St. John's Law Review

Volume 27, May 1953, Number 2 Article 6

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ments. Certainly the statute cannot mean that the implication is to be derived from outside circumstances and conditions, for that would in no way have altered the method employed before the statute was passed. It is submitted that the confusion present in the cases since 1947 is the result of a conflict created by the statute as it was finally enacted. This conflict arose because a literal interpretation of the section would have been in direct contradiction to the inherent nature of the spoken or written word, and a liberal interpretation would have nullified the provision. The courts, in an attempt to reconcile these two extremes, and still arrive at a just determination on each occasion, resorted to language which was, in essence, declaratory of prior law but which, because of an awareness of the statute, was couched in confusing and misleading terms. It is further submitted that the practical solution lies in legislatively eliminating the present problem from the provision. A re-drafting may be necessary in order to retain advances made under it in other directions,[51] but no attempt should be made to set an arbitrary standard for ascertaining the effect of words. This is an area for the exercise of administrative and judicial discretion, and more reliance should be placed upon the courts to balance the conflicting interests and to obtain substantial justice according to the demands of each dispute.

A Proposal for Comparative Negligence in New York

Introduction

In essence, negligence is the doing of an act without care, or the failure to perform an act, the performance of which is dictated by care. The degree of care to be exercised in a given factual situation is commensurate with the danger to be avoided.[1] Negligence is actionable only where an injured plaintiff shows: that a duty was owing by the defendant to him to exercise care; [2] an act or omission whereby defendant violated that existing duty; [3] that the defendant's negli-

[51] An example is the principle that an anti-union speech by the employer may not be used as a motivating factor for subsequent alleged anti-union activity on the part of the employer, if such speech is non-coercive in character. Pittsburgh S.S. Co. v. NLRB, 180 F. 2d 731 (6th Cir. 1950), *aff'd*, 340 U. S. 498 (1951).

[1] Barbato v. Vollmer, 273 App. Div. 169, 76 N. Y. S. 2d 528 (3d Dep't 1948).

[2] Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928).

[3] Johnson v. City of New York, 208 N. Y. 77, 101 N. E. 691 (1913).

gence was the proximate cause of plaintiff's injury;[4] and the minority rule in a jurisdiction such as New York, that plaintiff himself was free from contributory negligence.[5]

The origin of the doctrine of contributory negligence is generally attributed to the early English decision of *Butterfield v. Forrester*.[6] The significance and effect of this decision is that for the first time, it was expressly held that a party, though injured by virtue of the negligence of another, may be barred from recovering damages therefor, if he himself has contributed to the cause of his injury. Contributory negligence has been defined to be that ". . . conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and coöperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause."[7] A contributorily negligent plaintiff is barred from recovery, irrespective of the degree of contribution.[8] The rule, although reasonable in most instances, may work an injustice in the situation where the plaintiff's contribution to his injury is only slight. In such a case, the doctrine may be considered harsh and inequitable, since the defendant, who in the greater part has caused the plaintiff's injury, is excused from all liability.

In 1842, the English courts qualified the rule of contributory negligence by establishing the tenet of "last clear chance."[9] Where the rule applies, the plaintiff's negligence is deemed to be noncontributory, and thus no bar to his recovery from a negligent defendant. It applies in the situation where the plaintiff's negligence has placed him in a position of peril, of which the defendant is aware, but the defendant nevertheless fails to exercise the requisite care to avoid the consequences of plaintiff's negligence.[10] Since the defendant had the last opportunity to avert the accident, his negligence is deemed the proximate cause of same, while plaintiff's is merely remote. The doctrine does not apply, however, unless the plaintiff's

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[4] Saugerties Bank v. Delaware and Hudson Co., 236 N. Y. 425, 141 N. E. 904 (1923).

[5] Haley v. Earle, 30 N. Y. 208 (1864).

[6] 11 East 60, 103 Eng. Rep. 926 (K. B. 1809) (plaintiff, on horseback, riding unreasonably hard on highway, collided with a pole that defendant had placed across part of said highway).

[7] 45 C. J. 942 (1940).

[8] Reynolds v. Third Avenue R. R., 8 Misc. 313, 28 N. Y. Supp. 734 (C. P. 1894).

[9] Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842) (plaintiff wrongfully left his donkey fettered on highway, and defendant, racing in a wagon on said highway, carelessly crashed into it).

[10] Elliott v. New York Rapid Transit Corp., 293 N. Y. 145, 56 N. E. 2d 86 (1944). "Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." Davies v. Mann, *supra* note 9, at 549, 152 Eng. Rep. at 589.

peril becomes known to the defendant in time for him to avoid the accident.[11] The doctrine has been extended in New York so that a defendant need not have actual notice that a specific person is in peril; it is sufficient merely that defendant be aware that *someone* is in peril.[12] The rule has been held to be inapplicable where the negligence of the injured party is contemporaneous and active up to the very moment of an accident, thus contributing to the cause of such accident.[13] The doctrine of contributory negligence, as thus qualified, became entrenched in the common law, and has survived even to the present era.

Today, as a practical matter, juries have taken it upon themselves to mitigate the strictness of the rule, by overlooking it in certain cases. This oversight is based on their sympathy for an injured plaintiff who, because of a technical rule of law, is denied all recovery, and also, when the jury knows, or suspects, that the "real defendant" is an insurance company. The harsh and uncompromising nature of the rule of contributory negligence, especially in cases where the plaintiff is only slightly at fault, and the bold circumvention of its mandate by juries, exemplified the need for, and motivated the enactment of, appropriate legislation.

The stage was thus set for the intervention of "comparative negligence" [14] —the benefactor of negligent plaintiffs. Today, by statute in five states, the doctrine is applied to the general law of negligence.[15] The rule admits the existence of a plaintiff's contributory negligence, but instead of barring a recovery as it would at common law, it merely authorizes a reduction of damages in proportion to the fault attributable to the plaintiff. These statutes, though with a common purpose, vary in their application.

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[11] Wheelock v. Clay, 13 F. 2d 972 (8th Cir. 1926); Woloszynowski v. N. Y. C. R. R., 254 N. Y. 206, 172 N. E. 471 (1930); see Srogi v. N. Y. C. R. R., 247 App. Div. 95, 286 N. Y. Supp. 215 (4th Dep't 1936).

[12] Chadwick v. City of New York, 301 N. Y. 176, 93 N. E. 2d 625 (1950).

[13] Panarese v. Union Ry., 261 N. Y. 233, 185 N. E. 84 (1933); Donald v. Heller, 143 Neb. 600, 10 N. W. 2d 447 (1943); Hughes v. Omaha & Council Bluffs St. Ry., 143 Neb. 47, 8 N. W. 2d 509 (1943).

[14] See PROSSER, TORTS 403 (1941); Campbell, *Ten Years of Comparative Negligence,* [1941] WIS. L. REV. 289; Mole and Wilson, *A Study of Comparative Negligence,* 17 CORNELL L. Q. 333, 604 (1932); Philbrick, *Loss Apportionment in Negligence Cases,* 99 U. OF PA. L. REV. 572, 766 (1951); Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465 (1953); Turk, *Comparative Negligence on the March,* 28 CHI-KENT REV. 189, 304 (1950); Whelan, *Comparative Negligence,* [1938] WIS. L. REV. 465; Note, 17 NEB. L. BULL. 68 (1938); Comment, 5 WASH. & LEE L. REV. 147 (1948); 20 MISS. L. J. 99 (1948); Note, 114 A. L. R. 830 (1938).

[15] Nebraska, South Dakota, Wisconsin, Mississippi, and Georgia. The rule is also applied on the federal level under a statute similar to that of Mississippi. See 35 STAT. 65 (1908), 45 U. S. C. § 53 (1946) (FELA), Norfolk & Western Ry. v. Earnest, 229 U. S. 114, 122 (1913).

Comparative Negligence Statutes

Nebraska

The statute as enacted in Nebraska, provides that ". . . contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff. . . ." [16] In construing this section, the court, in *Morrison v. Scotts Bluff County*,[17] condemned as erroneous, a trial court's instruction to the jury, which purported to permit a proportionate recovery of damages, even if the jury found that the plaintiff's negligence was equal to, or greater than that of the defendant. In an effort to establish a uniform construction, the court laid down the rule to be that, "[i]f, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery." [18] A contributorily negligent plaintiff may recover *some* damages, but only when his fault is slight and defendant's gross, in comparison therewith. Notwithstanding the court's clear and concise explanation of the statutory guideposts, it seems that the difficulty experienced in the later decisions of properly applying it to the varying factual situations, stems from the inherent complexity of the statute itself. Since a statute is only as effective as its adaptability permits, this law leaves much to be desired. The following illustrations will indicate the confusing effect that the statute has had upon the judicial process.

An instruction to the jury was held, on appeal, to be confusing, because, with reference to establishing the comparison between slight and gross negligence as contemplated by the statute, it purported to place this burden upon the defendant. The court ruled that the comparison was for the jury to make.[19] It was similarly held to be prejudicial error for a trial court to instruct the jury that plaintiff may recover ". . . provided you . . . [find] that the . . . [defendant] was guilty of gross negligence as compared with the negligence of the plaintiff. . . ." [20] The court ruled that the statutory comparison is to be made between the gross negligence of defendant, and the

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[16] NEB. REV. STAT. § 25-1151 (1943).
[17] 104 Neb. 254, 177 N. W. 158 (1920).
[18] *Ibid.*
[19] Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250 (1952).
[20] McMullen v. Nash Sales Co., 112 Neb. 371, 199 N. W. 721, 722 (1924).

slight negligence of plaintiff.[21] An instruction, based upon the contention that before the statute becomes operative, it must appear that the plaintiff's negligence was slight without respect to the degree of negligence on the part of the defendant, was criticized on appeal. The appellate court held that "slight" and "gross" as used in the statute are comparative terms, and the negligence of the parties should be compared, one with the other, in determining questions of slight and gross negligence.[22] Where an instruction assumed the gross negligence of defendant for the purpose of the statutory comparison, it was held erroneous for the reason that the negligence of both parties must *first* be found, and then the statutory comparison is implemented to determine whether a plaintiff is entitled to recover *some* damages, or none at all.[23]

Where the evidence is conflicting or contradictory, the negligence of the parties, and the degrees thereof after comparison, are issues for the jury to determine, and if amply sustained by the evidence, its verdict will not be interfered with by the court.[24] However, in allegedly proper cases, the court itself has assumed the prerogative of comparing the negligence of the parties. Thus upon defendant's appeal, the court has directed a dismissal of plaintiff's complaint, on the ground that since the plaintiff was guilty of contributory negligence more than slight as a matter of law, the comparative negligence statute is inapplicable.[25] Upon the same ground, the trial court has been sustained in denying plaintiffs' recovery, by the direction of a verdict for the defendant.[26] It has also been held proper for the trial court, if the evidence permits, to instruct the jury that defendant was guilty of gross negligence as a matter of law.[27]

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[21] *Ibid.*

[22] Roby v. Auker, 151 Neb. 421, 37 N. W. 2d 799 (1949).

[23] Pratt v. Western Bridge & Constr. Co., 116 Neb. 553, 218 N. W. 397 (1928).

[24] Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518 (1948); Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614 (1946); Giles v. Welsh, 122 Neb. 164, 239 N. W. 813 (1931).

[25] See Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106 (1948) (at night, on a well-lighted street, plaintiff crashed his car into the rear of defendant's parked truck on which the tail light was off); Dickenson v. Cheyenne County, 146 Neb. 36, 18 N. W. 2d 559 (1945) (plaintiff, driving on defendant county's highway on foggy night, failed to see the last intersection and drove into ditch at dead-end of highway); Chana v. Mannlein, 141 Neb. 312, 3 N. W. 2d 572 (1942) (plaintiff's truck was approaching bridge, defendant's truck leaving it. Plaintiff, although having observed defendant's truck, swerved to the center of the highway to enter the bridge, and collided with defendant's truck).

[26] See Wertz v. Lincoln Liberty Life Ins. Co., 152 Neb. 451, 41 N. W. 2d 740 (1950) (plaintiff was washing windows without a safety belt, as defendant had failed to provide any safety devices; and plaintiff fell from the 4th floor); Travinsky v. Omaha & Council Bluffs St. Ry., 137 Neb. 168, 288 N. W. 512 (1939) (plaintiff stepped from the sidewalk into the path of defendant's approaching street car, which failed to stop).

[27] See Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462 (1948) (plaintiff

The fact situations, in the cases where the court has refused to rule that plaintiff's negligence was more than slight as a matter of law, do not seem so radically different from those wherein it does so rule, so as to warrant apt reconciliation.[28] On the basis of the foregoing decisions, the statutory comparison seems to be applied or not purely at the whim of the court. The manipulation of the tenuous condition precedent to plaintiff's recovery, *i.e., slight* negligence, is the apparent cause of the court's inconsistent rulings. Upon one occasion, the court refused, at the request of a defendant's counsel, to define the terms "slight" and "gross." Upon appeal, it was held not to be error, as the court quipped: "Any one of common sense knows that slight negligence actually means small or little negligence, and that gross negligence means just what it indicates, gross or great negligence." [29] This would serve to indicate that the court is itself either puzzled as to the meaning of the terms,[30] or is reluctant to admit the truly uncertain scope of slight contributory negligence, within the meaning of the statute.

In reviewing the cases, it seems that the "gremlin" in the Nebraska statute is the floating standard—slight negligence, and a clarification of the statute would be in order. The merit of the statute lies in its attempt, at least in form, to strike at the very heart of the injustice of the rule of contributory negligence, by allowing a "mitigated damage" recovery to the slightly negligent plaintiff.

South Dakota

This statute [31] is identical with that of Nebraska, and thus the South Dakota courts in applying it, have presumed that the legislature intended that the former state's construction thereof be likewise adopted.[32] In groping for an explanation of the statute, and for some

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crashed his car into the rear of defendant's truck, which had been parked at night, without rear signals, and partly protruding onto the highway).

[28] See Thomison v. Buehler, 147 Neb. 811, 25 N. W. 2d 391 (1946) (plaintiff, who had been working on the highway, was standing in the middle of the road at night, oblivious of oncoming traffic, and defendant's car crashed into him); Chew v. Coffin, 144 Neb. 170, 12 N. W. 2d 839 (1944) (plaintiff, walking upon public sidewalk, began to read from book, and defendant, backing car from driveway onto the highway, collided with plaintiff); Anderbery v. Katz, 142 Neb. 872, 8 N. W. 2d 207 (1943) (intersection automobile collision, where plaintiff reached the intersection first); Sgroi v. Yellow Cab & Baggage Co., 124 Neb. 525, 247 N. W. 355 (1933) (plaintiff alighted from trolley car onto safety zone, then stepped into path of a taxicab).

[29] Monasmith v. Cosden Oil Co., 124 Neb. 327, 246 N. W. 623, 625 (1933).

[30] ". . . [C]onfusion resulted by engrafting this doctrine [of comparative negligence] on our jurisprudence by statute." Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704, 705 (1934); *see* Kelso v. Seward County, 117 Neb. 136, 219 N. W. 843, 844 (1928) (". . . an abstruse statute . . . .").

[31] S. D. Laws, c. 160 (1941).

[32] *See* Roberts v. Brown, 72 S. D. 479, 36 N. W. 2d 665, 669 (1949) (con-

criteria upon which to base their own decisions, the courts have been unable to glean any fixed rule from the reported decisions of Nebraska.[33] Specifically, they have considered the floating standard —slight negligence—an immovable obstacle to the efficient workability of the statute. However, the courts did undertake to define slight negligence according to its ordinary meaning as found in the dictionary, to wit, "small of its kind or in amount; scanty; meager." [34] By the process of comparison, therefore, the disparity between the quantum of defendant's negligence and that exhibited by the plaintiff, must be extreme.[35]

The identical statutes of Nebraska and South Dakota, and the decisions applying them, have failed to provide any semblance of a *usable* yardstick. The courts must content themselves with that elusive epithet—"slight" negligence—and attempt to elucidate its meaning in forthcoming cases.[36]

Wisconsin

The Wisconsin statute provides that "[c]ontributory negligence shall not bar recovery . . . 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." [37] By the provisions of this statute, a plaintiff who is responsible for 49 per cent of the total causal negligence is entitled to a recovery of 51 per cent of the total damages that he has sustained. However, if a plaintiff is found to have been negligent to a degree of 50 per cent or more, he recovers nothing. Questions dealing with the negligence of the parties, and the degrees thereof, are for the jury to determine,[38] unless the negligence of each party is of precisely the same kind and character.[39] Similarly, a jury's verdict will not be disturbed by the court, unless the percentages found are grossly disproportionate.[40] In proper cases, the court, on appeal, has barred a plaintiff's recovery by ruling that his negligence was equal to, or greater than, that of defendant's as a matter of law.[41] Generally, however, the verdicts of

curring opinion); Friese v. Gulbrandson, 69 S. D. 179, 8 N. W. 2d 438, 441 (1943).

[33] *See* Roberts v. Brown, *supra* note 32, 36 N. W. 2d at 667.

[34] *See* Friese v. Gulbrandson, *supra* note 32, 8 N. W. 2d at 442.

[35] *Ibid.*

[36] See note 34 *supra.*

[37] WIS. STATS. § 331.045 (1951).

[38] See Bent v. Jonet, 213 Wis. 635, 252 N. W. 290 (1934); McGuiggan v. Hiller Bros., 209 Wis. 402, 245 N. W. 97 (1932).

[39] See Piesik v. Deuster, 243 Wis. 598, 11 N. W. 2d 358 (1943).

[40] See Gauthier v. Carbonneau, 226 Wis. 527, 277 N. W. 135 (1938).

[41] See Dinger v. McCoy Transp. Co., 254 Wis. 447, 37 N. W. 2d 26 (1949) (plaintiff improperly attempted to make a left turn in his car before defen-

juries, acting under the authority of the comparative negligence statute, have been stable and consistent. The few highly disproportionate verdicts that necessitated reversal on appeal, may be explained by reasoning that a verdict is only as intelligent as the jury that renders it, and that a jury is only as honest and dependable as its individual members. An obviously over-industrious jury, on one occasion, returned a verdict assessing plaintiff with 31⅓ per cent of the causal negligence, and defendant with 68⅓ per cent.[42]

The merit of the Wisconsin judicial process may be attributed to its consistent utilization of the special verdict in conjunction with the application of the comparative negligence statute. Either party to the suit may, upon request, require that the jury return a special verdict.[43]

By virtue of the separate and distinct findings, a court may readily determine the grounds upon which the jury apportioned the respective degrees of negligence of the parties, and review them intelligently on appeal.

The Wisconsin statute appears to be meeting with success in its application to the varying fact situations. The major drawback is the measure of damages which are recoverable. Specifically, a plaintiff who is found to be 49 per cent negligent may recover 51 per cent of his total damages, whereas a plaintiff, only a shade more at fault, namely, 50 or 51 per cent, may recover nothing. This is unreasonable, and even resembles, in a sense, the theory of contributory negligence, *viz.*, "all or nothing." This sharp division of "more than half the damages or nothing," around the fifty per cent mark is too arbitrary to be equitable.

Mississippi

The comparative negligence statute of this state provides that ". . . 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. . . ." [44] Under the provisions of this statute, a plaintiff who has been found to be 99 per cent contributorily negligent may nevertheless recover 1 per cent of the total damages he has sustained. A plaintiff is barred from all recovery only when his negligence is the *sole* proximate cause of his injury.[45] Thus, the direction of a verdict for defendant on the ground

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dant's bus crossed the intersection); Hustad v. Evetts, 230 Wis. 292, 282 N. W. 595 (1938) (plaintiff-milkman stepped from left side of delivery truck without first looking for traffic).

[42] See Gunning v. King, 249 Wis. 176, 23 N. W. 2d 602 (1946).

[43] See WIS. STATS. § 270.27 (1951).

[44] MISS. CODE ANN. § 1454 (1942).

[45] Stewart v. Kroger Grocery Co., 198 Miss. 371, 21 So. 2d 912 (1945) (plaintiff, employee of defendant's grocery store, attempted to open swinging

that plaintiff was grossly negligent was held improper, since the jury might have found defendant negligent, in which event the plaintiff's action would not have been barred, only his damages diminished in proportion to his fault.[46] Similarly, an instruction that the jury should diminish damages according to the gross negligence of the plaintiff was held erroneous for the reason that the question of plaintiff's negligence was for the jury to determine,[47] and only thereafter would a proportionate reduction of same be proper. An instruction that contributory negligence is "no defense in this case" was held to be error, since it is a partial defense, and the instruction as given precluded the jury from diminishing damages.[48]

The court may not, of its own volition, instruct the jury to compare the negligence of the parties, but may do so only upon the request of one of them.[49] Upon an appeal to determine whether or not a verdict was excessive, the comparative negligence of the parties could not be considered for that purpose, since at the trial neither party requested an instruction pursuant to the comparative negligence statute.[50] Similarly, where neither party invoked the statute, but the jury nevertheless did reduce damages, upon appeal, the court refused to disturb the verdict since the statute had not been invoked, and therefore, the comparative negligence of the parties could not be considered.[51] Ordinarily, where comparative negligence is applied, the negligence of the parties and the ultimate liability [52] are questions for the jury to decide.[53] However, if the verdict appears to be grossly inadequate, the court, on appeal, will promptly remand for a hearing, solely on the issue of damages.[54] In like manner, although the court is itself reluctant to apportion, it will not hesitate to do so where it clearly appears that the jury has failed to properly diminish damages in proportion to plaintiff's negligence.[55]

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door by placing a long box against door; it rebounded off the door and injured him).

[46] McClellan v. Illinois Cent. R. R., 204 Miss. 432, 37 So. 2d 738 (1948) (peremptory instruction); *cf.* Cumberland Tel. & Tel. Co. v. Cosnahan, 105 Miss. 615, 62 So. 824 (1913).

[47] McCollum v. Thrift, 156 Miss. 236, 125 So. 544 (1930) (peremptory instruction).

[48] Waterford Lumber Co. v. Jacobs, 132 Miss. 638, 97 So. 187 (1923).

[49] Lindsey Wagon Co. v. Nix, 108 Miss. 814, 67 So. 459 (1915).

[50] Mississippi Power & Light Co. v. Merritt, 194 Miss. 794, 12 So. 2d 527 (1943); Avent v. Tucker, 188 Miss. 207, 194 So. 596 (1940).

[51] Pounders v. Day, 151 Miss. 436, 118 So. 298 (1928).

[52] Gould v. Town of Newton, 157 Miss. 111, 126 So. 826 (1930).

[53] "All questions of negligence and contributory negligence shall be for the jury to determine." MISS. CODE ANN. § 1455 (1942), Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861 (1925).

[54] See Lee v. Reynolds, 190 Miss. 692, 1 So. 2d 487 (1941) ($100 verdict); *see* Dixon v. Breland, 192 Miss. 335, 6 So. 2d 122, 123 (1942) ($200 verdict).

[55] See Gulf & S. I. R. R. v. Bond, 181 Miss. 254, 179 So. 355 (1938) (verdict of $10,000 reduced to $7,500 with remittitur); Tallahala Lumber Co.

The Mississippi statute is extremely charitable to plaintiffs. So long as a defendant was negligent in any degree, a plaintiff is always entitled to *some* damages. The statute however is so charitable to plaintiffs, that it is unfair to defendants. One who is more responsible than another in causing his own injury should not be heard to request compensation—in full, or in part—from that other party.

Georgia

The law of comparative negligence in this state comprises three statutes. The pertinent portions provide that ". . . contributory negligence . . . shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such . . ." [56] plaintiff. However, no recovery of damages is permitted ". . . where the [injury] is . . . caused by his own negligence . . . ," [57] or if the plaintiff ". . . by ordinary care could have avoided the consequences to himself caused by the defendant's negligence. . . ." [58] At first blush, the latter provision seems to diminish the efficacy of the mitigated-damage recovery provided for in the first provision. However, the apparent inconsistency may be reconciled by the fact that the latter provision bars a recovery *only* where the plaintiff's negligence was the sole proximate cause of his injury. It may be noted, upon inspection of the statutes in their entirety, that the rule of comparative negligence was originally designed to affect only those actions where a railroad was the defendant. However, by judicial legislation, it seems that the rule may now be invoked in *all* negligence actions. Decisional law is also responsible for the rule that a negligent plaintiff may not recover where his negligence is equal to, or greater than that of the defendant.[59]

In *Rogers v. McKinley*,[60] the court, in correcting a confusing and misleading charge to the jury, took the opportunity to explain the prevailing rule of comparative negligence in Georgia. ". . . [W]here there is negligence by both parties which is concurrent and contributes to the injury sued for, a recovery by the plaintiff is not barred, but his damages shall be diminished by an amount proportioned to the amount of fault attributable to him, provided that his fault is less than the defendants, [sic] and that, by the exercise

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v. Holliman, 125 Miss. 308, 87 So. 661 (1921) (verdict of $18,000 reduced to $12,500 with remittitur). "It is rather difficult for us [the court] to apportion, and we would not undertake or attempt to apportion the negligence of the parties in any case, unless the case is so plain and the injustice so palpable that we feel safe in acting, as in this case, in which event we shall not hesitate to do so." Yazoo & M. V. R. R. v. Williams, 114 Miss. 236, 74 So. 835, 839 (1917) (verdict of $10,000 reduced to $5,000 with remittitur).

[56] GA. CODE § 66-402 (1933).

[57] *Id.* § 94-703.

[58] *Id.* § 105-603.

[59] See Conaway v. McCrory Stores Corp., 82 Ga. App. 97, 60 S. E. 2d 631 (1950); Southern Ry. v. Watson, 104 Ga. 243, 30 S. E. 818 (1898).

[60] 48 Ga. App. 262, 172 S. E. 662 (1934).

of ordinary care, he could not have avoided the consequences of the defendant's negligence after it became apparent or in the exercise of ordinary care should have been discovered by the plaintiff." [61] It may be noticed that the phrase, less than the defendant's fault, appearing in the court's statement, appears nowhere in the statutes; and conversely, the requirement of a railroad as the defendant, appears in the statutes, but no such limitation is mentioned by the court.[62]

It has been held that, irrespective of whether or not the defendant was guilty of negligence, the plaintiff is barred from recovery, if it appears that, by the exercise of ordinary care, he could have avoided the consequences of defendant's negligent act.[63] Thus, the plaintiff's negligence is deemed the sole proximate cause of the injury, and the defendant's negligence, if any, is relegated to remoteness. Ordinarily, this question of proximate causation is for the jury to determine; [64] however, in a proper case, the court may rule as a matter of law that the plaintiff's negligence was solely responsible for his injury.[65]

The courts of Georgia are apparently unusually proud of their juries, and are thus reluctant to take cases out of their hands, or set their verdicts aside on appeal.[66] In an interesting case, where a verdict for twelve cents was appealed from on the ground of inadequacy, the court refused to set it aside, reasoning that where the plaintiff's negligence was found to be only a shade less than that of defendant, the jury could properly award small damages.[67]

The Georgia law of comparative negligence is desirable in one respect, *viz.*, that if a plaintiff's fault was slightly less than that of defendant, his recovery of damages is small. The principal weakness of the statute lies in the unnecessary provision that ". . . [i]f the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence . . .", he is not entitled to recover.[68] This is surplusage, and should be deleted as it merely restates the obvious principle involved in every negligence action, that if plaintiff's negligence was the sole proximate cause of his injury, he

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[61] *Id.*, 172 S. E. at 664.

[62] Therefore, the comparative negligence rule seems applicable to all defendants, and only when a plaintiff's negligence, if any, was less than that of defendant.

[63] Fraser v. Hunter, 42 Ga. App. 329, 156 S. E. 268 (1930) (plaintiff, operating automobile in daytime, collided with defendant's truck, which was parked in middle of the street).

[64] McDowall Transport, Inc. v. Gault, 80 Ga. App. 445, 56 S. E. 2d 161 (1949); Southern Stages, Inc. v. Clements, 71 Ga. App. 169, 30 S. E. 2d 429 (1944); Pollard v. Heard, 53 Ga. App. 623, 186 S. E. 894 (1936).

[65] Fraser v. Hunter, *supra* note 63.

[66] See, *e.g.*, Evans v. Central of Georgia Ry., 38 Ga. App. 146, 142 S. E. 909, 910 (1928).

[67] *Ibid.*

[68] GA. CODE § 105-603 (1933).

may not recover.[69] Its inclusion tends to mislead, and unduly favor a negligent defendant. In the alternative, if its presence is desired for the sake of clarity, the counter-doctrine, "last clear chance," which may be favorable to plaintiffs in similar situations, should be likewise inserted.

Recommendations

Since the common-law rule of contributory negligence continues in New York in all its fury, it is hereby submitted that some form of comparative negligence rule be adopted. By removing the weaknesses, and preserving the desirable features of the foregoing state laws, the following recommendations are made: Where both parties have been found guilty of negligence, both proximately contributing to the cause of a plaintiff's injury, the jury should determine the total amount of damages that plaintiff has sustained, and then compare the negligence of the parties, to determine percentage-wise their respective degrees of negligence. If the jury decides that plaintiff's negligence was, in degree, equal to or greater than that of defendant's, plaintiff should be completely barred from recovery. However, if plaintiff's negligence was of lesser degree than that of defendant, plaintiff should be entitled to recover *some* damages. The extent of such plaintiff's recovery should be computed by the court pursuant to the following method: The plaintiff's degree of negligence should be subtracted from that of the defendant, and the remainder should be multiplied by the total damages that the plaintiff has sustained. The resulting product would represent the extent of plaintiff's recovery of damages.

To show the simplicity and effectiveness by which the foregoing rules may be applied, the following illustration may be of aid:

Assume that the jury found the plaintiff and defendant guilty of negligence, both proximately contributing to the cause of plaintiff's injury, resulting in damage to plaintiff to the extent of $1,000. After comparing the negligence of the parties, the jury determined that plaintiff was negligent to a degree of 45%, and the defendant to a degree of 55%. Since plaintiff's degree of negligence is less than that of defendant, the plaintiff is entitled to recover *some* damages. The court would compute such damages by subtracting plaintiff's degree of negligence, from that of defendant. The remainder, 10%, multiplied by the total damages sustained by the plaintiff, $1,000, results in a product of $100. Therefore, the plaintiff is entitled to recover damages of $100.

The barring of a recovery, where a plaintiff has been found guilty of negligence equal to or greater than that of defendant, would be reasonable and just, since one who is more responsible for his own

[69] See Fraser v. Hunter, 42 Ga. App. 329, 156 S. E. 268 (1930).

injury than another should not be heard to assert a claim against the other party for compensation for such injury. Also, there is a reason for the "subtraction" method of measuring plaintiff's damages, as opposed to the "Wisconsin" method.[70] An illustration may serve to explain the opposing theories of computation. Assume the plaintiff was 49% negligent and the defendant, 51%. Under the "Wisconsin" method, plaintiff would recover 51% of his total damages, while under the "subtraction" method, the plaintiff would recover only 2%. Increase by one per cent the negligence of the plaintiff, so that plaintiff was 50% negligent, and defendant also 50% at fault. Here, under both methods, plaintiff would recover nothing. It may thus be seen, that by a one per cent increase of plaintiff's negligence, his recovery under the "Wisconsin" method would drop from "51% of his total damages" to nothing; whereas under the "subtraction" method, his recovery gradually diminishes from "2% of his total damages" to nothing. It seems more logical that since a plaintiff's right to recover under a rule of comparative negligence would start at this 50% level, his numerical recovery should begin there, and gradually increase, rather than jump suddenly as under the "Wisconsin" method, from nothing to 51% of the damages. Also, it seems more equitable that a plaintiff, who is almost equally at fault with the defendant, should recover only small damages.[71]

The reason that the court should be required to compute plaintiff's damages is primarily to mitigate the confusing effect that any rule of comparative negligence would tend to have on juries in general. The less a jury is asked to do, the more efficiently they might perform the duties that are asked of them.

Conclusion

The strictness and uncompromising nature of the common-law rule of contributory negligence should be alleviated. The manner in which this end may be accomplished is herein suggested.[72] It may be argued by some, that since a comparative negligence rule would create new plaintiffs, and thus more causes of action, the congestion prevalent in the courts of New York City would be increased. It is submitted that this result would not necessarily follow, since defendants would tend to settle the cases with more frequency before

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[70] WIS. STATS. § 331.045 (1951).

[71] See note 66 *supra.*

[72] A similar plan has been considered by the Committee on Law Reform for the Association of the Bar of the City of New York (1953).

Presiding Justice Peck, of the Appellate Division, First Department, in an address, "Report on Justice," delivered to the public on court conditions in the City of New York, suggested the system of trial by judge, with a rule of comparative negligence, to relieve the congestion in the courts caused by plaintiffs' demands for jury trials in personal injury actions.

they even went to trial. Then again, it may be said that juries and courts may have difficulty in applying such a rule. This appears to be a lame excuse for a reluctance to make a justified innovation. Every law, of necessity, must have a beginning. Usually, beginnings are tedious. The conquering of difficulties results in success. It is submitted, therefore, that if justice is sought, the recommendations suggested herein be considered.

THE STATUTE OF LIMITATIONS VERSUS TRUST ACCOUNTINGS

Introduction

The "Achilles' heel" of a seemingly perfect case is often a statute of limitations. No amount of learned and persuasive argument can prevail in the face of a bar to the action raised by an applicable statute of limitations. While the statutes themselves are aimed at the accomplishment of impartial justice, since their effect is so devastating upon a bona fide cause of action, the rules governing their applicability and operation should be consistent and clearly defined. With regard to those causes of action which are cognizable only at law it can be said that the requirement of clarity has been generally fulfilled. On the other hand, the operation of a statute of limitations upon actions within the sphere of equity's jurisdiction is fraught with uncertainty and, in many instances, defies prediction. Nowhere within the broad scope of equity's influence is the unpredictability and confusion as to the operation of the statute of limitations more apparent than in the field of trust relationships.

The specific problems to be dealt with herein were chosen for discussion from the many existing problems merely because they serve as the best examples of trust relationships in general. References will be made throughout to the "legal statute of limitations" and to the "equitable statute." The former refers to the applicable statutes in the Civil Practice Act,[1] which cover most legal causes of action, while the latter has reference to Section 53 of the Civil Practice Act.[2]

Concurrent Jurisdiction

Where there is concurrent jurisdiction in law and equity over the subject matter involved, the applicable legal statute of limitations

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[1] N. Y. CIV. PRAC. ACT §§ 48, 49, 50, 51-a.

[2] *Id.* § 53.