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Donald A. Wiesner

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COMMENT

CONTRIBUTORY AND COMPARATIVE NEGLIGENCE IN PUERTO RICO

DONALD A. WIESNER*

I. INTRODUCTION

When a system of law is exposed to strong influences coming from other legal systems, confusion and divergence of judicial thinking will inevitably follow. Recent developments in Latin America are illustrative. Due to close proximity with that area, the problem is of special interest to students of comparative law. Cases decided by Latin American courts have furnished a wealth of material from which the interplay between different legal systems may be examined. A recent Puerto Rican decision,¹ which this paper will highlight, illustrates the peculiar status of its private law and evinces the pressures exerted upon its civil law system by the common law.

Spanish for nearly four centuries, Puerto Rico was imbued with a strong propensity for civil law traditions. Nevertheless, the events of the past fifty years, bringing common law ideas into the island, have occasioned a profound change in its legal system.² Strangely, Spanish history left little legal background. Private law found expression only in the *Ley de Indias*,³ complying with the military interests which governed the island for several centuries. American occupation, following the Spanish withdrawal, found courts to be almost non-existent, the island run like a corporate entity and a society that had experienced a civil government only in the last few months of Spanish rule.⁴

Soon after the American occupation, Puerto Rico adopted the Spanish Civil Code⁵ and also enacted legislation patterned after statutes in force in the several states of the United States.⁶ The effect of the enactment of the Spanish Code and the formal espousal of the techniques of the civil

* Instructor, Business Law, University of Miami.

1. *Irizarry v. The People of Puerto Rico*, 75 P.R. 740 (1953).

2. WELLS, *CONSTITUTIONAL DEVELOPMENTS IN PUERTO RICO. DEVELOPMENTS TOWARD SELF GOVERNMENT IN THE CARIBBEAN* (1955).

3. Spanish colonies were ruled by a series of special statutes. Later they were codified and called the *Recompiacion de la Ley de Indias*.

4. McIntosh, *Constitutional Government in Puerto Rico*, 24 REV. JUR. U.P.R. 197, 199 (1954-55).

5. "The Legal Systems of Louisiana and Puerto Rico have certain similar attributes. Both carried forward into America dominion a civil law tradition of European origin. In both places civil law came out the victor in the clash with the common law . . ." Dainow, *The Method of Legal Development Through Judicial Interpretation in Louisiana and Puerto Rico*, 22 REV. JUR. U.P.R. 108, (1952-3).

6. SADY, *THE UNITED STATES AND DEPENDENT PEOPLES*. (1956); PERKINS, *THE UNITED STATES AND THE CARIBBEAN*. (1947); While the island enjoys a considerable measure of political independence the economy is integrated with that of the United States to a great extent. PROUDFOOT, *BRITAIN AND THE UNITED STATES IN THE CARIBBEAN* (1953).

law system led one writer to state that their adoption would ". . . undoubtedly carry Puerto Rican courts back into the more or less remote history of Spanish law . . ."7 A half century has passed since these words were expressed. The instant case will indicate that the prediction was not realized.

II. THE CASE IN QUESTION

In *Irizarry v. The People of Puerto Rico*,⁸ the several opinions present material that persuasively illustrates the conflicting operations of civil and common law technique within a single jurisdiction.

The facts of the case are simple. A boy of eight years found a cartridge containing explosives apparently abandoned by a state highway crew. He carried it home, put the cartridge on a stone and struck it with a machete causing an explosion from which he suffered the loss of his left eye, possible future damage to the other eye and other injuries. He sued and recovered damages in the amount of \$3,000. Both parties appealed to the Supreme Court of Puerto Rico, the minor alleging the amount of damages was inadequate and the defendant claiming that the facts proved the minor contributorily negligent, barring his claim.

The per curiam opinion, citing four Puerto Rican cases and the American Law Reports, held that the acts of the minor did not constitute contributory negligence. Further, taking cognizance of the minor's plea, the award of damages was increased to \$15,000.

In his concurring opinion Justice Ortiz joined the per curiam decision as to the result, but disagreed as to the grounds by which the court reached its decision. He argued that even though the minor was somewhat negligent, such finding should not bar his recovery since the doctrine of contributory negligence was not the law in Puerto Rico. In the other concurring opinions, one Justice was convinced that the minor was not negligent; the other, even though in sympathy with the views of Justice Ortiz on the adoption of the comparative negligence doctrine, held that the court lacked authority to change the law.

It is in the differences in these four opinions that one is able to observe the variation in techniques. The acceptance of the contributory negligence doctrine, or its rejection, is merely the battleground;⁹ the issues are broader and rather appear to be the predominance of one or the other legal system.

III. CONTRIBUTORY NEGLIGENCE IN PUERTO RICO

The contributory negligence doctrine appears to be the present rule in Puerto Rico, but in what manner has it attached itself to the system? Does it belong there?

7. Drake, *The Old Roman Law and a Modern American Code*, 3 MICH. L. REV. 108, 112, (1904-5).

8. 75 P.R. 740, (1953).

9. Justice Ortiz in *Alvarez v. Hernandez*, 74 P.R. 460 (1953) on facts not dissimilar to the instant case failed to raise his objections to the issue of contributory negligence.

Justice Ortiz in the instant case cites the origin of the doctrine in *Claudio v. Cortinez*,¹⁰ decided in 1905, where a local court spoke of contributory negligence for the first time. Significantly, that decision relied on a special act¹¹ governing the master-servant relationship, and the court neither discussed, relied or even commented on any provision of the general, i.e. civil, code!

On the facts, the decision in the *Claudio* case was harsh one. A baker who had lost his arm in a kneading machine was denied recovery because he knew of the dangers of the machine and failed to bring his conduct within the limited applicability of the special statute governing liability of employers. In denying recovery the court cited American cases which supported the application of the contributory negligence doctrine in similar instances. However, no mention was made of the civil code and its general provision governing negligence actions.

The special employer statute was held inapplicable in a decision¹² four years later where the relation of master and servant did not exist between the parties. Nevertheless, the deadly touch of the common law, once recognized in the prior case, spread at once into the general area of torts, invading the civil law where today the code has been construed to embody the doctrine. The doctrine needed but the *Claudio* case and its subsequent citation in *Natal v. Bartolomy*,¹³ three years later, to establish itself as the proper interpretation of Article 1802 of the code; in the *Natal* decision it was firmly cemented by the terse statement of Justice Figueras that: "And with regard to contributory negligence, see the case of *Hermenegildo Claudio vs. Jose Cortinez . . .*"

Subsequently the doctrine was not questioned as the cases demonstrate. The only concern was with the collateral problems of whether certain acts on the part of the plaintiff constituted negligence.¹⁴ In 1931 the court in *Mirando v. Porto Rico Lt. & P. Co.*¹⁵ reaffirmed the doctrine when it said that, "The doctrine of contributory negligence has been adopted in this jurisdiction together with and subject to limitations . . ."¹⁶

It would appear that the doctrine has served Puerto Rico for the past fifty years in much the same fashion as it has operated in the United States.

10. 9 P.R. 97 (1905).

11. REV. STAT. PUERTO RICO §§ 332-333 pp. 150-156, March 1, 1902.

12. *Vargas v. A. Monrog é Hijos*, 15 P.R. 26 (1909).

13. 14 P.R. 474 (1908).

14. *Acosta v. Crespo*, 70 P.R. 223 (1949); *Tavarez v. San Juan Lodge*, 68 P.R. 681 (1948); *Castro v. Gonzalez*, 58 P.R. 369 (1941); *Rivcra v. Central Pasto Viejo, Inc.*, 44 P.R. 236 (1932); *Portalatin v. Noriega*, 33 P.R. 755 (1924); *Rubio v. Garage Mayagüez Inc.*, 23 P.R. 565 (1916); *Rosado v. Ponce Railway & Light Co.* 18 P.R. 593 (1912).

15. 42 P.R. 694 (1931).

16. *Id.* at 710. The limitations referred to by the court are the last clear chance doctrine and similar mitigating concepts that are recognized in common law jurisdictions. The court included in those the adoption of the constructive knowledge feature of the last clear chance doctrine.

As in the latter country, local courts decided the "hard" or "close" factual situations by finding that the plaintiff was not negligent. For example, two recent decisions illustrate how the courts sidestep the operation of the contributory negligence doctrine by virtue of the technique used also in American courts. In *Alvarez v. Hernandez*,¹⁷ the court held that the conduct of a nine year old boy who was killed by dashing in front of a car did not constitute negligence regardless of the fact that the driver was proceeding at twenty-five miles per hour, the lawful speed. The driver was not exonerated in view of the fact that he saw children playing on the sidewalk, a circumstance which should create notice to drive slower than the lawful speed. In *Diaz v. Stuckert Motor Co.*,¹⁸ the court reaffirmed the principle that one is not required to anticipate that others will act negligently; yet where a child of eight years demonstrates that due care is not being exercised, the operator of an automobile is responsible, for the child in such an instance, would "not be negligent."

In view of this background Justice Ortiz attacked the doctrine of contributory negligence, correctly characterizing it as a doctrine foreign to the civil law and even subject to severe criticism in American courts by judges and scholars who deny any policy justification behind the rule of contributory negligence.

Admitting that the minor was somewhat negligent, Justice Ortiz critically examined the contributory negligence doctrine and concluded by forcefully recommending the adoption of the comparative negligence theory.

In addition to arguments only too familiar in this country, Justice Ortiz relied mainly on Article 1802 which he felt did not support the requirement that the defendant's negligence must be the sole cause of the accident. The Justice stated that, historically, a doctrine created in England as a product of the industrial revolution and perpetuated to preserve the prosperity of the negligent employer,¹⁹ has no justification in Puerto Rico.

IV. COMPARATIVE NEGLIGENCE

If then the minor was somewhat negligent, what rule will govern such facts? It was in this area, as a proponent of the comparative negligence doctrine, that Justice Ortiz marshalled his comparative law materials.

Since Puerto Rico subscribes to the Spanish Civil Code, it submits itself to the code as its source of law. Consequently, the instant case must be tested against Article 1802 which provides that, "A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done."

17. 74 P.R. 460 (1953).

18. 74 P.R. 486 (1953).

19. "Perhaps no one theory can ever explain the doctrine of contributory negligence.

Justice Ortiz, in civil law fashion, analytically dissected the article and found that it contained three elements: (1) the damage, (2) the fault or negligence of the defendant and (3) the causation. He recited that he was unable to find support for the principle of contributory negligence, or any evidence permitting the construction of such a doctrine. He recommended that the court reevaluate Article 1802 and deny that the *Natal* case correctly interpreted the code. Unlike a common law judge, he was not concerned with the judicial precedent of the *Claudio* case which had established the applicability of the doctrine of contributory negligence.

In the instant case the per curiam decision continued the pattern of citing cases, as precedent, that established that the actions of the plaintiff did not constitute negligence and concluded that "[t]he majority of the courts in the United States have established liability on the part of a defendant in circumstances similar to or identical with those in the case at bar."²⁰ This language is significant in a jurisdiction dedicated to the civilian system.²¹

The submission of the court to a common law source of law provides an interesting illustration of the penalty of playing truant to the code. A naive use of judicial precedent can seductively beckon the advocate from applicable provisions of the code, insidiously chip away its spirit, widen the distance between it and its application and leave it a petrification of historical interest. But if private law is ruled by the code in this matter and Article 1802 controls, the judge must apply the code and where it is free from all ambiguity, "the letter of it is not to be disregarded, under the pretext of pursuing its spirit."²² Unfortunately, Article 1802 was never permitted to operate even by a specious interpretation but was attached to the doctrine without critical examination concerning their mutual compatibility.

The principle of comparative negligence appeals to Justice Ortiz as a doctrine logically compatible with justice and equity, and whose foundation is firmly implanted in a just theory of causation. He believed that a theory of causation amenable to the concepts of multiple, proximate and adequate causes, one that is found as a matter of fact by the judge, is the only concept that is consonant with the reality of the situation. He found that the comparative negligence doctrine prevails under different names in almost all countries and that the civil law, with the exception of Puerto Rico, applies it.

In its essence, it is an expression of the highly individualistic attitude of the common law, and its policy of making the personal interests of each party depend on his own care and prudence." PROSSER, *TORTS*, 284 (2 ed. 1955).

20. 75 P.R. 740, 746, (1953).

21. Rodriguez, *Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico*, 23 *TUL. L. REV.* 1, 345 (1949).

22. Civil Code Puerto Rico 1902, Art. 13., now Civil Code Puerto Rico 1930, Art. 14.

Dividing the civil law jurisdiction, he found they have arrived at the adoption of comparative negligence doctrine via two processes.²³ Some countries, notable Austria, Germany, Switzerland and Chile, enacted statutes that specifically provided for the application of the doctrine, while other countries developed the doctrine by more subtle means by interpreting their court codes. The French and Argentine Codes contain, for example, articles similar to Article 1802 of the Puerto Rican Code, and they both espouse the principles of comparative negligence.

However in attempting to discover the rule in Spain, Justice Ortiz gained little support. He found no positive support on the subject but did cite that the Supreme Court of Spain has refused to adopt any particular theory of causation,²⁴ that it had recognized the compensatory trend of the law and that one of its Justices was committed to this doctrine in his writings. Justice Ortiz admitted that the cases in Puerto Rico had buttressed the common law theory, but he believed that the first case in 1909 did not support the general adoption of such a doctrine on its facts and that judicial reversal is not an insurmountable obstacle against the adoption of a new and better doctrine. He stated that "the judicial investigation of a problem is not bound exclusively by the fact that the problem has been formerly decided . . .,"²⁵ and that the rule of *stare decisis* does not justify the perpetuation of an error. Further, he cautioned against believing "that the legislative inaction regarding our former opinions has made valid a wrong interpretation If the passiveness of the legislature is to have concrete legal consequences, judicial errors would never be set aside."²⁶

Mr. Justice Negrón Fernández wrote in a separate concurring opinion that while he did not object to the desirability of the doctrine of comparative negligence its judicial adoption would not be authorized under Puerto Rican legislation and that the doctrine "cannot be adopted by mere judicial *fiat*. There is need for legislation to establish — once the court determines that the cause of the damages was a concurrence of fault — the standards which must govern the consequences of such determination. The absence of those standards in our positive law cannot be supplied by judicial power at its whim."²⁷ He gave great weight to the established line of cases and felt that they must remain undisturbed by the judiciary. What then is law to such a code system?

23. Almost every civil code that has since been enacted contains the gist of French Civil Code Article 1382 with very little if any modification. LAWSON, *NEGLIGENCE IN THE CIVIL LAW* 27, (1950).

24. The Supreme Court of Spain in its opinion of February 22, 1946 held that the legal cause is one which has a logical and direct connection with a specific result.

25. 75 P.R. at 782.

26. *Id.* at 783.

27. *Id.* at 747.

V. CONSTITUTIONAL QUESTION

Law to the civilians is the solemn expression of legislative will,²⁸ basically classified and operating on the precept that persons are the subject of rights, things are its object and actions are the necessary means of its enforcement.²⁹

What role does precedent play in the civil jurisdiction? If case law in Puerto Rico has established the contributory negligence doctrine, may judicial decisions reverse it? As we have seen, Justice Negron Fernandez replied in the negative while Justice Ortiz believed that the court may and should renounce the doctrine of contributory negligence. Would a common law jurisdiction reverse itself in a similar situation?

The language Judge Negron Fernandez used suggests that he is adopting the common law approach to the problem of *stare decisis*; that is, only the legislature may change the common law rules.³⁰ This unquestionably is a basic premise in the common law system and would still seem to be the rule in England, the strictest adherent of *stare decisis* in the common law world.³¹

In England, superior court decisions absolutely bind lower courts and, more importantly, the House of Lords is bound by its own decisions. It would appear that Justice Negron Fernandez is correct in the position that his tribunal is bound by its own decisions but only if Puerto Rico is a common law jurisdiction guided by constitutional principles now in force in England.³²

American courts do not have uniform positions on the question of utilization of precedent. Most inferior state courts are controlled by the pronouncements of their superior state courts. However, these superior courts generally admit a limited power to reverse a previous decision.³³ Decisions of the Supreme Court of the United States are law to all inferior federal courts and all state courts, on federal matters, but the court has the power to reverse its own decisions, thereby creating new principles of law.³⁴

28. *E.g.*, Article I, La. Code, explicitly states such. Do the decisions of the supreme court of a civil jurisdiction constitute law? That proposition was interestingly presented in *Breedlove v. Turner*, 9 Mart. (o.s.) 353 (La. 1821) where in the defense in an action for damages for malpractice a lawyer maintained he was not responsible for knowledge of the court decisions of a code state. Held, that the decisions of that tribunal are to be regarded as interpretation of legislative will where the legislature does not later abrogate them.

29. Based on the Roman classification, for example, if the variation in personality affects the legal right, the rule will be stated under the law of persons.

30. Lobingier, *Precedent in Past and Present Legal Systems* 44 MICH. L. REV. 955 (1946).

31. Small, *Stare Decisis on Two Continents; A Saga of Gain and Loss*. 18 ROCKY MT. L. REV. 97 (1954-6).

32. Lipstein, *Doctrine of Precedent in Continental Law*, 28 J. COMP. LEG. & INT'L. L. 34 (3d ser.).

33. *People v. Tompkins*, 186 N.Y. 413, 79 N.E. 326 (1906).

34. *Ibid*; Spertl, *Case Law and the European Codified Law*. 19 ILL. L. REV. 505 (1925).

It would appear that Justice Ortiz is justified in basing his reasoning for reversal on the civil law authority; while the role of precedent is quite similar in both systems, it is somewhat easier for the civil law court to break away from a precedent which is recognized to be erroneous or to reverse a *jurisprudence constante* where new social conditions require change.³⁵

Puerto Rico, however, is not the only civilian jurisdiction faced with the question of establishing the comparative negligence doctrine by judicial decision. Justice Ortiz's plea paralleled the comment of one American writer when he said, "The restoration of Louisiana's civilian heritage of comparative negligence could be accomplished, of course, through a recognition by our supreme court that Article 2323 of the Civil Code affords the general controlling principle for all negligence cases where both parties were at fault."³⁶ He stated that so simple a solution is hardly to be hoped for in the light of the repeated adherence of the state to the contributory negligence doctrine.

CONCLUSION

Certain conclusions may be drawn from the opinions written in the *Irizarry* case. First, common law ideas cannot be considered as firmly established when believed to be in conflict with civil or, more importantly, Puerto Rican law. Second, the principles and techniques of the civil and common law systems do converge, intermingle and influence the fabric of Puerto Rican law. Third, the past Spanish background and the present economic and geographic proximity to the States, coupled with the diverse education of their legal authorities, is forcing the adoption of an eclectic method in the administration of private law.³⁷ Fourth, there is a noticeable growing tendency to return to one's own national legal identity. Finally, the doctrine of contributory negligence in Puerto Rico was not abrogated by the instant case. Nevertheless, it is not unlikely that future Puerto Rican developments will tend toward eliminating not only this but also other foreign elements from the private law, particularly where it is felt that they are incompatible with basic principles followed by a civil law country.

35. Rheinstein, *Common Law and Civil Law: an Elementary Comparison*, 22 REV. JUR. U.P.R. 90 (1952-3).

36. Malone, *Comparative Negligence, Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1944-6); Another writer expresses the thought that Louisiana has gone to great pains of importing the common law rule in face of Article 2323 and that the court has erred in not following the path such article directs. Hillyer, *Comparative Negligence in Louisiana*, 11 TUL. L. REV. 112 (1936).

37. "It is not possible to deduce a consistent pattern of method or technique. In a way, this process is more like the early development in common law through individual cases, rather than like the more mature of the civil law which proceeds from an established basis It cannot be said that Puerto Rico is adopting a common law method of approach in this field; neither can it be said that the traditional civil law methods are being followed." Dainow, note 4, *supra* at 151, 152.