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## TORTS—COMPARATIVE NEGLIGENCE—GOOD OR ILL FOR MISSOURI

The doctrine of contributory negligence has long been thought to be unnecessarily harsh, and even though efforts have been made to ameliorate it, it remains under heavy attack.<sup>1</sup> The question now presented is whether the whole doctrine, along with its modifications, has outlived its usefulness and should be finally laid to rest in favor of comparative negligence. The question may best be resolved by an analysis of comparative negligence, the experience of other jurisdictions, and its anticipated effect on Missouri law.

The battlelines in the fight for comparative negligence are clearly drawn.<sup>2</sup> While the opponents of contributory negligence are many, they have scored only one major victory in the last twenty years.<sup>3</sup> Unfortunately, the area is strewn with misnomers and misconceptions, and it is necessary to step carefully in order to avoid the semantic problems. The term "comparative negligence" itself is often misleading. Both Illinois<sup>4</sup> and Kansas<sup>5</sup> developed common law concepts in the last century that contributory negligence was not a bar to full recovery if the plaintiff's negligence was "slight," and that of the defendant "gross." No apportionment of damages was involved; only the matter of contributory negligence as a complete defense. Both states, however, were forced to abandon their ventures<sup>6</sup> into the comparative field due to the numerous appeals concerning the necessary ingredients of slight and gross negligence as a matter of law. These unsuccessful common law attempts to lessen the harshness of contributory negligence also bore the name of comparative negligence. Although the two plans are dissimilar in theory and practice, vestiges of common law comparative negligence are still used by some critics in an effort to discredit the modern form of statutory comparative negligence. The term "comparative negligence" in its modern usage, and as it is used in this discussion, is most simply expressed as "apportionment of damages based on degree of fault." The ambiguity is unfortunate, and it is now too late to coin a new and more appropriate title. Much confusion may be avoided, however, by keeping in mind that comparative negligence is now synonymous with damage apportionment.

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1. Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946).

2. The literature in regard to the merits and demerits of comparative negligence is voluminous. The leading articles are as follows:

In favor: Mole and Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333 (1932); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950).

Against: Benson, *Comparative Negligence, Boon or Bane*, 23 INS. COUNSEL J. 204 (1956); Heft, *Comparative Negligence—Problem Child: A Study of Growth to Manhood*, 7 DEFENSE L.J. 46 (1958); Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005 (1957).

3. Arkansas enacted a comparative negligence statute in 1955. ARK. LAWS 1955, art. 191; now ARK. STAT. ANN. § 27-1730.1,2 (Supp. 1961).

4. *Galena & Chicago Union R.R. v. Jacobs*, 20 Ill. 478 (1858).

5. *Sawyer v. Saver*, 10 Kan. 466 (1872).

6. *Lake Shore & M.S.R.R. v. Hessions*, 150 Ill. 546, 37 N.E. 905 (1894); *Atchison, T. & S.F.R.R. v. Henry*, 57 Kan. 154, 45 P. 576 (1896).

## I. ANALYSIS OF COMPARATIVE NEGLIGENCE

It is often thought that the doctrine of contributory negligence is as traditional as the law of negligence itself. Actually, it was not until 1809 that Lord Ellenborough<sup>7</sup> first espoused the doctrine which was destined to provide the entrepreneurs of the industrial revolution with the necessary protection against numerous and crippling damage suits. However favorable the doctrine may have been for the fledgling industries of the period, it soon began to be questioned by both lawyers and laymen. That a luckless plaintiff found to be one per cent negligent was completely barred from recovering from a defendant found to be ninety-nine per cent negligent seemed unfounded in both common sense and logic. Defenders of contributory negligence argued, as they still do, that juries do not actually apply such a strict standard and unless the contributory negligence is found to be substantial that the defense is ignored. The frailty of such an argument is patent. Justice under the law may only be achieved if the law itself is fair and just, not by expecting juries to achieve justice by disregarding the law and by applying their own standards of fairness and justice.

The doctrine of contributory negligence was substantially modified in 1842 by the formulation of the last clear chance doctrine.<sup>8</sup> Although almost every jurisdiction that has adopted the doctrine has its own peculiar variation,<sup>9</sup> the end result, when the plaintiff is successful in applying the doctrine, is the same. The pendulum is swung to the other side, and the plaintiff is permitted to recover his full damages although his own negligence also contributed to his injuries. The doctrine of last clear chance is as unduly harsh upon the defendant as the doctrine of contributory negligence is upon the plaintiff.

Dissatisfaction with both of these common law doctrines has led some jurisdictions to adopt the civil law system for apportioning the damages based on the degree of fault of the parties, or comparative negligence as we know it today. The plaintiff's negligence is no longer a complete defense but merely diminishes his recovery. The total negligence of the parties is considered as one hundred per cent. If the plaintiff's damages are \$10,000, and he is twenty per cent negligent, he may recover against the eighty per cent negligent defendant, but his damages are reduced by \$2,000 (twenty per cent times \$10,000).

Under the pure form of comparative negligence employed by Mississippi<sup>10</sup> and the Federal Employers Liability Act,<sup>11</sup> the plaintiff is permitted to recover regardless of his degree of negligence. Even if he is ninety-nine per cent negligent, the plaintiff is allowed to recover his damages although they are reduced by ninety-nine per cent for a net recovery of only one per cent. Other jurisdictions, notably Wisconsin<sup>12</sup> and Arkansas,<sup>13</sup> use the modified form which prohibits a plaintiff from recovering unless his negligence is less than that of the defendant.

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7. *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (1809).

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

9. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 473 (1953).

10. MISS. CODE ANN. § 1454 (1942).

11. § 53, 35 STAT. 66 (1908), 45 U.S.C. § 53 (1952).

12. WIS. STAT. § 331.045 (1953).

13. ARK. STAT. ANN. § 27-1730.1,2 (Supp. 1961).

Therefore, if the plaintiff is forty-nine per cent negligent, and the defendant fifty-one per cent, the plaintiff may recover although his damages will be reduced by forty-nine per cent of the total. But if the plaintiff and defendant are both fifty per cent negligent, then the plaintiff is barred from any recovery whatsoever because his negligence is not less than that of the defendant. No logical basis for the modified form has been seriously advanced. It seems to find its basis in political expediency while fighting for life in the legislature. Insurance interests are not as opposed to the modified form, for it does not present the likelihood of at least some recovery in almost every case as does the pure form, and therefore does not encourage as many claims.<sup>14</sup> Yet the obvious solution to the problem of multitudinous suits, the free use of counterclaims, is rarely mentioned in the abundance of material written on comparative negligence. A prospective plaintiff who has been ninety per cent negligent is unlikely to bring a suit and thereby encourage a counterclaim by the prospective defendant who has been only ten per cent negligent. It is anomalous that Mississippi, which uses the pure form, denies the use of a counterclaim; while Wisconsin, which uses the modified form, permits the use of a counterclaim by defendants for whom it will be of little assistance. If the defendant is fifty per cent or more negligent, in a modified jurisdiction, then his counterclaim will be barred because he has not been less negligent than the party against whom he seeks recovery. The result is inequitable for if the plaintiff has been forty-nine per cent negligent, and the defendant fifty-one per cent, then the plaintiff may recover although his damages will be reduced by forty-nine per cent. But the defendant's counterclaim will be completely barred. On the other hand, if the plaintiff is found to have been fifty-one per cent negligent, and the defendant forty-nine per cent, then the plaintiff's recovery will be barred, but the defendant can recover on his counterclaim although it will be reduced. Even though the modified form has advantages over the unyielding doctrine of contributory negligence, it is apparent that it does not attain a true apportionment of damages based on fault in all cases.

## II. SUCCESS IN OTHER JURISDICTIONS

It takes only a cursory examination of the subject to learn that the United States is the last stronghold of contributory negligence. An excellent treatment of the history of comparative negligence may be found in Turk's authoritative article,<sup>15</sup> and it will not be needlessly reproduced here. However, it is worth noting that England, itself, the birthplace of contributory negligence, adopted a complete system of comparative negligence in 1945.<sup>16</sup> Critics of the system are quick to point out that juries are not so widely employed in other countries as in the United States, and that its success has been due to its administration by able and experienced judges. However, six American states have been using some form of

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14. Gilmore, *Comparative Negligence from a Viewpoint of Casualty Insurance*, 10 ARK. L. REV. 82 (1955-56).

15. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950).

16. Law Reform Act of 1945, 8 & 9 Geo. 6, c. 28.

statutory comparative negligence for many years, and none have repealed it as being incompatible with the jury system.

Apportionment of damages was adopted in Mississippi<sup>17</sup> in 1910 and, as mentioned previously, will lie even though the plaintiff is the more negligent party. Georgia<sup>18</sup> enacted its statute as early as 1863, Wisconsin<sup>19</sup> acted in 1931, and Arkansas<sup>20</sup> followed suit in 1955; all three apply apportionment only when the plaintiff's negligence is less than that of the defendant. Nebraska<sup>21</sup> has used apportionment since 1913, and South Dakota<sup>22</sup> used Nebraska's statute as a guide in adopting its plan in 1941; both states apportion damages only where the plaintiff's negligence is "slight" in comparison with defendant's "gross" negligence. Tennessee has developed a common law system of apportionment, but limits it to cases in which the plaintiff's negligence is only a "remote" cause of the injury.<sup>23</sup> The federal government adopted comparative negligence in the Federal Employers Liability Act<sup>24</sup> of 1908 and later incorporated the apportionment provision into the Jones Act and the Merchant Marine Act.<sup>25</sup> Many states use some form of comparative negligence in either their workmen's compensation acts or their railroad liability acts. Prosser estimated as early as 1953 that there were approximately forty comparative negligence statutes already in use in America with a substantial body of case law estimated at approximately 1,200 cases.<sup>26</sup>

Wisconsin has had the most acclaimed success in the field, and much of the credit seems due to its form of special verdict for comparative negligence cases. A

17. MISS. CODE ANN. § 1454 (1942). In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence 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, or the owner of the property, or the person having control over the property.

18. GA. CODE § 105-603 (1956).

19. WIS. STAT. § 331.045 (1953). Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

20. ARK. STAT. ANN. § 27-1730.1,2 (Supp. 1961). In all actions hereafter accruing for negligence resulting in personal injuries or wrongful death or injury to property, contributory negligence shall not prevent a recovery where any negligence of the person so injured, damaged or killed is of less degree than any negligence of the person, firm, or corporation causing such damage; provided that where such contributory negligence is shown on the part of the person injured, damaged, or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence.

21. NEB. REV. STAT. § 25-1151 (1943).

22. S.D. CODE § 47.0304-1 (Supp. 1952).

23. *Anderson v. Carter*, 22 Tenn. App. 118, 121, 118 S.W.2d 891, 893 (1938).

24. § 53, 35 Stat. 66 (1908), 45 U.S.C. § 53 (1952).

25. March 4, 1915, c. 153, § 20, 38 Stat. L. 1185; June 5, 1920, c. 250, § 33, 41 Stat. L. 1007, 46 U.S.C. § 688 (1946).

26. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 467 (1953).

typical special verdict form is set out in the footnote,<sup>27</sup> and it is evident that the jury must responsibly answer the fundamental problems of the case. There is no opportunity for vague and nebulous verdicts, which hint of confusion and compromise. The arithmetic is properly left to the court; the jury merely resolves ultimate questions of fact. The jury is not faced with a question of algebra but of common sense. Under the Wisconsin approach, the increase in the number of claims predicted by the opponents of comparative negligence has apparently failed to materialize, and the amounts of recoveries are said to have decreased since its adoption.<sup>28</sup>

The success of comparative negligence in simple two party situations is largely unchallenged. The most valid criticism of the doctrine is occasioned by the complexities of a multiple party accident.<sup>29</sup> Assume a hypothetical in which *A* is twenty-five per cent negligent, *B* twenty per cent, and *C* fifty-five per cent. Can *A*, who was less than fifty per cent negligent, recover from *B*, who was less negligent than *A*? If *A* can recover from *B*, is *C* a necessary party to the suit? What about the problem of contribution among joint tortfeasors? Surprisingly enough, the states which have adopted comparative negligence report few such problems. Although, at first glance, the ramifications do seem hopelessly complex, there is a practical and workable solution to each one. For those who may be interested in pursuing the matter, Gregory's book, *Legislative Loss Distribution in Negligence Actions*,<sup>30</sup> provides many of the answers. It should be remembered, however, that these are problems which may be analyzed and solved in advance of the adoption of comparative negligence, and may be thus prevented from hampering its application.

### III. EFFECT ON MISSOURI LAW

The effect of a comparative negligence statute upon contributory negligence is clear, of course. Negligence of the plaintiff would no longer bar recovery but

#### 27. Special verdict:

1. In operating his automobile at the time of and immediately preceding the collision, was the defendant Smith negligent with respect to the speed of his car?

2. If you answer Question 1 "Yes", then answer this: Was the defendant Smith's negligence a cause of the collision?

3. In operating his automobile at the time of and immediately preceding the collision, was the plaintiff Jones negligent with respect to failure to stop before entering the intersection?

4. If you answer Question 3 "Yes", then answer this: Was the plaintiff Jones's negligence a cause of the collision?

5. If you answer all of Question 1, 2, 3, and 4, "Yes", then answer this: What percentage of the total negligence was attributable to the defendant Smith? \_\_\_\_\_ To the plaintiff Jones? \_\_\_\_\_

6. What is the amount of damages plaintiff Jones has sustained?

28. Bress, *Comparative Negligence: Let Us Harken to the Call of Progress*, 43 A.B.A.J. 127, 129 (1957).

29. For a good illustration of the problem, see Burns, *Comparative Negligence: A Law Professor Dissents*, 51 ILL. BAR J. 708, 709 (1962-63).

30. GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* (1936). Also see Philbrick, *Loss Apportionment in Negligence Cases*, 99 U. PA. L. REV. 572, 766 (1951).

would merely diminish the damages recovered. However, the effect of the doctrine upon the defense of assumption of risk is not as clear. Assumption of risk and contributory negligence have always been treated as two separate and distinct defenses. Although the two are easily distinguished upon their definitions,<sup>31</sup> there can be little doubt that the distinction is confusing to a jury, which is called upon to apply them to a difficult factual situation. The elimination of contributory negligence as a complete defense, but the retention of assumption of risk as a bar to recovery, naturally intensifies the problem and tends to place an impossible burden upon a jury. Although assumption of risk is still used in Mississippi,<sup>32</sup> Wisconsin finally gave up the struggle in 1962 and held that henceforth assumption of risk would no longer be treated as a complete defense, but, like contributory negligence, would go to diminish the plaintiff's recovery.<sup>33</sup> Again, Missouri has the opportunity to foresee the problem experienced by other jurisdictions and should eliminate the difficulty before it can arise.

Another effect of comparative negligence seemingly unpredictable is upon the doctrine of last clear chance and Missouri's humanitarian doctrine. It seems apparent that last clear chance is merely a transitional doctrine<sup>34</sup> from contributory negligence to comparative negligence and was formulated to alleviate the undue harshness of contributory negligence. Once contributory negligence is displaced, there is no longer a need for either last clear chance or humanitarian negligence. Yet, the state legislatures enacting comparative negligence statutes have neglected to deal with the problem, and as a result, Nebraska,<sup>35</sup> South Dakota,<sup>36</sup> Mississippi,<sup>37</sup> and Georgia<sup>38</sup> are still burdened with the confusion of last clear chance. However, Wisconsin has eliminated the doctrine by court decision,<sup>39</sup> and Arkansas specifically abolished the doctrine in its statute.<sup>40</sup> The retention of last clear chance is both unnecessary and unwise for it defeats the basic purpose of apportionment of damages by placing the entire loss upon the defendant.

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31. PROSSER, TORTS § 67 (3d ed. 1964).

32. Saxton v. Rose, 201 Miss. 814, 29 So.2d 646 (1947). Also see 27 MISS. L.J. 105, 109 (1956).

33. Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 21 (1962). Also see 41 TEXAS L. REV. 459 (1963).

34. James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938).

35. Wilfong v. Omaha & Council Bluffs St. Ry., 129 Neb. 600, 262 N.W. 537 (1935). Also see 15 NEB. L. BULL. 173 (1936).

36. Vlack v. Wyman, 78 S.D. 504, 104 N.W.2d 817 (1960).

37. Underwood v. Illinois Cent. R.R., 205 F.2d 61 (5th Cir. 1953). Also see Price, *Applicability of the Last Clear Chance Doctrine in Mississippi*, 29 MISS. L.J. 247 (1958).

38. Lovett v. Sandersville R.R., 72 Ga. App. 692, 34 S.E.2d 664 (1945).

39. Switzer v. Detroit Inv. Co., 88 Wis. 330, 206 N.W. 407 (1925).

40. In its original statute, Arkansas nullified the usual effect of last clear chance, but its newer statute omits any reference to the doctrine. There is no indication that it will be revived. ARK. LAWS, art. 191 (1955); now ARK. STAT. ANN. § 27-1703.1,2 (Supp. 1961).

## IV. CONCLUSION

Despite such impressive titles as *Comparative Negligence on the March*<sup>41</sup> and many bold prophesies of its bright future in America, the acceptance of comparative negligence has been slow. Why is it that our states have been so reticent in adopting a doctrine that has gained such wide acceptability in other countries and that has been successfully used in those American jurisdictions which have tried it? The doctrine of contributory negligence is too firmly entrenched to expect any court to suddenly repudiate such a venerable body of law. The transition to comparative negligence must necessarily come from the legislatures, which actually spend little of their time in studying and changing the substantive common law. In addition the legislatures are subject to the pressures of special interest groups, and the insurance interests have opposed the adoption of comparative negligence in the fear of more numerous recoveries.<sup>42</sup> Also, many lawyers are understandably reluctant to abandon a familiar form of practice. Many others are unaware of its advantages.

The rule of contributory negligence arose as a protective cover for the industrial revolution, long before the advent of the automobile could be foreseen. The millions of cars now congesting our highways have produced an unforeseeable multitude of accidents and have brought an entirely new era to the law of negligence. Encouragement of fair settlements out of court, and the assurance of a fair and prompt judgment in court are both social needs of the day. Reluctance on the part of defendants to settle out of court in the hope of establishing contributory negligence as a complete defense, falls far short of that goal. The belief that juries already apply some sort of apportionment of damages to their verdicts *sub rosa*,<sup>43</sup> while the bench and bar pay lip service to the doctrine of contributory negligence, also falls short.

The law of negligence is in need of a change which can gain both the understanding and approval of the general public. It has been demonstrated that comparative negligence stands ready to satisfy that need. Wisconsin adopted its system of comparative negligence under the threat of automobile negligence claims being transferred to a quasi-judicial commission, and now the success of the system has removed the cause for any such transfer.

Following is a proposed statute which incorporates the ideas and principles advocated throughout this discussion as a beneficial change in Missouri negligence law:<sup>44</sup>

1. In all actions hereafter accruing for negligence resulting in personal injury or wrongful death or injury to property, including those in

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41. Turk, *Comparative Negligence on the March*, 28 CHL-KENT L. REV. 189 (1950).

42. Gilmore, *Comparative Negligence from a Viewpoint of Casualty Insurance*, 10 ARK. L. REV. 82 (1955-56).

43. The rejection by juries of the complete defense of contributory negligence was openly recognized by the Supreme Court of Pennsylvania in *Karcesky v. Laria*, 382 Pa. 227, 114 A.2d 150 (1955).

44. Section one of the proposed statute follows the suggested statute in Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 508 (1953). Section two

which the defendant has had the last clear chance to avoid the injury, the contributory negligence of the person injured, or of the deceased, or of the owner of the property, or of the person having control over the property, shall not bar a recovery, but the damages awarded shall be diminished in proportion to the amount of the negligence attributable to the person injured or to the deceased or to the owner of the property or to the person having control over the property.

2. Assumption of risk shall be treated in a like manner as contributory negligence for the purposes of this act.
3. In any action to which this act applies, the court shall make findings of fact or the jury shall return a special verdict which shall state:
  - (a) Whether either party(s) was negligent.
  - (b) If so, the respective degrees of negligence attributable to each party.
  - (c) The actual damages sustained by the claimant(s).

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has been added to specifically eliminate assumption of risk as a complete defense. Section three has been modified to relieve the jury of any mathematical computations, except the basic approximation of the degrees of fault.