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Legislative Development

LEGISLATIVE DEVELOPMENT

TORTS—NEGLIGENCE—PENNSYLVANIA ENACTS COMPARATIVE NEGLIGENCE STATUTE. Act of July 9, 1976, P.L. —, No. 152.

On July 9, 1976, the Pennsylvania General Assembly enacted a statute "establishing the doctrine of comparative negligence in actions for damages for injuries due to negligence, and providing for recovery against and contribution among joint [tortfeasors]."[1] The statute changes the heretofore existing *in toto* defense of contributory negligence to a defense *pro tanto* and modifies in applicable situations the contribution scheme enunciated in the Uniform Contribution Among Tortfeasors Act.[2]

Pennsylvania's version of comparative negligence[3] allows recovery by a plaintiff if his contributory negligence is less than or equal to that of the defendant.[4] When the plaintiff does qualify for recovery, it is limited in

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1. Act of July 9, 1976, P.L. —, No. 152 (to be codified in PA. STAT. ANN. tit. 17, §§ 2101-02 (Purdon)) [hereinafter cited as Act 152]. The text of the Act is as follows:

> Section 1. Comparative Negligence.—In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.
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> Section 2. Recovery Against Joint Defendant: Contribution.— Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of causal negligence attributed to all defendants against whom recovery is allowed.
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> The plaintiff may recover the full amount of the allowed recovery from any defendant against whom such plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.
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> Section 3. Effective Date.—This act shall take effect in 60 days.

Section 1 is modeled after N.J. STAT. ANN. § 2A:15-5.1 (West Cum. Supp. 1976-77).

2. PA. STAT. ANN. tit. 12, § 2082-89 (Purdon 1967).

3. Three distinct forms of comparative negligence statutes have been enacted. First is the so-called "pure" form, under which the plaintiff's recoverable damages are reduced by his contributory negligence regardless of the proportion of his negligence to the total negligence. Mississippi is the only state to have adopted this type of statute. *See* MISS. CODE ANN. § 11-7-15 (1972). The "modified" form holds that at some point, for example when the plaintiff's contributory negligence exceeds the negligence of the defendants, recovery by the plaintiff is precluded. *See, e.g.*, ARK. STAT. ANN. §§ 27-1763 to -1765 (Cum. Supp. 1975). The Pennsylvania statute is of this type. The third form differentiates between slight and gross negligence of the plaintiff. According to this theory damages will be apportioned if the plaintiff's negligence is slight and the defendant's negligence is gross. Nebraska is the only state with a statute of this type. NEB. REV. STAT. § 25-1151 (1964).

See generally Note, *An Inquiry Into Comparative Negligence for Pennsylvania*, 18 U. PITT. L. REV. 783-89 (1957). For a comparison of the statutes as adopted by the various states see Annot., 32 A.L.R.3d 463, 473-78 (1970).

4. *See* Act 152, § 1, *quoted at* note 1 *supra*. An amendment was introduced that would have required the plaintiff's negligence to be less than the defendant's negligence before

proportion to the total damage attributable to the defendant's negligence.[5] The statute also makes provision for recovery from and contribution among joint tortfeasors: the plaintiff is allowed full recovery from any defendant and that defendant may then seek contribution. In the case of multiple defendants, each defendant is required to contribute in the proportion that his causal negligence bears to the causal negligence of all defendants.[6] Although there has been confusion concerning the retroactive applicability of the statute,[7] it is clear that comparative negligence does not apply to causes of action arising prior to September 7, 1976.[8]

The harshness of allowing contributory negligence as a total defense to a plaintiff's plea for recovery,[9] the necessity of using various legal theories to avoid this harsh effect, and the refusal of juries to strictly apply contributory negligence have all lent impetus to the enactment of comparative negligence legislation.[10] Thus, comparative negligence statutes are common in the United States.[11] Act 152 is the culmination of three decades

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allowing comparison of relative causal negligence. *See* LEGISLATIVE JOURNAL-SENATE, Session of 1976, vol. 1, No. 110 at 1703.

5. *See* Act 152, § 1, *quoted at* note 1 *supra*.

6. *See* Act 152, § 2, *quoted at* note 1 *supra*.

7. Memorandum from Timothy J. O'Connell to Senator Henry G. Hager (September 9, 1976).

8. *See* Act 152, § 3, *quoted at* note 1 *supra*. Nothing in the Pennsylvania Constitution expressly forbids retroactive legislation, but "no law shall be construed to be retroactive unless clearly and manifestly so intended by the Legislature." 1 PA. CONS. STAT. ANN. § 1926 (Purdon Cum. Supp. 1976-77). Just as the repeal of the statute under which a cause of action arose does not destroy the cause of action, O'Toole, *Comparative Negligence: The Pennsylvania Proposal*, 2 VILL. L. REV. 474, 477 (1957), *citing* Rebel v. Standard Sanitary Mfg. Co., 340 Pa. 313, 318-19, 16 A.2d 534, 537 (1940), so are defenses treated as similarly vested. O'Toole, *Comparative Negligence: The Pennsylvania Proposal*, 2 VILL. L. REV. 474, 477 (1957), *citing* Kay v. Pennsylvania R.R., 65 Pa. 269, 277 (1870). In Lewis v. Pennsylvania R.R., 220 Pa. 317, 69 A. 821 (1908), the Pennsylvania Supreme Court stated, "A legal exemption from liability on a particular demand, constituting a complete defense to an action brought, stands on quite as high a ground as a right of action." *Id.* at 324, 69 A. at 823.

9. According to that doctrine when the plaintiff's negligence was a proximate cause of his injury recovery was barred. McCay v. Philadelphia Elec. Co., 447 Pa. 490, 495, 291 A.2d 759, 762 (1972). Prior to this opinion two divergent lines of cases existed in Pennsylvania. One line barred plaintiff's recovery even when his negligence was not a proximate cause of the injury. *See, e.g.*, O'Neill v. United States, 411 F.2d 139, 141 (3d Cir. 1969). The other required that the plaintiff's negligence be a proximate cause of his injury before recovery was barred. *See, e.g.*, Cebulskie v. Lehigh Valley R.R., 441 Pa. 230, 234, 272 A.2d 171, 173 (1971).

10. *See* Bress, *Comparative Negligence: Let Us Harken to the Call of Progress*, 43 A.B.A.J. 127 (1957). *But see* Harkavy, *Comparative Negligence: The Reflections of a Skeptic*, 43 A.B.A.J. 1115 (1957).

11. In addition to Pennsylvania, the following states and territories have passed comparative negligence statutes: Arkansas, ARK. STAT. ANN. §§ 27-1763 to -1765 (Cum. Supp. 1975); Canal Zone, C.Z. CODE tit. 4, § 1357 (1936); Colorado, COLO. REV. STAT. § 13-21-111 (Cum. Supp. 1976); Connecticut, CONN. GEN. STAT. ANN. § 52-572h (West Cum. Supp. 1977); Georgia, GA. CODE ANN. § 105-603 (1968); Hawaii, HAW. REV. STAT. § 663-31 (Supp. 1975); Maine, ME. REV. STAT. tit. 14, § 156 (Cum. Supp. 1976-77); Massachusetts, MASS. GEN. LAWS ANN. ch. 231, § 85 (West Cum. Supp. 1976-77); Minnesota, MINN. STAT. ANN. § 604.01 (West, Cum. Supp. 1977); Mississippi, MISS. CODE ANN. § 11-7-15 (1972); Nebraska, NEB. REV. STAT. § 25-1151 (1964); New Jersey, N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3 (West Cum. Supp. 1976-77); Oklahoma, OKLA. STAT. ANN. tit. 23, §§ 11-12 (West Cum. Supp. 1976-77); Puerto Rico, P.R. LAWS ANN. tit. 31, § 5141 (1968); Rhode Island, R.I. GEN. LAWS § 9-20-4 (Supp. 1976); South Dakota, S.D. COMPILED LAWS ANN. § 20-9-2 (1967); Texas, TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Cum. Supp. 1976-77); Vermont, VT. STAT. ANN. tit. 12, § 1036 (1973); Wisconsin, WIS. STAT. ANN. § 895.045 (West Cum. Supp. 1976-77); Wyoming, WYO. STAT. § 1-7.2 (Cum. Supp. 1975).

Three other states have adopted comparative negligence through judicial action: California, Nga Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Florida, Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Tennessee, Southern Ry. v. Pugh, 97 Tenn. 624, 37 S.W. 555 (1896).

of legislative indecision during which time Pennsylvania plaintiffs have labored under the antiquated doctrine of contributory negligence.[12]

Pennsylvania courts have long recognized the harsh effect of having a plaintiff's entire recovery hinge on the absence of his or her contributory negligence. They have developed the discovered peril[13] and the wanton and reckless tortfeasor[14] doctrines to mitigate this result. Implementation of comparative negligence will require reconsideration of the continued necessity of these doctrines.

Under the discovered peril doctrine a contributorily negligent plaintiff may recover if it is shown that the defendant failed to exercise a reasonable standard of care after he knew or should have known of the plaintiff's peril.[15] Since the purpose of the doctrine is sufficiently encompassed by the comparative negligence statute, a reasonable conclusion is that its transitional usefulness has ended.[16]

On the other hand, when a defendant's act was wantonly, willfully or recklessly committed, contributory negligence has never posed a bar to a Pennsylvania plaintiff's award.[17] New Jersey subscribed to a similar doctrine before it enacted a comparative negligence statute. Its courts have

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Some states apply comparative negligence only in limited types of cases: Alaska, ALASKA STAT. § 23.25.020 (1962) (master-servant cases); Arizona, ARIZ. REV. STAT. § 23-806 (1976) (workmen's compensation); Nevada, NEV. REV. STAT. § 705.280 (1971) (suits against railroads); Virginia, VA. CODE § 8-642 (1951) (suits against common carriers).

The federal government has also adopted comparative negligence for certain cases. Death on the High Seas Act, 46 U.S.C. § 766 (1970) (admiralty cases); Federal Employer's Liability Act, 45 U.S.C. § 53 (1970) (employees' suits against railroads).

12. A list of attempts at legislative action in Pennsylvania is as follows: H. 604, Session of 1943 (noted in *Comparative Negligence in Pennsylvania?*, 17 TEMP. L.Q. 276 (1943)); H. 667, Session of 1955 (noted in Note, *Comparative Negligence*, 60 DICK. L. REV. 79 (1955)); H. 88, Session of 1957 (noted in *An Inquiry Into Comparative Negligence for Pennsylvania*, 18 U. PITT. L. REV. 783 (1957)); H. 579, Session of 1971; H. 752, Session of 1975; S. 957, Session of 1975; S. 1237, Session of 1975.

13. *See, e.g.*, Curt v. Ziman, 140 Pa. Super. Ct. 25, 12 A.2d 802 (1940). *See* note 15 and accompanying text *infra*.

14. *See, e.g.*, Kasvanovich v. George, 348 Pa. 199, 34 A.2d 523 (1943).

15. 27 P.L.E. *Negligence* § 101, at 178 (1960). This doctrine is a sub-species of the doctrine of last clear chance and is *sub rosa* a judicial amelioration of the effects of contributory negligence. There are two divergent views concerning the last clear chance doctrine. One view holds that last clear chance is a search for who caused the harm, and consequently, for who should be held liable. *See* MacIntyre, *Last Clear Chance After Thirty Years Under The Apportionment Statutes*, 33 CAN. B. REV. 257 (1955). This view requires that one or the other of the parties be held liable and cannot co-exist with the doctrine of comparative negligence. Cushman v. Perkins, 245 A.2d 846 (Me. 1968). Pennsylvania has adhered to this approach. *See, e.g.* Curt v. Ziman, 140 Pa. Super. Ct. 25, 12 A.2d 802 (1940).

The other view holds that the last clear chance doctrine is not an exception to the contributory negligence doctrine, because the conduct in the seminal case of Davis v. Mann, 152 Eng. Rep. 588 (1842), did not actually involve contributory negligence. *See Davis v. Mann and Contributory Negligence Statutes*, 9 CAN. B. REV. 470 (1931). States following this view have continued to adhere to the last clear chance doctrine. *See, e.g.*, Lovett v. Sandersville R.R., 72 Ga. App. 692, 697-98, 34 S.E.2d 664, 667 (1945).

16. This conclusion is consonant with current judicial and legislative trends. *See* Cushman v. Perkins, 245 A.2d 846 (Me. 1968); Switzer v. Detroit Inv. Co., 188 Wis. 330, 206 N.W. 407 (1925). The last clear chance doctrine has been statutorily abolished in Connecticut. *See* CONN. GEN. STAT. ANN. § 52-572h(c) (West Cum. Supp. 1977). *See generally* James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938). Several states, however, have taken a contrary view. *See, e.g.*, Lovett v. Sandersville R.R., 72 Ga. App. 692, 34 S.E.2d 664 (1945); Vlach v. Wyman, 78 S.D. 504, 104 N.W.2d 817 (1960). For a collection of relevant decisions, see Annot., 59 A.L.R.2d 1261 (1958).

17. Misorski v. Pennsylvania R.R., 348 Pa. 204, 34 A.2d 526 (1943); Kasanovich v. George, 348 Pa. 199, 34 A.2d 523 (1943).

held that the plaintiff's action against a willful, wanton or reckless defendant remains unaffected by the adoption of comparative negligence.[18] Public policy would appear to dictate similar results in Pennsylvania.

Closely related to contributory negligence is the doctrine of assumption of risk. Although assumption of risk was not designed to improve the plaintiff's chances of recovery, as were the discovered peril and the wanton, willful and reckless tortfeasor doctrines, its integral association with contributory negligence compels an examination of its continuing legal necessity.

The assumption of risk doctrine states that a defendant will not be held liable if the plaintiff has knowingly assumed the consequences of a negligent situation, albeit a situation created by the defendant.[19] A problem arises because Pennsylvania courts have not found it necessary to distinguish assumption of risk from causal negligence.[20] Since causal negligence is the basis upon which the proportional negligence of the parties is ascertained under the comparative negligence statute,[21] it would initially seem that the doctrine of assumption of risk is encompassed by the statute. But the conduct of which the plaintiff is guilty in assumption of risk cases is recklessness, not negligence.[22] It would therefore appear contrary to efficacious public policy to compare the negligence of a defendant with the recklessness of the plaintiff and require that the defendant pay for a proportion of the plaintiff's injury. Thus, under Act 152, courts should, in appropriate situations, continue to allow assumption of risk as a defense *in toto*.

Not only have Pennsylvania's courts adopted ameliorative theories, but juries, with some semblance of judicial approval, have failed to strictly

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18. Draney v. Bachman, 138 N.J. 503, 351 A.2d 409 (1976); Burd v. Vercruysoin, 142 N.J. Super. Ct. 344, 361 A.2d 571 (1976). *Cf.* Mallory v. Cloud, — Mont. —, 535 P.2d 1270 (1975).

19. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 440 (4th ed. 1971).

20. *See* Jerdon v. Sirulniek, 400 Pa. 423, 162 A.2d 202 (1960); Loeb v. Allegheny County, 394 Pa. 433, 147 A.2d 336 (1959).

21. *See* Act 152, § 1, *quoted at* note 1 *supra*.

22. *See* Kasanovich v. George, 348 Pa. 199, 34 A.2d 523 (1943) (analogy to the wanton tortfeasor doctrine). *But see* Manassa v. New Hampshire Ins. Co., 332 So. 2d 34 (Fla. Dist. Ct. App. 1976) (assumption of risk is a special form of contributory negligence).

Based on an examination of the case law, it is reasonable to conclude that Pennsylvania courts will continue to hold that reckless—not negligent—conduct is necessary to bar plaintiff's recovery when the defendant seeks to invoke the doctrine of assumption of risk. Prior cases have so held. *See* Hall v. Ziegler, 361 Pa. 228, 230, 64 A.2d 767, 769 (1949); Elliot v. Philadelphia Trans. Co., 356 Pa. 643, 648, 53 A.2d 81, 83 (1947); Eaell v. Wichser, 346 Pa. 357, 359, 30 A.2d 803, 804 (1943); Ruhl v. City of Philadelphia, 346 Pa. 214, 221, 29 A.2d 784, 787 (1943); Guerierro v. Reading R.R. Co., 346 Pa. 187, 191, 29 A.2d 510, 513, (1943); Casseday v. B & O R.R., 343 Pa. 342, 22 A.2d 663, 665 (1941); McFadden v. Pennzoil Co., 341 Pa. 433, 437, 19 A.2d 370, 372 (1941).

Nevertheless, there is authority abolishing assumption of risk in states having comparative negligence statutes. *See, e.g.*, McConville v. State Farm Mut. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962). In *McConville* the Wisconsin Supreme Court stated that "[c]onduct . . . denominated assumption of risk may constitute contributory negligence as well [and that] unreasonable assumption of risk constitutes negligence." *Id.* at 380, 113 N.W.2d at 19. *See also* Parker v. Maule Indus., Inc., 321 So. 2d 106 (Fla. Dist. Ct. App. 1975); Wilson v. Gordon, 354 A.2d 398 (Me. 1976).

apply the doctrine of contributory negligence. The Pennsylvania Supreme Court has recognized that "[t]he doctrine of comparative negligence . . . is not recognized by the Courts of Pennsylvania, but as a practical matter [it is] frequently taken into consideration by a jury. . . . [I]n a large majority of . . . cases where the evidence of negligence is not clear . . . the jury brings in a compromise verdict."[23] These jury compromises, which were *sub judicia* a realization of the intent and operation of comparative negligence, mandated legislative action in the form of comparative negligence.

As seen above, the elimination of existing legal doctrines or their interface with comparative negligence raises troublesome theoretical problems. The practical operation of the comparative negligence statute is similarly vexatious. Once the plaintiff has established a prima facie case of negligence,[24] the burden of proof shifts to the defendant. If the defendant is partially or fully to escape liability, he or she must then prove that the plaintiff's own negligence contributed to the injury. If it can also be shown that such contributory negligence was greater than the causal negligence of all of the defendants against whom recovery is sought, the plaintiff is barred from recovery.[25] It is therefore beneficial for the plaintiff to proceed against as many tortfeasors as possible. To illustrate, if there were two possible defendants, and if each defendant was twenty-five percent negligent, a fifty percent negligent plaintiff could not collect unless he sought recovery against both defendants.[26] It is reasonable to assume that the plaintiff may not include with the defendant's fault that proportion of fault attributable to unreachable parties.[27] To do so would create a disproportionate spreading of risks contrary to the basic philosophy of comparative negligence.[28]

The question of proportion of fault is unquestionably one for the trier of fact to decide. A serious failing in the Pennsylvania version of comparative negligence, therefore, is the failure of the legislature to provide for a special verdict, a device recommended by several commentators for use in such cases.[29] The case of contribution among multiple defendants provides

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23. Karcesky v. Laria, 382 Pa. 227, 234, 114 A.2d 150, 154 (1955).

24. To establish a prima facie case of negligence the plaintiff must prove that the defendant owed him a duty, that defendant breached that duty, and that the defendant's breach was the proximate cause of the plaintiff's injury. Evans v. Golfine Truck Rental Service, — Pa. Super. Ct. —, 361 A.2d 643 (1976).

25. *See* Act 152, § 1, *quoted at* note 1 *supra.*

26. To the effect that the concern is with comparative fault and not comparative contribution, see Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 481 (1953). *But see* Campbell, *Wisconsin's Comparative Negligence Law,* 7 WIS. L. REV. 222, 231 (1932).

27. The statute states that the plaintiff may recover the full amount of the allowed recovery from any defendant against whom such plaintiff is not barred from recovery. *See* Act 152, § 2, *quoted at* note 1, *supra.*

28. O'Toole, *Comparative Negligence: The Pennsylvania Proposal,* 2 VILL. L. REV. 474, 481 (1957).

29. An amendment was offered to Act 152 which would have required that the jury or the court in a non-jury trial answer specific questions. Under this amendment the trier of fact would have been required to specify the amount of damages that the party bringing the action would be entitled to recover had the person not been at fault, and the degree of negligence of

an example of the need for such a device. Whereas under the Uniform Contribution Among Tortfeasors Act contribution was in aliquot portions,[30] under comparative negligence contribution is in the ratio of each defendant's causal negligence to the total causal negligence of all of the defendants "against whom recovery is allowed."[31] Under Act 152 the jury must not only allocate causal negligence between the plaintiff and the defendants *en masse,* but it must also allocate the defendants' total causal negligence among those various defendants on a *per culpa* basis. The special verdict would allow for judicial overview of discrepancies that might arise in the jury's analysis of such difficult questions of fact.

The natural consequences of comparative negligence go beyond its apparent effect on substantive and procedural law to the very core of the negligence policy conceptualizing network—the insurance industry. Comparative negligence requires that the plaintiff be held responsible for a proportion of the loss for which he is unlikely to be insured.[32] Whereas jurors' sympathies were somewhat apt to keep the plaintiff from feeling the fatal effect of the application of contributory negligence,[33] under comparative negligence the plaintiff must now bear responsibility for a portion of the damages.[34]

each party expressed as a percentage. LEGISLATIVE JOURNAL—SENATE, Session of 1976, vol. 1, No. 110 at 1703.

The use of the special verdict in conjunction with comparative negligence is recommended in Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 503 (1953), and in Cadena, *Comparative Negligence and the Special Verdict,* 5 ST. MARY'S L.J. 688 (1974). *But see* Smith, *Comparative Negligence Problems with the Special Verdict: Informing the Jury of the Legal Effects of their Answers.* 10 LAND & WATER L.J. 199 (1974).

30. PA. STAT. ANN. tit. 12, §§ 2082-89 (Purdon 1967).

31. *See* Act 152, § 2, *quoted at* note 1, *supra.*

32. 2 F. HARPER & F. JAMES, THE LAW OF TORTS, § 22.11, at 1234 (1956).

33. Karcesky v. Laria, 382 Pa. 227, 234, 114 A.2d 150, 154 (1955).

34. While initially this analysis tends to indicate a decrease in insurance rates, such is not the case. Although fewer cases will be litigated, *see* Averbach, *Comparative Negligence Legislation: A Cure for Our Congested Courts,* 19 ALB. L. REV. 4, 11 (1955), and the size of awards will decrease, the increase in the number of awards will cause insurance rates to rise. Grubb, *Comparative Negligence,* 32 NEB. L. REV. 234, 246 (1953).
[Statute Note by Harry R. Swift.]