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Comparative Negligence

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COMPARATIVE NEGLIGENCE

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The present law of Pennsylvania is, that a person who by his own negligence contributes in any degree, however small, in causing his injury, may not recover anything from the defendant, no matter how definite the latter's negligence and its causal connection with the harm.

The query is, should the case of the uncompensated victim be considered or should his misconduct, no matter how small, be considered of such penal basis as to deprive him completely of a recovery no matter how negligent the defendant was? Should a negligent defendant be encouraged and go scot free regardless of his blame and notwithstanding the fact that the plaintiff was only slightly at fault?

The usual case is that of a motorist who enters an intersection and fails to yield the right of way on the mistaken assumption that the speeding defendant will slow down for him. Another case may involve a plaintiff who saw, or should have seen, a defendant driving carelessly.

The strict rules of the Common Law have been modified in cases of intentional tort.

Though it may be difficult to apportion loss on the basis of comparison of fault with fault between a pedestrian not looking and a driver who runs him down, yet this is not any more accurate than one based on the arbitrary conclusion that 100 percent responsibility rests with plaintiff and none whatsoever with defendant.

A closer approximation of substantial justice is to divide the damages equally between the parties rather than to deny all recovery.

As a result of the present decisions and clamor for legislation, a bill has been introduced in the House, called House Bill 667 which, if enacted, would change Pennsylvania law so as to conform to the law in other states and be in accord with our own decisions on the subject.

House Bill 667 provides for the determination and effect of comparative negligence in actions of tort and provides that contributory negligence shall not bar recovery:

> "Section 1
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> (a) In all actions hereafter brought for death or personal injuries or damage to property caused by unlawful violence or negligence the fact that the person injured or killed or the parties suing or the owner of the property or the person having control over the property may have been guilty of contributory negligence shall not bar a recovery.

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(b) In any action the damages to be recovered shall be diminished in proportion to the amount of contributory negligence attributable to any such person.

(c) The determination of the proportion of contributory negligence in any action shall be a matter entirely for the jury or in cases tried without jury for the trial judge.

(d) If having regard to all the circumstances of the case the fact finding body shall not find it possible to determine the respective degrees of faults between the plaintiffs and the defendants they shall be deemed to be equally at fault and the damages shall be diminished by one-half."

Great injustice is done by the doctrine of contributory negligence. The defense of contributory negligence absolves from all fault and liability, whereas that of proportionateness goes merely to the reduction of damages.

In the United States there are forty statutes on the books and in apparently successful operation, dealing with the subject of comparative negligence.

The apportionment of damages was first brought home to most of the United States in 1908 by the Federal Employers' Liability Act which applied to all negligence actions in the Federal or State Courts for injuries to railroad employees engaged in interstate commerce. The apportionment provision was incorporated by reference into the Jones Act and the Merchant Marine Act which were enacted in 1915 and 1920 and are applicable to injuries to maritime employees. The provision was repeated in a series of State Employers' Liability Acts covering railroad and other employees enacted in eighteen states.

Comparative Negligence Statutes in one form or other have been enacted in Mississippi, Arkansas, Florida, Georgia, Iowa, Nebraska, South Dakota, Virginia and Wisconsin.

Where both parties have been guilty of negligence, both must share responsibility and the plaintiff may recover a portion of the damages suffered according to the negligence attributable to him.

Courts of Admiralty showed their displeasure with the common law rule of contributory negligence and early claimed that if both parties contributed to the loss, the damages should be divided between them.

The Maritime Conventions Act of 1911 in England has provided, along the line of the present proposed legislation, that where it is difficult or impossible to allocate the degrees of blame on both ships but where it is proven that both were at fault in some degree, the rule of division of loss would not be altered and each wrongdoer should bear one-half of the total loss.

Legislation forced the doctrine of comparative negligence in the employer-employee relationship in cases of common carriers. In the field of workmen's compensation acts involving master and servant, the common law rule of contributory negligence proved too harsh. The most striking features of the workmen's compensation law is the provision abolishing the common law defenses of contributory negligence and assumption of risk.

The operation of the principle of contributory negligence is unjust and untenable. No matter how negligent the defendant is, if the person injured has failed to exercise proper care on his part, he cannot recover.

A Mississippi Act,[1] provides that in all personal injury or death or property damage actions, 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".

Perhaps the rule of contributory negligence may have acted as a deterrent in the early days in England, commencing with the case of *Butterfield v. Forrester,*[2] but experience has shown that it is unjust to allow a negligent defendant to escape the consequences of his negligent conduct.

In the light of present decisions, if the defense propounds a question to show that plaintiff failed to continue to look while crossing an intersection, plaintiff would be non-suited.

The Pennsylvania Supreme Court has realized that the doctrine of contributory negligence is unsuited to modern conditions, and where left to the jury, after the most careful charge, juries nonetheless bring in verdicts for the plaintiff but generally in a smaller amount than would otherwise be the case. Lawyers act on these facts in valuing cases for settlement.

The application of the rule of comparative negligence and the injustice of the rule of contributory negligence is best illustrated in our own court decisions:

In the case of *Karcesky v. Laria,*[3] the plaintiffs, while crossing in the middle of the block from east to west, were struck as they were in the center of the highway, by the defendant's northbound automobile at about the time the additional defendant's southbound automobile passed them. Plaintiffs last saw defendant's automobile about a block away when they had walked to the center of the street but never looked again to their left, from which direction defendant's car was coming.

The court held that the circumstantial evidence in this case was sufficient to make out a prima facie case of negligence on the part of defendant. Plaintiffs were held not guilty of contributory negligence as a matter of law. The male plaintiff suffered a fracture of the left clavicle and severe contusions to the left forearm and left shoulder. The expenses for himself and wife totalled $1,700; the wife suffered fractures of three front teeth, a fracture of the sacrum and of the pelvis and of the left fibula, a sprain of the lower back, hematoma of the left thigh and small bruises, and her total loss of earnings approximated $4,000. The verdict of $3,000 for the husband and $2,000 for the wife was permitted to stand. It was obviously a sympathy verdict due to the jury's belief that the plain-

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1 MISS. CODE ANN. § 1454 (1942).
2 East 60, 103 Eng. Rep. 926 (K. B. 1809).
3 382 Pa. 227 (1955).

tiffs stepped into the path of defendant's car without looking and consequently contributed substantially to their own accident. The Court held:

> "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. The net result, as every trial judge knows, is that in the large majority of negligence cases, where the evidence of negligence is not clear, or where the question of contributory negligence is not free from doubt, the jury brings in a compromise verdict."

The jury renders a compromise verdict which is much smaller in amount than they would have awarded (a) if defendant's negligence was clear and (b) if they were convinced that plaintiffs were free from contributory negligence. As stated by Mr. Justice Musmanno, in a strong dissenting opinion in said case, the doctrine of comparative negligence must be applied methodically and not spasmodically. This court or the legislature will need to establish procedure and norms of appraisal, such as those which are now embodied in the Federal Employers' Liability Act.

An example of an injustice done by the doctrine of contributory negligence is the case of *Good v. Pittsburgh*.[4] It was a trespass case against a municipality to recover damages for personal injuries and partial destruction of a house resulting from an explosion, in which it appeared that a hole had exploded in a public highway in front of plaintiff's home, and that trucks were violently jolted when their wheels traversed the hole, causing vibrations in plaintiff's house which finally caused a crack to develop in the gas pipe in plaintiff's cellar through which gas escaped and exploded. A recovery was denied.

The court stated that the plaintiff has the burden of establishing by a preponderance of the evidence the fault of the defendants as the proximate cause of the injury.

As Section 463 of the Restatement of Torts defines it, "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, cooperating with the negligence of the defendant in bringing about the plaintiff's harm."

Contributory negligence may stem either from a person's careless exposure of himself to danger or from his failure to exercise reasonable diligence for his own protection.[5]

As a result of the decisions of our appellate courts, there is great confusion and the legal profession is left in a quandry as to what advice to impart to injured citizens seeking its services and intervention in behalf of justice.

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[4] 382 Pa. 255 (1955).
[5] RESTATEMENT, TORTS § 465 (1934).

Successful application of the doctrine of comparative negligence in the several special fields, as in admiralty, workmen's compensation acts, employers' liability acts and in automobile guest cases, reveals the practicability of this change in the rules of negligence. Judging from the practical experience of admiralty courts and other courts applying special statutes dealing with comparative negligence, there are no hidden pitfalls in the doctrine into which courts may fall other than certain other problems in connection with proper instructions by trial courts covering the mode of division or apportionment of damages.

If enacted, comparative negligence law would demand thought and study, but legal problems have been effectively solved in the past and the solution of this problem should be hastened by the precedents available in sister jurisdictions. The subject is neither new nor revolutionary. Steady encroachments upon the doctrine of contributory negligence have weakened its claim of authority.

At present the proposed Bill 667 is in the hands of a subcommittee of the Judiciary Committee, for study.

It is felt that the legislature will be taking a tremendous step forward in the field of social legislation if it adopts this bill. The problem certainly deserves the attention of the legislature.

It is hoped that this small note will help the legislature give the doctrine legal status.