NEW JERSEY LAW REVISION COMMISSION

Tentative Report Concerning Application of Tort Claims Act Notice of Claim Provision in N.J.S. 59:8-8 to Contribution and Indemnification Claims

March 21, 2024

The New Jersey Law Revision Commission is required to "[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it" and to propose to the Legislature revisions to the statutes to "remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions." *N.J.S.* 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **May 21, 2024**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

Whitney G. Schlimbach, Counsel
New Jersey Law Revision Commission
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: wgs@njlrc.org
Web site: http://www.njlrc.org

Project Summary[1]

The New Jersey Tort Claims Act (TCA),[2] provides public entities with "broad but not absolute immunity" from tort liability.[3] The TCA sets forth procedures for initiating a tort claim against a public entity, including the requirement in N.J.S. 59:8-8 that "[a] claim relating to a cause of action for death or for injury or damage to person or to property shall be presented . . . not later than the 90th day after accrual of the cause of action."[4]

In *Jones v. Morey's Pier, Inc.*, a child died after falling from an amusement park ride while on a school trip.[5] Her parents filed a wrongful death action against the amusement park ("Morey Defendants"), which, in turn, filed third-party contribution and indemnification claims against the child's charter school, a public entity.[6] Neither party filed a notice of claim, and the Supreme Court determined that "a defendant's contribution and common-law indemnification claims against a public entity are barred when it fails to serve a notice of tort claim within the time limit imposed by N.J.S.A. 59:8–8."[7]

To mitigate the impact of its holding, the *Jones* Court also held that a party whose contribution claim is barred for failing to comply with the TCA notice provision may request an allocation of fault to the absent public entity tortfeasor.[8] Furthermore, although the Comparative Negligence Act[9] permits recovery of the entire amount of damages from any tortfeasor party who is at least sixty percent at fault, a court may limit recovery to the amount attributable to the non-public entity party even if that party's percentage of fault is greater than sixty percent.[10]

The proposed modifications, set forth in the Appendix, change N.J.S. 59:8-8 in the TCA to reflect the complete holding in *Jones*. They clarify that contribution and indemnification claims brought against public entities are subject to the TCA's ninety-day notice provision, which is triggered by the accrual of the underlying claim. In addition, consistent with the "Legislature's clear objective . . . to fairly apportion liability for damages in accordance with the factfinder's allocation of fault,"[11] the proposed modifications add language stating that a court may (1) allocate fault to an absent public entity tortfeasor, and (2) limit the recovery of damages to reflect the

---

[1] Preliminary work on this project was conducted by Eileen Funnell, during her tenure as a Legislative Law Clerk with the NJLRC.
[2] N.J. STAT. ANN. §§ 59:1-1 to 59:12-3 (West 2024).
[3] *Jones v. Morey's Pier, Inc.*, 230 N.J. 142, 154 (2017) (continuing that "[t]he Act's guiding principle is that immunity from tort liability is the general rule and liability is the exception.") (internal quotations omitted).
[4] N.J. STAT. ANN. § 59:8-8 (West 2024).
[5] *Jones*, 230 N.J. at 147.
[6] *Id.*
[7] *Id.* at 155.
[8] *Id.* at 165-66.
[9] N.J. STAT. ANN. §§ 2A:15-5.1 to -5.8 (West 2024).
[10] *Jones*, 230 N.J. at 169-70.
[11] *Id.* at 169.

percentage of fault allocated to the public entity tortfeasor even if the percentage of fault attributable to the non-public tortfeasor is sixty percent or more.

Additional modifications are proposed to N.J.S. 2A:15-5.2 and -5.3 that cross-reference the modifications made to N.J.S. 59:8-8. These modifications are intended to make clear that the rules governing allocation and recovery articulated in the Comparative Negligence Act may not apply in circumstances like those in *Jones*.

Statutes Considered

N.J.S. 59:8-8 provides that:

A claim relating to a cause of action for death or for injury or damage to person or to property shall be presented as provided in this chapter not later than the 90th day after accrual of the cause of action. After the expiration of six months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity or public employee if:

a. The claimant failed to file the claim with the public entity within 90 days of accrual of the claim except as otherwise provided in N.J.S.59:8-9; or

b. Two years have elapsed since the accrual of the claim; or

c. The claimant or the claimant's authorized representative entered into a settlement agreement with respect to the claim.

Nothing in this section shall prohibit a minor or a person who is mentally incapacitated from commencing an action under this act within the time limitations contained herein, after reaching majority or returning to mental capacity.[12]

N.J.S. 2A:15-5.2 provides, in relevant part:

a. In all negligence actions and strict liability actions in which the question of liability is in dispute, including actions in which any person seeks to recover damages from a social host as defined in section 1 of P.L.1987, c. 404 (C.2A:15-5.5) for negligence resulting in injury to the person or to real or personal property, the trier of fact shall make the following as findings of fact:

(1) The amount of damages which would be recoverable by the injured party regardless of any consideration of negligence or fault, that is, the full value of the injured party's damages.

[12] N.J. STAT. ANN. § 59:8-8 (emphasis added).

(2) The extent, in the form of a percentage, of each party's negligence or fault. The percentage of negligence or fault of each party shall be based on 100% and the total of all percentages of negligence or fault of all the parties to a suit shall be 100%.[13]

* * *

N.J.S. 2A:15-5.3 provides, in relevant part:

Except as provided in subsection d. of this section, the party so recovering may recover as follows:

a. The full amount of the damages from any party determined by the trier of fact to be 60% or more responsible for the total damages.

b. (Deleted by amendment, P.L.1995, c. 140.)

c. Only that percentage of the damages directly attributable to that party's negligence or fault from any party determined by the trier of fact to be less than 60% responsible for the total damages.[14]

* * *

Background

The *Jones* case arose from the death of an eleven-year-old who fell from an amusement park ride while on a school trip.[15] Two years after the accident, the child's parents (Plaintiffs) filed a lawsuit against the amusement park (Morey Defendants), which then filed a third-party complaint against the child's school (PleasanTech) seeking "contribution pursuant to the Joint Tortfeasors Contribution Law,[[16]] as well as common-law indemnification."[17] Neither the Plaintiffs nor the Morey Defendants served a notice of claim on PleasanTech, a charter school and, therefore, a public entity.[18]

The trial court "concluded that N.J.S.A. 59:8–8 does not require the service of a notice of claim as a prerequisite to a defendant's contribution or common-law indemnification claims against a joint tortfeasor that is a public entity."[19] The Appellate Division denied PleasanTech's

[13] N.J. STAT. ANN. § 2A:15-5.2 (West 2024) (emphasis added).
[14] N.J. STAT. ANN. § 2A:15-5.3 (West 2024) (emphasis added).
[15] *Jones*, 230 N.J. at 149.
[16] N.J. STAT. ANN. §§ 2A:53A-1 to -48 (West 2024).
[17] *Jones*, 230 N.J. at 149 & 151.
[18] *Id.* at 150; *see also* N.J. STAT. ANN. § 18A:36A-6(b) (West 2024) ("[a] charter school [can s]ue and be sued, but only to the same extent and upon the same conditions that a public entity can be sued").
[19] *Jones*, 230 N.J. at 150.

motion for leave to appeal and the Supreme Court granted the motion for leave to appeal.[20]

Analysis

Applicability of N.J.S. 59:8-8 to Contribution and Indemnification Claims

The Supreme Court considered "the legal consequences" of the fact that "neither plaintiffs nor the Morey defendants served a Tort Claims Act notice of claim on [PleasanTech] pursuant to N.J.S.A. 59:8-8 within ninety days of [the child]'s death."[21] Concluding that the notice of claim requirement is applicable to a defendant's claims for contribution from or indemnification by a public entity, the Court dismissed the Morey Defendant's claims against PleasanTech for failure to serve a notice of claim within ninety days of the accrual of the Plaintiffs' claims, as required by N.J.S. 59:8-8.[22]

The Court analyzed the legislative intent underlying the enactment of the TCA generally, and N.J.S. 59:8-8 specifically,[23] as well as the plain language of the notice of claim requirement in N.J.S. 59:8-8,[24] and the case law interpreting the statute.[25]

Legislative Intent

The TCA embodies the "guiding principle . . . that immunity from tort liability is the general rule and liability is the exception."[26] The *Jones* Court explained that the "Legislature imposed a strict constraint on public entity liability" with the enactment of N.J.S. 59:8-8, by "forever barr[ing]" recovery from a public entity for failure to comply with the statute.[27]

The Court concluded that interpreting the statute to allow the assertion of contribution or indemnification claims against a public entity without a notice of claim "would undermine" the legislative purpose of N.J.S. 59:8-8.[28]

Plain Language of N.J.S. 59:8-8

---

[20] *Id.*
[21] *Id.* at 150 & 153 ("All parties agree that neither plaintiffs nor the Morey defendants served a Tort Claims Act notice on [PleasanTech] within the time period prescribed by *N.J.S.A.* 59:8–8.").
[22] *Id.* at 157-58.
[23] *Id.* at 154.
[24] *Id.* at 157.
[25] *Id.* at 155-56.
[26] *Id.* at 154 (quoting *D.D. v. Univ. of Med. & Dentistry of N.J.*, 213 N.J. 130, 134 (2013)).
[27] *Id.* (explaining that the Legislature intended: "(1) to allow the public entity at least six months for administrative review with the opportunity to settle meritorious claims prior to the bringing of suit; (2) to provide the public entity with prompt notification of a claim in order to adequately investigate the facts and prepare a defense; (3) to afford the public entity a chance to correct the conditions or practices which gave rise to the claim; and (4) to inform the State in advance as to the indebtedness or liability that it may be expected to meet").
[28] *Id.* at 155 (citing *McDade v. Siazon*, 208 N.J. at 475-76).

Examining the language of N.J.S. 59:8-8, the *Jones* Court noted that it is "expansively phrased" and that the statute does "not distinguish between a plaintiff's claim and a defendant's cross-claim or third-party claim against a public entity."[29] The Legislature "did not exempt from the tort claims notice requirement . . . any . . . category of claims."[30] The *Jones* Court determined, therefore, that N.J.S. 59:8-8 clearly "governs contribution and indemnification claims brought by defendants, as it governs direct claims asserted by plaintiffs."[31]

Cases Interpreting N.J.S. 59:8-8

The issue addressed by *Jones* was one of first impression in the Supreme Court.[32] The Court noted that "courts' published decisions addressing [the] issue reach[ed] divergent results."[33] One line of cases in the lower courts "viewed a defendant's claim for contribution and indemnification to be beyond the reach of N.J.S.A. 59:8-8."[34]

By contrast, "trial courts [in *Cancel v. Watson*[35] and *Kingan's Estate v. Hurston's Estate*[36]] construed N.J.S.A. 59:8-8 to bar all claims, including contribution and indemnification claims, if the claimant failed to serve a [TCA] notice within the ninety-day period set forth in the statute."[37] Determining that the holdings in *Cancel* and *Kingan* "properly focused on N.J.S.A. 59:8-8's plain

---

[29] *Id.* at 157.
[30] *Id.* (interpreting the statutory language otherwise "would contravene the public policy stated by the Legislature in the [TCA]: 'public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein'").
[31] *Id.*
[32] *Id.* at 155.
[33] *Id.*
[34] *Id.* at 155-56 (citing *S.P. v. Collier High Sch.*, 319 N.J. Super. 452 (App. Div. 1999), abrogated by *Jones v. Morey's Pier, Inc.*, 230 N.J. 142 (2017) and *Ezzi v. DeLaurentis*, 172 N.J. Super. 592 (Law Div. 1980), abrogated by *Jones v. Morey's Pier, Inc.*, 230 N.J. 142 (2017) and *Markey v. Skog*, 129 N.J. Super. 192 (Law Div. 1974), abrogated by *Jones v. Morey's Pier, Inc.*, 230 N.J. 142 (2017)).
In *Markey*, the Appellate Division determined that "a defendant's right to contribution from a joint tortfeasor is . . . an inchoate right which does not ripen into a cause of action until he has paid more than his pro rata portion of the judgment obtained against him by the plaintiff." *Markey*, 129 N.J. Super. at 200. Therefore, "the viability of the right of a nonpublic defendant to seek contribution from a public entity as a joint tortfeasor is [not] dependent upon plaintiff having complied with the [notice of claim provision in] N.J.S.A. 59:8-8." *Id.* at 196.
Subsequently, the *Ezzi* Court held that, although a defendant's third-party contribution claim is not barred by the failure to file a notice of claim within ninety days of the accrual of the *plaintiff's* claim, the defendant must comply with N.J.S. 59:8-8 by filing a notice of claim within ninety days of the accrual of the contribution claim. *Ezzi*, 172 N.J. Super. at 600.
Additional decisions in *Berreta* and *S.P. Collier High School* held that a third-party complaint for contribution may be asserted against a public entity without a prior notice of claim to the public entity. *See Berretta v. Cannon*, 219 N.J. Super. 147, 155 (Law. Div. 1987); *see also S.P. Collier High Sch.*, 319 N.J. Super. at 475-76.
[35] *Cancel v. Watson*, 131 N.J. Super. 320, 322 & 324 (Law. Div. 1974), disapproved of by *D'Annunzio v. Borough of Wildwood Crest*, 172 N.J. Super. 85 (App. Div. 1980) (identifying provisions of the TCA which made "clear that the Legislature intended to discourage the joinder of public entities as third-party defendants" and holding that "joinder should not be permitted" if the plaintiff did not comply with the ninety-day notice provision in N.J.S. 59:8-8).
[36] *Kingan's Est. v. Hurston's Est.*, 139 N.J. Super. 383 (Law. Div. 1976), disapproved of by *D'Annunzio v. Borough of Wildwood Crest*, 172 N.J. Super. 85 (App. Div. 1980) (holding consistently with *Cancel*).
[37] *Jones*, 230 N.J. at 156.

language," the *Jones* Court "concur[red] with the analysis" and holdings in these two cases, abrogating the three other cases.[38]

Given the plain language of N.J.S. 59:8-8, and its legislative purpose, the Court held "that when a defendant does not serve a timely notice of claim on a public entity pursuant to N.J.S.A. 59:8–8 . . . , the Tort Claims Act bars that defendant's cross-claim or third-party claim for contribution and common-law indemnification against the public entity."[39]

Applicability of Comparative Negligence Act and Joint Tortfeasors Contribution Law

The *Jones* Court acknowledged, however, that its holding "may deprive a defendant of its right to pursue a claim against a joint tortfeasor before the defendant is aware that the claim exists."[40] The Court explained that, "[in] some circumstances . . . the statutory scheme for the allocation of fault to joint tortfeasors, prescribed by the Comparative Negligence Act[[41]] and Joint Tortfeasors Contribution Law, may mitigate th[is] impact."[42]

The Comparative Negligence Act (CNA) "was designed to further the principle that '[i]t is only fair that each person only pay for injuries he or she proximately caused.'"[43] Once the total damages and allocation of fault have been determined, "the trial court molds the judgment based on those findings,"[44] but a plaintiff is entitled to "recover '[t]he full amount of the damages from any party determined by the trier of fact to be 60% or more responsible for the total damages.'"[45]

In the event that a defendant is "compelled to pay more than the percentage of damages corresponding to the jury's allocation of fault to that defendant," the remedy is "a claim for 'contribution from the other joint tortfeasors.'"[46] The Joint Tortfeasors Contribution Law (Joint Tortfeasors Law) governs such contribution claims, and "was enacted to promote the fair sharing of the burden of judgment by joint tortfeasors and to prevent a plaintiff from arbitrarily selecting his or her victim."[47]

---

[38] *Id.*; *see supra* note 34.
[39] *Id.* at 157-58.
[40] *Id.* at 158.
[41] N.J. STAT. ANN. §§ 2A:15-5.1 to -5.8 (West 2024).
[42] *Jones*, 230 N.J. at 158 (noting that a "common-law indemnification claim . . . is distinct from [a] statutory contribution claim [as n]either the Comparative Negligence Act nor the Joint Tortfeasors Contribution Act governs a common-law indemnification claim, and an allocation of fault pursuant to those statutes is unrelated to such a claim").
[43] *Id.* at 159 (quoting *Fernandes v. DAR Dev. Corp.*, 222 N.J. 390, 407 (2015)).
[44] *Id.* (citing N.J. STAT. ANN. § 2A:15-5.2(d) (West 2024)). Damages are further reduced "by the percentage of negligence attributable to the person recovering." *Id.* at 159 (citing N.J. STAT. ANN. § 59:9-4 (West 2024)).
[45] *Id.* (quoting N.J. STAT. ANN. § 2A:15-5.3(a) (West 2024)). A plaintiff is entitled to recover "[o]nly that percentage of the damages directly attributable to [a] party's negligence or fault" when the party is responsible for less than sixty percent of the total damages. *Id.* (quoting N.J. STAT. ANN. § 2A:15-5.3(c)).
[46] *Id.* (quoting N.J. STAT. ANN. § 2A:15-5.3(e)).
[47] *Id.* at 160 (quoting *Holloway v. State*, 125 N.J.S 386, 400-01 (1991)); *see also* N.J. STAT. ANN. § 2A:53A-3 (West 2024) (when "any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors for the excess so paid over his pro rata share").

Allocation of Fault to an Absent Tortfeasor

Allocation is not permitted when a party "could not under any circumstances be a joint tortfeasor under N.J.S.A. 2A:53A-2."[48] As the *Jones* Court pointed out, however, there are multiple contexts in which courts have allowed "a factfinder to allocate fault to an [absent] individual or entity . . . and the allocation may reduce the amount of damages awarded to the plaintiff."[49]

With these considerations in mind, the *Jones* Court examined "whether the objectives of the Tort Claims Act, the Comparative Negligence Act and the Joint Tortfeasors Contribution Law are furthered by an allocation of fault" to a public entity that is not part of an action because of the failure of a party to comply with the notice of claim provision in N.J.S. 59:8-8.[50]

The legislative policy underlying the TCA is "to ensure prompt notice to public entities of potential claims against them," while the purpose of the Comparative Negligence Act and the Joint Tortfeasors Law is to make "a fair apportionment of damages as among joint defendants in accordance with the factfinder's allocation of fault."[51] Construing these statutes "as a unitary and harmonious whole,"[52] the *Jones* Court concluded that "[a]uthorizing the Morey defendants to seek an allocation of fault to [PleasanTech] is an equitable result in the circumstances of [the] case,"[53] and "harmonizes and furthers the three statutes' separate goals."[54]

Therefore, the Court instructed that if the jury found "that [PleasanTech] was negligent and that its negligence was a proximate cause of [the child]'s injuries and death," the jury should allocate fault to both the Morey Defendants and PleasanTech.[55]

Applicability of Sixty Percent Threshold in the CNA

Following an allocation of fault by the jury, a party may recover "[t]he full amount of the damages from any party determined by the trier of fact to be 60% or more responsible for the total

---

[48] *Id.* at 161 (quoting *Town of Kearny v. Brandt*, 214 N.J. 76, 101 (2013)).
[49] *Id.* at 161. *See infra* at pp. 9-12.
In *Bolz v. Bolz*, both plaintiff and defendant were barred "from asserting claims against a public entity and public employees because the plaintiff [did not] sustain[] an injury meeting the statutory criteria" of the Tort Claims Act. *Id.* at 163 (citing *Bolz v. Bolz*, 400 N.J. Super. 154, 159 (App. Div. 2008)). The Appellate Division held, however, "that the defendant 'was entitled to have the jury determine each party's percentage of negligence or fault in causing the injury,'" and if the defendant in the action was found "to be less than sixty percent at fault, 'he would be responsible to pay damages only for his percentage of fault.'" *Id.* (quoting *Bolz*, 400 N.J. Super. at 160-61).
[50] *Id.* at 164.
[51] *Id.* at 164-65.
[52] *Id.* at 164.
[53] *Id.* at 165 (noting that "[t]he equities . . . weigh against plaintiffs," because the Plaintiffs' strategic choice to bring the claim first in a Pennsylvania forum "deprived the Morey defendants of the opportunity to preserve their right to file a cross-claim against" PleasanTech and further noting that "the procedural posture of [the] case allows for a fair determination of [PleasanTech]'s alleged fault").
[54] *Id.*
[55] *Id.* at 166.

damages," pursuant to N.J.S. 2A:15-5.3(a).[56] In *Jones*, the Court held that, to "best further[] the Legislature's equitable intent," the Morey Defendants would only be liable for their own percentage of fault *even if* the jury allocated sixty percent or more of the fault to them.[57]

In coming to this conclusion, the *Jones* Court agreed with the Appellate Division decision in *Burt v. West Jersey Health System*, which involved a plaintiff's failure to file an Affidavit of Merit against a defendant who was dismissed from the suit as a result.[58] The *Burt* Court reasoned that permitting the plaintiff to recover the full amount of damages from the undismissed tortfeasor "would deprive [the undismissed tortfeasor] of their right to seek contribution from the [dismissed] defendants."[59] The Appellate Division in *Burt* concluded that the undismissed tortfeasors "should not be prejudiced by the failure of plaintiff to file the required Affidavit of Merit."[60]

The *Jones* Court concluded that the same concerns arose in the case before it. "If the jury were to allocate sixty percent or more of the fault . . . to the Morey defendants, and the Morey defendants were required to pay one hundred percent of the damages . . . they would similarly be denied the benefit of their contribution claim."[61] The Supreme Court found that, "[i]n the setting of this case, that result would defeat the Legislature's clear objective: to fairly apportion liability for damages in accordance with the factfinder's allocation of fault."[62]

Proposed Modifications

During the July 20, 2023, and September 21, 2023, meetings of the New Jersey Law Revision Commission, the Commission discussed whether and how to modify the statutes in accordance with the aspect of the *Jones* holding relating to allocation of fault.[63] The Commission proposed modifying the CNA to reflect the potential consequences of failing to comply with the notice provision in the TCA, because the situation addressed by *Jones* arises only when a party has *failed* to properly bring a claim against a public entity. Therefore, since "the circumstances [of *Jones*] involve claims that could *not* be brought against a public entity," the Commission determined that notice of the potential consequences of failing to file a notice of claim against a public entity should also appear in the CNA.[64]

---

[56] N.J. STAT. ANN. § 2A:15-5.3(a).
[57] *Jones*, 230 N.J. at 169.
[58] *Id.* at 167. *See Burt v. W. Jersey Health Sys.*, 339 N.J. Super. 296 (App. Div. 2001).
[59] *Burt*, 339 N.J. Super. at 308.
[60] *Id.*
[61] *Jones*, 230 N.J. at 169.
[62] *Id.*
[63] N.J. Law Revision Comm'n, *Minutes NJLRC Meeting*, at 7-8, July 20, 2023, www. njlrc.org (last visited Jan. 4, 2024) [hereinafter "July 2023 Minutes"]. *See also* N.J. Law Revision Comm'n, *Minutes NJLRC Meeting*, at 6-7, Sept. 21, 2023, www. njlrc.org (last visited Jan. 2, 2024) [hereinafter "September 2023 Minutes"].
[64] *Id.* at 7.

Modifications to N.J.S. 59:8-8 in the TCA[65]

The proposed modifications to N.J.S. 59:8-8 are intended to reflect the complete *Jones* holding. Specifically, the proposed modifications clarify that the notice of claim provision is applicable to contribution and indemnification claims and specify that the ninety-day time period is triggered by the accrual of the *underlying* cause of action.

In addition, the proposed modifications provide notice to parties that (1) an allocation to an absent tortfeasor may be sought by the remaining tortfeasor(s), and (2) the court may limit the remaining tortfeasor's liability to their own percentage of fault, notwithstanding the relevant provisions in the CNA.[66]

Modifications to the CNA

The proposed modifications to the CNA cross-reference the proposed new language in N.J.S. 59:8-8. In N.J.S. 2A:15-5.2, the modified language clarifies that an allocation of fault may be made to an absent public entity tortfeasor in the circumstances described in N.J.S. 59:8-8. In addition, language was added to N.J.S. 2A:15-5.3 to make clear that the rules of recovery set forth in the CNA are subject to the new parameters in N.J.S. 59:8-8.

---

[65] During the September 2023 Commission meeting, the Commission expressed a preference that language reflecting the allocation and recovery aspect of the *Jones* holding be added to the CNA, and a cross-reference to that language added to the TCA. *See* September 2023 Minutes, *supra* note 63, at 6-7. This was based in part on the recommendation of Commissioner Rainone during the July 2023 Commission meeting. *See* September 2023 Minutes, *supra* note 63, at 7 ("[Commissioner Bell] recalled that Commissioner Rainone felt strongly that the language should be placed in the CNA, but [Commissioner Bell] acknowledged that it can work either way."); *see also* July 2023 Minutes, *supra* note 63, at 6 ("Commissioner Rainone questioned the rationale behind placing this language in the TCA rather than the CNA, given that the circumstances involve claims that could *not* be brought against a public entity."). In order to make sure that Commissioner Rainone's recommendations were accurately reflected in the revised draft modifications, Staff reached out to Commissioner Rainone, who was not present during the September 2023 meeting. During a September 29, 2023, meeting of Commissioner Rainone, Laura Tharney, and Whitney Schlimbach, Commissioner Rainone clarified that the substantive language could appear in the TCA with a cross-reference to the TCA in the CNA (because adding the *Jones* language to the TCA essentially constitutes an amendment to the CNA). He cautioned that if the language in the TCA and the CNA are not an exact match, the modifications could open the statute up to interpretation.
Chairman Gagliardi and Commissioner Bell expressed a preference during the September 2023 Commission meeting for including the substantive *Jones* language in the CNA, consistent with their recollection of Commissioner Rainone's position. After clarifying Commissioner Rainone's position, Staff provided updated draft language to Commissioner Rainone, Commissioner Bell, and Chairman Gagliardi. All conveyed approval of the new language to Staff. *See* E-Mail from Louis N. Rainone, Commissioner, NJLRC, to Whitney G. Schlimbach, Counsel, NJLRC (Feb. 6, 2024, 3:14 PM EST); E-Mail from Bernard Bell, Commissioner, NJLRC, to Whitney G. Schlimbach, Counsel, NJLRC (Feb. 8, 2024, 9:17 AM EST); and E-Mail from Vito A. Gagliardi, Jr., Chairman, NJLRC, to Whitney G. Schlimbach, Counsel, NJLRC (Feb. 29, 2024, 9:27 PM EST).

[66] Although it was proposed during the September 2023 Commission meeting that the modified language should appear in the CNA *only*, with a cross-reference to the relevant CNA provisions added to N.J.S. 59:8-8, Staff was unable to identify an appropriate location for a cross-reference to the allocation and recovery rules of the CNA without first adding language referencing allocation and recovery to N.J.S. 59:8-8. *See* September 2023 Minutes, *supra* note 63, at 7.

Pending Bills

There are currently no pending bills involving N.J.S. 59:8-8, N.J.S. 2A:15-5.2, or N.J.S. 2A:15-5.3.

Conclusion

In *Jones*, the Supreme Court resolved a long-standing split in the lower courts regarding the applicability of the notice provision in N.J.S. 59:8-8 to claims for contribution or indemnification brought against a public entity.[67] The Court also held that in circumstances like those found in *Jones,* a court may permit an allocation of fault to the absent public entity tortfeasor and reduce the plaintiff's recovery by the amount allocated to the public entity, notwithstanding N.J.S. 2A:15-5.2 and -5.3 in the Comparative Negligence Act.[68]

The proposed modifications to these three statutes are intended to reflect the holding in *Jones*, both to clarify the applicability of the notice of claim requirement to contribution and indemnification claims against a public entity, and to provide notice that a court may allocate fault to an absent public entity tortfeasor and reduce the plaintiff's recovery accordingly.

---

[67] *Jones*, 230 N.J. at 155.
[68] *Id.* at 166 & 169.

APPENDIX

The proposed modifications to **N.J.S. 59:8-8**, **N.J.S. 2A:15-5.2, and N.J.S. 2A:15-5.3,** (shown with ~~strikethrough~~, underlining, *italics*,[69] and **bolding**[70]), follow:

N.J.S. 59:8-8: Time for presentation of claims.

a. A claim relating to a cause of action for death or for injury or damage to person or to property, including claims for contribution and common law indemnification, shall be presented as provided in this chapter[ ] not later than the 90th day after accrual of the cause of action for death or for injury or damage to person or to property. After the expiration of six months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity or public employee if:

~~a.~~ 1. The claimant failed to file the claim with the public entity within 90 days of accrual of the claim except as otherwise provided in N.J.S. 59:8-9; or

~~b.~~ 2. Two years have elapsed since the accrual of the claim; or

~~c.~~ 3. The claimant or the claimant's authorized representative entered into a settlement agreement with respect to the claim.

b. If a party's contribution claim is barred pursuant to this section or N.J.S. 59:8-9,[71] the court **may**:

1. **notwithstanding the provisions of N.J.S. 2A:15-5.2(a)(2) of the Comparative Negligence Act (C.2A:15-5.1 et seq.),**[72] permit the finder of fact to allocate a percentage of fault to the absent public entity tortfeasor,[73] provided the party *gives fair and timely*

[69] Italicized language was derived from language proposed by Commissioner Bell after the July 2023 Commission meeting. *See Memo Re: Application of Notice of Claim Provision to Contribution and Indemnity Claims - Supplemental Memorandum [2 pages]*, From Bernard W. Bell, Commissioner, to Whitney G. Schlimbach, Counsel, and Laura C. Tharney, Executive Director, NJLRC (August 21, 2023) (on file with NJLRC).
[70] Bolded language represents modifications that have been added since the September 2023 Commission meeting.
[71] N.J. STAT. ANN. § 59:8-9 (West 2024) ("A claimant who fails to file notice of his claim within 90 days as provided in section 59:8-8 of this act, may, in the discretion of a judge of the Superior Court, be permitted to file such notice at any time within one year after the accrual of his claim provided that the public entity or the public employee has not been substantially prejudiced thereby. Application to the court . . . shall be made upon motion supported by affidavits . . . showing sufficient reasons constituting extraordinary circumstances for his failure to file notice of claim within the period of time prescribed by section 59:8-8 of this act or to file a motion seeking leave to file a late notice of claim within a reasonable time thereafter; provided that in no event may any suit against a public entity or a public employee arising under this act be filed later than two years from the time of the accrual of the claim.").
[72] Given the modifications to N.J.S. 2A:15-5.2 and -5.3, the proposed language also adds a cross-reference to the relevant statutes in N.J.S. 59:8-8.
[73] *Jones*, 230 N.J. at 149 ("hold[ing] . . . that the trial court should afford the Morey defendants an opportunity to present evidence at trial that [PleasanTech] was negligent and that its negligence was a proximate cause of [the child]'s death. If the Morey defendants present prima facie evidence, the trial court should instruct the jury to determine whether any fault should be allocated to" PleasanTech).

notice[74] *of the intent to pursue allocation and meets their burden of proof of the public entity's negligence or fault,*[75]; and,

2. mold the judgment to reduce the damage award by the percentage of fault allocated to the public entity,[76] ***even if N.J.S.*** *2A:15-5.3(a)* ***of the Comparative Negligence Act (C.2A:15-5.1 et seq.)*** *would otherwise authorize recovery of the full amount of the damages from a party* ~~*determined to be 60% or more responsible for the total damages*~~.[77]

c. Nothing in this section shall prohibit a minor or a person who is mentally incapacitated from commencing an action under this act within the time limitations contained herein, after reaching majority or returning to mental capacity.

COMMENT

The proposed modifications to N.J.S. 59:8-8 add language to subsection (a) derived from the Supreme Court's opinion in *Jones v. Morey's Pier, Inc.*, clarifying that claims for contribution and common-law indemnification are subject to the ninety-day notice of claim requirement in the TCA, and that the ninety-day period is triggered by the accrual of the underlying cause of action.[78]

In addition, the modifications add a new subsection (b) that provides notice to parties that the court may allow an allocation of fault to the absent public entity tortfeasor in certain circumstances. As held by the *Jones* Court, the party seeking allocation must present "prima facie evidence of the [absent public entity tortfeasor]'s negligence" to have the issue of allocation considered by the jury.[79] The *Jones* Court also observed that the plaintiffs had ample notice of the defendant's intent to seek allocation, and the formulation of the notice requirement ("fair and timely") is derived from the Supreme Court decision in *Young*, which governs tortfeasors absent due to settlement.[80]

[74] *Young,* 123 N.J. at 597 ("The conclusion we reach today, as the Appellate Division cautioned, does not give a non-settling defendant free rein to assert the liability of a settling defendant without first providing the plaintiff with fair and timely notice."); *see also Jones*, 230 N.J. at 165 (observing that "[t]he parties have long been on notice of the Morey defendants' intention to seek the apportionment of a percentage of fault to [PleasanTech] at trial").
[75] *Jones*, 230 N.J. at 166 (instructing that "if the Morey defendants present prima facie evidence of [PleasanTech]'s negligence when the case proceeds to trial, the trial court should instruct the jury to determine whether the Morey defendants have proven by a preponderance of the evidence that [PleasanTech] was negligent and that its negligence was a proximate cause of [the child]'s injuries and death").
[76] *Jones*, 230 N.J. at 149 ("[s]hould the jury find that [PleasanTech's] . . . negligence was a proximate cause of [the] death, the trial court should mold any judgment entered in plaintiffs' favor . . . to reduce the damages awarded to plaintiffs by the percentage of fault that the jury allocates to" PleasanTech).
[77] Commissioner Bell suggested eliminating the phrase "determined to be 60% or more responsible for the total damages" to account for the possibility that the Legislature may, at some point in the future, change the liability threshold in the CNA. *See* E-Mail from Bernard Bell, Commissioner, NJLRC, to Whitney G. Schlimbach, Counsel, NJLRC (Feb. 8, 2024, 9:17am EST). Commissioner Bell explained that ending the phrase with "from a party," "incorporate[s] the current percentage level [for liability for the total amount] and any future change of the percentage level." *Id.* The Commission approved that suggestion during the March 21, 2023 meeting.
[78] *Id.* at 157-58 ("Accordingly, we hold that when a defendant does not serve a timely notice of claim on a public entity pursuant to N.J.S.A. 59:8–8 and is not granted leave to file a late notice of claim under N.J.S.A. 59:8–9, the Tort Claims Act bars that defendant's cross-claim or third-party claim for contribution and common-law indemnification against the public entity.").
[79] *Id.* at 166.
[80] *Young*, 123 N.J. at 597.

The new subsection also permits the court to mold the judgment to reduce damages by the percentage of fault allocated to the public entity tortfeasor.[81]

N.J.S. 2A:15-5.2. Comparative negligence; findings of fact; damages; percentage of negligence of each party; molded judgment

a. In all negligence actions and strict liability actions in which the question of liability is in dispute, including actions in which any person seeks to recover damages from a social host as defined in section 1 of P.L.1987, c. 404 (C.2A:15-5.5) for negligence resulting in injury to the person or to real or personal property, the trier of fact shall make the following as findings of fact:

(1) The amount of damages which would be recoverable by the injured party regardless of any consideration of negligence or fault, that is, the full value of the injured party's damages.

(2) The extent, in the form of a percentage, of each party's negligence or fault. The percentage of negligence or fault of each party shall be based on 100% and the total of all percentages of negligence or fault of all the parties to a suit shall be 100%. **<u>If a party's contribution claim against a public entity is barred for failure to comply with section 59:8-8 or 59:8-9 of P.L.1972, c. 45 of the "New Jersey Tort Claims Act," fault may be allocated in accordance with the provisions of N.J.S. 59:8-8(b).</u>**

b. In an action in which a person seeks to recover damages from a social host for negligence resulting in injury to the person or to real or personal property, the negligence of any person in becoming intoxicated shall be considered by the trier of fact, and the trier of fact shall allocate a percentage of negligence to that person.

c. As used in this section:

(1) "Negligence actions" includes, but is not limited to, civil actions for damages based upon theories of negligence, products liability, professional malpractice whether couched in terms of contract or tort and like theories. In determining whether a case falls within the term "negligence actions," the court shall look to the substance of the action and not the conclusory terms used by the parties.

(2) "Strict liability actions" includes, but is not limited to, civil actions for damages based upon theories of strict liability, products liability, breach of warranty and like theories. In determining whether a case falls within the term "strict liability actions," the court shall look to the substance of the action and not the conclusory terms used by the parties.

d. The judge shall mold the judgment from the findings of fact made by the trier of fact.

COMMENT

[81] N.J. STAT. ANN. § 2A:15-5.3 (". . . the party so recovering may recover . . . [t]he full amount of the damages from any party determined by the trier of fact to be 60% or more responsible for the total damages").

The proposed modifications to N.J.S. 2A:15-5.2 add language reflecting that, when a party has failed to comply with the notice provisions in N.J.S. 59:8-8 and -9 of the TCA, fault may be allocated in accordance with the provisions of N.J.S. 59:8-8. This language is intended to alert parties to the fact that the rules governing allocation of fault may be different from those set forth in the CNA when a party has failed to present a timely notice of claim against a public entity as required by the TCA.[82]

N.J.S. 2A:15-5.3. Recovery of damages based on party's responsibility; exception for environmental torts <u>and certain other tort claims</u>;[83] definitions.

Except as provided in subsection d. of this section, the party so recovering may recover as follows:

a. The full amount of the damages from any party determined by the trier of fact to be 60% or more responsible for the total damages**<u>, except as provided in N.J.S. 59:8-8(b) of the "New Jersey Tort Claims Act"</u>**.

b. (Deleted by amendment, P.L.1995, c. 140.)

c. Only that percentage of the damages directly attributable to that party's negligence or fault from any party determined by the trier of fact to be less than 60% responsible for the total damages.

d. With regard to environmental tort actions, the following provisions shall apply:

(1) the party so recovering may recover the full amount of the compensatory damage award from any party determined to be liable, except in cases where the extent of negligence or fault can be apportioned. Such apportionment shall be done in accordance with section 2 of P.L.1973, c. 146 (C. 2A:15-5.2);

(2) in those cases where it is possible to apportion negligence or fault, if the party so recovering is unable to recover the percentage of compensatory damages attributable to a non-settling insolvent party's negligence or fault, that amount of compensatory damages may be recovered from any non-settling party in proportion to the percentage of liability attributed to that party; and

(3) notwithstanding the provisions of any other provision of law to the contrary, if the percentage of liability or fault of any party is found to be five percent or less, upon acceptance of that determination by that party and payment thereof in full, that party shall not be liable for any further claims for contribution regarding that action.

e. Any party who is compelled to pay more than his percentage share may seek contribution from the other joint tortfeasors.

f. As used in this section, "environmental tort action" means a civil action seeking damages for personal injuries or death where the cause of the damages is the negligent manufacture, use, disposal, handling, storage or treatment of hazardous or toxic substances.

---

[82] *Jones*, 230 N.J. at 149.

[83] The title of this section is modified to reflect the new language added to subsection (a) of N.J.S. 2A:15-5.3.

COMMENT

The proposed modifications to N.J.S. 2A:15-5.3 add language to subsection (a), which permits a party to recover the total amount of damages from any party determined to be sixty percent or more at fault. The modified language provides notice that this rule of liability and recovery is superseded by the provisions of N.J.S. 59:8-8(b), which incorporates the holding in *Jones*. [84]

[84] *Jones*, 230 N.J. at 149.