The Empty Chair Game
Is The Price More Than We Should Pay?

by William D. Cleaveland

Consider the following scenario: A few months ago, a medical malpractice victim wheeled herself into your office. Armed with a two-foot-high stack of documentation covering everything from billing statements to x-ray films, she meticulously detailed the events that led to her being restricted to a wheelchair for life. A few weeks after minor symptoms began, she consulted her family physician. After a few tests, the family physician recognized the symptoms as potentially serious and referred your client to a specialist. The specialist misdiagnosed your client's condition and recommended surgery. The specialist botched the surgery in the most egregious manner, resulting in your client's permanent physical impairment.

Your experience led you to believe that the specialist is responsible, not the family physician. However, as any prudent lawyer would do, you consulted an expert. The expert, nationally renowned in this particular field, confirmed part of your suspicions. The specialist's performance fell far below the standard. However, your expert also found a minor deficiency in the family physician's performance. This deficiency is questionable, but may amount to a small fraction of the fault, perhaps a few percent.

You now find yourself in the middle of the "empty chair game." You are facing a dilemma created by Arizona's comparative fault liability[1] and our nonparty-at-fault rules.[2] Do you file suit naming only the specialist and not the family physician? If you do, based on conversations you have had with the defense attorney, you are certain the defendant will name the family physician as a nonparty-at-fault. This leaves your client in the precarious position of potentially having her damage award reduced at the hands of a jury apportioning fault to an empty chair, and the jury may not agree with your expert's apportionment. The other alternative is to name the family physician and let the two defendants fight it out over the apportionment issue. The answer for a plaintiff's attorney is obvious — name the family physician.
chose the professional negligence context only because it is so easy to technically remove the attorney's ethics from the equation through reliance on expert opinion. If our expert utters the words, we have no ethical dilemma. In fact, the same issue is presented in a simple negligence action brought under the reasonable man standard. However, the plain-vanilla negligence scenario raises far more troublesome ethical issues. If we progressively reduce the potential nonparty's involvement, at some point a Rule 11 violation occurs because there is no reasonable basis for the claim against the third party. Whether the case involves professional or simple negligence, our current process virtually guarantees that the litigation will begin with the most all-encompassing collection of parties imaginable.

The Enormous Cost

Except for cases where a nonparty is immune from suit or has a strong relationship with the plaintiff, when a nonparty-at-fault is identified, the nonparty does not remain a nonparty for long. The plaintiff simply adds them as a party by amending the complaint. Once a person has the misfortune of being named as a defendant, our legal system always leans towards leaving them as a party. The litigation costs incurred in the process of attempting to remove an inappropriately named party from a suit are staggering.

What is really going on in the empty chair game? Early in the game, while drafting the complaint, the plaintiff's attorney is encouraged to speculate on whom the defendant may name as a nonparty-at-fault. After the plaintiff's attorney has engaged in this game of speculation, the defense takes the field. With almost complete impunity, the defendant's attorney is invited to offer up the names of anyone else who may be in some way connected to the alleged harm.

In reaction, the plaintiff files a motion to strike the nonparty-at-fault allegation. This forces the defendant to establish a prima facia or colorable case against the nonparties,[3] and insulates the plaintiff from the possibility of Rule 11 sanctions for adding them as additional defendants. Because of the very low standard for naming a nonparty-at-fault, the motion to strike is typically denied, and the plaintiff promptly amends the complaint to add the new parties.

Next, the action proceeds through discovery with everyone named as a party. Eventually the defendants with the least apparent fault file motions for summary judgment. The plaintiff will not oppose and may even invite these summary judgment motions — if a defendant is dismissed on summary judgment, the remaining defendants will be barred from arguing the fault of the dismissed party at trial. These motions often have little chance of success.

The mere existence of an expert opinion, no matter how questionable the opinion may be, means the court will deny the motions. When expert opinion is unnecessary, a self-serving affidavit or two will suffice. In the worst cases, these affidavits will be so inconsistent with other facts that the parties will strategically refrain from telling this story to the jury, and, lacking evidence at trial, the judge will direct a verdict for a marginally culpable defendant.

Because of the high standard for granting summary judgments or directed verdicts, this process always faults in favor of leaving defendants in the litigation and further encourages expansion of even the simplest tort case into complex litigation.

Regardless of who initiates the game — plaintiffs or defendants — everyone involved, including the court, is forced into the mud and required to play along. Although the major parties can often absorb these costs, the worst injustice invariably falls on the inappropriately named defendants. These parties, who had little if any connection with the tort, must either pay an attorney to litigate or offer the nuisance value of the suit in the hope that it will entice the plaintiffs to settle and accept the risk of the empty chair defense. In either event, these costs are not recoverable.

Motivations Driving the Game

Both sides play the empty chair game. Plaintiffs try to fill the empty chairs while defendants try to label them. The basic motivation for the game is quite simple. Plaintiffs want multiple defendants to aid the settlement process and to create hostility between defendants that results in finger-pointing at trial. Defendants want to label an empty chair in order to argue that the real culprit is not before the court and to watch the squirming as plaintiffs try to present their case and defend the empty chair at the same time.

Our move from joint and several to comparative fault liability has had a major impact on the empty chair game. With joint and several liability, it took truly egregious facts for a defendant to secure an outright win in the empty chair game. If a defendant's conduct contributed "only a little" to the plaintiff's injuries, judgment was entered for the full damages.[4] Under joint and several liability, defendants play the game in the hope that jury sympathy will create a compromise on damages — even though this is contrary to the legal theory and the jury instructions. A jury that believes there is a player with a significant share of the fault not before the court may be more likely to arrive at a lower damage amount.

Comparative fault liability dramatically increases the stakes in the empty chair game. With comparative fault liability, where a defendant is liable only for a portion of the total damages based on that defendant's share of the fault, the defendant is allowed to ask the jury for a direct set-off against the empty chair and the other defendants. Even the smallest degree of success creates an explicit and very visible dollar-for-dollar reduction in the damage award against the principal defendants. No longer is success in the empty chair game hidden in the relative magnitude of a jury's damage verdict. Instead, it is held up like a yard marker for all to see.

The empty chair game is counter-productive. The goal of our civil litigation system should be both equitable and efficient resolution of disputes. Our move to a comparative fault-based system was to enhance the equity arm of the goal. However, with this dramatic change in our tort law, we made relatively few adjustments in our procedural rules.[5] Instead of encouraging complex litigation, we should look for alternative ways to implement comparative fault liability that capitalize on the litigants' natural tendencies to avoid unnecessarily expanding the litigation.

The ideal system should bring only those persons who significantly contributed to the harm before the factfinder, either as a party to the litigation or in name only. The empty chair game does not have this result as a goal. To the contrary, defendants play the empty chair game not to get the significant players before the factfinder, but to place any name before the factfinder in an effort to expand and confuse the litigation, thereby shedding their liability onto an empty chair that offers no defense. Plaintiffs add additional parties not because they carry a significant share of the fault, but as a defensive measure preventing defendants from "winning" the empty chair game. The increased visibility of the empty chair game presents a significant barrier to ever achieving an efficient tort system.

Enforcement Does Not Work

The gamesmanship inherent in the empty chair game that undermines efficiency can be addressed in two different ways — either through creation of a strong enforcement mechanism ever vigilant for the counter-productive behavior, or through creation of incentives that encourage the productive behavior and discourage the counter-productive behavior.

The heart of the problem with the empty chair game as it currently exists is that plaintiffs perceive no limitation on defendants' ability to name nonparties-at-fault. Even under the most blatant of circumstances, a plaintiff has virtually no hope of ever obtaining sanctions against a defendant because of an inappropriate

notice of a nonparty-at-fault.[6] It is simply too easy to dismiss any such motion for sanctions as the mere cries of another plaintiff longing for the good old days of joint and several liability. As for sanctions against plaintiffs, early in the litigation no one blames plaintiffs for painting with a broad brush in their complaint. Then, as explained above, if plaintiffs play the game correctly, they insulate themselves from the possibility of sanctions later on. The theoretical threat of Rule 11 sanctions is no limitation at all.

The solution does not lie in strengthening court-imposed sanctions. The line between a properly named nonparty-at-fault and abuse of the game is too blurred to ever formulate an effective deterrent.

The Solution Lies in Incentives

If the empty chair game is ever going to be reined in, it will be because the litigants do it themselves out of their own self-interest. Under our current rules, we are left with only the good conscience of the attorneys. However, with so much at risk in comparative fault liability, far too often the attorneys seem to leave their conscience in the locker room.

Instead of allowing defendants to merely list the names of alleged nonparties-at-fault in a disclosure statement, our rules should require defendants to serve process on the nonparties and bring them into the action as third-party defendants. Then plaintiffs should be required to proceed to judgment against all of the defendants. Only if nonparties cannot be added should their fault be considered.

This change in the rules removes many of the harmful incentives inherent in our current procedures. Defendants will be forced to consider the consequences of their actions more carefully, as impleading a third party holds more ramifications than simply naming a nonparty-at-fault. No longer allowed to simply label an empty chair betting that the plaintiff will be unwilling to sue the nonparty, defendants will have to weigh all of the normal considerations that impact on a decision to bring suit. For starters, there is the risk of alienating friends and business associates. Defendants will have to sit at the same table — elbow-to-elbow — with the new parties they brought into the litigation. Moreover, there are considerations of added costs through complicating the litigation, and the risk of weakening their position at trial by creating a finger-pointing scenario among the defendants. Finally, Rule 11 is a more effective deterrent when there is another potential defendant ready and willing to use it. Thus, defendants have an effective and visible incentive to only name persons who contributed significantly to the harm.

These limitations placed on the defendant’s motivation for naming nonparties-at-fault in turn remove other harmful incentives. With assurance that defendants must bring additional parties into the litigation, plaintiffs will no longer have the incentive to preempt the game by naming marginally culpable defendants in the original complaint based on speculation as to defense strategies for nonparties-at-fault. The almost total abolition of joint and several liability places plenty of pressure on plaintiffs to carefully consider and name all possible parties. The added threat of the empty chair game only encourages plaintiffs to overstep reasonable boundaries and name defendants with even the slightest hint of liability. Plaintiffs will also no longer be placed in the awkward position of defending the empty chair at the motion to strike phase. Instead, the third-party defendants themselves will vigorously oppose their being added to the suit.

The Savings

Impleading nonparties-at-fault is certainly not a cure-all. On occasion, both plaintiffs and defendants will still name persons who had very questionable connections to the harm, and we will still have complex, multi-party, multi-theory litigation. However, the added incentives to not engage in the empty chair game will reduce the frequency that inappropriately named co-tortfeasors are brought into the litigation. These defendants, who should have never been named as parties, will be spared defense costs. The savings to our legal system will be realized through a reduction in the number of defendants named in tort actions.

In the above medical malpractice example, we will never know whether the specialist would have brought the family physician into the suit. Instead, under our current rules, the plaintiff avoided most of the game by preemptively naming the third-party. Even if the plaintiff had not chosen this route, with the stroke of a pen, it would have been relatively painless for the specialist to force the plaintiff to do the dirty work. Upon receiving a notice of nonparty-at-fault, the plaintiff would amend the complaint and serve process on the family physician.

Under our current rules, many questions go unanswered. After further consideration of the facts, would the specialist have reached the conclusion that the family physician was not at fault? Does the specialist have a good professional relationship with the family physician? If so, the specialist may believe that the relationship can be preserved when all that is required is a notice of nonparty-at-fault. Whereas if the specialist were required to file a third-party complaint and serve it on her business associate, there is a

much higher risk that the relationship would be destroyed. Could the specialist's decision to assert the nonparty-at-fault defense have been based on an incorrect assumption that the plaintiff would not sue her long-standing family physician? If the plaintiff is unwilling to sue the nonparty, naming a nonparty-at-fault presents no risk to the defendant. In summary, do the social and economic costs outweigh the possible benefits offered by bringing the family physician into the litigation?

If defendants are required to implead and serve process on nonparties-at-fault, these questions will be presented in almost every case. If any of these questions are answered in the affirmative, the nonparty will most likely not be added to the litigation.

Without adding costs to our judicial system, this proposed rule change realizes significant efficiencies by creating tangible limitations on the defendant's incentive to name nonparties-at-fault and eliminating the plaintiff's incentive to speculate on the defendant's approach. This proposal shifts the cost of bringing a third party into the suit from plaintiffs to defendants. However, this cost-shifting can be redistributed after trial by taxing the plaintiffs for the costs of serving third-party defendants if the defendant is ultimately successful in achieving some apportionment of fault to the third party.

There is Nothing Wrong With Defendants Bringing in Parties

When discussing this proposal with my colleagues, I often hear the response that plaintiffs are unrestricted in their choice of whom to sue and not to sue — they made their bed, now they should lie in it. Why? This attitude seems to be a residual vestige of the joint and several liability days. In Arizona's comparative fault liability system, the share of damages for all persons responsible for the harm is determined at one time.[7] Judgment is entered binding the parties, and the nonparties' shares are tracked merely as an accounting device.[8] In the interest of efficiency, all potentially liable parties should be before the court at the same time so that the entire dispute can be resolved in a single action. If a fair and efficient method requires both the plaintiff and the defendant to bring the parties before the court, then it should be followed. I see no value to our judicial system in blindly following a philosophy that arbitrarily restricts the parties to those named by the plaintiff.

Federal Rule 14(c)

We can look to admiralty and maritime practice in the federal courts for an example of this proposed procedure at work. Comparative fault liability in maritime tort cases is strikingly similar to Arizona's comparative fault-based tort system.[9] Early in the century, the federal courts experimented with allowing a similar impleader practice in civil actions. Concerns caused by diversity jurisdiction and case law holding that federal courts could not force plaintiffs to go to judgment against the third party led the federal courts to abandon this practice for civil actions.[10] However, it was retained for admiralty and maritime suits and is currently embodied in Federal Rule 14(c).

We should adopt a counterpart to Federal Rule 14(c). The language "*in accordance with the requirements established by court rule...*" found in A.R.S. § 12-2506(B) allows for just such a change. This new rule should only apply to claims subject to several only liability as set forth in A.R.S. § 12-2506. The new rule should bar the factfinder from apportioning fault to a nonparty unless the defendant establishes good cause for failing to implead the nonparty. There should be timeliness requirements similar to those currently applicable to allegations of nonparties-at-fault. It should allow for waiver of the impleader requirement in situations where the parties agree that a nonparty-at-fault is warranted. And lastly, the new rule should award a successful third-party plaintiff reasonable costs incurred in impleading the additional party.

Conclusion

Nurturing the current empty chair game does not make good public policy sense. We have created the appearance that we are powerless to do anything but shrug our shoulders as the fees continue to roll in. The courts are clogged and the public is sickened. Some procedural refinements are in order. The Arizona Supreme Court should adopt a counterpart to Federal Rule 14(c) for use in comparative fault liability tort actions. This rule requiring defendants to implead nonparties-at-fault is certainly not a cure-all, but would be a step in the right direction. I invite comment and discussion from other members of the Bar, especially those who have experience in the maritime and admiralty practice under Federal Rule 14(c).

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ENDNOTES

1. A.R.S. § 12-2506 (Supp. 1996). Although this statute is in the chapter titled "Uniform Contribution Among Tortfeasors Act," in its current form it more closely resembles the Uniform Comparative Fault Act. *See Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n. 4, 701 P.2d 1182, 1185 n. 4 (1985).
2. Rule 26(b)(5), Ariz. R. Civ. P.; Rule V, Ariz. Unif. R. Practice Superior Ct.
3. *See Ocotillo West v. Superior Ct.*, 173 Ariz. 486, 844 P.2d 653 (Ct. App. 1992) (reviewing allegation of nonparty-at-fault under a summary judgment standard).
4. *E.g., Markiewicz v. Salt River Valley Water Users' Assoc.*, 118 Ariz. 329, 338 n. 6, 576 P.2d 517, 526 n. 6 (Ct. App. 1978).
5. *See* Rule 26(b)(5), Ariz. R. Civ. P.; Rule V, Ariz. Unif. R. Practice Superior Ct.
6. There is no reported Arizona case law discussing sanctions for naming a nonparty-at-fault. For examples of some more innovative uses of the nonparty-at-fault defense *see* M. Siegel & H.M. Wright, "The Non-Party at Fault Defense, The Squirrel, The Phantom and Everybody Else But Me," *Arizona Attorney*, Jan. 1995 at 23.
7. A.R.S. §§ 12-2506(B) & (C).
8. A.R.S. § 12-2506(B).
9. *Compare* the maritime practice described in Rule 14, Fed. R. Civ. P., Advisory Committee's Note, 1966 Amendment *and* 2 C.J.S. Admiralty § 112 (1972) *with* A.R.S. § 12-2506.
10. Rule 14, Fed. R. Civ. P., Advisory Committee's Note, 1946 Amendment.