



1956

Torts - Comparative Negligence - Evaluation

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Recommended Citation

Arthur R. Flores, *Torts - Comparative Negligence - Evaluation*, 1 Vill. L. Rev. 115 (1956).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol1/iss1/13>

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TORTS—COMPARATIVE NEGLIGENCE—EVALUATION.

I.

Comparative negligence, generally stated, is a rule whereby an injured plaintiff who, himself, is guilty of negligence which operated concurrently with that of the defendant to become the proximate cause of the injury, may recover if the degree of his negligence is slight as compared with that of the defendant.¹ It is frequently and more descriptively referred to as the "apportionment of damages" rule. It is that area of the law and its implications to which this Comment is addressed. No attempt will be made to consider the vast area of the law which is neatly summed up under the title "Negligence" or to give a full picture of that segment known as contributory negligence except as it is directly relevant for contrast and placing the rule of comparative negligence in proper prospective. A word as to what is not comparative negligence seems appropriate at this point because of the confusion which sometimes arises owing to a failure to realize the distinction between comparative negligence and the rule of contributory negligence which bars recovery if the plaintiff's negligence was a proximate cause of the injury. Some cases where a negligent plaintiff has been permitted recovery have been viewed as adhering to the comparative negligence rule, whereas actually the only reason the action was not defeated was because the plaintiff's negligence was irrelevant because it was not the proximate cause of the injury.² In jurisdictions where the rule of comparative negligence is not followed the plaintiff is barred from recovery because of his own negligence if it is a proximate cause of the injury. Having this distinction in mind will prevent a misunderstanding of the problem.

II.

The doctrine of contributory negligence which bars a plaintiff from recovery for his injuries, if, by his own act, no matter how slight, he has proximately contributed to his misfortune, did not exist at the early common law. The doctrine is first reported in England in 1809 in the case of *Butterfield v. Forrester*,³ where it was said that one man's negligence did not preclude the necessity of another's taking ordinary precautions to safeguard himself. Fifteen years later this rule was adopted in the United States⁴ and by 1854 courts were citing it as a fixed rule of law.⁵ So harsh were the results which flowed from the application of this rule that within a few years the courts in England sought relief from the doctrine.

1. *Kerr v. Forgue*, 54 Ill. 482 (1870); *Wichita & Western R.R. v. Davis*, 37 Kan. 743 (1887).

2. *Mc Caa v. Thomas*, 207 Ala. 211, 92 So. 414 (1922); *Atlanta & Birmingham Air Line Ry. v. Wheeler*, 154 Ala. 530, 46 So. 262 (1908).

3. 11 East 60, 103 Eng. Rep. 926 (1809).

4. *Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824).

5. *Pennsylvania R.R. v. Aspell*, 23 Pa. 147 (1854).

They succeeded in establishing the "last clear chance" or "humanitarian" doctrine.⁶ This rule was widely accepted in the United States although its meaning and interpretation varied among the states.⁷

It was upon this historical background that the courts, notably those of Illinois and Kansas, began to make a judicial comparison of the fault of the parties in determining the amount of damages in cases where both parties were negligent in a proximately causative manner. The plaintiff's negligence was found not to be a total bar to recovery but upon satisfaction of the court that it was only *slight* as compared to the *gross* failure of care on the part of the defendant, the damage figure was diminished by an amount reflecting the degree to which the plaintiff had been negligent.⁸ This is the judicial doctrine of comparative negligence.

With a resurgence of the importance of the rule of contributory negligence, the courts began to cite *Butterfield v. Forrester* as the common-law rule and judicial approval of an apportionment of damages became almost extinct. In fact, such apportionment was expressly repudiated in most American jurisdictions.⁹ The rule next emerged in statutes. The specifications for its use vary. However, the most widespread situation in which it is invoked is in the employer-employee relationship, and particularly in cases involving common carriers. In these situations there were many "hard" cases. A moment's lapse could visit great hardship upon a worker who had been a model of carefulness, and in the face of an employer's failure to offer sufficient safeguards for the welfare of his employees. The Federal Employer's Liability Act is a concise statement of the comparative negligence rule.¹⁰ Some forty states now have compara-

6. *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (1842). The theory of this doctrine is that the negligence of the plaintiff does not preclude a recovery for the negligence of the defendant where it appears that the defendant by exercising reasonable care and prudence might have avoided injurious consequence to the plaintiff notwithstanding the plaintiff's negligence.

7. There is at least one major division which is noticeable among the courts which apply this doctrine. One group makes the existence of actual knowledge in the defendant a prerequisite to application of the doctrine while the other group finds that if in the exercise of due care the defendant should have known of the plaintiff's peril, this is sufficient. See *Chunn v. City & Suburban Ry.*, 207 U.S. 302 (1907) on the former view, and *Smith v. Gould*, 110 W. Va. 579, 159 S.E. 53 (1931) on the latter.

8. *Kerr v. Forgue*, 54 Ill. 482 (1870); *Galena & Chicago Union R.R. v. Fay*, 16 Ill. 558 (1855); *Wichita & Western R.R. v. Davis*, 37 Kan. 743 (1887).

9. *Chicago, R.I. & P. Ry. v. Hamler*, 215 Ill. 525, 74 N.E. 705 (1905); *Union Trust Co. v. Detroit, G.H. & M. Ry.*, 239 Mich. 97, 214 N.W. 166 (1927); *New Jersey Express Co. v. Nichols*, 33 N.J.L. 434 (1867); *Falk v. Crystal Hall, Inc.*, 200 Misc. 979, 105 N.Y.S.2d 66 (Sup. Ct. 1951), *aff'd*, 279 App. Div. 1071, 113 N.Y.S.2d 277 (1st Dep't 1952); *Building Supply Co. v. McCabe*, 336 Pa. 322, 77 A.2d 368 (1951); *Tesch v. Milwaukee Electric Ry. & Light Co.*, 108 Wis. 593, 84 N.W. 823 (1901).

10. 35 STAT. 66, 45 U.S.C. § 53 (1952). The text of the section is: "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *Provided*, That no such em-

tive negligence statutes governing at least some negligence cases. Many are imitations of the federal law. Mississippi and Nebraska make the utilization of the rule most general,¹¹ the former being the only state which makes it applicable to all negligence cases. The other jurisdictions which include the rule as part of their law make its applicability depend upon the particular type of situation set forth in the statute.¹² As indicated earlier these may include workmen's compensation cases, suits against common carriers, employer-employee suits generally, and combinations of these.

Employing the rule of comparative negligence as opposed to that of contributory negligence may result in full recovery rather than the usual bar,¹³ but generally a diminution of damages is the end intended and achieved.¹⁴ As a prerequisite to recovery some of the statutes provide that there must be a finding that the plaintiff's negligence was "slight" as compared to "gross" on the part of the defendant.¹⁵ This imitates the test used by the courts in the early days of the rule. To use this test the court must evaluate each party's fault in order to satisfy the statute. Litigation as to the class of each party's fault is a necessity under this type of statute. Another manner of stating the requisites for recovery in cases where dual negligence is present is that the plaintiff's negligence be *less than* that of the defendant.¹⁶ This proves to be a more workable test for the courts.

The acceptability and form of the rule of comparative negligence in any jurisdiction, then, is very much dependent upon the existence and stipulations of a statute. In England the trend toward comparative negligence and away from contributory negligence has been the same in principle though somewhat different in form. As already stated, the "last clear chance" doctrine found an early entry into the law of England after the emergence and extensive acceptance of the doctrine of contributory negligence.¹⁷ A more recent innovation into the English law of torts was that of requiring a different standard of care from an employee than from the employer.¹⁸

ployee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

11. MISS. CODE ANN. § 1454 (1942); NEB. REV. STAT. § 25-1151 (1953).

12. MASS. GEN. LAWS c. 229 §§ 2, 2A, 20 (1933); N.M. STAT. ANN. § 24-103 (1941); S.D. GEN. LAWS c. 160 p. 184 (1941) (all cases of negligent damage to person or property); TENN. CODE ANN. § 2628-30 (Williams 1934); WIS. STAT. § 331.045 (1953) (all cases of negligent damage to person or property).

13. Barnhart v. Pere Marquette R.R., 188 Mich. 537, 155 N.W. 355 (1915).

14. Reed v. Paldwin, 192 Ark. 491, 92 S.W.2d 392 (1936); Sgroi v. Yellow Cab & Baggage Co., 124 Neb. 525, 247 N.W. 355 (1933); Englebrecht v. Bradley, 211 Wis. 1, 247 N.W. 451 (1933).

15. NEB. REV. STAT. § 25-1151 (1953).

16. WIS. STAT. § 331.045 (1953).

17. Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842).

18. Flower v. Ebbe Vale Steel, Iron & Coal Co. [1934] 2 K.B. 132, *rev'd on other grounds*, [1936] A.C. 206; Caswell v. Powell Duffryn Association Collieries, Ltd. [1940] A.C. 1952.

This permitted the court to allow recovery to the injured employee who had contributed to his own injury, notwithstanding the rule of contributory negligence, by a finding that he was not negligent since he had met his less rigorous duty of care. The necessity for this rather circuitous way of avoiding the hardship of the contributory negligence rule was ended by the Law Reform (Contributory Negligence) Act of 1945.¹⁹

III.

The rule of comparative negligence, like any innovation, has an impact on the existing status of the law. Naturally, the most important change made by this rule is in the law of negligence itself. Under the rule, fault on the part of the plaintiff should not be a bar to his recovery. The basic rules of negligence are left unaltered. The requisite elements to sustain a cause of action grounded on negligence remain unaltered. The same is true of contributory negligence which is measured by the same standards as negligence, the only difference being that the negligence is on the part of the one seeking redress rather than the party from whom it is sought. Thus statutes introducing comparative negligence change the legal effect of contributory negligence, but not what constitutes contributory negligence.²⁰ What is brought about is a different approach to a case involving negligence coupled with contributory negligence. The practical effect, however, is much greater. Court calendars are relieved of a great deal of litigation. Parties are less inclined to await the workings of justice since a settlement can be arrived at far easier in the face of an almost inevitable apportionment of damages.²¹ Precision is injected into the damage award for the cost to each party is representative of what damage each has caused. For example, under English application of the rule, in an accident where \$10,000 damage has occurred to the person or property of the two parties involved, upon an adjudication that the plaintiff was 30% responsible and the defendant 70%, the plaintiff would recover for 70% of his loss, while the defendant would be compensated for 30% of his loss. In this manner each party pays for the damages to the other for which he was responsible and bears the loss to the extent to which he caused his own loss. Even though he might recover but a small part of his loss, depending upon the percentages of responsibility, he is better off than being denied any recovery because of the fact that he has partially caused his own loss.²² Under the prevailing American view, recovery is limited to a plaintiff who is responsible for less than 50% of the damage.²³

Another important area where the rule has a decided impact is in the field of contribution among joint tortfeasors or multiple party cases. Under

19. 8 & 9 GEO. 6, c. 28.

20. *Raine v. Southern Ry.*, 169 N.C. 189, 85 S.E. 294 (1915).

21. See address by Dean Pound in 13 NACCA L.J. 195 (1954).

22. *Jay (William A.) & Sons v. Veevers, Ltd.* [1946] 1 All E.R. 646.

23. *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934).

the accepted rules regarding joint tortfeasors, each is liable for the whole of the damages caused regardless of the degree to which he may have been responsible even though as between himself and his joint tortfeasors he may have the right to contribution.²⁴ Some statutes, embodying the rules of comparative negligence, have attempted to regulate the problems of multiple parties. They have been largely unsuccessful. In an attempt to gain the benefits of an apportionment statute to the point of limiting a defendant's judgment to the percentage of the plaintiff's loss which this particular defendant caused, the Supreme Court of Wisconsin held that the rules regulating joint tortfeasors have been unchanged by the comparative negligence statute.²⁵ This seems to be the only satisfactory decision until a way is found to work out the whole problem in a sure and equitable manner which will safeguard the rights of all parties.

Opposition to adoption of the rule of comparative negligence is based principally on two basic contentions. One reason, popular among the traditionalists, is that no such provision is found at common law and that its introduction is a radical innovation in the law. A worthier objection, though not conclusive, is that great practical difficulties of percentage determination are raised under the rule. There is no obvious yardstick by which apportionment of negligence can be measured. A somewhat arbitrary figure must be assigned to the negligence of each party in order to regulate the amount of damages which will be chargeable to each. Those who favor the rule contend that neither objection is valid to forestall its inclusion in the working law of a modern jurisdiction. Many innovations have been made in the law to make it workable and to adapt it to changing social conditions. Change for the sake of change alone is never good, and hasty change to keep pace with every new idea is not advisable. However, when a serious injustice is taking place under an existing rule and a time proven solution is available, the fact that it will alter the law on the subject should not be a bar to its acceptance. As to the difficulty in determining the percentage of negligence, it is pointed out that this is not a new problem in the law. All damages are to some extent arbitrary and speculative. It is a rare case where monetary recompense can be awarded which corresponds exactly to each party's obligation to the other. Furthermore, courts of many jurisdictions which do not provide for the comparison of negligence have been handling the exact same problem in admiralty cases and cases involving the federal law for some time. New York is an excellent example.²⁶ It has long been recognized that a great injustice is done when a man guilty of a slight omission of care is made to bear the entire brunt of a costly accident in the face of a gross failure of due care on the

24. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, adopted with some variations in Ark., Del., Md., Mich., N.M., Pa., R.I., and S.D.

25. *Ready v. Hafeman*, 239 Wis. 1, 300 N.W. 480 (1941).

26. *Wolf v. Baltimore & Ohio R.R.*, 239 App. Div. 95, 267 N.Y. Supp. 199 (1st Dep't 1933); *McAuliffe v. New York C. & H.R.R.R.*, 172 App. Div. 597, 158 N.Y. Supp. 922 (1st Dep't 1916).

part of the other party. The rule of comparison, it is said, places as nearly as is humanly possible the share of loss on each party in proportion to the extent to which he was responsible. That it is more convenient not to make a comparison of fault is not a sound reason for failing to make it. Justice should be pursued though administration may involve inconvenience.

Support for the comparative negligence rule has come from many noted jurists. Justice Black, in the recent case of *Pope v. Talbot*, in which the admiralty rule was extended to apply to a carpenter who was working on a ship when he was injured, said:

“The hard rule of common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires. Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.”²⁷

Associate Justice Charles D. Breitel of the Appellate Division of the Supreme Court of New York in an evaluation of our current mode of judging negligence cases said:

“We are still trying automobile cases as if they had the same legal and social problems and occurred in the same volume as accidents arising out of the use of the horse and buggy. We have a rule of contributory negligence which has as much significance to the social fact of the automobile on the streets as the rule in *Shelley's case*.”²⁸

As with any rule of law, difficulties arise in its administration and there are undoubtedly different approaches to the same end. Before a jurisdiction adopts the rule, it is advisable to evaluate the form in which it has been operating in those situations where the rule is already utilized with an eye toward preventing obvious mistakes in interpretation. Dean Prosser, who has long advocated adoption of the comparative negligence rule, after a study of the ways in which it is being executed today, has made suggestions for improvement.²⁹ Avoidance of the terms “slight” and “gross” in describing the negligence of the parties as well as the “lesser” negligence of the plaintiff are strongly urged since these terms lead only to difficulty in application. Coupling a comparative negligence rule with a procedure for handling multiple party suits is also discouraged. He considers the problems which it raises too intricate to be handled with apportionment of damages.

27. 346 U.S. 406 (1953).

28. 2 BAR BULLETIN, N.Y. COUNTY LAWYERS ASS'N 81 (1953).

29. See 51 MICH. L. REV. 465 (1953).

Use of the special verdict is recommended in order to keep the jury under control while utilizing the apportionment procedure. This form of control has been successfully employed in Wisconsin for some time.³⁰ For example, in an automobile accident case the following special issues are put to the jury: whether the defendant was negligent with respect to the speed of his car; if so, was this a cause of the accident; was the plaintiff negligent in entering the intersection; if so, was the plaintiff's negligence a cause; if all of these questions are affirmatively answered then what percentage of the total negligence was attributable to the defendant and what percentage to the plaintiff; what is the amount of damage which the plaintiff has sustained. With responses to these questions on the record, the jury cannot reach its verdict in secrecy leaving the court unaware of whether its instructions were followed and whether the law was correctly applied to the facts. A more precise verdict will be forthcoming or the grounds for overriding the verdict will be much more evident.

The rule of comparative negligence now stands as a useful and necessary part of the law of negligence. The hardships which were worked by strict adherence to the principles of contributory negligence were apparent at an early date, and juries are not unknown to have granted recovery in negligence cases while making allowance for the degree to which the plaintiff was responsible. A most frank appellate recognition of this unofficial action by juries is found in three recent Pennsylvania cases. In each case the court held that the fact that the size of the verdict was possibly influenced by the evidence of the plaintiff's contributory negligence was not a sufficient basis for a refusal to overthrow a denial of a motion for a new trial on the ground that the verdict was inadequate.³¹ Such an unauthorized apportionment of damages is not advisable both because of the loss of respect for the law which it creates and because of the injustice to one who does not receive like treatment in another similar case.

There is no reason why any jurisdiction should permit a continuance of the cold refusal to make any adjustment for a plaintiff who has in some way helped to place himself in the situation for which he seeks redress. It is the duty of the courts to afford justice and not to make examples of negligent plaintiffs. The comparative negligence rule stands as an answer to the problem, awaiting only its adoption by the legislatures in order to permit the courts to put it into operation.

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30. *Webster v. Roth*, 246 Wis. 535, 18 N.W.2d 1 (1945); *Tomany v. Camozzi*, 238 Wis. 611, 300 N.W. 508 (1941); *Schulz v. General Casualty Co.*, 233 Wis. 118 288 N.W. 803 (1939).

31. *Ewing v. Marsh*, 174 Pa. Super. 589, 101 A.2d 391 (1953); *Karcesky v. Laria*, 114 A.2d 150 (Pa. 1955); *Patterson v. Palley Mfg. Co.*, 360 Pa. 259, 61 A.2d 861 (1948); *Carpenelli v. Scranton Bus Co.*, 350 Pa. 184, 38 A.2d 44 (1944). In the *Ewing* case note the language at p. 392; "It is also possible that the size of the verdict was influenced by the evidence of the decedent's contributory negligence. Although this issue was decided on the plaintiff's favor by the verdict against the defendants, it may properly be considered by the appellate court."