History, Development, and Analysis of the Pennsylvania Comparative Negligence Act: An Overview

David S. Shrager
Carol Nelson Shepherd

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Torts Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol24/iss3/2

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
HISTORY, DEVELOPMENT, AND ANALYSIS OF THE PENNSYLVANIA COMPARATIVE NEGLIGENCE ACT:
AN OVERVIEW

DAVID S. SHRAGER†
CAROL NELSON SHEPHERD‡‡

The Pennsylvania General Assembly adopted a comparative negligence statute which became effective on September 7, 1976. The legislation is brief and its general language leaves numerous issues open to judicial interpretation. Although the Pennsylvania Comparative Negligence Act was patterned to some extent after the comparative negligence statute of Wisconsin, it has no statutory twin in any other jurisdiction.

It was early decided that the Act was not to be applicable retroactively, but was to apply only to causes of action accruing on September 7, 1976 or thereafter. Case law interpreting the Act is therefore just now developing in the Pennsylvania courts.

This article will first trace the development of comparative negligence law in Pennsylvania. It will then analyze the judicial treatment of some of the issues left unresolved by the Act and several of the areas which remain to be construed by the courts. In the latter instances, the opposing policy considerations will be set forth along with the authors' recommendations concerning the rules of law which should be adopted in Pennsylvania. Finally, some of the practical considerations and consequences engendered by the Act, for both the attorney and the litigant, will be discussed.

‡‡ B.A., Arizona State University, 1975; J.D., Syracuse University College of Law, 1978. Member, Pennsylvania Bar.

The authors express their appreciation to Ellen Mecklenborg, Jon Willinger, and John Wright for their research assistance.
1. For purposes of this symposium, references to and quotations from the Pennsylvania Comparative Negligence Act have been made without citation. For the text of the Act, see Spina, Introduction, Symposium: Comparative Negligence in Pennsylvania, 24 VILL. L. REV. 419, 419 (1979).
2. The Act was approved by former Governor Milton Shapp on July 9, 1976. The statute provided that it would take effect in 60 days, thereby becoming effective on September 7, 1976.
3. See note 98 infra.
4. See id. See also V. Schwartz, Comparative Negligence 357-69 (1974); H. Woods, Comparative Fault 421-595 (1978).
6. Only § (a) of the Act will be discussed in this article. Section (b), which provides for contribution among joining defendants, is discussed in another article in this symposium. See Griffith, Hemsley & Burr, Contribution, Indemnity, Settlements, and Releases: What the Pennsylvania

(422)
1978-1979] COMPARATIVE NEGLIGENCE IN PENNSYLVANIA 423

I. HISTORY OF THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE

In order to understand the Pennsylvania Comparative Negligence Act, it is essential to review the historical background of the common law doctrine of contributory negligence. Much of the case law prior to the enactment of comparative negligence statutes was developed in an attempt to ameliorate the harshness of the impact of the doctrine of contributory negligence upon the plaintiff.

The legal doctrine that culpable conduct by a plaintiff absolves the defendant of liability actually antedates the concept of negligence. Based upon proximate cause, the doctrine posited that the plaintiff's act was the proximate cause of his injury. His right to recover was denied not because of his negligence, the notion of which had not yet arisen, but because his own act was deemed to be the direct cause of the accident.

The doctrine of contributory negligence is generally believed to have been first enunciated in 1809 in the English case of Butterfield v. Forrester. It entered American jurisprudence in 1824 through the Massachusetts case of Smith v. Smith. In Butterfield and

Comparative Negligence Statute Did Not Say, Symposium: Comparative Negligence in Pennsylvania, 24 Vill. L. Rev. 494 (1979). Certain areas in which the Act has had an impact, including multiple defendants, jury, and verdict, are discussed in greater depth in another article. See Beasley & Tunstall, Jury Instructions Concerning Multiple Defendants and Strict Liability After the Pennsylvania Negligence Act, Symposium: Comparative Negligence in Pennsylvania, 24 Vill. L. Rev. 518 (1979).

8. Id.
9. Turk, Comparative Negligence on the March (pt. 1), 28 Chi.-Kent L. Rev. 189, 196 (1950). Pollock, the nineteenth century authority on torts, considered proximate cause to be the true basis of contributory negligence. F. Pollock, Law of Torts 366-68 (14th ed. 1939). He stated that the plaintiff's recovery should not be barred unless his negligence occurred at the final stage, or at a decisive point, and was more proximate than the defendant's negligence in causing the accident or injury. Id. at 367. It was not until the early years of the twentieth century that the emphasis on proximate cause came into question. H. Woods, supra note 4, § 1:2, at 6.
10. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). In Butterfield, the plaintiff, who was riding upon a public road, was injured when he ran into a pole which the defendant had left across the highway. Id. at 60, 103 Eng. Rep. at 926-27. Evidence was introduced which proved that the plaintiff could have avoided the pole if he had been riding slower or had maintained a better lookout. Id., 103 Eng. Rep. at 927. The court held that
[a] party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do [sic] not himself use common and ordinary caution to be in the right . . . . One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.
Id. at 61, 103 Eng. Rep. at 927.
11. 19 Mass. (2 Pick.) 621 (1824). In Smith, the plaintiff's horse was injured by defendant's woodpile which projected into the highway. Id. at 621. The court specifically cited Butterfield in holding that the plaintiff could not recover unless he could show that he had used ordinary care. Id. at 624.
Smith, the doctrine of contributory negligence was greatly expanded as the courts adopted the test of lack of ordinary care, without requiring proximate cause.12 Where plaintiff’s lack of ordinary care, no matter how slight, contributed to his injury, he was completely barred from obtaining recovery against the defendant.13 The doctrine "reflected a desire to protect an emerging yet weak industrial economy from catastrophic tort losses."14 Broad philosophical bases such a laissez-faire, free will, and individualism were asserted.15 The rule was also justified by the assertion that it encouraged every member of the community to maintain a certain standard of care,16 since a person who did not exercise ordinary care for his own safety was punished by an inability to recover for his injuries.17

Professors Harper and James have stated that "almost from the very beginning there has been serious dissatisfaction with the Draconian rule sired by a medieval concept of cause out of a heartless laissez-faire."18 By the twentieth century, the doctrine was under

12. See H. Woods, supra note 4, § 1:3, at 7. Discussing Butterfield and Smith, Woods states:

No attempt was made to measure the degree of plaintiff's contribution. The defense was applicable whether or not plaintiff's negligence made a substantial or material contribution to his injury. A plaintiff who contributed even slightly to his own injury could not recover regardless of how negligent the defendant may have been, and in some jurisdictions the plaintiff was required to plead and prove absence of negligence on his part.


In the nineteenth century . . . Law was a realization of the idea of liberty, and existed to bring about the widest possible individual liberty. Liberty was the free will in action. Hence it was the business of the legal order to give the widest effect to the declared will and to impose no duties except in order to effectuate the will or to reconcile the will of one with the will of others by a universal law . . . the bases of liability were culpable conduct and legal transaction, and these came down to an ultimate basis in will. The fundamental conception in legal liability was the conception of an act—of a manifestation of the will in the external world.

16. See Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233, 254-55 (1908). This commentator explained:

The duty of care for others manifestly should be no higher than the duty of self-protection. To hold otherwise would be to unduly burden business and enterprise, to make of those engaged therein the guardians of those apt to be affected by their operation, and at the same time to rob of self-reliance, and so enervate and emasculate and in effect pauperize the latter by accustoming them to look to others for protection and by removing from them all responsibility for their own safety.

17. F. Pollock, supra note 9, at 367.

heavy assault by both the bench\textsuperscript{19} and by legal scholars.\textsuperscript{20} It has been called "the harshest doctrine known to the common law of the nineteenth century."\textsuperscript{21}

The rigid application of contributory negligence inevitably produced inequitable results in many cases. By the close of the nineteenth century, significant limitations\textsuperscript{22} had been engrafted upon

\textsuperscript{19} In 1953, the Supreme Court of the United States, in an opinion written by Justice Black, characterized contributory negligence as "a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight." Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953). Many additional state and federal court opinions have criticized the doctrine. See, e.g., Li v. Yellow Cab Co., 13 Cal. 3d 804, 809-13, 532 P.2d 1226, 1230-32, 119 Cal. Rptr. 858, 862-64 (1975); Louisville & N.R.R. v. Yniestra, 21 Fla. 700, 737-38 (1886); Haeg v. Sprague, Warner & Co., 202 Minn. 425, 429-30, 281 N.W. 261, 263 (1938).

\textsuperscript{20} Professor Turk, in his seminal article, \textit{Comparative Negligence on the March}, eloquently criticized the contributory negligence doctrine:

All human beings, because of their imperfections, are what the law would style "negligent" at some time or another, the one today, the other tomorrow. Why then, if an accident results from the negligence of two or more persons, should the noxal consequences be distributed so unevenly? Why should the mutilated victim have to suffer the sorrows of pain, tears, and sleepless nights while his opponent, perhaps guilty of fault to a higher degree, is free to leave a court of justice bearing a certificate that he is not to be deemed a tort-feasor? To call such a result "harsh" is to use a mild expression, to say the least!

Turk, supra note 9, at 201-02.

Dean Prosser was also a vociferous critic of contributory negligence, arguing that it is no answer to the harshness of the rule to contend that it will promote caution by making the plaintiff responsible for his own safety. \textsc{W. Prosser, Law of Torts} \textsection 67, at 433 (4th ed. 1971). Dean Prosser stated:

It is quite as reasonable to say that it encourages negligence, by giving the defendant reason to hope that he will escape the consequences. . . . No one supposes that an automobile driver, as he approaches an intersection, is in fact meditating upon the golden mean of the reasonable man of ordinary prudence, and the possibility of tort damages, whether for himself or for another.


\textsuperscript{22} Professor Thomas Lambert has listed the limits on contributory negligence as follows:

\begin{enumerate}
  \item The defense is not available in an action based upon intentional or reckless wrongdoing. . . .
  \item Contributory negligence is generally not a defense where defendant engages in ultrahazardous or extrahazardous activities giving rise to strict liability. . . .
  \item In general, although the question is complicated by the amorphous and protean nature of the concept of nuisance, contributory negligence is insignificant as a defense in such cases, especially in cases of absolute nuisance. . . .
  \item Contributory negligence is not a defense in strict privity—free tort or warranty products liability cases where the negligence of the plaintiff consists only in failure to discover the danger in the product or to take precautions against its possible existence. . . .
  \item Limitation to specific risk, i.e., plaintiff's contributory negligence is no bar unless it contributes to the "specific foreseeable risk" which harms plaintiff and which antecedently made defendant's conduct negligent. . . .
  \item Contributory negligence is no bar unless plaintiff has exposed himself to an unjustifiable or unreasonable risk of harm. . . .
\end{enumerate}
the doctrine in order to ameliorate its harshness. There was also a decided trend to leave the determination of the existence of contributory negligence to the jury. Although the limitations on the applicability of contributory negligence may have served their purpose at the time, the question of their continued viability following the enactment of comparative negligence statutes has been a source of considerable controversy.

II. THE STANDARD FOR CONTRIBUTORY NEGLIGENCE IN PENNSYLVANIA

A. Proximate Cause Requirement

Prior to the adoption of comparative negligence in 1976, Pennsylvania followed a unique standard for contributory negligence. In Crane v. Neal, the Supreme Court of Pennsylvania held that the test for contributory negligence in Pennsylvania was whether the plaintiff’s “negligence contributed in any degree, however slight, to the injury.” The court held that it was error for the

(7) While, in general, contributory negligence is a defense to a negligence action founded on defendant’s violation of a purely criminal statute it will not be where the statute is “enacted to protect a class of persons from their inability to exercise self-protective care” against the risks created by the statute’s violation. . . .

(8) Professor Fleming James, Jr. has persuasively argued that the courts have adopted a double standard, in comparing such elastic concepts as negligence and contributory negligence, so as to extend the concept of negligence and contract that of contributory negligence. . . .

(9) The largest and most significant inroad on the indefensible contributory negligence defense is found in the last clear chance doctrine. . . .

(10) The sharpest and most rational inroad on the harsh contributory negligence defense . . . is the admirable doctrine of comparative negligence.


24. Id.

25. For a discussion of the effect of comparative negligence on the limiting principles promulgated under contributory negligence in Pennsylvania, see notes 103-70 and accompanying text infra.


27. 389 Pa. 329, 132 A.2d 675 (1957). In Crane, two motorcyclist-plaintiffs stopped on the paved partition of a highway when one of their motorcycles stalled. Id. at 330, 132 A.2d at 676. They were subsequently struck by defendant’s automobile. Id. The defendant’s defense was that plaintiff’s failure to remove their motorcycles from the highway amounted to contributory negligence. Id. at 331, 132 A.2d at 677. Although the trial court found for the plaintiffs, the Supreme Court of Pennsylvania reversed. Id. at 331-32, 132 A.2d at 677.

lower court to instruct the jury that plaintiff's negligence must be a proximate cause of the injury in order to bar the plaintiff's recovery. Applied literally, the Crane rule would mandate a verdict for the defendant whenever a plaintiff's negligence contributed to the injury in a "but for" sense, even though it was not a "proximate cause" of the injury.

Although the federal courts in Pennsylvania often applied Crane literally, the United States District Court for the Eastern District of Pennsylvania, in Moore v. United States, held that although a plaintiff could not recover if his negligence contributed in any degree to his injury or death, negligence contributes to the occurrence only if it is a "juridical" cause of the injury, not simply a condition of its occurrence. In another federal case, the United States District Court for the Middle District of Pennsylvania, although reciting the rule of Crane, obviated its harshness by giving the jury wide discretion on the issue of contributory negligence.

It is hardly surprising that the courts in Pennsylvania struggled to apply the Crane rule in a way that would not contradict traditional tort concepts of causation. In 1966, without expressly overruling Crane, the Supreme Court of Pennsylvania added a proximate cause requirement in Hamilton v. Fean. This holding did not, however, dissipate the confusion. Certain lower courts continued to apply liter-

---

30. See Musi v. DeSarro, 370 F.2d 113 (3d Cir. 1966) (per curiam). In Musi, plaintiffs brought suit for personal injuries and property damage which resulted from an automobile accident. Id. at 114. The plaintiffs admittedly had driven through a flashing red light and the defendants had driven through a flashing yellow light without decelerating or looking. Id. The issue was whether the defendant, in his counterclaim against the plaintiffs, was guilty of contributory negligence as a matter of law. Id. The United States Court of Appeals for the Third Circuit held that the defendant was guilty of contributory negligence as a matter of law since, by failing to look before entering the intersection, "his negligence contributed in any degree, however slight, to the injury." Id., quoting Crane v. Neal, 389 Pa. 329, 333, 132 A.2d 675, 677 (1957), quoting McDonald v. Ferrebee, 366 Pa. 543, 546, 79 A.2d 232, 234 (1951) (citations omitted).
31. 217 F. Supp. 289 (E.D. Pa. 1963). In Moore, a crane operator was electrocuted while standing near a mobile crane whose boom made contact with overhead transmission lines on government property. Id. at 292. The court held that the plaintiff was guilty of contributory negligence in the "juridical" sense because he knew of the danger of the boom being near the wire, yet stayed in an area where he had no responsibilities. Id. at 297.
32. Id. at 297. The plaintiff's claim in Moore was, nevertheless, barred. Id.
33. Stanchis v. Hess Oil & Chem. Co., 292 F. Supp. 22 (M.D. Pa. 1967), aff'd, 403 F.2d 24 (3d Cir. 1968) (per curiam). Plaintiffs, an automobile driver and passenger, brought actions for injuries sustained when their car collided with defendant's truck, which was blocking a highway at the bottom of a hill without any headlights or warning signals. 292 F. Supp. at 24. The district court held that the issue of plaintiffs' contributory negligence was a jury question since the evidence was not sufficient to decide the issue as a matter of law. Id. at 26. As the court explained: "Contributory negligence as a matter of law should be declared only in a very clear case where there is no room for reasonable men to differ." Id. (citations omitted).
ally the rule that the plaintiff’s negligence need only “contribute” to the accident. In several decisions after Hamilton the courts, citing Crane, specifically stated that in order to defeat recovery, the plaintiff’s negligence need not be a proximate cause of the injury.\textsuperscript{35}

In 1970, however, the Supreme Court of Pennsylvania reaffirmed its proximate cause requirement.\textsuperscript{36} In Argo v. Goodstein,\textsuperscript{37} the court held that to prevent the plaintiff’s recovery, his conduct must be a proximate cause of the occurrence of his injury, in any degree.\textsuperscript{38} The standard applied to the causal relationship between the plaintiff’s negligence and the resulting harm was the same as that applied to the causal relationship between defendant’s negligence and the resulting harm.\textsuperscript{39}

After Argo, the lower courts recognized that Crane had been implicitly overruled.\textsuperscript{40} Until 1971, however, the Supreme Court of Pennsylvania insisted that the proximate cause requirement was not in conflict with the holding of Crane.\textsuperscript{41} Finally, in 1971, Crane was

\textsuperscript{35} See Matteo v. Sharon Hill Lanes, Inc., 216 Pa. Super. Ct. 188, 263 A.2d 910 (1970). In Matteo, plaintiff was injured in defendant’s bowling alley when a wet spot on his shoes prevented him from sliding. Id. at 189, 263 A.2d at 911. The Superior Court of Pennsylvania reversed a decision below for the plaintiff, noting that the trial court’s charge that the plaintiff’s negligent conduct “must be the proximate cause of the injury or hurt” was incorrect. Id. at 191 & n.1, 263 A.2d at 912 & n.1 (footnote omitted). Cf. Kapes v. Leader Dep’t Store, 6 Luz. 155 (C.P. Luzerne County 1972) (court granted defendant’s motion for summary judgment and stated that any negligence on the part of the plaintiff will defeat recovery; plaintiff’s negligence need not be a proximate cause of the injury).


\textsuperscript{37} 438 Pa. 468, 265 A.2d 783 (1970). Argo involved an action by a blind door-to-door salesman for injuries sustained when he opened the door of defendant’s premises, a place where he had previously done business, entered, and fell in an area where there was no floor since the premises were being remodeled. Id. at 471, 265 A.2d at 784.

\textsuperscript{38} Id. at 481, 265 A.2d at 790.

\textsuperscript{39} Id.

\textsuperscript{40} See Harrison v. Nichols, 219 Pa. Super. Ct. 428, 281 A.2d 696 (1971). In Harrison, the plaintiff, a pedestrian, was injured when he was struck by defendant’s vehicle. Id. at 429, 281 A.2d at 698-99. The superior court affirmed the trial court’s instruction that any negligence, no matter how slight on the part of the plaintiff, would bar his action if it were a proximate cause of his injury. Id. at 431-32, 281 A.2d at 698-99.

The superior court reasoned that the decision in Argo, which was rendered 20 days after the Harrison trial, made it clear that “no matter how slight plaintiff’s negligence may be it will bar him if it is a proximate cause of his injury.” Id. Argo, the court noted, appeared to overrule Crane. Id. at 431, 281 A.2d at 698.

\textsuperscript{41} See Cebulske v. Lehigh Valley R.R., 441 Pa. 230, 272 A.2d 171 (1971). In Cebulske, the plaintiff claimed that the defendant railroad company’s negligence in maintaining a bridge was the proximate cause of his injuries, which were sustained when his delivery truck went off the bridge. Id. at 231-32, 272 A.2d at 172. Defendant raised plaintiff’s knowledge of the defective condition as proof of contributory negligence. Id. at 232, 272 A.2d at 172. The trial court held for plaintiff and the Supreme Court of Pennsylvania affirmed, holding that Crane did not overturn the traditional rule in Pennsylvania that plaintiff’s negligence must be a proximate cause in order to defeat recovery. Id. at 236, 272 A.2d at 174. The court stated that the correct rule was that plaintiff’s negligence, however slight, would defeat his recovery if it were a proximate cause of the accident. Id. at 233, 272 A.2d at 173. The defendant and plaintiff were thus
explicitly overruled in *McCay v. Philadelphia Electric Co.* The court held that the "slightest degree" language in *Crane* had never been the law in Pennsylvania; rather, the correct rule was that the party who proximately caused the injuries should be held accountable, whether plaintiff or defendant. Both the state and federal courts have subsequently adopted this proximate cause standard.

**B. Attempts to Mitigate Harshness of Contributory Negligence**

The harshness of contributory negligence has been mitigated in most jurisdictions by the development of doctrinal limitations. Prior to the adoption of comparative negligence, Pennsylvania incorporated many of these limiting principles into its jurisprudence. For example, juries have been given wide discretion in determining whether the plaintiff's negligence is a proximate cause of the injury. It is clear, however, that there are limits on the jury's discretion. Where, for example, the plaintiff has notice of a danger, yet acts in apparent disregard of the danger without exercising due care, such disregard may amount to contributory negligence as a matter of law if it is a proximate cause of the accident.

placed in the same position: whoever was the proximate cause of the accident was legally responsible. It should be noted, however, that proximate cause is not equivalent to negligence, as *Crane* might imply.

42. 447 Pa. 490, 498, 291 A.2d 759, 761-62 (1972). The plaintiff motorist was injured when her vehicle was struck in the rear by defendant's automobile. *Id.* at 492, 291 A.2d at 760. Defendant's witnesses claimed that the plaintiff stopped suddenly, and plaintiff admitted she never looked to see if other automobiles were behind her. *Id.*

43. *Id.* at 495, 291 A.2d at 761-62. The Supreme Court of Pennsylvania stated: "The correct statement of the law is that a plaintiff cannot recover if his own negligence, however slight, contributes to the happening of the accident in a proximate way." *Id.*, 291 A.2d at 762.


45. See notes 7-25 and accompanying text *supra*; notes 46-75 and accompanying text infra.

46. *Poltorak v. Sandy*, 236 Pa. Super. Ct. 355, 345 A.2d 201 (1975). In *Poltorak*, two vehicles collided after the plaintiff's vehicle stalled during an attempt to make a left turn. *Id.* at 358-59, 345 A.2d at 203. The defendant alleged that the plaintiff had failed to use due care in crossing the highway and in taking too much time to restart the engine. *Id.* at 359, 345 A.2d at 203. The Superior Court of Pennsylvania held that the issue of the existence of contributory negligence and whether such contributory negligence was the proximate cause of the accident were proper jury questions. *Id.* at 359-61, 345 A.2d at 203-04.

Another example of the wide discretion offered to the jury is *Groh v. Philadelphia Elec. Co.*, 441 Pa. 345, 271 A.2d 265 (1970). In that case, the decedent sustained fatal burns when the downspout he was removing from a building came into contact with electrical transmission lines. *Id.* at 347-48, 345 A.2d at 266. Although the Supreme Court of Pennsylvania reversed a decision for the administratrix on grounds not related to contributory negligence, the court noted that the fact that decedent saw or should have seen the transmission lines did not make decedent contributorily negligent as a matter of law. *Id.* at 350, 345 A.2d at 268.

47. See *Kronk v. West Penn Power Co.*, 422 Pa. 458, 463, 222 A.2d 720, 722 (1966) (plain-
1. **Doctrine Held Inapplicable In Cases of Intentional Torts or Wanton Misconduct**

The courts have also limited the impact of contributory negligence by holding that it is inapplicable as a defense to certain conduct by the defendant. When a defendant intentionally inflicts an injury upon a plaintiff, the plaintiff's contributory negligence is not a defense.\(^49\)

In addition, although the doctrine of "last clear chance"\(^49\) has been rejected in Pennsylvania,\(^50\) the courts have recognized the concepts of "discovered peril"\(^51\) and "wanton misconduct,"\(^52\) both of

---

\(^{49}\) See F. Harper & F. James, supra note 18, § 22.5, at 1211. These authors stated: "Intentional wrongdoing is so much graver a wrong than negligence both in its social consequences and in the amount of resentment it arouses that the felt need both to deter and to punish it outweighs any social benefits that are thought to accrue from the rule of contributory negligence." Id. (footnote omitted). See also W. Prosser, supra note 20, § 65, at 426.

\(^{50}\) The doctrine of last clear chance originated in the 1842 English case of Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. D. 1842). In Davies, the defendant drove into the plaintiff's animal, which was tethered in the highway. Id. at 546-47, 152 Eng. Rep. at 588. The court held that the plaintiff could recover, in spite of his own negligence, if the defendant might have avoided injuring the animal by exercising proper care. Id. at 549, 152 Eng. Rep. at 589. The first and most frequently cited explanation for the doctrine is that "if the defendant has the last clear opportunity to avoid the harm, the plaintiff's negligence is not a proximate cause of the result." W. Prosser, supra note 20, § 66, at 427.


The **Summary of Pennsylvania Jurisprudence** has characterized the doctrine as one of antecedent and subsequent negligence:

Where a plaintiff, by his own carelessness, gets himself into a position of helpless peril and there is a distinct break and lapse of time between the original negligence of plaintiff and subsequent negligence of defendant, the plaintiff's negligence is not regarded as an operative force constituting a contributory cause of the accident but rather merely as part of the history of the occurrence. In this situation the sole cause of the accident is defendant's subsequent negligence. Hence, there is no basis for barring plaintiff's right of recovery on the basis of contributory negligence under the circumstances.


\(^{52}\) See Kasanovich v. George, 348 Pa. 199, 203, 34 A.2d 523, 525 (1943).
which effectively produce the same result. When the plaintiff's prior negligence leaves him in a position from which he is unable to extricate himself and the defendant discovers the plaintiff's peril in time to avoid injuring him yet fails to do so, the Pennsylvania courts have permitted the plaintiff to recover under the doctrine of "discovered peril" despite his antecedent negligence.

The doctrine of "wanton misconduct" has often yielded the same result. In Geelen v. Pennsylvania Railroad, the Supreme Court of Pennsylvania held that if the jury found "wanton misconduct" which was greater "not only in degree but in kind" from simple or even gross negligence, then contributory negligence would not defeat the plaintiff's recovery. The court stated that if defendant's train conductor in Geelen had possessed actual knowledge of decedent's peril for a sufficient time to enable him to avoid the accident, a finding of wanton misconduct would have been justified. The Geelen standard of actual awareness of plaintiff's peril was relaxed in Fugagli v. Camasi. In that case, the court held that the defendant was not required to have actual knowledge of the plaintiff's peril to be guilty of wanton misconduct. The court indicated that to be held liable the defendant need only have "knowledge of sufficient facts to cause a reasonable man to realize the existing danger for a sufficient period of time beforehand to give him a reasonable opportunity to take means to avoid the danger, and, despite this knowledge, he recklessly ignores the other person's peril."
2. Doctrine Inapplicable to Cases Based on Implied Warranty or Strict Liability

Although contributory negligence is generally a defense only to actions based upon negligence, there is authority for the view that it should be a defense in cases of breach of implied warranty. Cases and authorities are in conflict. Dean Prosser has argued that the cases fall into a consistent pattern. When the conduct of the plaintiff consists merely of failing to discover the hazardous nature of the product, his cause of action in warranty is not barred. When he proceeds to encounter a known risk, however, his action is barred, as it would be under the defense of assumption of risk. A parallel analysis obtains in strict liability cases. The Supreme Court of Pennsylvania, applying the Restatement (Second) of Torts (Restatement), has held that contributory negligence is no defense to a strict liability action. Similarly, contributory negligence is not a defense in instances where the law imposes absolute liability upon the defendant.

62. F. Harper & F. James, supra note 18, § 22.4, at 1210.
65. See also Gardner v. Coca Cola Bottling Co., 267 Minn. 505, 511, 127 N.W.2d 557, 562 (1964); L. Frumer & M. Friedman, 2 Products Liability § 16.01[3], at 3A-26 to 3A-44 (1977).
66. Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966). Dean Prosser stated:
Where the negligence of the plaintiff consists only in failure to discover the danger in the product, or to take precautions against its possible existence, it has uniformly been held that it is not a bar to an action for breach of warranty. . . . But if he discovers the defect, or knows the danger arising from it, and proceeds nevertheless deliberately to encounter it by making use of the product, his conduct is the kind of contributory negligence which overlaps assumption of risk; and on either theory his recovery is barred.
Id. at 838-89 (footnotes omitted). Accord, U.C.C. § 2-316(3)(b), Comment 8; L. Frumer & M. Friedman, supra note 63, § 16.01[3], at 3A-42 n.20.
67. Prosser, supra note 64, at 838.
68. Id. at 839.
69. See Restatement (Second) of Torts § 402A, Comment n (1965).
70. The classic case is where the defendant harbors a wild animal which attacks and injures...
1978-1979]  COMPARATIVE NEGLIGENCE IN PENNSYLVANIA  433

3. Minors

In Pennsylvania, there is a conclusive presumption that minors under seven years of age are incapable of contributory negligence.71 Furthermore, there is a rebuttable presumption that minors between the ages of seven and fourteen are incapable of negligence.72 Cases have arisen regarding the factors that a jury may weigh to rebut this presumption.73 As stated by the Supreme Court of Pennsylvania, the rule is that

the care and caution required of a child is measured by his capacity to see and appreciate danger and he is held only to such measure of discretion as is usual in those of his age and experience; this being necessarily a varying standard, the question is ordinarily one for the jury and not for the court.74

The jury may be presented with evidence of the minor's education, habits, intelligence, and experience in order to ascertain the degree of his appreciation of danger.75

III. History Of Comparative Negligence

The concept of comparative negligence in the civil law can be traced to Roman law.76 Some authorities believe that Roman law was responsible for the prevailing civil law rule that where both parties have been negligent, both must share responsibility, with the plaintiff recovering proportionately.77 Another legal scholar views the source of comparative negligence to be the medieval sea codes.78 There is no question, however, that comparative negligence

the plaintiff. See May v. Burdett, 9 Q.B. 101, 115 Eng. Rep. 1213 (Q.B. 1846). Another type of absolute liability is created by safety statutes or protective statutes such as child labor acts. If a plaintiff is injured while engaged in the activity for which the law is designed to protect him, his action shall neither be deemed contributory negligence nor bar his recovery. H. Woods, supra note 4, § 1:7, at 13. See also Masters v. Alexander, 424 Pa. 65, 71-74, 225 A.2d 905, 909-11 (1967).


76. Roman law "provided that a party should assume damages in proportion to his fault and that where damages cannot be apportioned they should be divided equally." H. Woods, supra note 4, § 1:9, at 17 (citation omitted). See Mole & Wilson, supra note 20, at 337.

77. Mole & Wilson, supra note 20, at 337.

78. Turk, supra note 9, at 209-18. Comparative fault has long been the rule in admiralty cases. See Franck, Collisions at Sea in Relation to International Maritime Law, 12 L.Q. REV.
is firmly embedded in the civil law.\textsuperscript{79} England adopted a comparative negligence statute in 1945.\textsuperscript{80}

Comparative negligence did not emerge in American jurisprudence until the early twentieth century.\textsuperscript{81} At that point, comparative negligence provisions were included in several of the federal safety and employment statutes\textsuperscript{82} and state railway and labor acts.\textsuperscript{83} Mississippi, in 1910, was the first state to adopt a pure comparative negligence statute applicable to all personal injuries.\textsuperscript{84} Although Georgia had earlier adopted a statute which provided for diminution of damages in railroad cases where the plaintiff was negligent,\textsuperscript{85} it then enacted a statute which provided that a "defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."\textsuperscript{86} Wisconsin enacted its law in 1932,\textsuperscript{87} and Arkansas

\begin{quote}

79. Switzerland, Spain, Portugal, Austria, Germany, France, the Philippines, China, Japan, Russia, Poland, and Turkey all have statutory provisions for comparative negligence. See H. Woods, \textit{supra} note 4, \textsection 1:9, at 17.

80. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28, \textsection 1.

81. See Turk, \textit{supra} note 9, at 333-34. Comparative negligence had emerged before then in the field of admiralty. See note 78 and accompanying text \textit{supra}.


83. See Turk; \textit{supra} note 9, at 334.

84. Act of Apr. 16, 1910, ch. 135, \textsection 1, 1910 Miss. Laws 125 (current version at \textit{Miss. Code Ann.} \textsection 1:17-15 (1972)).


87. Act of June 16, 1931, 1931 Wis. Laws 375 (current version at \textit{Wis. Stat. Ann.} \textsection 895.045 (West Supp. 1978-1979)). The original Wisconsin statute provided that a plaintiff could not recover unless his negligence "was not as great as the negligence of the person against whom recovery is sought." \textit{Id.} See Campbell, \textit{Wisconsin's Comparative Negligence Law}, \textit{7 Wis. L. Rev.} 222, 225 (1932). It was the first of the "modified" comparative negligence rules. In 1971, Wisconsin switched to the rule that the plaintiff may recover if his negligence was equal to or less than that of the defendant. Act of June 22, 1971, ch. 47, 1971 Wis. Laws 50 (current version at \textit{Wis. Stat. Ann.} \textsection 895.045 (West Supp. 1978-1979)). Although the substance of the current Wisconsin rule is similar to Pennsylvania's Act, Wisconsin practice generally provides that a special verdict shall be rendered in any civil action unless the court orders otherwise. \textit{Wis. Stat. Ann.} \textsection 270-27 (West Supp. 1978-1979).
passed a statute in 1955.88 The "Wisconsin-Arkansas Plan" of modified comparative negligence was followed by a number of states.89 In 1969, New Hampshire adopted a different variation of comparative negligence90 which has been widely followed in recent years.91 At present, twenty-eight states have enacted some form of comparative negligence statute92 and three other states have adopted it by judicial

---


91. H. Woods, supra note 4, § 1:11, at 85. There has been a decided trend towards the New Hampshire type of comparative negligence. Id. The New Hampshire example has been followed by Connecticut, Nevada, New Jersey, Texas, and Vermont. Id. at 26-27. Hawaii, Oregon, Massachusetts, Montana, Pennsylvania, and Wisconsin have all recently switched to the New Hampshire rule. Id.


decision.\textsuperscript{93} It is expected that most jurisdictions enacting comparative negligence statutes in the future will adopt either the New Hampshire plan or the pure form.\textsuperscript{94}

IV. COMPARATIVE NEGLIGENCE IN PENNSYLVANIA

The notion of comparative negligence was first introduced in the Pennsylvania General Assembly in 1943.\textsuperscript{95} Several proposals were submitted before the legislature adopted the Comparative Negligence Act in 1976.\textsuperscript{96}

Unfortunately, because of the paucity of legislative history, it is unknown why the legislature adopted the particular form of comparative negligence it did.\textsuperscript{97} Nowhere did the legislators indicate that
they were basing the Pennsylvania Act on another state's law. In fact, no state has a comparative negligence statute identical to that of Pennsylvania. For this reason, decisions by the courts of other jurisdictions are of limited usefulness in construing problems which arise under the Pennsylvania Act.

The Pennsylvania Act is a codification of the "modified" form of comparative negligence. It does not abolish the defense of contributory negligence, but simply operates to reduce the plaintiff's damages proportionately where his negligence was not greater than the causal negligence of the defendant or defendants. Where the plaintiff's negligence was greater than the causal negligence of the defendant, the plaintiff's claim is barred.

"Modified" comparative negligence statutes, such as Pennsylvania's, have been widely criticized as producing only "modified" justice. Critics claim that "nonpure" statutes can be justified on no basis other than pure political compromise. The fears of insurance companies that costs would skyrocket as a result of increases in the size and number of plaintiffs' claims following the enactment of comparative negligence statutes are well-known. Despite the fact that complete bar to a plaintiff's recovery for even slight negligence, the brief discussion provides little insight. See id.

98. One commentator has disagreed, citing an isolated comment by Senator Hager as support for the view that the Pennsylvania Act was intended to follow that of Wisconsin. See Timby, Comparative Negligence, 48 Pa. B.A.Q. 219, 221 (1977); Timby & Plevyak, The Effect of Pennsylvania's Comparative Negligence Statute on Traditional Tort Concepts and Doctrines, Symposium: Comparative Negligence in Pennsylvania 24 Vill. L. Rev. 453, 462 (1979). The only sense in which the Pennsylvania Act is based upon Wisconsin's statute is that Wisconsin had previously adopted the same type of modified comparative negligence. See note 87 supra. The actual language of the statutes is appreciably different. See Wis. Stat. Ann. § 895.045 (West Supp. 1978-1979).

99. For definitions of the different types of comparative negligence, see note 92 supra.

100. The nonpure approach has been described as a "giant step in the wrong direction" and as a "misfit in a system designed to distribute responsibility according to degrees of fault" because in too many cases it betrays the just principle of apportionment of damages. Schwartz, Pure Comparative Negligence in Action, 34 J. Am. Trial Law. A. 117, 119 (1972), quoting Campbell, Recent Developments of the Law of Negligence in Wisconsin—Part II, 1956 Wis. L. Rev. 4, 21. See also C. Morris, Morris on Torts 215 n.1 (1953) (terming the Wisconsin statute a "curious failure to take full advantage of the comparative fault principle"). Another commentator has stated:

The depressing result of . . . [the nonpure approach] is that it incites migraine in the judicial process; emasculates apportionment where the fault of the parties is anywhere near approximately equal; generates excessive, prolix, and costly appeals, in which the court is asked to unscramble, scrutinize, and second guess a jury's finding of comparative fault; and in effect to frustrate and defeat the vital core of the apportionment system in a sizeable group of cases falling in the borderland of approximately equal fault. Lambert, supra note 22, at 764-65 (citation omitted).

101. See W. Prosser, Comparative Negligence, in Selected Topics on the Law of Torts 46 (1954). Dean Prosser stated: "It appears impossible to justify the [50%] rule on any basis except one of pure political compromise." Id.
statistical studies refute these allegations of the insurers,\textsuperscript{102} the modified form of comparative negligence is still the most prevalent form and remains the rule in Pennsylvania.

V. Specific Issues Under The Pennsylvania Comparative Negligence Act

As a result of its brevity, the Pennsylvania Act fails to answer many of the questions which arise regarding its application. For example, one must ask whether the statute applies only to actions based on negligent conduct by the defendant, or whether the plaintiff's negligence will be compared, and damages apportioned, where the defendant has acted intentionally or wantonly. One must further inquire whether the plaintiff's negligence will be compared with the defendant's where the action is based on breach of warranty or strict liability. The impact of comparative negligence upon the doctrines of discovered peril and assumption of risk must also be examined. One must additionally consider the practical effects of the Act upon trial practice. In some instances, the statute itself or the developing case law in Pennsylvania provides an answer. In other instances, analysis must depend upon case law from other jurisdictions and policy considerations. It is important to remember in all cases that the Comparative Negligence Act does not alter the prior substantive law of negligence, but merely changes the effect of plaintiff's contributory negligence upon his right to recover and the amount of recovery.

A. When Will the Plaintiff's Negligence Be Compared and Damages Apportioned? Theories of Liability other than Negligence

Adoption of the Comparative Negligence Act gives rise to questions of whether the statute should apply to causes of action based on theories of liability other than negligence.\textsuperscript{103} The statute refers only to "all actions brought to recover damages for negligence." Although some comparative negligence statutes in other states similarly refer only to causes of action for negligence, courts in some of these states

\textsuperscript{102} For discussions of both the claims and rebuttals concerning the impact of comparative negligence statutes, see Peck, Comparative Negligence and Automobile Liability Insurance, 58 Mich. L. Rev. 689 (1960); Flankuch, Comparative Negligence v. Contributory Negligence, 1968 Ins. L.J. 725; Rosenberg, Comparative Negligence in Arkansas: A "Before and After" Survey, 13 Ark. L. Rev. 89 (1959); Note, Comparative Negligence—A Survey of the Arkansas Experience, 22 Ark. L. Rev. 682 (1969).

\textsuperscript{103} See V. Schwartz, supra note 4, § 2.2, at 34-35.
have nevertheless applied their comparative negligence statutes to actions based on other theories of liability. Professor Victor Schwartz has advocated the application of comparative negligence, even when the statute specifically states that it is limited to actions based on negligence, whenever "reason and policy dictate that the principle of reducing plaintiff's recovery on the basis of his fault would be helpful." In Pennsylvania, however, section 1921(b) of the Statutory Construction Act of 1972 requires that "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." It is therefore questionable whether section 1 of the Comparative Negligence Act, referring to "actions . . . for negligence," will be held to apply to other theories of liability in Pennsylvania.

1. Intentional Torts

Pennsylvania's comparative negligence statute should be construed to be inapplicable to an action against a defendant for an intentional tort. At common law, contributory negligence was not a defense to an action for an intentional tort, and this is also the rule in Pennsylvania.

It could be argued that the adoption of a comparative negligence statute evidences a public policy of reducing damages in proportion to plaintiff's misconduct that should be applied to intentional torts. The two states which have decided this issue, Wisconsin and New Jersey, have held, however, that their comparative negligence statutes do not apply to actions for intentional misconduct. Both states, like Pennsylvania, have statutes which limit the applicability of comparative negligence to actions for "negligence." Since the difference between intentional misconduct and negligence is considered "not merely in degree but in the kind of fault," a strict construction of

104. See text accompanying notes 114-17 infra.
105. V. Schwartz, supra note 4, § 12.1, at 195.
107. Id.
108. See note 48 and accompanying text supra.
110. Draney v. Bachman, 138 N.J. Super. 503, 514, 351 A.2d 409, 415 (Law Div. 1976) (dictum); Schulze v. Kleeber, 10 Wis. 2d 540, 545-46, 103 N.W.2d 560, 564 (1960). Henry Woods has also stated that there should be little controversy that comparative negligence will have no effect upon the rule that contributory negligence is no defense to a defendant's intentional conduct. H. Woods, supra note 4, § 7.1, at 159.
112. W. Prosser, supra note 20, § 65, at 426.
Pennsylvania's statute should render it inapplicable to actions for intentional conduct.

2. Wanton Misconduct

Under prior law in Pennsylvania, contributory negligence was not a defense to an action for an injury caused by wanton misconduct.\(^{113}\) It should also not be a defense under the Comparative Negligence Act. The Pennsylvania courts have not yet specifically addressed this issue, however, and the decisions in other states are divided.

Wisconsin\(^ {114}\) and Arkansas\(^ {115}\) courts have held that a plaintiff's negligence is subject to comparison with the defendant's willful and wanton misconduct. In Bielski \textit{v. Schulze},\(^ {116}\) the Supreme Court of Wisconsin stated that any negligence of a tortfeasor causing injury should be evaluated on a relative fault basis.\(^ {117}\)

The Superior Court of New Jersey reached a contrary conclusion in Draney \textit{v. Bachman},\(^ {118}\) wherein it held that the negligence of the plaintiff is no defense where defendant's conduct is "willful, wanton, and reckless."\(^ {119}\) In its decision, the court relied on recent New Jersey cases which had recognized a claim of willful, wanton, and reckless conduct as a separate offense,\(^ {120}\) and held that the comparative negligence statute should not apply to such conduct.\(^ {121}\)

There appears to be no valid reason to abandon the prior law of Pennsylvania following the enactment of the Comparative Negligence Act, especially in light of the express language of the Supreme Court of Pennsylvania, which stated that "wanton misconduct is something different from negligence however gross,—different not merely in degree but in kind, and evincing a different state of mind on the part of the tortfeasor."\(^ {122}\) The Comparative Negligence Act, which provides for the comparison of negligence of the parties, should thus be


\(^{114}\) Bielski \textit{v. Schulze}, 16 Wis. 2d 1, 17-18, 114 N.W.2d 105, 113 (1962).


\(^{116}\) 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

\(^{117}\) Id. at 17-18, 114 N.W.2d at 113.


\(^{119}\) Id. at 514, 351 A.2d at 415.


\(^{121}\) 138 N.J. Super. at 514, 351 A.2d at 415, \textit{construing} N.J. STAT. ANN. \S\S 2A:15-5.1 to -3 (West Supp. 1979).

inapplicable to cases where the defendant has engaged in wanton misconduct.

If, however, Pennsylvania’s comparative negligence statute were deemed to be applicable to an action for willful, wanton, or reckless conduct by a defendant, it should be construed to apply only to compensatory damages and not to any punitive damages that might be recoverable. The statute refers to diminishing “any damages sustained by the plaintiff,” that is, compensatory damages, in proportion to his contributory negligence. It does not require diminishing all damages otherwise recoverable by him, that is, punitive damages. “[D]amages sustained by the plaintiff” should therefore be interpreted to embrace only compensatory damages intended to compensate the plaintiff for harm sustained by him, and not punitive damages which are designed to punish the defendant and to deter future reckless conduct.  

3. Products Liability

In Webb v. Zern, the Supreme Court of Pennsylvania adopted strict liability as embodied in section 402A of the Restatement. Comment n to this section abolishes contributory negligence as a defense in cases based on strict liability. In Berkebile v. Brantly Helicopter Corp., the court held that “the ‘reasonable man’ standard in any form has no place in a strict liability case,” concluding that “[a] plaintiff cannot be precluded from recovery in a strict liability case because of his own negligence.” The enactment of a comparative negligence statute thus has no effect upon the prior Pennsylvania law of products liability, and contributory negligence remains unavailable as a defense to strict liability and warranty cases.

123. The United States District Court for the Middle District of Florida so held in Tampa Elec. Co. v. Stone & Webster Eng’r Corp., 367 F. Supp. 27, 38 (M.D. Fla. 1973). The court held that while plaintiff’s negligence would be used to diminish compensatory damages, no diminution should be made in punitive damages. Id.
126. Id. at 427, 220 A.2d at 854, adopting Restatement (Second) of Torts § 402A (1965).
127. Restatement (Second) of Torts § 402A, Comment n (1965).
128. Comment n provides: “[T]he form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability.” Id.
130. Id. at 96, 337 A.2d at 900.
131. Id. at 100, 337 A.2d at 901.
4. Ultrahazardous Activities

The Pennsylvania comparative negligence statute should be deemed inapplicable to cases involving strict liability for abnormally dangerous activities. Strict liability for abnormally dangerous activities is a fundamental basis for liability distinguishable from liability based on negligence.132

Although Pennsylvania courts have not specifically ruled whether contributory negligence is a defense to an action based on a theory of absolute liability for ultrahazardous activities, a footnote in McCown v. International Harvester Co.133 indicated that the Supreme Court of Pennsylvania would adopt the Restatement exclusion of contributory negligence as a defense to an action involving ultrahazardous activity.134

Section 524 of the Restatement135 provides that “[e]xcept as stated in Subsection (2), the contributory negligence of the plaintiff is not a defense to the strict liability of one who carries on an abnormally dangerous activity.”136 Subsection (2) speaks of a plaintiff “knowingly and unreasonably subjecting himself to the risk of harm,” commonly known as a form of assumption of risk.137 The same reasoning should apply to this situation as well as to strict liability generally. The Comparative Negligence Act should thus have no effect upon the nonavailability of the contributory negligence defense in ultrahazardous activity cases.

B. Impact of Comparative Negligence Upon Other Defenses

Following the advent of comparative negligence, the Pennsylvania courts must determine the continued viability of the plaintiff-protecting defenses developed under precomparative negligence law and of the defendant-protecting doctrine of assumption of risk.

1. Residual Voluntary Assumption of Risk Defense

Since the Act provides that the negligence of the parties is to be compared, and the plaintiff's recovery reduced proportionately, the

132. Sherman, supra note 124, at 71.
134. Id. at 17 n.5, 342 A.2d at 382 n.5. See notes 127 & 128 and accompanying text supra.
136. Id.
137. Id.
question arises whether assumption of risk should remain a complete defense.

It has been the law of Pennsylvania that a person who assumes the risk of danger may not recover for personal injuries sustained as a result of that danger.\(^{138}\) The Pennsylvania courts, however, have encountered difficulty in distinguishing between assumption of risk and contributory negligence.\(^ {139}\) Following the enactment of comparative negligence in Pennsylvania, this lack of clarity poses a substantial problem if contributory negligence is to be compared, while assumption of risk is to operate as a complete bar to plaintiff's recovery. As long as the distinction continues to be drawn, and disparate results reached, characterization of the plaintiff's conduct will be highly important.

One source of the difficulty encountered by the Pennsylvania courts in applying the doctrine of assumption of risk may lie upon the fact that two types of assumption of risk are recognized in Pennsylvania.\(^ {140}\) In *Pritchard v. Liggett & Myers Tobacco Co.*,\(^ {141}\) the United States Court of Appeals for the Third Circuit stated that, in Pennsylvania, assumption of risk is divided into assumption of risk in the "primary sense" and assumption of risk in the "secondary sense."\(^ {142}\) Assumption of risk in its "primary and strict sense involves voluntary exposure to an obvious or known danger which negates liability."\(^ {143}\) In the primary sense, assumption of risk bars the plaintiff's claim since he is assumed, through his actions, to have relieved the defendant of any duty to protect him.\(^ {144}\) Assumption of risk in its secondary sense "involves a failure to exercise reasonable care for one's own safety," and is "ordinarily synonymous with contributory negligence."\(^ {145}\) It is an affirmative defense that can be as-

---

141. 350 F.2d 479 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1966). In *Pritchard*, a cigarette smoker, alleging that he had developed lung cancer as a result of his habit, sued the manufacturer of Chesterfield cigarettes on the basis of negligence and breach of warranty. 350 F.2d at 481.
142. 350 F.2d at 484.
143. *Id.*
144. *Id.*
145. *Id.*
asserted only if it is established that the defendant has breached a duty.\textsuperscript{146}

The primary assumption of risk presents no problems under the comparative negligence statute. Courts in other comparative negligence jurisdictions have made it clear that the defense remains intact,\textsuperscript{147} and it may be expected that Pennsylvania's courts will also so hold.

The treatment of implied assumption of risk under the comparative negligence statute, however, has not yet been squarely decided by the Pennsylvania courts. It appears that the trend in Pennsylvania is towards the merger of secondary assumption of risk and contributory negligence. In \textit{Stephenson v. College Misericordia},\textsuperscript{148} the United States District Court for the Middle District of Pennsylvania observed: "Pennsylvania takes the progressive attitude that because of the overlap in concepts, assumption of the risk in its secondary sense should be merged into the definition of contributory negligence avoiding the use of the term assumption of the risk altogether."\textsuperscript{149} Since, as the Third Circuit stated in \textit{Pritchard}, secondary assumption of risk in Pennsylvania is "synonymous with contributory negligence,"\textsuperscript{150} there is no logical reason not to merge the two concepts.

Cases and authority in other jurisdictions are in favor of this ap-

\textsuperscript{146} See id. Other jurisdictions have drawn the same distinction, although some courts have used the terms "express" and "implied" assumption of risk instead of primary and secondary. See, e.g., Blackburn v. Dorton, 348 So. 2d 287, 290-93 (Fla. 1977); Wilson v. Gordon, 354 A.2d 398, 402-03 (Me. 1976); Lyons v. Redding Constr. Co., 83 Wash. 2d 86, 95-96, 515 P.2d 821, 826 (1973); Gilson v. Drees Bros., 19 Wis. 2d 252, 258, 120 N.W.2d 63, 67 (1963). For general discussions of these concepts, see W. Prosser, supra note 20, \S 68, at 439-47; V. Schwartz, supra note 4, \S 9.1, at 153-58.

Some jurisdictions have further divided implied assumption of risk into "reasonable" and "unreasonable" conduct. Blackburn v. Dorton, 348 So. 2d at 290. See also W. Prosser, supra note 20, \S 68, at 440-41. Pennsylvania law, however, does not define assumption of risk to include reasonable conduct. For example, assumption of risk as applied to \S 402A products liability means that "one who voluntarily and unreasonably proceeds to encounter a known danger [brings] the risk of that danger." Henrich v. Cutler Hammer Co., 460 F.2d 1325, 1326 (3d Cir. 1972) (per curiam). See Elder v. Crawley Book Mach. Co., 441 F.2d 771, 772-73 (3d Cir. 1971).


149. Id. at 1327 (citations omitted).

150. 350 F.2d at 484.
proach,\textsuperscript{151} and it is also the more equitable result in light of Pennsylvania’s express legislative purpose of apportionment according to fault. Plaintiffs who engage in “synonymous” conduct should not be treated differently by the courts. Whether characterized as assumption of risk or as contributory negligence, any culpable conduct of the plaintiff should be compared with that of the defendant, and his damages reduced proportionately.

2. Discovered Peril

One must determine the effect of the comparative negligence statute upon the doctrine of last clear chance or, as styled in Pennsylvania, “discovered peril.” It may initially be argued that comparative negligence should have no effect upon the existing substantive law of contributory negligence, and that comparative negligence simply reduces damage recovery by a plaintiff where his negligence otherwise exists. Further, it can be urged that at least one of the purposes for adoption of the discovered peril notion was a recognition that not-

\textsuperscript{151} Three states resolved the issue immediately by abolishing any distinction between the doctrines of assumption of risk and contributory negligence in the comparative negligence statutes themselves. \textit{Conn. Gen. Stat. Ann.} § 32-572h(c) (West Supp. 1978); \textit{N.Y. Civ. Prac. Law} § 1411 (McKinney 1976); \textit{Okla. Rev. Stat.} § 18-475 (1977). Seven states have accomplished this result by judicial decision. Blackburn v. Dorta, 348 So. 2d 287, 292 (Fla. 1977) (there is no distinction between contributory negligence and assumption of risk); Wilson v. Gordon, 354 A.2d 398, 402-03 (Me. 1976) (defense of assumption of risk abolished); Springrose v. Willmore, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971) (voluntary, unreasonable assumption of risk retained as an element of contributory negligence to be apportioned under comparative negligence statute); Wentz v. Deseth, 221 N.W.2d 101, 104-05 (N.D. 1974) (abolition based on amendment to comparative negligence statute); Farley v. M.M. Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (assumption of risk abolished in negligence cases); Lyons v. Redding Constr. Co., 83 Wash. 2d 86, 95, 515 P.2d 821, 826 (1973) (assumption of risk is not available where contributory negligence is a defense); Gilson v. Drees Bros., 19 Wis. 2d 252, 258, 120 N.W.2d 63, 67 (1963) (implied assumption of risk should be coughed in terms of contributory negligence). The Supreme Court of Wisconsin had earlier abolished the doctrine as it applied to certain cases. See McConville v. Mutual Auto. Ins. Co., 15 Wis. 2d 287, 323, 113 N.W.2d 14, 16 (1962) (assumption of risk no longer a separate defense between automobile host and guest); Colson v. Rule, 15 Wis. 2d 387, 395, 113 N.W.2d 21, 25 (1962) (assumption of risk defense abrogated in farm labor cases). Only five states appear to retain the doctrine of assumption of risk as a complete defense. Spradlin v. Klump, 244 Ark. 841, 841, 427 S.W.2d 542, 543 (1968); McGargue v. Black Grading Contractors, Inc., 122 Ga. App. 1, 4, 176 S.E.2d 212, 216 (1970); Saxton v. Rose, 201 Miss. 814, 823, 29 So. 2d 646, 649 (1947); Mason v. Western Power & Gas Co., 183 Neb. 392, 395, 160 N.W.2d 204, 206 (1968); Bartlett v. Gregg, 77 S.D. 406, 411, 92 N.W.2d 654, 657 (1958). Only in Georgia is the doctrine vigorously applied with cases suggesting that even reasonable implied assumption of risk may bar a plaintiff’s claim. See Yankey v. Battle, 122 Ga. App. 275, 275-76, 176 S.E.2d 714, 714-15 (1970) (summary judgment motion by defendants should have been granted); Wade v. Roberts, 118 Ga. App. 284, 287, 163 S.E.2d 343, 345-46 (1968) (same). Arkansas, Mississippi, Nebraska, and South Dakota have given only reluctant cognizance to the doctrine of implied assumption of risk by applying it only when the plaintiff’s conduct was unreasonable, and by giving juries wide latitude to hear and reject the defense. See Spradlin v. Klump, 244 Ark. at 841, 427 S.W.2d at 543; Saxton v. Rose, 201 Miss. at 823, 29 So. 2d at 649; Mason v. Western Power & Gas Co., 183 Neb. at 395, 160 N.W.2d at 206; Bartlett v. Gregg, 77 S.D. at 411, 92 N.W.2d at 657.
withstanding the negligence of a plaintiff which placed him in a predicament, antecedent fault should not be treated as the proximate cause of an accident when the defendant knew or had reason to know of the predicament and his timely action could have avoided the occurrence.\textsuperscript{152} It would therefore seem anomalous to abolish the discovered peril doctrine as a corollary to the enactment of comparative negligence. The net effect of this would be to constrict prior substantive law and impose a reduction of damages upon a plaintiff who would have been in a better position had there not been a comparative fault statute in the first place. This view has further weight in cases which are not analyzed on the basis of discovered peril, but rather are decided under the doctrine of wanton misconduct or recklessness.\textsuperscript{153} Many fact situations involving a plaintiff who negligently finds himself in a hopeless predicament and is thereafter injured due to the failure of the defendant to act within a specified time frame have been decided according to either approach.\textsuperscript{154} Clearly, it is more difficult to suggest that wanton misconduct is no longer a defense under a comparative negligence statute of the Pennsylvania type than to argue that the discovered peril defense should be abandoned.\textsuperscript{155}

It has nonetheless been impressively argued by scholars, commentators,\textsuperscript{156} and courts\textsuperscript{157} that a comparative fault statute demands an abrogation of the last clear chance or discovered peril doctrines. In support of this view it is pointed out that the principal rationale for the discovered peril notion was to ameliorate the harshness of the traditional contributory negligence rule, and that since a comparative negligence statute largely obviates the problem, it is no longer necessary or even fair to retain the doctrine.\textsuperscript{158} It is further urged that

\textsuperscript{152} W. Prosser, supra note 20, § 66, at 427.
\textsuperscript{153} See notes 48-61 and accompanying text supra.
\textsuperscript{155} See notes 113-24 and accompanying text supra.
\textsuperscript{156} For authorities labelling last clear chance a transitional doctrine whose usefulness has ended, see F. Harper & F. James, supra note 18, § 22.12, at 1241-45; W. Prosser, supra note 20, § 66, at 427-29; H. Woods, supra note 4, § 8:2, at 172-74; James, Last Clear Chance: A Transitional Doctrine, 47 Yale L. J. 704, 722-23 (1938); McIntyre, The Rationale of Last Clear Chance, 53 Harv. L. Rev. 1225, 1251-52 (1940).
\textsuperscript{157} For cases abrogating the doctrine of last clear chance following adoption of comparative negligence, see Kaatz v. State, 540 P.2d 1037, 1047 (Alas. 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240, 119 Cal. Rptr. 855, 872 (1975); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); Cushman v. Perkins, 245 A.2d 846, 850 (Me. 1968). Wisconsin effectively abolished the last clear chance doctrine prior to adoption of comparative negligence by declaring that contributory negligence by the plaintiff would defeat recovery absent gross negligence by the defendant. Switzer v. Detroit Inv. Co., 198 Wis. 330, 334, 266 N.W. 407, 408 (1935).
\textsuperscript{158} See Kaatz v. State, 540 P.2d 1037, 1047-48 (Alas. 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240, 119 Cal. Rptr. 855, 872 (1975); F. Harper & F. James,
the discovered peril doctrine did involve conduct by a plaintiff which, by causation principles, was "proximately" related to the occurrence.\textsuperscript{159} A survey of the case law suggests that abrogation of the last clear chance doctrine is the prevailing view.\textsuperscript{160} The issue, however, is not free from doubt. Although certain comparative fault statutes have simply resolved the matter by black letter abolition of the last clear chance doctrine,\textsuperscript{161} the Pennsylvania law leaves this issue open.

3. Minors

Traditionally, tort law has not held children to the same standard of care as that for adults.\textsuperscript{162} A child under seven years of age is conclusively presumed incapable of negligence,\textsuperscript{163} and a child between the ages of seven and fourteen is protected by a rebuttable presumption.\textsuperscript{164} Under Pennsylvania law, the measure of a child's capacity for contributory negligence is his ability to see, understand, and avoid danger, determined by the expected behavior of children of like age, intelligence, and experience.\textsuperscript{165} It is thus necessary to examine the impact, if any, which the Comparative Negligence Act has upon the treatment of minors.

The Act clearly has no effect upon the standard of care for determining a child's negligence. Wisconsin, however, has developed an interesting technique for apportioning damages in cases of contributorily negligent minors under their comparative negligence law.\textsuperscript{166} The Supreme Court of Wisconsin has held that the youthfulness of a plaintiff must be considered twice in a negligence action.\textsuperscript{167}
Not only should the plaintiff's age be considered in determining the child's contributory negligence, but age should also be a factor weighed by the jury in apportioning damages. Although Wisconsin's position is unique, it may in the future be considered by Pennsylvania courts at the request of counsel for minor plaintiffs for whom the Wisconsin approval could operate advantageously.

In cases involving children under age seven who have enjoyed a conclusive presumption of due care for obvious policy reasons, it may be persuasively argued that comparative negligence has no effect.

C: Comparative Negligence at Trial

As previously stated, the Comparative Negligence Act does not significantly alter Pennsylvania substantive or procedural law. It merely controls the impact of a plaintiff's contributory negligence upon his potential recovery. Certain questions which have been raised regarding the Act are thus really not issues. The Comparative Negligence Act does not affect the prior existing law on causation or burden of proof. It also does not affect the availability of procedures such as summary judgments and directed verdicts. As under prior law, the issue of contributory negligence will rarely be taken from the jury.

The Act does raise significant issues regarding multiple defendants, jury instructions, and verdicts. These problems and their potential solutions under the Act are discussed in another article in this symposium.

D. Anticipated Effects Upon Practice

Naturally; it is premature to assess the actual effects the Pennsylvania comparative negligence law will have upon personal injury practice. Developing case law and future statutory amendments will better decipher for the practitioner the legal parameters of the law in practice. Experience with the normal handling of claims between and among plaintiff's counsel, defendant's counsel, and claims adjusters will inevitably generate rules of thumb in terms of the practical effects of the law.


169. See Prosser, supra note 20, at 481.

170. See Beasley & Tunstall, supra note 6.
For the present, while empirical data remains scarce, it may fairly be predicted that, overall, comparative negligence will not greatly exacerbate claims loss experience. This has at least been the lesson of those jurisdictions whose comparative negligence rule is analogous to the Pennsylvania rule.171

The worst fears of the proponents and opponents of a comparative negligence rule will almost certainly not be realized. Comparative negligence will, however, clearly change the result in individual categories of cases, largely in terms of damage reduction in what previously were thought to be “clear” liability cases and of the rescuing of many “no liability” claims. The latter category will include “slip and fall” cases in which the strict contributory negligence rule was long the bane of injured pedestrians and shoppers. Also included will be the two car accident cases, particularly at intersections where the burden of the inquiry has been “who struck John” and/or “who had the red light.” Still other categories of cases fitting into this mold will be construction site accidents involving failure to observe or to react in time to the risk, pedestrian crossing accidents involving failure to observe approaching vehicular traffic, various types of recreational activity accidents where the plaintiff creates or enhances the risk of injury by his own activity that is sometimes styled as voluntary assumption of the risk, and a select category of medical malpractice claims involving failure to report symptoms in time or to follow medical advice. These are all instances of cases which, in the past, often have been fatally flawed by the strict contributory negligence rule. As a practical matter, it may be anticipated that these claims will at least have settlement value beyond the mere cost of defending the claim in court.

On the other hand, the settlement or verdict value of strong liability claims may be compromised. In significant damage cases, this may prove to be a substantial financial benefit to defendants and their

171. See Rosenberg, supra note 102; Note, supra note 102 (follow-up study). Examining the impact of comparative negligence upon judicial administration, Professor Rosenberg concluded that although “[i]ntroduction of comparative negligence brought perceptible changes to the course of personal injury litigation, . . . it did not drastically alter the size or quality of the courts’ burdens in processing these cases.” Rosenberg, supra note 102, at 108. See Note, supra note 102, at 713. He stated further that while plaintiffs did win a higher percentage of verdicts, they did not obtain greater recoveries. Rosenberg, supra note 102, at 108.

...
insurers, for it is the rare case where it is not possible to articulate some element of contributory fault. Under comparative negligence, astute defense counsel may elect to concede his client’s negligence, making his trial strategy pivot around proving to the jury’s satisfaction that plaintiff was also negligent and that the verdict should therefore be reduced in proportion to plaintiff’s negligence. For example, the intersectional motor vehicle collision often includes an ingredient of contributory fault, particularly in the legal context of the obligation of any motorist to be on the lookout for approaching traffic. It requires no lengthy recitation of examples to understand that the law of torts deals primarily with the human frailty of live actors whose conduct rarely measures up perfectly against the reasonable man standard.

The challenge to litigation counsel in dealing with comparative negligence is plain. The all-or-nothing strategy, which typically has characterized the offense and defense in personal injury cases, must be rethought. Plaintiff’s counsel must consider the prospects for a finding of contributory fault, the approximate measure thereof, and whether the case will have greater credibility if contributory negligence is dealt with “out front” and an effort is made to limit the finding. In other cases, counsel may determine that it is better strategically to insist upon one hundred percent fault on the part of defendants and leave it to their counsel to prove contributory negligence and the amount thereof. A converse judgment must obviously be made by defense counsel. The problem is more complex in the case of defense counsel’s individual judgment in multi-party cases. If there is a significant prospect of joint liability on the part of more than one defendant, that party’s counsel might attempt at the outset to suggest comparative fault to the jury and the degree thereof.

One common challenge to the bar and its ingenuity is the manner in which the jury should be urged to quantify contributory fault. The measuring rods must be defined. Counsel must decide whether it is better from the plaintiff’s point of view either to argue a small percentage of contributory fault, or none at all, or to double the emphasis on the amount of the damage with the thought that even a significant degree of contributory fault will still net a decent damage award for the plaintiff. Again, the reciprocal situation obtains for the defendant. No reason is apparent why both approaches and techniques could not coincidentally be used in a given case.

There are at least two beneficial effects upon practice which may be anticipated that do not depend upon the nature of the case or the vested interest of any party to the litigation. First, there should develop greater uniformity of results in terms of statewide practice. It is
well known to the bar that the strict contributory negligence rule depended for its practical effect upon the style of the trial judge, which varied widely not only from judge to judge but from county to county. In certain counties it has thus been the prevailing practice to emphasize the literal dictates of the rule in the course of the jury charge or to vindicate legally the black letter requirements of the rule in its “pure” form in post trial motions. In yet other counties, the matter has been treated more gingerly. The use of comparative negligence should lessen this disparity in practice.

More importantly, the proper and judicious use of the comparative negligence rule should facilitate the disposition of claims, ease the jury’s burden in establishing fault, and even enhance public respect for the judicial and adversary processes. Even the occasional court room participant is aware that comparative negligence has been in the jury box for years de facto if not de jure. In many, if not most, cases, “compromise verdict” have simply been the code words for a comparative negligence finding. The explicit dealing with the comparative fault concept in court could not only offer more direction to the jury but also make it more comfortable to reach a compromise verdict under clear guidelines. A legal system which recognizes that an accident may result from more than one source or depend upon the conduct of more than one individual is bound to generate greater respect and understanding than the all-or-nothing format which understandably has sometimes generated extreme offensive and defensive positions. Comparative negligence is a more direct and even more honest fashion in which to proceed in the disposition of claims and the trial of cases. Moreover, it serves the integrity of tort law and tends to protect it from further encroachment by cynical critics.

VI. CONCLUSION

The adoption of comparative negligence in Pennsylvania is consistent with modern social policy and the decided trend in the United States towards adoption of some form of comparative fault. Because the Pennsylvania Act does not specifically address certain issues, however, substantial judicial interpretation is necessary. It is the authors’ view that the Act does not particularly alter the law of negligence in Pennsylvania, but only the effect of a plaintiff’s contributory negligence.

For example, the plaintiff’s contributory negligence should not be compared in actions based upon intentional or wanton conduct, or strict liability, since plaintiff’s negligence was not a defense under prior law. The impact of defendant’s conduct in cases such as discov-
ered peril should also not be changed since the Act provides only that the plaintiff’s negligent conduct shall not be a bar and that his damages shall be apportioned instead. These issues, however, remain to be decided definitively by the Pennsylvania courts.

The effect of the Act upon personal injury practice has already begun in the areas of evaluation and settlement of claims. Significant problems remain to be resolved, however, with regard to multiple defendants, jury instructions, and verdicts. Challenges to counsel in trial strategy and technique are apparent. Developing case law and application of the statute in practice hopefully will clarify the broad spectrum of issues which remain unsettled.