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Silent Growth of Comparative Negligence in Common Law Court

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THE COMMON LAW VIEW of contributory negligence theoretically still obtains in most jurisdictions. Thus, if the plaintiff's negligence proximately contributes to his resulting injury or damage, he is barred entirely from recovery. But this rule is "honored in the breach" in a growing number of jurisdictions that theoretically do not accept the doctrine of comparative negligence.

Six states openly recognize the doctrine of comparative negligence through statutes of general application. Generally these statutes provide that where an injury or accident results from the negligence of both the plaintiff and the defendant, the relative negligence of both parties shall be compared, and damages will be apportioned between the parties according to the amount of negligence attributable to each.[1] In other words, the courts

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[1] ARKANSAS: Where plaintiff's negligence is "less than that of any person causing the damage," recovery will not be barred, but shall be diminished in proportion to such contributory negligence." Ark. Stat. Ann. § 27-1730.1, 2 (Supp. 1961).

GEORGIA: Court decisions have blended the effect of the railroad liability statute and the general application statute. Ga. Code Ann. § 94-703 (1958) and § 105-603 (1956). Generally, there will be no recovery if plaintiff fails to exercise ordinary care or if his negligence is equal to or greater than the negligence of the defendant. In Wright v. Concrete Co., 107 Ga. App. 190, 129 S. E. 2d 351 (1962), the court refined the tests for determining whether a plaintiff may recover. It held that plaintiff's negligence concurring with the defendant's negligence as the proximate cause will diminish but not bar recovery, except—

1) where the plaintiff fails to exercise ordinary care after knowing of defendant's negligence;
2) where plaintiff's failure to discover defendant's negligence is tantamount to negligence;
3) where plaintiff's negligence is the sole proximate cause.

MISSISSIPPI: "The fact that the person injured" may have been contributorily negligent shall not bar a recovery, but "damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured . . ." Miss. Code Ann. § 1454 (1942).

NEBRASKA: A plaintiff's "slight" contributory negligence shall not bar a recovery if the defendant's negligence "was gross by comparison," but such contributory negligence will be "considered by the jury in mitigation of damages." Neb. Rev. Stat. § 25-1151 (1943).

SOUTH DAKOTA: Same as Nebraska. S. D. Code § 47.0304-1 (Supp. 1952).

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view the total negligence, and reduce the plaintiff's recovery in proportion to the role he played in causing the accident.

Advocates of the doctrine of comparative negligence point to the equitable effect of these statutes. Meanwhile, supporters of the common law disclaim the doctrine as being too difficult to administer and a decided threat to the entire fabric of liability insurance.

Whatever the arguments on either side, the fact remains that many of the states recognizing the common law rule of contributory negligence have enacted employer and railroad liability statutes which in fact apply the doctrine of comparative negligence. Most of these jurisdictions allow the plaintiff to recover irrespective of the amount of his negligence.[2] Other states deny recovery only when the plaintiff is grossly negligent.[3] Still others allow recovery only when the plaintiff's negligence is slight and the defendant's is gross in comparison.[4] None specify recovery only when the plaintiff's negligence is not as great as defendant's.[5]

In addition, the Federal Employer's Liability Act[6] provides that the doctrine of comparative negligence applies to all forms of negligence, including gross negligence. In *Lindgren v. United*

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WISCONSIN: A plaintiff's contributory negligence does not bar a recovery if the negligence of the defendant exceeds that of the plaintiff. Wis. Stat. § 331.045 (1957). Courts have clarified this statute in its relation to certain common law defenses. In McConville v. State Farm Mut. Auto. Ins. Co., 113 N. W. 2d 14 (1962), assumed risk was overruled as a complete defense with respect to host-guest cases (Wisconsin has no guest statute). Colson v. Rule, 15 Wis. 2d 387, 113 N. W. 2d 21 (1962), abolished assumed risk in cases involving farm laborers in favor of comparative negligence. In Bielski v. Schulze, 16 Wis. 2d 1, 114 N. W. 2d 105 (1962), "gross" negligence is abolished; conduct previously characterized as gross negligence will be treated as ordinary for purposes of comparison and contribution.

[2] Arizona Rev. Stat. Ann. § 23-806 (1956); Florida Stat. § 768.06 (1944); Kansas Gen. Stat. Ann. § 66-238 (1949); Minnesota Stat. Ann. § 219.79 (1947); Nevada Rev. Stat. § 41.150 (1957); North Carolina Gen. Stat. § 60-67 (1960); North Dakota Cent. Code § 49-16-03 (1960); Oregon Rev. Stat. § 764.220 (1953); South Carolina Code § 58-1232 (1952); Texas Rev. Civ. Stat. Ann. Art. 6440 (1926); Virginia Code Ann. § 8-642 (1950); Wyoming Stat. Ann. § 37-225 (1959).

[3] Iowa Code § 85.15 (1958); Michigan Stat. Ann. § 17.141 (1960); Montana Rev. Code Ann. § 92-201 (1949).

[4] District of Columbia Code Ann. § 44-402 (Supp. 1961); Ohio Rev. Code Ann. § 4113.07 (page 1954).

[5] Only Arkansas applies this standard, Ark. Stat. Ann. 81-1202 (1960), which is similar to that in the statute of general application, *supra*, n. 1.

[6] 35 Stat. 66 (1908), 45 U. S. C. § 53 (1959).

States,[7] the Supreme Court extended the provisions of the FELA to hold that they also apply to the Merchant Marine Act of 1920.[8]

Thus there are several jurisdictions upholding both the doctrine of comparative negligence and the common law rule of contributory negligence.

Plaintiffs bringing actions in these jurisdictions seek, whereever appropriate, to come within the scope of the liability statutes if there are suggestions of contributory negligence. In a Virginia case[9] plaintiff attempted to show that defendant's locomotive engineer failed to ring the bell as his train approached the grade crossing. Such a warning was required by a municipal ordinance and would invoke the doctrine of comparative negligence under state law[10] if it was violated. If the plaintiff had succeeded in his contention (and if he had remembered to prove the municipal ordinance) comparative negligence would have prevailed over contributory negligence.

Similarly, defendant's failure to sound a whistle or bell one mile outside the city limits brought plaintiff's action within the liability statute, in spite of the fact that the collision with the decedent's truck was some distance inside the city limits.[11]

Aside from statutes providing recognition of the doctrine of comparative negligence, courts also apply the maritime doctrine of comparative negligence. Collisions between boats, or collisions of boats with bridges and like stationary objects, often result in enormous damages. To avoid the disastrous financial consequences which might arise from applying the common law rule of contributory negligence in such cases, courts in the United States have adopted the view that damages shall be apportioned when both parties contribute to the accident. But only where plaintiff's negligence is slight is his recovery mitigated according to the amount of his negligence. In all other instances, i.e., where both parties are substantially negligent, damages are divided equally between plaintiff and defendant.

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[7] 281 U. S. 38 (1930).

[8] 41 Stat. 988 (1920), 46 U. S. C. § 861 (1959).

[9] Norfolk P. B. L. R. Co. v. C. F. Mueller Co., 197 Va. 533, 90 S. E. 2d 135 (1955).

[10] Va. Code Ann. § 56-416 (1950).

[11] Illinois Cent. R. Co. v. Perkins, 223 Miss. 891, 79 So. 2d 459 (1955).

This course was followed in *Petition of Adams.*[12] The court found that the defendant was very negligent in maneuvering his boat in the harbor channel, but that the plaintiff carelessly delayed reversing his engines to avoid collision. The court then held that the plaintiff's negligence was far too clear and substantial to bring the case within the "major-minor fault rule," even though defendant's negligence was far more flagrant. Therefore, damages were to be divided equally. On a petition for rehearing, which was denied, the court reluctantly amplified its earlier decision by stating that the damages were not to be proportioned in accordance with comparative faults, since the equal division rule was too well established to depart from it without some sanction from a higher court.

The maritime doctrine of comparative negligence has also been applied in personal injury suits. In *Hurst v. Point Landing, Inc.*,[13] plaintiff, a guard for a drydock company, fell into the open hatch of a barge, injuring himself severely. He brought suits against everyone in sight—the barge owner, the tug company that towed the barge, and his employer. In excusing all but the employer from liability, the court held that since the barge was in for repair of, among other things, the jammed-open hatch cover, the only parties that could be negligent were the employer and the plaintiff. The court went on to find that the employer should have warned the plaintiff, and the plaintiff should have looked where he was going. Since each party's negligence was substantial, the plaintiff was awarded only fifty per cent of his damages.

Further than these applications of the doctrine of comparative negligence, most of the common law states refuse to go. Some, however, look longingly at the doctrine as a possible answer for the contributorily negligent plaintiff who suffers large damages, much as ship owners suffered as the maritime doctrine developed.

The question of comparative negligence sometimes arises in instructing juries on the effects of negligence by defendant and plaintiff. Care must be taken in these instructions, particularly if the plaintiff's case appeals to the jury. This requires meticulous emphasis by the court on the jurors' duty should they find

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[12] 125 F. Supp. 110 (S. D. N. Y. 1954); aff'd, 237 F. 2d 884; cert. den., 77 S. Ct. 364, 352 U. S. 971 (1957).

that the plaintiff's actions helped to bring about his injury. Taken out of context, these instructions sometimes must appear hard-hearted to a sensitive juror. In a Delaware case[14] the court held that if plaintiff was not free of contributory negligence, he cannot recover. The law will not attempt to measure or apportion the negligence attributable to each party. The law has no scales to weigh contributing fault.

A North Carolina court was not quite so careful in its instructions, which were held to be in error on defendant's appeal. The court charged the jury that plaintiff's negligence, if any, would not bar recovery unless it directly and proximately contributed to his injury. But the jurors apparently were uncertain and returned for additional instruction which led to the error, the court instructing that plaintiff's contribution to his own injury would not prevent recovery if the defendant's negligence, when compared to the plaintiff's, was the proximate cause of injury. The higher court held that these instructions embodied the principle of comparative negligence, which is not applicable in North Carolina.[15]

A Minnesota court fell into similar error recently, when it charged that if the plaintiff were guilty of, say, five per cent negligence, he could not recover. The higher court's words made it appear that the heresy of comparative negligence was forever cropping up in that state: [16]

> This court has repeatedly stated that no reference should be made in a jury charge to a comparative degree or percentage of negligence or contributory negligence. If the plaintiff contributed directly to the accident so that the accident was partly or wholly due to his own fault, he cannot recover.

The majority of cases in which the question of comparative negligence is raised involve automobiles. Plaintiff and defendant collide head on, for example, when both continue to drive toward each other through a dense cloud of smoke.[17] In an intersection collision, defendant failed to yield the right of way, but plaintiff was driving on the wrong side of the road.[18] In a nighttime

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[13] 212 F Supp. 160 (E. D. La. 1962).

[14] Willis v. Schlagenhauf, 188 A. 700 (Del. 1936).

[15] Cashatt v. Asheville Seed Co., 202 N. C. 383, 162 S. E. 893 (1932).

[16] Busch v. Lilly, 257 Minn. 343, 101 N. W. 2d 199 (1960).

[17] McClelland v. Harper, 38 So. 2d 425 (La. App. 1948).

[18] Public Service Co. of Oklahoma v. Sanders, 362 P. 2d 90 (Okla. 1961).

head-on collision, decedent was speeding, defendant was on the wrong side of the road, and neither was keeping a proper lookout.[19] Plaintiff, who had only slight vision in one eye, failed to judge properly the distance of defendant's approaching car. Crossing the four-lane highway on foot, he was struck by defendant's car.[20] Contributory negligence barred this plaintiff from recovery.

This last case upheld an earlier California decision in which the plaintiff was struck as he crossed the street at night against a stop light. He pleaded that the defendant had the last clear chance, because he must have known of the plaintiff's peril. But the court held that to rule on last clear chance by conjecture rather than by evidence would be, in effect, to apply the doctrine of comparative negligence. It went on to observe that although the doctrine may be just and fair, the California Legislature had not seen fit to adopt it.[21]

Similar court refusal to recognize the doctrine occurred in *Condon v. Epstein.*[22] There the plaintiff collided with the defendant as the latter was making a U-turn in mid-block. The court pointed out that the defendant must exercise extra care in such a maneuver, while the plaintiff must exercise ordinary care; and if the plaintiff were exercising ordinary care, how could he have failed to see the defendant? As in the *Haerdter* case,[23] the court looked to the legislature to recognize the need for a comparative negligence statute.

Preceding the *Condon* decision by a few years was *Falk v. Crystal Hall, Inc.,*[24] where the court warned against any deviations from the common law rule of contributory negligence. In the *Falk* case there were two defendants—the coal delivery company, which was responsible for knocking down a fence over which plaintiff tripped, and the landlord, who let the fence lie there. Following plaintiff's successful suit, the landlord tried to collect from the coal company for the damages he had to pay the plaintiff. In commenting on use of the terms "active negli-

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[19] Alexander v. Appell Drilling Co., 290 S. W. 2d 377 (Tex. Civ. App. 1956).

[20] Summers v. Burdick, 191 Cal. App., 2d 464, 13 Cal. Rptr. 68 (1961).

[21] Haerdter v. Johnson, 92 Cal. App. 2d 547, 207 P. 2d 855 (1949).

[22] 168 N. Y. S. 2d 189, 8 Misc. 2d 674 (1957).

[23] *Supra,* note 21.

[24] 105 N. Y. S. 2d 66, 200 Misc. 979 (1951); aff'd, 113 N. Y. S. 2d 277, 279 App. Div. 1071, 1073; app. and rearg. den., 114 N. Y. S. 2d 660.

gence" (applied to the coal company) and "passive negligence" (applied to the landlord), the court observed that such legal jargon arises from comparative negligence. It further stated that the doctrine was struggling to obtain a foothold in controversies between two defendants, but that the common law of New York refused to recognize it. [See the Ohio case below.]

Recently in the District of Columbia, a similar question arose. A bus and taxi collided, injuring passengers who sued both the bus company and the taxi company. Following settlement of these actions, the bus company brought action against the taxi company for contribution. In reversing a lower court's verdict for the bus company, the court pointed out that since the doctrine of comparative negligence was not recognized in the District of Columbia, the damages could not be apportioned between the two parties.[25]

Damage awards present another problem area, where a jury may introduce, on its own, what is tantamount to the doctrine of comparative negligence. Torn by conflicting evidence, the jury renders a compromise verdict, awarding what the plaintiff believes are inadequate damages, and what the defendant believes should have been a verdict for him.

Two New Jersey decisions demonstrate one approach to this situation. In one case, plaintiff's damages as a result of an auto collision were established at $432.12, and defendant's at $225. The jury returned a verdict of $300 for the plaintiff. The court then proceeded to set aside the verdict, and entered judgment for the plaintiff for the full amount of his damages. On defendant's appeal, the court noted that when the jury returns a compromise verdict, a court must order a new trial, for it cannot set aside the verdict.[26]

This decision upheld the earlier decision rendered in *Juliano v. Abeles*.[27] There plaintiff appealed on the question of grossly inadequate damages, and the court ordered a new trial on the ground that the award represented a compromise. The court went on to say that a jury cannot compromise for the purposes of reaching agreement on a verdict, as the comparative degree of culpability may not be taken into consideration in assessing damages resulting from negligence.

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[25] D. C. Transit System, Inc. v. Garman, 301 F. 2d 568 (D. C. Cir. 1962).

[26] Stalter v. Schuyler, 135 N. J. L. 228, 51 A. 2d 213 (1947).

[27] 114 N. J. L. 510, 177 A. 666 (1935).

In a recent Washington decision, however, conflicting evidence did not appear to be the jury's only reason for returning a compromise verdict. Rather, there may have been a suggestion of contributory negligence. Plaintiff and defendant, both women, stopped at a couple of bars and had a few drinks together. Plaintiff then let defendant drive her car, and an accident followed in which plaintiff was injured. Although finding defendant liable, the jury awarded the plaintiff the exact amount of her doctor, dentist, and hospital bills, plus the repair of her car. When plaintiff appealed, the Supreme Court held that the damages were inadequate since they provided for no pain and suffering. Further, both liability and damages must be retried where there is a compromise verdict.[28]

In the oft-cited Pennsylvania case of *Karcesky v. Laria*,[29] the evidence was conflicting as to whether plaintiffs were struck by defendant's car or whether they walked into the side of it. The jury rendered a compromise verdict, and plaintiffs appealed on the ground of inadequate damages. In upholding the trial court's verdict, the Supreme Court ruled:

> Where the evidence of negligence or contributory negligence, or both, is conflicting or not free from doubt, a trial judge has the power to uphold the time-honored right of a jury to render a compromise verdict. . . . The doctrine of comparative negligence, or degrees of negligence, is not recognized by the courts of Pennsylvania, but as a practical matter they are frequently taken into consideration by a jury.

Tennessee applies yet another view. While holding that the doctrine of comparative negligence is not recognized in Tennessee,[30] it limits this view to cases where plaintiff and defendant both are proximately negligent. In other words, if a plaintiff is proximately negligent, his recovery will be barred. But his remote negligence may be looked to in mitigation of damages.

What is remote? A few cases help clarify the Tennessee view.

Plaintiff and his wife were traveling on a rain-swept highway, slightly under the speed limit of 65 m.p.h., when a mail carrier drove his car onto the road ahead of them. Too late plaintiff realized how slowly the mail carrier's car was moving. He applied the brakes and skidded into an oncoming truck. His

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[28] Shaw v. Browning, 367 P. 2d 17 (Wash. 1962).

[29] 382 Pa. 227, 114 A. 2d 150, 154 (1955).

[30] Denton v. Watson, 16 Tenn. App. 451, 65 S. W. 2d 196 (1932).

wife suffered multiple injuries which caused her excruciating pain and her eventual death. Plaintiff asked for damages of $25,000 for himself and $200,000 for his wife. The court recognized that plaintiff may have been driving too fast for the road conditions, but held that the plaintiff's negligence was not the cause of injury and did not proximately concur with defendant's (mail carrier) negligence. The court then awarded the plaintiff $4575.45 for himself, and $41,838.32 for his wife.[31]

A Tennessee Court of Appeals went further when the question of a plaintiff's negligence was raised. Plaintiff drove her car at about 30 miles per hour down a steep hill and around a sharp bend in the road. There she ran into the defendant's truck, which was stopped in the wrong lane of the highway. Again, there was the issue of what would have been a safe speed. In upholding the plaintiff's cause, the court ruled that where a plaintiff was not guilty of willful and wanton negligence, the suit could be maintained; failure to exercise ordinary care would not bar the action if defendant were guilty of a higher degree of negligence.[32]

In another case, the defendant failed to barricade an unsafe overpass road which it was responsible for maintaining. The plaintiff, a minor who had been drinking before the accident, drove onto the road leading to the overpass. The road was strange to him, and he failed to negotiate the turn onto the overpass, crashing onto the tracks below. In holding for the plaintiff, the court upheld the Tennessee rule that remote contributory negligence will mitigate damages, while proximate contributory negligence will bar recovery entirely.[33]

One other area where common law jurisdictions smile on the doctrine of comparative negligence may be found in cases involving the law of a foreign jurisdiction. The Supreme Court of Texas held that the doctrine of comparative negligence, which applied in South Dakota, did not violate the public policy of Texas. Therefore, the doctrine could be invoked by the plaintiff since the accident had occurred in South Dakota.[34]

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[31] Cline v. U. S., 214 F. Supp. 66 (E. D. Tenn. 1962).

[32] Fontaine v. Mason Dixon Freight Lines, 357 S. W. 2d 631 (Tenn. App. 1961).

[33] Atlantic Coastline R. Co. v. Smith, 264 F. 2d 428 (6th Circ. 1959).

[34] Flaiz v. Moore, 359 S. W. 2d 872 (Tex. 1962).

Similarly, the Vermont Supreme Court allowed plaintiff to recover under the law of Quebec, where the parties had collided. The court overruled the trial court's verdict barring the plaintiff's recovery because of his contributory negligence, and held that the law of the locus, not the forum, applied.[35]

Ohio now appears to have accepted the doctrine of comparative negligence as between joint tort feasor defendants, by calling it "indemnity" from a "primary" tort feasor who did not pay, to a "secondary" tort feasor who did pay.[36]

Thus, while many states give no distinct statutory recognition to the doctrine of comparative negligence, they find themselves in fact giving tacit approval of the doctrine while puritanically adhering to the common law approach in theory.

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[35] Goldman v. Beaudry, 170 A. 2d 636 (Vt. 1961).

[36] Ohio Fuel Gas Co. v. Pace Excavating Co., 187 N. E. 2d 89 (Ohio App. 1963).