a case were to go all the way through trial and verdict, it will be, at best, a difficult proposition for a general contractor to avoid having some percentage of fault attributed to it when there is claimed negligence involving safety and supervision issues.

It is what it is.

Massachusetts is very tough on insurance companies. To the extent that the drafters of the Massachusetts comparative negligence statute even considered the issue, there probably was an assumption that, ultimately, an insurance company - and not the general contractor itself - would be paying the damages that an injured subcontractor employee recovers after trial or in a settlement before trial.

If a general contractor first understands its potential exposures and options, through careful contract drafting, including consideration of some of the ideas stated above, that general contractor can, in all likelihood, reduce the net effects of its being a target in a negligence case brought by an injured subcontractor's employee.

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[1] A s*quib* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines *squib* as "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

[2]For an earlier Squib on related topics, see Scribbles Squibs #30 (October17, 2014) LIABILITY FOR JOB SITE ACCIDENTS: PART ONE –SOME OF THE BASICS AND THE ISSUE OF RETAINED CONTROL

[3] That's a lot of money! Here's an interesting idea. This employee is listed as only injured. In other words, he was still alive. It is widely believed among lawyers doing this type of work that injuries to an injured worker have a greater damage value than cases in which the plaintiff died and the plaintiff is the deceased worker's estate (family). That seems counter-intuitive. After all, isn't death the ultimate damage one can sustain? How could anything be worse than death? But, juries seem to give dead plaintiffs' estates less money - sometimes, a lot less money - than they would have given that very same injured worker had s/he survived. It is believed that the reason for this is that for a plaintiff who is still alive, the jury wants to make sure s/he is taken care of and fairly-compensated. If and when that same individual dies, however, the only beneficiaries of a wrongful death action are what could be seen as the 'greedy relatives' and, sometimes, the jury responds to such claims accordingly. The thinking seems to be: "Why should we make these people rich? They didn't suffer any injury or harm. They simply have their hands out seeing how much they can profit from their dead relative's injury and death."

[4]I try to not get too legal in writing these Squibs. But, this subject matter is almost exclusively statutory and a general understanding of applicable statutes is necessary to both understand potential general contractor liability for negligent supervision cases and how general contractors can at least partially protect themselves.

[5]Widely considered by many, including some of its practitioners, to be an oxymoron.

[6]Without having to declare a homestead as an affirmative act, by statute, all homeowners have a homestead in their homes in the amount of $125,000. This is a fairly recent change in Massachusetts law.

[7]As they say, much as with the making of sausages, one doesn't want to look too closely into the process of how laws are made. Seriously, though, if you do not have a homestead on your home, discuss this forthwith with your legal advisor! S/he is likely to advise you to drop whatever you are presently doing and file a homestead declaration *today*.

[8] I recently read a contract that had such a provision. More usually, the obligation to indemnify reads that it will indemnify the general contractor even where the general contractor was partially at fault in creating the harm.