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Mr. Butterfield was riding his horse home one evening at dusk when he rode into a pole that Mr. Forrester had left in the street. Butterfield was thrown from his horse and injured. The pole was observable from one hundred yards and could have been avoided had Butterfield exercised ordinary care. Butterfield sued Forrester for his injuries, but the judge, Lord Ellenborough, ruled he could not recover:

> "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he did not himself use common and ordinary caution to be in the right."[1]

Thus the judge ruled that in order for the plaintiff to recover, two elements must have been present: the defendant must have been negligent, and the plaintiff must have been free from any negligence which may have contributed to his injury.[2] And so this celebrated English case of 1809 first enunciated the legal doctrine of contributory negligence. This English rule moved across the ocean quickly and became part of the common law in America[3] and Oklahoma.[4]

The Supreme Court of Oklahoma ruled in 1896 in the case of *Pittman* v. *City of El Reno* that a plaintiff guilty of contributory negligence could not recover as a matter of law.[5] The court held that if the facts showed any contributory neg-

[1] Butterfield v. Forrester, 103 Eng. Rep. 926,927 (1809).
[2] *Id.*
[3] *See* Smith v. Smith, 19 Mass. 621 (1825), Washburn v. Tracy, 20, Chip 128 (Vt. 1824). For further discussion of the history of the acceptance of the doctrine *see* Bohlen, *Contributory Negligence,* 21 Harv. L. Rev. 233 (1908).
[4] *See* Pittman v. City of El Reno, 4 Okla. 638, 46 P. 495 (1896); Severy v. Chicago R.I. & P. Ry. Co., 6 Okla. 153, 50 P. 162 (1897); St. Louis & S.F.R. Co. v. Elsing, 37 Okla. 333, 132 P. 483 (1913).
[5] 4 Okla. 638, 641.

ligence on the part of the plaintiff, his claim must be dismissed by the trial judge.[6] This doctrine was faithfully followed with slight modification in every subsequent Oklahoma case until the present. The Oklahoma courts attempted to modify this rather harsh legal doctrine by adopting the last clear chance doctrine and by attempting to adopt a court initiated rule of comparative negligence.

This latter attempt by some trial judges was swiftly and completely struck down by higher state courts. In a 1913 case, *Hailey-Ola Coal* v. *Morgan,* the trial judge instructed the jury that the plaintiff's negligence should not bar his recovery, but only serve to mitigate his damages.[7] The Supreme Court of Oklahoma ruled that this instruction was error and that any plaintiff who was contributively negligent was barred from any recovery.[8] The court made it clear that no theory of comparative negligence was permissible.[9]

Oklahoma did adopt the last clear chance doctrine which was first enunciated in the 1842 English case, *Davies* v. *Mann.*[10] The court held that where a party had the last clear chance to avoid the accident and failed to do so, a plaintiff's negligence would then not bar recovery, or a defendant's negligence might not make him liable to the plaintiff, if the latter had the last clear chance to avoid his injury.[11]

This modifying doctrine found quick acceptance in the U.S.[12] and in Oklahoma.[13] Since this doctrine in a sense weighs

[6] *Id.* at 649.
[7] Hailey-Ola Coal Co. v. Morgan, 34 Okla. 71,72, 134 P. 29,30 (1913).
[8] *Id.* at 77.
[9] *Id.* at 78.
[10] 152 Eng. Rep. 588 (1842).
[11] *Id.* at 589.
[12] *See* Ruter v. Foy, 46 Iowa 132 (1877). Brendle v. Spencer, 125 N.C. 474, 34 S.E. 634 (1899). Birmingham Ry., Light & Power Co. v. Jones, 146 Ala. 277, 41 So. 146 (1906). *See also* Prosser, *Comparative Negligence,* 51 Mich. L. Rev. 465 (1953).
[13] Atchison, T.&S.F. Ry. Co. v. Taylor, 196 F. 878, (8th Cir.

the relative fault of the parties, it could be considered a form of comparative negligence. It could be said that the doctrine presumes that the party having the last chance to avoid the injury was more negligent than the other, and thus allows the other party to win the lawsuit.[14] A distinction can be made, however, between comparative negligence and the doctrine of the last clear chance since in the last clear chance doctrine here is no apportionment of damages.

Such was the state of contributory negligence and last clear chance until Senate Bill 138 was recently passed by the Oklahoma legislature. The bill brought Oklahoma a crippled step forward in its legal progress. It was a step forward because it eliminated the harsh and unfair doctrine of contributory negligence and replaced it with a type of comparative negligence. It was a crippled step because the legislation left unsolved several legal problems involved with comparative negligence that the courts and/or the legislature must now confront.

Comparative negligence is a legal doctrine which allows the plaintiff to recover even though he has contributed to his injury. Contributory negligence is still considered, but only to mitigate the recovery, rather than bar it. Thus a plaintiff can recover his damages minus the proportionate amount he was responsible for. A plaintiff who was 30% negligent, or responsible, could recover 70% of his damages.

There are basically three types of comparative negligence statutes: the "pure" type, the 50% type, and the 49% type. The pure type states that a plaintiff's negligence will not bar his recovery, but will simply diminish the amount of his recovery in proportion to the amount of his fault. Thus if a plaintiff is 70% negligent, he can recover 30% of his dam-

1912). Clark v. St. Louis & S.F.R. Co., 24 Okla. 764, 108 P. 361 (1909). Muskogee Electric Tractor v. Tice, 116 Okla. 24, 243 P. 175 (1926).

[14] *See* Restatement (Second) of Torts § 479 (1965).

ages. The Federal Employer's Liability Act of 1908, which applied to all federal and state courts where a railroad employee was injured while engaged in interstate commerce, was the first federal adoption of comparative negligence, and it was the "pure" type.[15] Mississippi adopted the "pure" type of comparative negligence in 1910.[16]

The salient criticism of this type of comparative negligence is that it allows a plaintiff to recover from a defendant even though that defendant was less negligent that the plaintiff. Thus the one with the greater fault can recover from the one with the lesser fault.[17]

The second type is the 50% type. Under this statute the plaintiff can recover only if his negligence did not exceed the defendant's. Thus a plaintiff 50% negligent could recover 50% of his damages.

The third type, the 49% form, states that in order for the plaintiff to recover he must be less at fault than the defendant. The difference between the latter two is one percent, but the legal ideological difference could be construed as much greater.

Senate Bill No. 138, the new Oklahoma law, is a 49% statute. In order for the plaintiff to recover, his negligence must be of a lesser degree than that of the defendant. Thus while Oklahoma has eliminated the doctrine of contributory negligence as a complete bar to recovery, it has left unanswered several questions on its application, and one on its constitutionality.

Article 23, §6 of the state constitution states that, "The defense of contributory negligence or of assumption of risk shall, in all cases, be a question of fact, and shall, at all times,

[15] 45 U.S.C. § 53 (1970).

[16] Miss. Code Ann., § 1454 (Supp. 1966).

[17] *See* Ghiardi and Hagan, *Comparative Negligence-The Wisconsin Rule and Procedure.* 18 Defense L.J. 537, 544 (1963).

be left to the jury."[18] If one assumes that this precludes a definition of contributory negligence other than the common law definition, then the new statute is unconstitutional. If the interpretation is that contributory negligence, whatever that might be, shall be a question of fact for the jury, then the statute is perfectly legal.

Questioning of the sponsor of the bill in the House revealed that this concern was expressed, but was disregarded as not likely to be a problem. Court decisions seem to back up this view. Oklahoma courts have ruled that this constitutional section does not apply to actions controlled by the Federal Employer's Liability Act, which has a provision changing the common law doctrine of contributory negligence to comparative negligence.[19] Also, other state courts have ruled that this section is merely a procedural one, rather than a substantive one.[20] Being procedural in nature, it can and should be construed as leaving contributory negligence for the jury to decide, but not precluding any legislative ability to change the effect of such negligence, without a constitutional amendment. It should be remembered that the new law does not eliminate the defense of contributory negligence. It can still be pleaded, but now only diminishes recovery, rather than barring it.

Assuming the constitutionality of the statute, it is necessary to consider more serious problems dealing with its application. These problems are basically, 1) the effect on the last clear chance doctrine, 2) the problem with multiple defendants, and3) general verdicts versus special verdicts.

In states with comparative negligence statutes there is a conflict of authority as to whether comparative negligence

[18] OKLA. CONST. art. 23, § 6.
[19] Kansas City M.&O. Ry. Co. v. Roe, 72 Okla. 238, 180 P. 371 (1919). Chicago R.I.&P. Ry. v. Hessenflow, 69 Okla. 185, 170 P. 1161 (1918).
[20] Hopkins v. Kurn, 351 Mo. 41, 171 S.W.2d 625 (1943). Bourestom v. Bourestom, 231 Wis. 666, 285 N.W. 426 (1939).

eliminates the last clear chance doctrine. In states which do not see any inconsistency, the view is that where the party shown to have the last clear chance to avoid the injury could be solely liable, there is no inconsistency if last clear chance is viewed as an element of proximate cause.[21] It should be noted that in these states the courts have ruled that where the plaintiff's negligence continues until the time of the injury, the rule is inapplicable.[22]

In states which have judicially eliminated last clear chance, the theory was that this doctrine was merely a softening of contributory negligence, and was in reality a form of comparative negligence, which apportioned fault, if not damages.[23]

Prosser has called the doctrine unnecessary in comparative negligence states, contending that the doctrine has "frozen the transition from contributory negligence to comparative negligence."[24] While the word "frozen" may be extreme, Prosser argues that the intent of last clear chance was to shift the legal state to comparative negligence with all due speed, and this the doctrine failed to do.[25]

Malcolm MacIntyre, Professor of Law at the University of Alberta, in Canada, wrote in the Harvard Law Review:

> The whole last clear chance doctrine is only a disguised escape, by way of comparative fault, from contributory negligence as an absolute bar, and serves no useful purpose in jurisdictions which have enacted

[21] Bezdek v. Patrick, 170 Neb. 522, 103 N.W.2d 318 (1960). Vlach v. Wyman, 78 S.D. 504, 104 N.W.2d 817 (1960).
[22] Moses v. Scott Paper Co., 280 F. Supp. 37 (S.D. Me. 1968). Bezdek v. Patrick, 170 Neb. 522, 103 N.W.2d 318 (1960).
[23] *See* Cushman v. Perkins, 245 A.2d 846 (Me. 1968). Loftin v Nolin, 86 So.2d 161 (Fla. 1956). For further reference *see* MacIntyre, *The rationale of last clear chance*, 53 Harv. L. Rev. 1225 (1940).
[24] Prosser at 472-3.
[25] *Id.* at 473.

> apportionment statutes. The decisions superimposing last clear chance upon these statutes . . . add injustice as well as complexity to an already confused *corpus juris*. Had the statutes not been thus hamstrung, they would have provided the means of doing openly and more completely what the courts have been doing unavowedly and incompletely ever since *Davies* v. *Mann*.
>
> Every vestige of last clear chance must be swept away in favor of apportionment.[26]

Thus both Prosser and MacIntyre see no need for last clear chance in comparative negligence states. The last chance to avoid the injury is merely another element in determining apportionment of fault. There thus being no need for the doctrine, it should be eliminated by the courts in the state at the first opportunity.

Where there is only one defendant, the plaintiff recovers his damages minus the proportional amount of his fault. In Oklahoma, the plaintiff's negligence must be of a lesser degree than the defendant's. When there is more than one defendant, the problem becomes apparent. Can the plaintiff join the defendants to determine whether he was less at fault than they were? If the defendants combined were more at fault, can the plaintiff recover his damages against one of the defendants who was individually less at fault than the plaintiff? Are the defendants jointly and severally liable for the total amount or are they only liable in proportion to their contributing fault?

These questions, while unnecessary in a state with a pure form of comparative negligence, are extremely germaine to Oklahoma with a 49% statute. And, of course, one other question arises out of this quagmire. If the defendants are jointly and severally liable, (or only those defendants who were of greater fault), should there be a right of contribution among the defendants on an equal or proportional basis?

[26] MacIntyre at 1251-2.

The right of the plaintiff to combine the defendants to determine whether he was less negligent than they were as a group is allowed only in Arkansas. The Supreme Court of Arkansas ruled in *Walton* v. *Tull* that a plaintiff could combine the negligence of the defendants and if that combined negligence was greater than his, he could recover against any of the defendants, irrespective of their individual fault as compared to the plaintiff.[27] Thus where the plaintiff was 25% negligent, and defendants A, B, and C each 25% negligent, the plaintiff can recover 75% of his damages against any of the defendants. In a more extreme example where plaintiff was 40% negligent, defendant A 40% at fault, defendant B 15%, and defendant C 5%, the plaintiff can recover 60% of his damages against C, even though the plaintiff was 35% more at fault than C was. Not surprisingly, there was a strong dissent in this case by Chief Justice Harris.[28]

The fairer rule, is to prohibit the plaintiff from combining the negligence of the defendants, and to allow him to recover only against defendants who were individually more at fault.

One can now hear the anguished cries of lawyers pleading that their client should not be barred from recovery if he was 40% negligent and the two defendants each 30%. But is it fair that a defendant who was less at fault than the plaintiff pay for the total amount of the plaintiff's damages?

This leads into the next issue which is the apportionment of damages among the defendants. The statute apportions the fault and as such the damages as between the plaintiff and defendants. But why stop there? Why not also apportion the damages among the defendants in accordance with their relative fault? If the defendants were responsible to the plaintiff on a pro rata basis, rather than jointly and severally liable, then a strong case could be made for adopting the Arkansas

[27] Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20 (1962).
[28] *Id.* at 27.

rule expressed in the *Walton* case. But if there is no pro rata apportionment of damages, then it seems unjust and unreasonable to extend the number of situations where the defendants could be liable for injuries in an amount far out of proportion to their degree of fault. If the plaintiff is 10% at fault, Defendant A 15%, defendant B 75%, then defendant A could be liable for 90% of the plaintiff's damages, even though responsible for only 15%.

Since there is little likelihood that the common law rule holding joint tort feasors jointly and severally liable will be changed in the near future, there is one possible alternative. At the present time there is generally no right of contribution among joint tortfeasors in Oklahoma.[29] There is no rational reason why the right of contribution cannot exist on a pro rata basis. This would in no way affect the plaintiff's right to recover against any defendant the entire judgment, if that defendant had greater fault. But it would allow each defendant to be responsible for the amount of damage he caused. Thus if the plaintiff were 20% at fault, defendant A 30%, and defendant B 50%, the plaintiff could recover 80% of his damages from A, but then A could recover 5/8 of that judgment from B, or if B paid, B could recover 3/8 from A.

Arkansas has such a provision in its Uniform Contribution Among Joint Tortfeasors Act which states:

> When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law.[30]

[29] *See* Cain v. Quannah Light & Ice Co., 18 Okla. 25, 267 P. 641 (1928), where the court held that the right of contribution does not apply as between joint tortfeasors.

[30] ARK. STAT. 34-1002 (4) (1971).

The plaintiff has been greatly aided by the comparative negligence law and rightly so. It is essential that the defendant also receive some fairness and equitable treatment as well. It is of the utmost urgency that Oklahoma follow Arkansas's example and pass a joint tortfeasors contribution act. It is unconscionable that a defendant 15% at fault should have to pay 90% of the plaintiff's damages, and then have no recourse against another defendant who was 75% at fault.

A special verdict is where the judge issues a series of questions to the jury, which the jury answers without knowing the effect of those answers. Based on those answers the judge renders the final verdict. The special verdict has been criticised as inconsistent with trial by jury, letting the jury listen and weigh the evidence, but not letting them render the verdict.[31] But while there are cogent and persuasive arguments against special verdicts, the arguments in support of them are stronger. Prosser, in a Michigan Law Review article, argues that special verdicts tend to eliminate both jury confusion and prejudice:

> The advantages claimed for the special verdict are many. So far as they are pertinent to the apportionment of damages, the most important is of course that the jury is no longer given a free hand in a cloak of secrecy, and the court is informed as to what has been done. If the instructions have been thrown out the window, if they have been misunderstood, if there has been error in applying them, even in arithmetic, it may be corrected, rather than allowed to stand . . . [B]eyond this, the jury is forced to give detailed consideration to the issue, rather than to jump at a general conclusion without paying any attention to it. A jury which on general principles would return a large verdict in favor of a pretty woman and against a railroad company may well hesitate to return special findings which it knows to be against the evidence. Finally, the special verdict may, in

[31] Flynn, *Comparative Negligence-The Debate,* Trial Magazine 49,51 (May/June 1972).

> many cases, avoid the necessity of long and complicated instructions, incomprehensible to anyone but a lawyer, and in themselves a fertile source of error.[32]

The need for special verdicts also becomes apparent when considering the necessity of eliminating defendants who are less negligent than the plaintiff, as well as the necessity of apportioning the damages among the defendants for the purposes of contribution. (This assumes that the aggregation of the fault of the defendants will not be allowed, and that Oklahoma will pass a joint tortfeasors contribution act.) Oklahoma has a provision for special verdicts[33], and they should be used at all times when a comparative negligence case demands it.

The basic and most important intent of the new statute was to eliminate the old common law. After many years of trying the votes were finally sufficient for its passage, and it was passed without serious consideration being given to the problems it might cause. The thinking was that such problems would be dealt with later by the courts and the legislature.

Comparative negligence has been described as fairness to all parties involved. There is no question that the new law is fair to the plaintiff. Only time will tell whether it will be ensured that the law is fair to the defendant as well.

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[32] Prosser at 501-2.
[33] OKLA. STAT. tit. 12, § 587 (1971).