Ricci Tyrrell Johnson & Grey

ATTORNEYS AT LAW

QUARTERLY NEWSLETTER

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In This Issue:

News and Events:

On March 30, 2018 **Ricci Tyrrell Johnson & Grey** celebrated its four year anniversary. The Members of the firm wish to thank our associates and other employees for helping us to four successful years. We also thank the clients who came with us into this new venture, and those new clients who saw fit to trust us after our firm was established. **Ricci Tyrrell** continues to be governed by our mission statement - Our Commitment Is To Excellence In All Aspects Of Advocacy On Behalf Of Our Clients.

Ricci Tyrrell has offices in Pennsylvania, New York, and New Jersey and its lawyers represent our clients nationally in the following areas:

- Products Liability
- Sports and Event Liability and Risk Management
- Premises Liability
- General Liability
- Commercial Litigation
- Hospitality Industry Liability
- Insurance Law and Coverage
- Admiralty and Maritime Law
- Toxic-Tort and Environmental Practice
- Aviation Law
- Construction Litigation
- Dram Shop and Social Host Liability
- Intellectual Property
- Health Care Law

John E. Tyrrell gave a presentation for CLE credit on January 9, 2018 titled, "Pennsylvania Products Liability-Defenses For All Cases". The presentation focused on the use of defense methodology from traditional products liability cases when defending toxic tort cases.

Bill Ricci is one of the authors of an article addressing the impact of the *Tincher II* decision, which will be published in the April edition of *Counterpoint*, a publication of the **Pennsylvania Defense Institute**.

TINCHER II!

On February 16, 2018, a unanimous 3-judge panel of the Superior Court in *Tincher v. Omega Flex, Inc.*, A.3d, No. 1285 EDA 2016 (Pa. Super. Feb. 16, 2018) ("Tincher II"), held, following the Supreme Court's prior landmark ruling in the same case, *Tincher v. Omega Flex, Inc., 104 A.3d 328 (Pa. 2014) ("Tincher I")*, that in a strict product liability case it is "fundamental error" to use an *"Azzarello"* jury charge employing the now-overruled "any element" defect test and informing the jury that the defendant manufacturer was the "guarantor" of product safety.

The procedural history that led to the most recent *Tincher* decision is nothing short of fascinating. In a nutshell, Omega Flex appealed from the judgment entered in favor of the Tincher's following a jury trial, and the denial of its post-trial motions. In this most recent appeal, Omega Flex claimed it was entitled to a new trial because the Pennsylvania Supreme Court determined that the trial court's jury instruction contained a fundamental misstatement of the governing law. Plaintiffs essentially countered that the voluminous evidence adduced at trial would have led a jury to the same conclusion of defect, regardless of the Court's charge on the law. The Superior Court did not agree with the plaintiffs, and instead vacated the judgment, reversed the order of the trial court denying post-trial relief, and have remanded the case for a new trial. "[T]he trial court had no authority to deny a new trial on the basis of its own speculation about what the jury would do under the Supreme Court's new formulation of the law." *Slip op.* at 27.

According to the unanimous panel, "there is no question" that the *Azzarello* charge given during the trial was "incorrect:"

> The charge [that was given] contained all of the product liability law under *Azzarello* that the Supreme Court has now disapproved, including a definition equating a defective product with one that "leaves the suppliers' control lacking any element necessary to make it safe for its intended use," and a declaration that a manufacturer "is really a guarantor of [a product's] safety . . . "

Id. at 18. "There is no question that the error was fundamental to the case. It dealt with the principal issue disputed by the parties – whether there was a defect. "*Id.* at 25.

An *Azzarello* "any element / guarantor" charge "fail[s] to conform to the applicable law, as stated in *Tincher*, " *Id.* at 20. "The trial court gave a charge under law that the Supreme Court has explicitly overruled in this very case. Such a charge would appear to be a paradigm example of fundamental error." *Id.* at 23.

The Superior Court's *Tincher II* opinion culminated in the following critical statement:

> In effect, the trial court seemed to conclude that because it believes there is sufficient evidence in the record to support a verdict for plaintiffs under the new *Tincher* standards, a new trial is not required. But, as the Supreme Court specifically instructed in *Tincher* itself, that is not a proper basis for decision. The Tinchers asked the Supreme Court to forgo resolving the issues presented to it because, they said, there was so much evidence supporting liability that any change in the law would not change the outcome. The Supreme Court rejected that suggestion, explaining that a verdict has meaning only considering the charge under which it was delivered: "a trial court's charge defines the legal universe in which a jury operates for purposes of the verdict." *Tincher*, 104 A.3d at 347. . . The bare litmus of sufficiency review cannot correct the fundamental error in the instructions to lay jurors concerning just what it is they are deciding. *Id.* The trial charge based on law overruled in this case was fundamental error. Omega Flex therefore is entitled to a new trial.

Id. at 29-30.

Like the Superior Court in *Tincher II*, both the Pennsylvania Defense Institute and The Pennsylvania Association of Defense Counsel have steadfastly maintained that, after *Tincher I*, giving a strict liability jury charge using the principle "any element / guarantor" elements of the overruled *Azzarello* charge is reversible error.

In June 2016 - for reasons known only to the drafters - the Pennsylvania Bar Institute published a series of new, post-*Tincher I* Suggested Standard Jury Instructions that retained most of the *Azzarello* language." For that and other important reasons, the Pennsylvania Defense Institute (with the help of a panel of some of the most experienced and knowledgeable product liability practitioners in the state) published alternative Suggested Jury Instructions for use in Product Liability cases in September 2017 that faithfully follow *Tincher I*. Of importance, The PDI *Tincher I*-based alternative Suggested Jury Instructions were expressly approved by the Philadelphia Association of Defense Counsel

and have recently been given to a jury by a Philadelphia trial judge.

Clearly, the PBI Suggested Standard Jury Instructions are now expressly disapproved in *Tincher II*, on the critical definition of "defect." *Tincher II* is controlling precedent that the PDI / PADC view is correct, and that using the PBI definition of defect is "fundamental" - and thus reversible - error. Equally clearly, the drafters of the PBI- published Suggested Standard Jury Instructions "undervalue[d] the importance of the Supreme Court's decision" in *Tincher I*. *Tincher II*, slip op. at 27.

Finally, and in sum, *Tincher II* stands for the following propositions:

1. if properly preserved, *Tincher I* is retroactively applied to cases previously filed and tried;
2. in a post-*Tincher* product liability trial, it is fundamental and reversible error for a trial court to give an *Azzarello* "any element / guarantor" jury charge; and
3. *Tincher I* requires that the product be "unreasonably dangerous" and the jury must be instructed accordingly.

Bill Ricci is one of the founding Members of Ricci Tyrrell Johnson & Grey.

PENNSYLVANIA SUPERIOR COURT HOLDS THAT FAIR SHARE ACT APPLIES TO STRICT LIABILITY ASBESTOS CLAIMS

In a question of first impression, the Superior Court of Pennsylvania recently ruled that the Fair Share Act amendments, 42 Pa.C.S. § 7102, which provides generally that defendants are only responsible to pay for the percentage to which they are found liable, applies to strict liability cases involving asbestos exposure. A three-judge panel of the court in *Roverano v. John Crane, Inc.*, 177 A.3d 892 (Pa. Super. 2017), rejected the idea that the Act did not apply to strict liability claims and remanded the case to the trial court for a new trial to apportion liability amongst defendants and settled non-parties, including bankrupt entities.

In *Roverano*, Plaintiff brought suit in the Philadelphia County Court of Common Pleas alleging that as part of his employment with PECO Energy, he was exposed to a variety of asbestos-containing products that eventually caused him to develop lung cancer. After a six-day trial, a jury found in favor of Mr. and Mrs. Roverano and awarded $5,189,265 to Mr. Roverano and $1,250,000 to Mrs. Roverano on her loss of consortium claim. The trial court apportioned the judgment equally among the eight defendants whom the jury determined to be tortfeasors. The jury was not permitted to allocate percentages of fault against the defendants it found liable, nor was the jury permitted to consider the liability of bankrupt entities from which the plaintiff recovered money through bankruptcy trusts.

Prior to trial, several defendants filed a motion *in limine* seeking a ruling that their liability, if any, would be apportioned by the jury according to the extent to which each defendant caused harm to the plaintiff. After argument, the court denied the motion ruling that the Fair Share Act did not apply to asbestos cases and explaining that the jury would not be able to quantify the exposure which would permit an apportionment to be made by it. The trial judge denied post-trial motions to that effect as well. After the verdict was rendered, the remaining defendants appealed the verdict on several grounds, including that the trial court erred in not allowing the jury to allocate percentages of fault against defendants and certain bankrupt entities. The appellants argued that the Act allowed the jury to apportion fault amongst parties and settling non-parties while the Plaintiffs argued that the Act did not apply to strict liability asbestos cases.

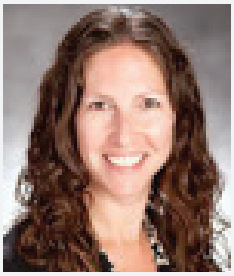
The Fair Share Act was enacted in 2011 as an amendment to the section of the Pennsylvania Judicial Code that provides for comparative negligence. Before enactment of the Fair Share Act, the Comparative Negligence Act provided for proportionate recovery against negligent joint tortfeasors according to a percentage determination that was made by the fact-finder. Liability among joint tortfeasors who were strictly liable was not covered by the statute and, under court decisions, was calculated on a per capita basis - that is, each defendant was allocated equal shares of liability regardless of the extent to which its conduct contributed to the injury. The *Roverano* Court rejected this approach.

On appeal, the Court looked at the statutory language as well as the legislative intent of the Act and held that there was no exemption afforded to asbestos

cases. Specifically, the Court noted that the Fair Share Act explicitly applies to tort cases in which "recovery is allowed against more than one person, including actions for strict liability. Nothing in the statute makes an exception for strict liability cases involving asbestos." It found that, by expressly making strict liability joint tortfeasors subject to the same allocation applicable to negligent joint tortfeasors, the Legislature made clear its intent to abolish the former per capita construct.

The Superior Court agreed that the Roverano's claim fell within the ambit of the Act and that nothing in the plain language of the Act supported the trial court's decision to exempt asbestos litigation from the Act's requirements. The Court also agreed that under the Act, the jury must be permitted to consider evidence of any settlements by the Roveranos with bankrupt entities in connection with the apportionment of liability. The decision remanded the case for a new trial to apportion liability.

Trial courts grappling with how to apportion liability amongst defendants in strict liability cases now have some guidance after this decision. It should also be noted that in ruling that evidence of settlements with bankrupt entities must be considered in the apportionment of liability, plaintiffs may now choose to delay the filing of trust claims until after litigation. This could have the potential effect of increasing the liability apportionment assessed against viable asbestos defendants at trial as there could be less entities listed on the verdict sheet. Plaintiffs, have filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court so this may not be the final word from the courts



Nancy Green is a Member of Ricci Tyrrell Johnson & Grey.

COVERAGE CORNER — LEGAL NEGLIGENCE ALLEGED BY A NON-CLIENT

Pennsylvania law recognizes a conceptual distinction between a "claim" and a "cause of action" (legal theory). A claim is the aggregate of operative facts giving rise to a right enforceable by a court under one or more legal theories. A "cause of action" or "legal theory" supplies the statutory or common law principle, and elements of proof, under which a litigant seeks relief or asserts a defense.[1] Although distinct, the terms are commonly used interchangeably when speaking of a suit or pre-suit threat of litigation.

The word "Claim" is, of course, a fundamental ingredient of claims-made coverage. It is also and invariably a contractually defined term; therefore, the policy definition controls independent of either the common law definition or conversational usage by judges and lawyers. A policy definition drove the outcome in a recent federal district court case involving a demand for professional liability coverage by a law firm engaged to represent the Executor of an Estate. The firm was first accused of professional negligence in a letter sent to the Orphans' Court by non-client estate beneficiaries challenging costs of administration, including legal fees in the millions of dollars. The district court held that the "Claim" was first made when the letter was received prior to the policy inception date, not almost two years later when a formal Adjudication in the estate proceedings found the Executor and his lawyers jointly and severally liable for a net loss to the Estate of $557,001.00. *Allied World Insurance Company v. Lamb McErlane, P.C.*, 2018 U.S. Dist. LEXIS 29223 (E.D. Pa. 2018).[2]

The policy included the following definitions:

> Claim means: (1) any written notice or demand for monetary relief; (2) any civil proceeding in a court of law; ... made to or against any Insured seeking to hold such Insured responsible for any Wrongful Act... A Claim will be deemed to have been first made when an insured receives written notice of the Claim.
>
> Legal Services Wrongful Act means any actual or alleged act, error or omission committed by any insured, solely in the performance of or failure to perform Legal Services.
>
> Legal Services means those services performed on behalf of the Named Insured [the law firm] for others by an Insured [lawyers of the firm], whether or not performed for a fee or other consideration, is a licensed lawyer in good standing...

The policy provided coverage for Claims made during the policy period beginning June 20, 2016 and ending June 20, 2017. Allied World was not the firm's insurer prior to June 20, 2016.

The demand for coverage arose out of representation of the Executor of two substantial estates with common beneficiaries. Administration began in 2006. In March 2013, the Executor filed accounts for approval by the Orphans' Court that documented administrative costs paid from the estate assets, including fees charged for his own services and legal fees paid to Lamb McErlane. In April 2013, the beneficiaries objected to the costs. They accused the Executor of mismanaging the Estates and paying millions of dollars in unwarranted legal fees.[3]

At the request of the Orphans' Court, and in advance of a pre-trial conference, the beneficiaries submitted a letter dated May 4, 2015 outlining issues they intended to raise in the proceeding for adjudication of the dispute over the costs and fees. The letter was sent to the court, the executor and three Lamb McErlane partners. As pertinent to the later coverage dispute, it alleged that the firm had performed "flawed and inadequate" work, "grossly mismanaged" the federal tax filing process, and by negligently failing to "check a box" on a tax form one Estate incurred a penalty in excess of $500,000. In November 2015, the beneficiaries filed a motion for sanctions asking the court to find the Executor and the law firm "jointly and severally responsible for reimbursing the Estate for any ultimate net loss it has suffered as a result of [the tax] penalty."

In a December 2015 pre-trial Order, the Orphans' Court precluded the beneficiaries from introducing evidence for the purpose of establishing a right to recovery against the law firm for legal malpractice because the beneficiaries lacked standing to sue.

After fourteen days of hearings, the Orphans' Court issued an Adjudication on March 7, 2017. Among other things, the court held that the Estate incurred an IRS tax penalty caused by breach of fiduciary duties owed by the executor and his lawyers to the Estate and the beneficiaries. The net loss caused by the "tax fiasco" was $557,001.[4] The executor and the law firm were found to be jointly and severally liable for the loss.

On March 28, 2017, Lamb McErlane forwarded the Adjudication to Allied World and requested coverage. Allied World denied responsibility on several grounds and commenced an action seeking a declaration that it had no duty to defend or indemnify the law firm.[5] After the pleadings were closed, Allied World moved for judgment on the pleadings arguing that the May 2015 letter constituted a "Claim" within the policy definition and was first made before June 20, 2016.[6]

The law firm argued that the 2015 letter was not a "Claim." It pointed to the fact that the beneficiaries had not asserted any professional negligence claim in the Orphans' Court proceeding, had been found by the court to lack standing to bring such claims against the lawyers, and sought only an adjudication that legal fees were unreasonable and should not be approved. The firm also argued that the letter was simply an offer of proof, not a notice or demand for monetary relief, because the beneficiaries were not parties to the underlying estate proceedings and had no standing to assert a claim against the lawyers.

The district court rejected Lamb McErlane's characterization of the 2015 letter as an effort calculated "to rewrite the policy to permit a claim only after an insured is faced with a viable cause of action in a formal legal proceeding." The court observed that the beneficiaries were permitted to object to excessive legal fees and costs paid from the Estate.[7] The court held that the letter was written notice that the beneficiaries sought to make the law firm return payments received for improperly performed legal services and, therefore, "meets the policy's unambiguous definition of a claim" made before the firm was insured by Allied World in June 2016. The court also rejected the notion that the 2015 letter did not satisfy the policy definition of a "Claim" because the beneficiaries lacked standing to assert a legal malpractice claim:

> The claim against Lamb McErlane was granted, not initiated, in the March 2017 Adjudication. Although Lamb McErlane contends the Adjudication "improperly" imposed a judgment against it "for an alleged violation of a standard of care and an alleged negligent act," the judgment merely resolved the account Objections.[8]
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> **********
>
> In the March 2017 Adjudication, the [Orphans'] court agreed the estate should not have to cover costs attributable solely to Lamb McErlane's negligence. Because the executor had already paid those improper fees, the court ordered the executor or Lamb McErlane to reimburse the estate. Any disagreement about the precise legal mechanism to pursue a professional malpractice claim is not material to the disputed coverage issue here.

Whether an allegation constitutes a Claim requires close study of the operational definition found in a policy. The definition need not adhere to the meaning used for the same term as a matter of law or in conventional speech; provided, however, the definition is written in unambiguous language. As defined in the policy

considered in *Allied World v. Lamb*, a "Claim" does not require more than a written notice or demand for monetary relief seeking to hold an Insured responsible for a wrongful act. The Claim need not be made by a client or be paired with a threat of litigation. Legal merit or viability of the Claim is not part of the inherent logic of the definition.

The impulse to add a mitigating gloss to a clearly defined policy term must always be resisted when lawyers are faced with a legal grievance from any source. Assumptions can also infect claim notice administration on the other side of the coverage conversation. Patient study of the policy language is always the prudent course.

[1] See, *Steiner v. Markel*, 9 6 8 A.2d 1253 n.11 (Pa. 2009).

[2] This digest of the case is drawn both from the court's opinion and filings available from the docket.

[3] The firm was ordered by the Orphans Court to return substantial fees that had been paid but did not seek coverage for that obligation.

[4] "... the Orphans' Court held that Lamb McErlane breached its obligations to Sir John's Estate and the beneficiaries, and that the firm breached its fiduciary duties, resulting in the $1 million tax penalty assessed by the IRS. The court further held that the firm's fees incurred to remedy the effects of the penalty were not properly chargeable to the Estate. The Adjudication surcharged the Executor and Lamb McErlane $557,001, for which they were held jointly and severally liable." Allied World Complaint, ¶20.

[5] The law firm did not challenge the district court's exercise of discretionary jurisdiction under the federal Declaratory Judgment Act and the court did not raise or discuss the issue *sua sponte*.

[6] Allied World's Complaint also alleged there was no coverage because the Insured could not satisfy the lack of "prior knowledge" condition precedent to coverage, the allegations raised in the estate proceedings were not disclosed in the firm's application for coverage, and sums the firm was ordered to pay did not fall within the policy definition of "Damages."

[7] The law firm also argued that the state court was authorized to surcharge only the executor for the losses claimed by the beneficiaries, but the district court was persuaded by case law cited in the Adjudication in which courts disallowed unreasonable or excessive attorneys fees and ordered the executor's counsel to refund fees already paid.

[8] An appeal from the Adjudication was discontinued in state court on February 13, 2018.

Francis P. Burns III is a Member of Ricci Tyrrell Johnson & Grey

WHAT DO YOU REALLY HAVE WHEN YOU HAVE A PATENT?

A client recently approached me with a new design for an automotive battery jumper clamp which he wished to patent. A U.S. patent, a valuable property right, would afford him the exclusive right to exclude others from making, using, selling, and distributing his clamp in the United States. But what does having a "patent" really mean? Does the grant of a "patent" give you full patent rights to the entire invention described in the patent? What rights does the patentee actually have? To answer these questions, consideration must be given to the patent process, prior related inventions, and the body of a patent itself.

The patent process for the jumper clamp client began by my conducting a search of prior jumper clamps which have been patented or which have previously been invented. The search would tell us whether my client's jumper clamp is new and if it was merely an obvious modification of prior clamps. In this case, the search revealed a variety of jumper clamps which were close to, but not the exact design which my client believed to be unique. He was surprised by the number of patents which I found related to jumper clamps. But just as significantly, he was puzzled as to how so many patents could be granted on similar, relatively well-known products. This is something about which I am routinely asked. And the answer is simple when you consider where the intellectual property protection of a patent actually resides.

A properly drafted patent usually consists of a number of sections: e.g. the Background of the Invention, which discusses what is already known in the industry and why there is a need for something better; the Summary of the Invention, which briefly capsulizes the invention; the various drawings in the patent and the Description of the Drawings; and the Detailed Description of the Invention, which describes the invention in such detail so as to allow the individual who has ordinary skill in

that area to be able to make and use the invention. All these sections provide the underlying support for the section in the patent known as the "Claims."

The claims in a patent describe the scope of the invention and thus actually provide the protection afforded by the patent. In other words, it is the language of the claims which describes the invention which is protected. This claim language must be distinguishable from all the prior art. It is the claims which determine whether a patent will be granted and it is the claims which are considered by a court in any cause of action for patent infringement.
As a means of illustration, and using my jumper clamp client as an example, consider a claim which states:

1. A jumper clamp comprising dual electrical conductive jaws which are pivotably connected and spring-loaded.

It is obvious that this description would apply to most commonly used jumper clamps. As a result, it would not pass muster as an allowable claim in a patent application and it would be rejected by the patent examiner who reviews the application.

However, consider the following claim:

2. A jumper clamp comprising dual electrical conductive jaws which are pivotably connected and spring-loaded, the clamp further comprising a third electrically conductive element connected to and extending between the dual jaws.

The addition of the "third electrically conducted element" in claim 2 overcomes any rejection based on prior jumper clamps described in the first example. The claim may thus be allowable over the prior art, based on this added feature, which may have never been considered before. If even one claim in a patent application is found to be distinguishable from the prior art, the patent will be granted.

Significantly, even if claim 2 is allowable and a patent is granted, my client will not have a "patent" on a jumper clamp, per se, since, as has previously been described, there are numerous patents relating to jumper clamps. He will have a patent on the specific jumper clamp which is recited in the allowable claim. All his patent rights are vested in that claim and that claim alone.

Thus, the scope of patent protection a patentee actually resides solely on the specific language of the allowable claim. Claims describing different unique features can support many "jumper clamp" patents.

Stuart Goldstein heads Ricci Tyrrell's Intellectual Property Practice.

WILL APPORTIONMENT MATTER: A QUESTION FOR AUTONOMOUS VEHICLES?

Earlier this year, the first lawsuit was filed against a manufacturer for an accident involving a self-driving vehicle where a motorcyclist alleged the autonomous vehicle veered into his lane and knocked him to the ground. Recently, an Uber self-driving car in Arizona was involved in fatal crash when it allegedly failed to detect a pedestrian at night as she rolled her bicycle across a five lane road. These two situations are examples of how as autonomous technology continues to develop, accidents may occur due to malfunctions in technology, the applicable human interface, maintenance and/or other outside factors. These two situations also further the debate on how to fairly apportion liability among automated vehicle owners, operators, passengers, manufacturers, and third parties (including insurers) in the event a lawsuit is filed.

In September of 2016, the National Highway Transportation and Safety Administration (NHTSA) issued a Federal Automated Vehicles Policy, titled "Accelerating the Next Revolution in Roadway Safety," which among other things explores how autonomous technologies will be introduced in stages and because of continued technological development, the report recognizes that negligence, product liability and insurance laws regarding autonomous vehicle accidents may be left to the individual states.

According to the National Conference of State Legislatures, as of March 2018, twenty one (21) states have passed legislation related to autonomous vehicles. [1] No state has passed legislation on how to determine liability in the event of an autonomous vehicle accident. [2] The New York legislature has a bill pending which would impose strict liability for manufacturers, owners, and operators of unmanned motor vehicles.[3] Pending in the Illinois legislature is the Autonomous Vehicle Act

which provides that when engaged, the automated driving system shall be considered the driver or operator for purposes of assessing conformance to applicable traffic or motor vehicle laws and for liability of incidents.[4] Florida's Autonomous Vehicle Statute allows for limited liability for a manufacturer whose vehicle is converted into an autonomous vehicle by a third party, as long as the defect was not initially present.[5]

In traditional motor vehicle accidents, liability for drivers and operators is assessed through negligence, with the possibility that the manufacturer may be liable if a defect caused or contributed to the accident and/or the injuries. However, in states with active autonomous vehicle testing, courts will be faced with determining the appropriate standard of liability for manufacturers of autonomous vehicle involved in accidents. Such courts will need to consider the level of automation of these vehicles. The Society of Automotive Engineers (SAE) has classified automation into stages ranging from Level 0 (no automation) to 5 (full automation).[6] At level 5, the automated system can perform all driving tasks under all conditions that a human driver could perform them. At level 4, the automated system can conduct the driving task but only in certain environments and under certain conditions, at level 3 the human driver must be ready to take back control when the automated system requests, at level 2, the human continues to monitor the driving environment and performs the driving task the automated system cannot, and so forth.

The question is whether apportionment will matter in the event of an autonomous accident, as the manufacturer will be in the liability chain. The vehicle manufacturer would be at risk for claims under strict liability and possibly negligence for the automated system's decision making. While a manufacturer has never had a duty to design an accident-proof vehicle, the apportionment of liability will be difficult in instances where it is not clear who, or what, is at fault, especially through the different levels of automation.

Pennsylvania's Fair Share Act ("the Act"), applicable in any action where more than one defendant is found liable, including actions for strict liability, applies the rule of several liability. Under the Act, a defendant found less than 60% responsible is (absent a few exceptions) only severally liable for the percentage of the total damages the fact finder apportioned to that defendant.[7] However, if a defendant is found more than 60% liable, its liability is both joint and several.[8] A defendant held both jointly and severally liable may still assert claims for contribution.[9] The Act also allows a fact finder to allocate liability to defendants and non-parties that the plaintiff released.[10]

In practicality, under current legal landscapes, such as the Fair Share Act, the vehicle manufacturer may ultimately be a party found responsible. Besides being the deep pocket, where plausible, the allegation in most cases will be that the complex autonomous system failed to avoid the accident; an argument easily made without a driver to blame. Thus, apportionment will only remain relevant in situations where a consumer misuses the technology or if a third party contributes causally the accident.

[1] http://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx

[2] http://www.ncsl.org/research/transportation/autonomous-vehicles-legislative-database.aspx

[3] See 2017 NY S 736 0 and 2017 NY A 7243.

[4] See 2017 IL H 2747.

[5] Fla. Stat. §316 .86 (2).

[6] SAE J3016 _2016 09 .

[7] 42 Pa.C.S. § 7102(a.1)(1)-(2).

[8] 42 Pa.C.S. § 7102(a.1)(3)(iii).

[9] 42 Pa.C.S. § 7102(a.1)(4).

[10] 42 Pa.C.S. § 7102(a.2).

Samuel Mukiibi is an Associate of Ricci Tyrrell.

IN THE COMMUNITY

On January 17, 2018, Ricci Tyrrell hosted an information session regarding the upcoming inaugural **Eagles Autism Challenge**. **Ricci Tyrrell** is one of the inaugural sponsors of the event. The **Eagles Autism Challenge** is dedicated to raising funds for innovative research and programs to help unlock the mystery of autism. Philadelphia Eagles players, alumni, coaches, executives, cheerleaders and Swoop will be present for the bike ride and family friendly 5K run/walk scheduled to take place on May 19, 2018. Team Ricci Tyrrell is made up of Ricci Tyrrell founding members **John E. Tyrrell** and **James W. Johnson**, Member **Patrick J. McStravick**, Associates **Jason M. Avellino**, **Tracie Bock Medeiros**, **Kelly J. Woy**, Chief Operating

Officer, **Julianne F. Johnson**, and employees **Sheila J. Ciemniecki**, **Bernadette Golden**, **Megan P. McDonnell**, **Susan E. Schonewolf**, **Eric P. Shaw**, and **Lisa A. Tiffany**.

Each holiday season, Ricci Tyrrell makes a donation to **Philabundance®**, a regional non-profit hunger relief organization. The firm's tradition was continued this past holiday season.

On December 10, 2017, Ricci Tyrrell Associate **Tracie Bock Medeiros** and her family attended the **Jewish Relief Agency (JRA) Tiny Tots Food Packing Time** where her 5 year old son Zachary and 2 year old daughter Naomi filled boxes with ingredients for a traditional Hanukkah meal to be delivered to local families. The **JRA** mobilizes volunteers to assist people in need. Its volunteers pack and deliver food and provide a variety of caring support services to 6,000+ wide-ranging low-income individuals throughout Greater Philadelphia.

On December 21, 2017, Ricci Tyrrell hosted its second annual Holiday Ugly Sweater 50/50 Competition. All participants got in the holiday spirit and wore their competition submissions for the day. Following a firm wide vote, Ricci Tyrrell employee **Sheila J. Ciemniecki** earned half the pot and the remainder was donated to **The Philadelphia Ronald McDonald House (RMH)**. The RMH provides a comfortable room to sleep, home cooked meals, and other supportive services to families who travel to Philadelphia to obtain medical treatment for their children. These services allow parents to comfort their children around the clock, in the hospital or after an outpatient treatment. By staying at the House, the families also get support from a community of other parents in similar situations, finding comfort and hope.

In honor of **Martin Luther King** day, Ricci Tyrrell Associate **Tracie Bock Medeiros** and her 5 year old son Zachary participated in **Har Zion Temple's Martin Luther King Day of Service**. Together they donated stuffed animals to **S.A.F.E. (Stuffed Animals for Emergencies)**, made warm winter hats for people in need and craft projects for Senior centers, and wrote letters to Veterans and Israeli Defense Forces.

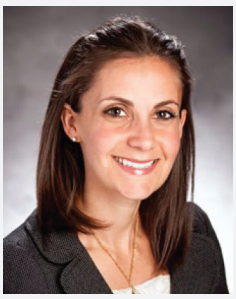
On March 1, 2018, Ricci Tyrrell Associate **Tracie Bock Medeiros** completed her assignment on the Senior Rabbi Search Committee for her synagogue, **Har Zion Temple**. Since August 2017, Tracie along with 12 other congregants volunteered an extensive amount of time to the process required for selecting the congregation's spiritual leader for years to come.

On March 8, 2018, Ricci Tyrrell Associate, **Samuel Mukiibi**, attended the **2018 Drexel University Thomas R. Kline School of Law Public Interest Experience (PIE)**, an auction which raises money to provide stipends for law students who are taking unpaid, summer public interest positions. The money raised is allocated through a grant to offset the costs of living and significant financial burden these students will incur by opting not to take a paid summer position. Mr. Mukiibi won two bids: (1) lunch with three public interest attorneys from Philadelphia Legal Assistance; and (2) a salon package from La Mirage Salon (for his wife).

Ricci Tyrrell Associate, **Samuel Mukiibi**, volunteered as judge and witness in this year's annual **Evidence & Advocacy for Trial Lawyers (National Trial Regional Competition)**, two-decade-old Philadelphia tradition hosted by the **L.L.M in Trial Advocacy Program** at the **Temple University Beasley School of Law**. Throughout the regional competition, teams from law schools in three states competed for the right to represented this region at National Trial Competition to be held April 4-8, 2018 in Austin, Texas. The volunteers for the regional competition are all Philadelphia lawyers who preside over the rounds and evaluate/score student performances. The winners of the regional competition were students from Temple University Beasley School of Law and Drexel University Thomas R. Kline School of Law.

Ricci Tyrrell was a "King" sponsor for the **3rd Annual Delran Education Foundation Pot O' Gold Casino Night** held on March 3, 2018. Ricci Tyrrell Member **Patrick J. McStravick** attended the event with his wife **Mary Ann**. The **Delran Education Foundation's** mission is "Investing in the highest quality innovative programs to enhance the knowledge, skills, and educational experience of Delran's students."

Ricci Tyrrell is a proud sponsor of the **6th Annual Philly Showcase of Wine, Cheese & Beer** on April 20, 2018 at the Pennsylvania Convention Center, a fundraiser for the **Boys & Girls Clubs of Philadelphia**. This event is always the cornerstone of the **Boys & Girls Clubs of Philadelphia's** efforts to provide thousands of Philly youth with a safe place to learn, grow and succeed.



"In the Community" is edited by Ricci Tyrrell Associate **Tracie Bock Medeiros.**

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