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The Ohio Supreme Court's Expansion Of The Same Juror Rule – And Other Issues To Remember When It Comes To Jury Interrogatories

by Brenda M. Johnson

Under the "same juror" rule, only those jurors who find a defendant negligent may participate in determining whether the defendant's actions were a proximate cause of injury. In 1991, in the case of *O'Connell v. Chesapeake & Ohio R. Co.*,[1] the Ohio Supreme Court held that this rule applies in cases involving claims of comparative negligence. Subsequent opinions from the courts of appeals limited *O'Connell* to the issue of allocation of fault between parties. However, in *Hild v. Samaritan Health Partners*,[2] decided on September 5, 2024, the Ohio Supreme Court held that the "same juror" rule applies to questions of negligence and proximate cause as well, in *all* negligence cases.

This means we must ensure that jury interrogatories on these issues comport with *Hild's* requirements, and must include instructions that inform the jurors that the *only* jurors who can sign an interrogatory as to whether a party's conduct was a proximate cause of injury are those who found that the standard of care was breached by that party in the first instance. Then, as *O'Connell* already required, if there is an apportionment issue in your case, it is imperative that you ensure that apportionment interrogatories contain an instruction that informs the jury that only those jurors who found liability on the part of all those among whom liability is to be apportioned can sign the interrogatory that apportions fault.

These are not, however, the only issues of which we need to be vigilant when it comes to jury interrogatories and the instructions that accompany them. When it comes to assessing damages in cases where comparative fault is an issue, jurors can sometimes become confused as to how they should calculate damages, which is exactly what occurred in *Cook v. M-F Transport, Inc.*,[3] a case which our firm recently tried. As discussed in more detail below, the jurors in that case mistakenly took it upon themselves to reduce the amount of damages by the percentage of fault they had attributed to the plaintiff – a fact that did not become known to the court or the parties until after the jury was formally discharged. An instruction might have precluded the jury from having done so. Also, in cases where there is a fact question as to whether your client's injuries support an exception to the noneconomic damage caps in R.C. § 2315.18 and R.C. § 2323.43, it is imperative that you propose a jury interrogatory on this issue before the commencement of closing argument. Otherwise, you risk the application of the caps to a damage award, regardless of the evidence.[4]

The Same-Juror Rule And Comparative Fault

O'Connell involved an appeal from a jury verdict in a railroad crossing crash case in which the defendant railroad argued that the plaintiff was also at fault. The jury had been given interrogatories addressing negligence and proximate cause as to both plaintiff and defendant, as well as apportionment of fault. Six jurors signed the interrogatory allocating fault; however, it turned out that a juror who had not

signed any of the interrogatories finding fault or proximate cause as to either party had signed the interrogatory apportioning fault between the parties, as had a juror who had not found fault or proximate cause on the part of the railroad.[5]

The plaintiff challenged this on appeal, contending that the participation by these two jurors in the process of allocating fault between the parties was impermissible, as it essentially meant that only four of the eight jurors had concurred as to allocation of fault, which in turn meant that the verdict violated Ohio's constitution, which requires civil verdicts to be rendered by no less than three-fourths of the jury.[6]

This posed a question of first impression for the Court, which was whether to adopt the "same juror" rule, or, instead, to adopt what is known as the "any majority" rule.[7] As the *O'Connell* opinion notes, courts applying the "same juror" rule hold that the same jurors must decide both causal negligence and apportionment of fault, based on the proposition that "a juror's finding as to whether liability exists is so conceptually and logically connected with apportioning fault that inconsistent answers to the two questions render that juror's vote unreliable and thus invalid."[8] The "any majority" rule, on the other hand, rests on the proposition that a dissenting juror can nonetheless accept the majority's finding as to the parties' negligence and participate intelligently in deciding the issue of allocation of fault between them, and that limiting that juror's participation effectively deprives the litigants of the benefit of a full jury.[9]

The *O'Connell* Court chose to adopt the "same juror" rule for cases involving claims of comparative negligence, and in light of that found that the two jurors who had not found fault on the part of both the plaintiff and the defendant should not have participated in determining how to allocate fault between them. As such, the Court found the verdict in that case was constitutionally invalid, as the participation of those two jurors in allocating fault had resulted in a verdict rendered by less than three-fourths of the jury.[10]

The Same Juror Rule And Liability In General

O'Connell is clear when it comes to the "same juror" rule in cases involving allocation of fault. What was *not* clear, however, was whether the "same juror" rule should also be applied to the initial questions of liability – namely, whether a party was negligent and whether that party's negligence was a proximate cause of injury. Ohio's courts of appeals took the position that the concerns posed by allocation of fault were not implicated when it comes to the initial questions of negligence and proximate cause. In *Estate of Lawson v. Mercy Hosp. Fairfield*,[11] for instance, the Twelfth District found that the question of whether there was a breach of the standard of care was sufficiently independent of the question of proximate cause that the "same juror" rule did not apply. The Tenth District reached the same conclusion in *Dillon v. OhioHealth Corp.*,[12] which a divided Ohio Supreme Court declined to review.[13]

In *Hild v. Samaritan Health Partners*, the Ohio Supreme Court reached the opposite conclusion, both as to accepting the appeal and as to the applicability of the "same juror" rule. In that case, the trial court (over plaintiff's objection) gave the jury interrogatories on the issues of negligence and proximate cause as to a defendant that were accompanied by instructions that followed the same juror rule – namely, that the only jurors who could participate in determining whether that care provider's conduct was a proximate cause of injury were the ones who found negligence on the part of that care provider.[14] The jury returned a defense verdict, and on appeal to the Second District, the plaintiff argued that the instruction violated his right to a trial by full jury.[15]

The Second District agreed, following *Lawson* and *Dillon*, but the Ohio Supreme Court held otherwise. Unlike the lower courts, the Supreme Court found that the issues of "duty, breach, and proximate cause" are interdependent, and thus "[i]t would be illogical to allow a juror who does not find a duty or a breach of that duty to vote on the issue of proximate cause."[16] Curiously, the Court also indicated that this rule does not prohibit jurors who do not find fault from participating in a *discussion* of the issue of proximate cause – the rule only prohibits them from *voting* on the issue.[17] Based on this, the Court found no error in the instructions given with the interrogatories in that case, and reinstated the defense verdict.[18]

What this means is that in *every* case in which interrogatories on negligence and proximate cause are submitted to the jury, regardless of whether comparative fault is at issue, the jury must be instructed that the *only* jurors who can vote on whether a particular party's conduct was a proximate cause of injury are those who found a breach of the applicable standard of care on the part of that particular party. The trick, though, it would seem, would be phrasing this instruction in a way that preserves your client's right to have the entire jury participate in discussing this issue, while at the same time ensuring that the only jurors who vote on it are those who are authorized to do so under the "same juror" rule. To that end, an example instruction to accompany a proximate cause interrogatory (here, a hypothetical "Interrogatory B" following a hypothetical "Interrogatory A" as to negligence) might be worded as follows:

"All jurors may participate in discussing Interrogatory B. However, only those jurors who answered "YES" to Interrogatory A may vote on or sign Interrogatory B."

Instructions On Damages Interrogatories In Cases Where There May Be Allocation of Fault

Another area of potential confusion arises when jurors are asked to calculate damages in cases where there has been an allocation of fault. Under R.C. § 2307.22, any tortfeasor that is responsible for 50 percent or less of the tortious conduct is responsible for only his or her proportional share of economic damages, and no defendant is liable for more than its proportionate share of noneconomic damages. A defendant's proportionate share of damages is calculated by multiplying the total amount of damages by that defendant's share of fault. For purposes of this calculation, R.C. § 2307.23 requires that the jury be given interrogatories specifying the percentage of tortious conduct attributable to the respective parties and to any relevant third party. The trial court then applies the apportionment to the damages figure provided by the jury.

For this to work correctly, the jury must first arrive at a *total* damages figure that can then be apportioned between the relevant parties. In a recent case tried by our firm, however, the jury took it upon themselves to reduce the damages, and entered a number in the damages interrogatory provided to them that reflected the percentage of fault they had assigned to the defendants – even though the interrogatory required them to determine the plaintiff's "total damages."[19] When the jurors were told that their damage award would be reduced by the defendants' share of fault, they explained they had already done so. In that case, the jury was re-convened to correct the interrogatory, and the resulting verdict was upheld on appeal. However, in order to discourage jurors from making their own calculations, in cases where apportionment is an issue it is worthwhile to frame your damages interrogatory in a way that makes it clear that the jury is to calculate damages *without regard* to any apportionment of fault. An example interrogatory could be framed as follows:

"State the total amount that would fully and fairly compensate [Plaintiff] for her injuries, without regard to any percentage of fault you may have attributed to any party."

Interrogatories In Cases Where Exceptions To Damage Caps Are At Issue

Finally, in cases where your client's injuries are severe enough to get past Ohio's statutory caps on noneconomic damages, it is imperative that you propose submitting a jury interrogatory on this issue before closing argument at trial. Neither R.C. § 2315.18 nor R.C. § 2323.43 specifically require an interrogatory to be submitted on this specific issue; however, Ohio courts have interpreted these statutes to require the jury to make a factual determination as to whether a plaintiff's injuries fall within an exception to the caps.[20] From this, these same courts have held that the caps will apply unless the jury itself makes a finding on this issue through an appropriate interrogatory.[21] Moreover, such an interrogatory must be proposed within the time period set forth in Civ. R. 49(B), which requires proposed jury interrogatories to be submitted to the court and opposing counsel prior to the commencement of closing argument.[22] ■

End Notes

1. 58 Ohio St.3d 226 (1991).
2. 2024-Ohio-3338.
3. 2024-Ohio-4678 (8th Dist.).
4. *See Estate of Samples v. Lagrange Nursing & Rehab. Ctr., Inc.*, 2024-Ohio-4441 (9th Dist.); *Giuliani v. Shehata*, 2014-Ohio-4240 (1st Dist.).
5. *O'Connell*, 58 Ohio St.3d at 228, 229-230.
6. *Id.* at 231.
7. *Id.* at 232.
8. *Id.* at 233.
9. *Id.* at 233-234.
10. *Id.* at 236-237.
11. 2011-Ohio-4471 (12th Dist.).
12. 2015-Ohio-1389 (10th Dist.).
13. *Dillon v. OhioHealth Corp.*, 2015-Ohio-4947 (appeal not accepted for review; O'Donnell, Kennedy, and French, JJ, dissenting).
14. *Hild*, 2024-Ohio-3338, ¶¶ 6-7. Notably, at the time the *Hild* trial was conducted (and as of this day), the form interrogatories accompanying CV 403.01 of the Ohio Jury Instructions included this instruction. *See* OJI CV 403.01.
15. *Hild v. Samaritan Health Partners*, 2023-Ohio-2408, ¶ 44 (2d Dist.), *reversed in part*, 2024-Ohio-3338.
16. *Hild*, 2024-Ohio-3338, ¶ 23.
17. *Id.* at ¶ 24 ("[J]urors who do not find one element of a negligence action are not barred from participating in deliberation discussions about the other elements – they are prohibited only from voting on them.").
18. *Id.* at ¶ 25.
19. *Cook v. M-F Transport, Inc.*, 2024-Ohio-4678, ¶¶ 8, 26.
20. *See Estate of Samples v. Lagrange Nursing & Rehab. Ctr., Inc.*, 2024-Ohio-4441 (9th Dist.); *Giuliani v. Shehata*, 2014-Ohio-4240 (1st Dist.).
21. *Id.*
22. Civ. R. 49(B); *see also Estate of Samples*, 224-Ohio-4441, ¶ 9 ("A trial court is not required to consider proposed interrogatories that are submitted outside of the timeframe provided by Rule 49(B).").