

CPLR Art. 14-A: Legislature Enacts Comparative Negligence Statute

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propriate notice to all class members in such manner as the court directs.⁸⁹

Section 909 leaves room for experimentation by allowing the court in its discretion to assess attorneys' fees, based on the reasonable value of legal services rendered, against the opponent of a successful class. For public policy reasons, however, no reciprocal provision allowing the court to assess attorneys' fees against a losing class is included.⁹⁰

In sum, the new class action law portends significant change in state litigation. Under the prior law,⁹¹ with its restrictive judicial interpretation,⁹² group claimants were often denied access to the courts. Now, claims involving environmental offenses, consumer interests, civil rights, adhesion contracts, and other collective activities may be championed in class form.⁹³

The advantages of a class action are tripartite: economic, procedural, and psychological.⁹⁴ The latter is borne of the strength which comes with numbers. For "[e]ven if the court is not impressed, a favorable public or political reaction may be important."⁹⁵ The disadvantages focus around the potential for abuse.⁹⁶ An active judiciary, exercising its discretion⁹⁷ sagaciously in fashioning decisional guidelines, can obviate such potential.

ARTICLE 14-A — DAMAGE ACTIONS: EFFECT OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

CPLR art. 14-A: Legislature enacts comparative negligence statute.

The legislature has enacted a "comparative negligence" statute,⁹⁸ thus abandoning the traditional rule of tort law that any

⁸⁹ Section 908 is virtually identical to its federal counterpart. See FED. R. CIV. P. 23(e). For a discussion of the problems likely to be encountered were settlements allowed without court approval, see Becker, *supra* note 73, at 997.

⁹⁰ See Homburger, *supra* note 63, at 654. Class actions often are in the nature of "private attorney general" suits. The public is interested in aiding those who represent economically or socially disadvantaged groups. *Id.* See also Special Comm. Report, *supra* note 76, at 10. For a discussion of the problems encountered by awarding attorneys' fees, see 7B MCKINNEY'S CPLR 909, commentary at 71-72 (Supp. 1975), and Becker, *supra* note 73 at 997.

⁹¹ CPLR 1005, ch. 318, § 4, [1962] N.Y. Laws 2086.

⁹² See notes 61-63 and accompanying text *supra*.

⁹³ See Fink, *supra* note 58, at 1.

⁹⁴ 2 WK&M ¶ 1005.06, at 10-64.

⁹⁵ *Id.* at 10-66.

⁹⁶ See generally Weinstein, *supra* note 82; Retail Merchants, *supra* note 77; Becker, *supra* note 73.

⁹⁷ The new article, leaving much to the discretion of the court, places great reliance upon a strong and active judiciary. See Homburger, *supra* note 63, at 657. For a discussion of the various hardships a class action places upon the courts, see Weinstein, *supra* note 82, at 300-02.

⁹⁸ Ch. 69, § 1, [1975] N.Y. Laws 94 (McKinney). A comparative negligence statute had

contributory negligence on the part of a plaintiff serves as a complete bar to recovery.⁹⁹ The newly enacted article 14-A extends the application of the principles of comparative negligence to include the dispute between the injured party and the tortfeasor, thus completing the radical change in New York tort law begun by the Court of Appeals in *Dole v. Dow Chemical Co.*¹⁰⁰

The new law, applicable to "all causes of action accruing on or after September first, nineteen hundred seventy-five,"¹⁰¹ establishes a "pure" form of comparative negligence allowing an injured party to recover damages even if his own culpable conduct is greater than that of the defendant.¹⁰² The amount of recovery,

been passed by the legislature in 1974, but was subsequently vetoed by the Governor. That statute would have barred recovery by a plaintiff who was more than 50% negligent, as opposed to the present statute which allows such a claimant a diminished recovery. For a discussion of the reasons for the disapproval of the 1974 bill, see THIRTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, as appearing in [1975] N.Y. Laws 1482 (McKinney).

The Court of Appeals has called for the passage of a comparative negligence law several times in recent years, but has always refused to make such a change by judicial action, declaring that such a complex issue was best left to the legislature. *See, e.g.,* *Godling v. Paglia*, 32 N.Y.2d 330, 344-45, 298 N.E.2d 622, 630, 345 N.Y.S.2d 461, 471-72 (1973). In only three states have the courts established a system of comparative negligence. *See* *Kaatz v. State*, 540 P.2d 1037 (Alas. 1975); *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). In most states, courts have agreed that this was a matter best left to the legislature. *See, e.g.,* *Maki v. Frelk*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968); *Vincent v. Pabst Brewing Co.*, 47 Wis. 2d 120, 177 N.W.2d 513 (1970); W. PROSSER, *THE LAW OF TORTS* § 67, at 434-35 (4th ed. 1971); *Comments on Maki v. Frelk — Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889 (1968).

⁹⁹ Although the Court of Appeals had refused to change this rule of contributory negligence, the courts have gone to great lengths in attempts to avoid its harsh effects. For example, in *Rossmann v. La Grega*, 28 N.Y.2d 300, 270 N.E.2d 313, 321 N.Y.S.2d 588 (1971), the Court reversed a lower court decision which had found a plaintiff contributorily negligent as a matter of law. The plaintiff had been struck by a car while he was standing on an expressway at night attempting to divert traffic from a disabled car without using a light.

¹⁰⁰ 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). In *Dole*, the Court applied comparative negligence principles in allowing proportionate contribution among joint tortfeasors.

¹⁰¹ CPLR 1413.

¹⁰² *Id.* 1411. There are three basic types of comparative negligence statutes: pure comparative negligence, in which an injured party may recover, regardless of the proportion of culpable conduct attributed to him; greater or less than comparative negligence, in which an injured party may recover only if his share of the culpable conduct is less than either 50% or 51% of the total culpable conduct; and slight-gross comparative negligence, in which an injured party may recover if his negligence is slight and the defendant's is gross. For a fuller discussion of these three types of comparative negligence, see C. HEFT & C. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* §§ 1.30-50 (1971); V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 43-82 (1974).

Most jurisdictions which have enacted comparative negligence statutes have chosen a greater or less than system. *See, e.g.,* ARK. STAT. ANN. § 27-1764 (Supp. 1973); CONN. GEN. STAT. ANN. § 52-572h (Supp. 1975); HAWAII REV. STAT. § 663-31 (Supp. 1974); ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1975); NEV. REV. STAT. § 41.141 (1973); WYO. STAT. ANN. § 1-7.2 (Cum. Supp. 1975). A slight-gross system has been enacted in only two states, Nebraska and South Dakota. *See* NEB. REV. STAT. § 25-1151 (1964); S.D. COMPILED LAWS ANN. § 20-9-2 (1967). Pure comparative negligence has been established by statute in Mississippi, Rhode

however, is diminished in proportion to the amount of culpable conduct attributed to the injured party.¹⁰³ And, the existence and extent of any such culpable conduct is an affirmative defense to be pleaded and proved by the party attempting to diminish damages.¹⁰⁴ This abrogates the traditional New York rule which had placed the burden of proving freedom from contributory negligence upon the plaintiff.¹⁰⁵

Evidently aware of the many controversial questions left unanswered by comparative negligence statutes in other jurisdictions,¹⁰⁶ the draftsmen of the New York statute sought to resolve these controversies yet allow leeway for judicial creativity. Using the term "culpable conduct,"¹⁰⁷ the article is not limited to an action for negligence, referring instead to "any action to recover damages for personal injury, injury to property, or wrongful death"¹⁰⁸ Hence, the new rule is intended to apply to actions based on breach of warranty or strict products liability, as well as to actions based on a theory of negligence; indeed, it is intended to apply to any action in which the claimant's culpable conduct will affect his right to recover.¹⁰⁹

Assumption of risk and contributory negligence are enumerated as examples of the type of culpable conduct which will di-

Island, Washington, and Puerto Rico. See MISS. CODE ANN. § 11-7-15 (1972); R.I. GEN. LAWS ANN. § 9-20-4 (Supp. 1974); WASH. REV. CODE ANN. § 4.22.010 (Supp. 1974); P.R. LAWS ANN. tit. 31, § 5141 (1968). Georgia has a unique statute which denies recovery "[i]f the plaintiff by ordinary care could have avoided the consequences to himself," but allows diminished recovery in other situations. See GA. CODE ANN. § 105-603 (1968). Notably, in the three states where a comparative negligence rule was judicially established, a pure form was chosen. See note 98 *supra*.

The United States Supreme Court has recently established a system of pure comparative negligence in maritime collision cases. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). This decision abrogates the traditional American rule of maritime law, which had provided for equal division of damages resulting from collisions in which both ships were at fault. See *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855).

¹⁰³ CPLR 1411.

¹⁰⁴ *Id.* 1412.

¹⁰⁵ Although the rule itself was never judicially abrogated, courts have occasionally gone to great lengths to avoid unjust results. Thus, in *Wartels v. County Asphalt, Inc.*, 29 N.Y.2d 372, 278 N.E.2d 627, 328 N.Y.S.2d 410 (1972), the Court of Appeals reversed a lower court decision and upheld a verdict in favor of a party who, due to amnesia, had been unable to offer proof of freedom from contributory negligence.

¹⁰⁶ For a discussion of the problems raised by the adoption of comparative negligence statutes in other jurisdictions, see Schwartz, *Comparative Negligence*, 20 PRAC. LAW., Nov. 1974, at 13.

¹⁰⁷ CPLR 1411.

¹⁰⁸ *Id.*

¹⁰⁹ See THIRTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, as appearing in [1975] N.Y. Laws 1483, 1484 (McKinney). For a discussion of the uncertainty in other jurisdictions regarding the applicability of comparative negligence principles to breach of warranty and strict products liability actions, see Schwartz, *Comparative Negligence*, 20 PRAC. LAW., Nov. 1974, at 13, 24-25.

minish, but not bar, recovery.¹¹⁰ The express inclusion of the former is clearly intended to avoid much of the uncertainty which has resulted in jurisdictions in which the comparative negligence statutes do not specifically treat assumption of risk.¹¹¹ The use of the open ended term "culpable conduct" indicates the intended application of the statute to any situation in which a plaintiff's conduct, not necessarily involving either contributory negligence or assumption of risk, would previously have barred recovery. Such a situation might arise, for example, in a breach of warranty or strict products liability action.¹¹²

Although article 14-A does not specifically abolish the mitigating doctrine of last clear chance, such is the logical consequence of the abrogation of the contributory negligence rule. The courts have consistently applied this doctrine only when contributory negligence has been claimed as a bar to recovery.¹¹³ Since contributory negligence no longer bars recovery, the doctrine of last clear chance presumably will no longer be applied. Thus, express abolition of the doctrine was deemed unnecessary by the article's draftsmen.¹¹⁴

¹¹⁰ CPLR 1411.

¹¹¹ The effect of comparative negligence statutes on the doctrine of assumption of risk has varied from jurisdiction to jurisdiction and has created a great deal of confusion. Much of this confusion may be due to the fact that although, prior to comparative negligence statutes, most courts agreed that assumption of risk barred recovery completely, there was little agreement as to just what assumption of risk entailed. See W. PROSSER, *THE LAW OF TORTS* § 68 (4th ed. 1971). Professor Prosser has distinguished three distinct situations in which the term is used: (1) the plaintiff expressly assumes a known risk by agreeing to relieve the defendant of some duty of care owed to the plaintiff; (2) the plaintiff impliedly assumes a known risk by entering "into some relation with the defendant, with knowledge that the defendant will not protect him against the risk;" and (3) the plaintiff voluntarily encounters a known risk already created by the defendant. *Id.* at 440. The effect of comparative negligence on assumption of risk will largely depend on the meaning given to the term in a particular jurisdiction. See, e.g., *Braswell v. Economy Supply Co.*, 281 So. 2d 669 (Miss. 1973) (assumption of risk retained as a complete bar only when it can be clearly distinguished from contributory negligence); *Farley v. M M Cattle Co.*, 44 U.S.L.W. 2054 (Sup. Ct. Tex., July 9, 1975) (implicit assumption of risk abolished in negligence actions); *Gilson v. Drees Bros.*, 19 Wis. 2d 252, 120 N.W.2d 63 (1963) (implicit assumption of risk abolished, while express assumption of risk retained); Schwartz, *Comparative Negligence*, 20 PRAC. LAW., Nov. 1974, at 13, 22-24; Comment, *Voluntary Assumption of Risk and the Texas Comparative Negligence Statute*, 26 BAYLOR L. REV. 543 (1974); Comment, *Torts: Comparative Negligence & Implied Assumption of Risk = Injustice*, 27 OKLA. L. REV. 549 (1974); Comment, *Comparative Negligence Legislation: Continuing Controversy Over the Doctrine of Assumption of the Risk in Oregon*, 53 ORE. L. REV. 79 (1973).

¹¹² See THIRTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, as appearing in [1975] N.Y. Laws 1484-86 (McKinney). For example, culpable conduct might include misuse of a product. See, e.g., *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

¹¹³ See, e.g., *Polk v. New York Cent. R.R.*, 10 App. Div. 2d 703, 198 N.Y.S.2d 84 (1st Dep't) (per curiam), *aff'd mem.*, 8 N.Y.2d 1106, 171 N.E.2d 873, 209 N.Y.S.2d 786 (1960).

¹¹⁴ See THIRTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, as appearing in [1975] N.Y. Laws 1488 (McKinney).

Recoverable damages are to be diminished "in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages."¹¹⁵ This language indicates that, in a multiparty situation, damages recoverable by the claimant will be his total damages minus a percentage of the total damages, the particular percentage deducted being that percentage of the total causal culpable conduct for which the claimant is responsible, either directly or by legal imputation.¹¹⁶ The claimant's culpable conduct is to be compared to the total causal culpable conduct, rather than to the culpable conduct of a particular defendant.¹¹⁷ The new law does not change existing provisions for contribution between joint tortfeasors,¹¹⁸ nor does it change the present rule of joint and several liability among tortfeasors.¹¹⁹

Consider, for example, a situation in which *A* has suffered damages amounting to \$10,000 and is found to have been responsible for 20 percent of the incident, *B* has suffered no damages and is found to have been responsible for 10 percent of the incident, *C* has suffered damages amounting to \$100,000 and is found to have been responsible for 40 percent of the incident, and *D* has suffered no damages and is found to have been responsible for 30 percent of the incident. *B* and *D*, having suffered no injury, obviously may not recover anything. *A* may recover \$8,000 in a suit against any or all of the others. *C*, although the most culpable of the parties, may recover \$60,000 in a suit against any or all of the others. Assuming that all parties are solvent and subject to the jurisdiction of the court, the final result, after applying comparative negligence and apportionment principles, would be: *A* liable to *C* for \$20,000; *B* liable to *A* for \$1,000 and to *C* for \$10,000; *C* liable to *A* for \$4,000; and *D* liable to *A* for \$3,000 and to *C* for \$30,000.

Although these results might seem somewhat unjust in this rather extreme example in that *B*, who is the least culpable party, is liable in toto for \$11,000, whereas *C*, the most culpable party, is liable for only \$4,000; it must be remembered that *C* has suffered additional unrecompensable damages of \$40,000. The goal of the new law is to distribute the total loss resulting from any particular

¹¹⁵ CPLR 1411.

¹¹⁶ The new law is not intended to change or expand the scope of vicarious liability or imputed negligence. THIRTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, as appearing in [1975] N.Y. Laws 1486 (McKinney).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1487.

¹¹⁹ *Id.* at 1486.

incident in direct proportion to culpable causal responsibility. Thus, out of total damages of \$110,000 in the above hypothetical, *B*, 10 percent responsible for the incident, will bear the burden of 10 percent of the damages resulting from the incident; whereas *C*, 40 percent responsible for the incident, will bear the responsibility for 40 percent of the total damages. This result is clearly more equitable than placing the entire burden of loss upon the injured parties, as would have been the case under the traditional contributory negligence rule. Furthermore, since the amount of damages suffered by each party does not necessarily have any correlation with his responsibility for the incident, the fortuitous lack of direct damages, although occasionally creating an illusion of inequity in an extreme case such as the one posited, is not and should not be relevant to legal liability for the incident.

Article 14-A contains no provision for special verdicts or multiple judgments, both of which are designed to clarify the complex awards which may be involved in multiparty comparative negligence actions.¹²⁰ The draftsmen apparently judged it better to leave this matter to the discretion of the courts rather than to mandate a special form in every case.¹²¹ They did, however, indicate a clear intent that "a casualty insurance company representing one of the parties not be permitted to set off against its obligation under the policy of insurance, the judgment in favor of its insured against the other party to the litigation."¹²² The frequent use of special verdicts and multiple judgments will probably be necessary in order to effectuate this intent.¹²³

In addition to enacting CPLR article 14-A, the legislature also

¹²⁰ See *id.* at 1487.

¹²¹ See *id.* at 1489. Several jurisdictions provide for special verdicts at the request of any party. See, e.g., IDAHO CODE § 6-802 (Supp. 1975); N.D. CENT. CODE § 9-10-07 (1975); UTAH CODE ANN. § 78-27-38 (Supp. 1975). A few jurisdictions require special verdicts or findings of fact. See, e.g., COLO. REV. STAT. ANN. § 13-21-111 (1973); ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1975); N.J. STAT. ANN. § 2A:15-5.2 (Supp. 1975).

¹²² THIRTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, as appearing in [1975] N.Y. Laws 1489 (McKinney).

¹²³ See *id.* CPLR 3019(d) provides that a separate judgment for a counterclaim "may not be had unless the court so orders." Thus, in a negligence case in which the defendant has counterclaimed for his own injuries, only one judgment will normally be entered. Under the old contributory negligence doctrine this presented no problem, since only the completely nonnegligent party could recover anything and there was no possibility of a setoff. Under the new law, however, it is probable that both parties will be awarded a part of their claim. A simple judgment in these circumstances would consist of the difference between the amount awarded each party.

Clearly, it would be difficult, if not impossible, to show the existence and amount of any setoff without the use of special verdicts and multiple judgments. Thus, in order to prevent a setoff accruing to the advantage of an insurance company, special verdicts and multiple judgments will often be required.

amended EPTL sections 5-4.2¹²⁴ and 11-3.2(b)¹²⁵ to bring them into conformity with the new law. Section 5-4.2 states that in an action for wrongful death "the contributory negligence of the decedent shall be a defense, to be pleaded and proved by the defendant,"¹²⁶ thus providing an exception to the traditional New York rule requiring the plaintiff to prove his freedom from contributory negligence. Section 11-3.2(b) provides the same exception for a survival action when joined with a wrongful death action.¹²⁷ The new amendments limit these exceptions to actions accruing before September 1, 1975,¹²⁸ the effective date of CPLR article 14-A.¹²⁹ Any such actions accruing after that date will be subject to the provisions of article 14-A.

One probable result of the new law will be a decrease in negligence litigation. Since a negligent defendant will no longer be able to escape all liability by proving contributory negligence on the part of the plaintiff, but may anticipate at most some diminution of damages, an increased number of settlements should result. More significant, however, is the greater equity of the new law — an injured party will no longer be completely barred from recovery for injuries due only in part to his own negligence.

ARTICLE 78 — PROCEEDING AGAINST BODY OR OFFICER

Civic association granted standing to challenge zoning variance.

Recent judicial decisions, on both federal¹³⁰ and state¹³¹ levels, evince a trend towards a relaxation of restrictive requirements for

¹²⁴ Ch. 69, § 2, [1975] N.Y. Laws 94 (McKinney).

¹²⁵ Ch. 69, § 3, [1975] N.Y. Laws 94-95 (McKinney).

¹²⁶ EPTL 5-4.2 (McKinney Supp. 1975).

¹²⁷ *Id.* 11-3.2(b).

¹²⁸ *Id.* 5-4.2, 11-3.2(b).

¹²⁹ CPLR 1413.

¹³⁰ Under the early federal test for standing a plaintiff was required to show that a legal interest or property right of his had been violated or was in danger of being violated. *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939). A far more liberal test, however, was enunciated in 1970 by Justice Douglas in the landmark decision of *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970). The Court announced a bipartite test: the plaintiff must demonstrate that he has suffered injury in fact, economic or otherwise, and that his interest is "arguably within the zone of interests to be protected . . . by the statute or constitutional guarantee in question." *Id.* at 153. The Court further established that the "interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values." *Id.* at 154, quoting *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965).

This two-pronged test was criticized in *New Hampshire Bankers Ass'n v. Nelson*, 113 N.H. 127, 302 A.2d 810 (1973), wherein the court held that the injury in fact test should alone be controlling. *Id.* at 128-29, 302 A.2d at 811. There is some disagreement, however, as to the precise definition of injury in fact. Compare *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 683-90 (1973) (liberal approach