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THE PLAINTIFF'S VIEW OF COMPARATIVE NEGLIGENCE

E. JOSEPH BUFFA, JR.*

The cornerstone for understanding the impact of the Supreme Court of Appeals of West Virginia's recent decision adopting a modified comparative negligence rule[1] is the court's statement that the "judicial rule of contributory negligence is therefore modified . . . ,"[2] not abolished. The plaintiff's attorney must understand that what has been abolished is the unjust rule of contributory negligence which entirely barred recovery no matter how slight the plaintiff's negligence. In its place, the court adopted what has been called the 49% rule which allows a plaintiff to recover damages in a tort action so long as his negligence does not equal or exceed the combined negligence of all defendants. Except for this modification in the amount of negligence necessary to bar a plaintiff's claim, the entire concept of contributory negligence in West Virginia tort law remains essentially intact. This is not to say there will be no necessity for numerous "adjustments" in negligence law as changes can be anticipated. However, those adjustments will not be made within the more equitable framework of a "pure" comparative fault concept.

From a plaintiff's point of view, the court's decision did not go far enough in correcting the injustices which have grown from the old rule of contributory negligence. Contributory negligence, as a limiting concept of tort law, should have been completely supplanted by a system of pure comparative fault, which is more consistent with modern thinking and the basic foundation of tort law. In a system of pure comparative negligence, the plaintiff's negligence is taken into account by reducing his award in proportion to his fault, even if that fault exceeds 50%. This is in contrast to the newly adopted modified system where the contributory negligence defense returns as a complete bar to recovery once the plaintiff's fault exceeds 49% of the total fault of all parties to the accident. The pure comparative system is simply more consistent with the historical basis of tort liability, developed in

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[1] Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979).

[2] *Id.* at 885.

the middle of the 19th century, that liability should be based upon fault.

The court in *Bradley* recognized that all four of the other states judicially adopting comparative negligence doctrines found pure comparative negligence preferable to the modified forms. However, the court criticized the reasoning of these courts and found pure comparative negligence objectionable in that "it favors the party who has incurred the most damages regardless of his amount of fault or negligence."[3] It is clear from the opinion that the court's principal argument against pure comparative negligence is that it is morally improper to allow a party who is more at fault in an accident to recover from a party who is less blameworthy.[4] By way of illustration the court points out the potential unfairness of a pure comparative negligence approach in a situation where a 90% at fault defendant suffers massive damages while a plaintiff who is only 10% at fault is only slightly injured.[5] According to the illustrations, a slightly negligent plaintiff could end up paying a grossly negligent defendant, perhaps even beyond the limits of his insurance coverage.

Dean Schwartz points out the fallacy of such illustrations, stating that it is inappropriate to make a judgment about an entire comparative negligence system based upon such an unusual hypothetical situation.[6] This type of a case is indeed unique in

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[3] *Id.* at 883.

[4] The court stated that "we are not willing to abandon the concept that where a party substantially contributes to his own damages, he should not be permitted to recover for any part of them." *Id.* at 885.

[5] To illustrate, a plaintiff who has sustained a moderate injury with a potential jury verdict of $20,000, and who is 90 percent fault-free, may be reluctant to file suit against a defendant who is 90 percent at fault, but who has received severe injuries and whose case carries a potential of $800,000 in damages from a jury verdict. In this situation, even though the defendant's verdict is reduced by his 90 percent fault to $80,000, it is still far in excess of the plaintiff's potential recovery of $18,000.

Id. at 883. For a further discussion of this hypothetical, see Cady, *Alas and Alack, Modified Comparative Negligence Comes to West Virginia, Symposium on Bradley v. Appalachian Power Co. — West Virginia Adopts Comparative Negligence* 82 W. VA. L. REV. 473, 483-86 (1980).

[6] V. SCHWARTZ, COMPARATIVE NEGLIGENCE 345 (1974). Dean Schwartz relates that a review of the annotated cases following the Mississippi pure comparative negligence statute, which has been in effect since 1910, reveals no case in which a

the experience of most plaintiff's attorneys. It is far more common to encounter a situation where, regardless of a counterclaim, a plaintiff may be barred from any recovery because he is found by the jury to be 50% or slightly more negligent under our present 49% rule. In such an instance, the plaintiff bears the entire burden of his loss, whether great or small. Dean Schwartz further points out that any such unfairness as demonstrated by the *Bradley* illustration is unlikely to occur because the rule of proximate cause will probably bar the claim of a party whose negligence substantially caused the accident.[7] Even if the hypothetical case were likely to happen, the liability for the costs of the accident has been borne by each party in proportion to his culpability in consonance with the underlying premise of tort law.

The criticism of pure comparative negligence by the court in *Bradley* does not seem well taken. The law of torts is concerned with the allocation of losses arising from human activities. The purpose of that law is to adjust these losses and to allow compensation for injuries sustained by one person as the result of the conduct of another.[8] Pure comparative negligence does not favor the party who incurs the most damages without regard to his fault. Rather, it gives full expression to the historically developed principle of tort law that liability should be based upon or attributed to fault. Perhaps the best approach the court could have taken in *Bradley* was to have followed Justice Neely's suggestion, made during oral argument, merely to frame an opinion adopting the standards of the Uniform Comparative Fault Act, a pure comparative negligence system.

Aside from the criticism of *Bradley*, questions abound concerning the effect the decision is likely to have on counsel for the plaintiff. Although the advent of comparative negligence has generally been considered a boon to the injured plaintiff, it is not pure plaintiff's law. Instead, it facilitates a full implementation of the fault principle so as to be fairer to both plaintiff and defendant. Practitioners for both plaintiffs and defendants should recognize the *Bradley* decision as an opportunity for innovative changes in traditional tort law. The decision itself changed very

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90% at fault party obtained a substantial recovery.

[7] *Id.*

[8] PROSSER, LAW OF TORTS 6 (4th ed. 1971).

little substantive tort law. However, it has, in the common law tradition, restored a dynamic aspect to negligence litigation. That field is now basically wide open for change by aggressive litigators. While it is impossible to pinpoint all the changes that will follow the *Bradley* decision, the following will highlight some of the more prominent areas.

The most obvious departure from previous negligence law is the specific holding of *Bradley* that an injured plaintiff will no longer be completely barred from recovery because of his own negligence unless his negligence exceeds or equals the combined negligence of the other parties. Cases which were not viable under the old contributory negligence rule may now be brought with a reasonable expectation of recovering a substantial portion of the damages involved. From the onset of the professional relationship, the attorney should familiarize the client with the change in the operation of the negligence law and explain its effect upon his case. Under the new rule, the plaintiff's attorney still faces the danger that his client may leave the courtroom with no damages at all if his negligence exceeds 49%. More time should probably be spent initially investigating and analyzing all facets of the occurrence than was done under the previous rule so the client is properly advised of the damage potential of his case. With the adoption of the 49% rule, there is a stronger possibility of successful counterclaims against the client. Previously, in the one plaintiff — one defendant case with a complaint and counterclaim, even if the plaintiff lost his claim against the defendant, it was not likely the defendant would be successful on his counterclaim since he would almost surely have been barred by contributory negligence. For instance, if the plaintiff was believed by the jury to be 55% negligent and the defendant 45%, under the old rule both were barred from recovery. Under the present rule, however, in the same situation, the plaintiff would be barred from recovering any of his damages since his negligence exceeded 49%, but the defendant could now recover 55% of his damages. This not uncommon example illustrates an inequity of the 49% rule which would not occur under pure comparative negligence. Unfortunately, this inequity is more likely to occur than the "unjust" illustrations discussed in *Bradley*.

It will be equally important during the initial client interview to determine whether one of several considerations will suspend the operation of the new comparative negligence rule in that ac-

tion. The court indicated that where contributory negligence had not been available as a defense previously, it would not be available under the rule of comparative negligence. For instance, *Bradley* specifically held that the plaintiff's contributory negligence would not be taken into consideration by the jury when the doctrine of last clear chance is applicable, where defendant is found to be guilty of wanton and willful misconduct or, in some instances, where the defendant violates a statute clearly designed for protection of the plaintiff.[9] The defense of contributory negligence would likewise seem unavailable in a case brought by an employee against an employer under the recent decision of *Mandolidis v. Elkins Industries, Inc.*[10] and in suits against employers where Workmen's Compensation coverage was not obtained. Assumption of risk was not specifically discussed in *Bradley* so it is difficult to predict whether this doctrine is still available to defendants as a complete defense to a negligence action. Although assumption of risk has been abolished or merged into an overall concept of comparative fault in many jurisdictions adopting comparative negligence,[11] the status of this doctrine in West Virginia must await further refinement by the court. A plaintiff alleging strict liability pursuant to *Rylands v. Fletcher*[12] would not have his negligence compared to that of the defendant, while a product liability plaintiff suing pursuant to *Morningstar v. Black & Decker*,[13] is very likely to be subject to the comparative negligence rule.

Commentators assessing the impact of comparative negligence seem to agree that the new doctrine promotes settlement of personal injury litigation.[14] Adjusters and lawyers representing insurance companies can no longer adamantly refuse to consider settlement in reliance upon the now discarded "however slight" rule of contributory negligence. When the plaintiff's negligence approaches 50%, however, the defense may decide to gamble on a jury apportionment of fault that will bar the plaintiff's recovery

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[9] 256 S.E.2d at 882.

[10] 246 S.E.2d 907 (W. Va. 1978).

[11] *See* text accompanying note 39 *infra*.

[12] L.R. 3 H.L. 330 (1868).

[13] 253 S.E.2d 666 (W. Va. 1979).

[14] *See* H. WOODS, COMPARATIVE FAULT § 19.1 (1978)(discussion of surveys taken in Arkansas in 1958 and 1968).

completely, especially when substantial damages are involved. This, of course, only highlights the need for a thorough evaluation of plaintiff's case and a realistic assessment of the probable reduction in recovery for the plaintiff's percentage contribution to his own injury. The client must be made aware that it is no longer an "all or nothing" proposition and that his own negligence will result in a reduction of his overall award whether the case is resolved by way of settlement or trial.

The attorney representing the plaintiff should be very careful to join as defendants all persons who might have been involved in the occurrence. Practically speaking, the more culpable parties there are before the jury, the better chance there will be to spread the apportionment of fault and reduce the percentage of fault attributable to the plaintiff. The comparative negligence rule adopted in *Bradley* has no affect on the plaintiff's right to sue only one of several joint tortfeasors.[15] However, as recently pointed out by the court,[16] a defendant may implead any nonjoined tortfeasor as a third party defendant. It must be kept in mind that the plaintiff's negligence is not compared to each of the defendants, but rather is compared to the combined percentages of negligence of all the defendants. Equally important is the consideration that neither the comparative negligence rule nor *Haynes v. City of Nitro* alters the basic West Virginia law which provides for joint and several liability among joint tortfeasors after judgment.[17] The obvious reason for joining all possible defendants is that an injured plaintiff may recover all his damages from any one of a number of defendants, even if the plaintiff's percentage of negligence happens to exceed the percentage of negligence apportioned by the jury to that particular defendant.

A question which arises in consideration of multiple defendants is whether the apportionment of fault by the jury will include the negligence of absent tortfeasors or only the negligence of the parties to the action. It has been suggested that unsued tortfeasors should be included in the apportionment of negligence based upon the *Bradley* language that the plaintiff's negligence should be compared to "the other parties involved in the acci-

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[15] 256 S.E.2d at 886.

[16] Haynes v. City of Nitro, 240 S.E.2d 544 (W. Va. 1977).

[17] 256 S.E.2d at 886.

dent."[18] This likely will have little practical effect in West Virginia since all tortfeasors generally wind up as parties either because the plaintiff sues them all or the defendant brings them in as third party defendants under *Haynes*. Jurisdictions adopting comparative negligence have reached different conclusions on this question. Wisconsin and California courts have ruled that the plaintiff's negligence should be compared to the combined negligence of all other tortfeasors whose negligent conduct proximately caused the injury, whether or not they were joined as defendants.[19] South Dakota has held that a party shielded from liability by an automobile guest statute should not be considered in the apportionment of negligence.[20] A Flordia decision holds that only those tortfeasors actually joined will be considered in the causal comparison.[21] A federal district court interpreting the Kansas comparative negligence statute held that only defendants against whom recovery is allowed by law should be considered in allocating damages.[22] From the standpoint of simplicity, the preferable manner of handling this question is to allow apportioning of fault only among those parties actually before the court, especially in light of the *Haynes* decision. The comparative negligence rule does not change the right of a joint tortfeasor to obtain a *pro tanto* credit on the plaintiff's judgment for money obtained by the plaintiff in a settlement with another joint tortfeasor.[23]

With respect to opening statements, counsel for plaintiff should consider a full discussion of the new rule of comparative negligence and how it will effect the work of the jury. This is especially so where the voir dire questioning has revealed that some members of the jury panel have served on juries applying the old "however slight" contributory negligence rule. Some jurors may still cling to the idea that any degree of contributory negligence will defeat the claim. The plaintiff's attorney should consider conceding that his client was negligent to some degree since it will no

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[18] *Id.* at 885.

[19] Walker v. Kroger, 214 Wis. 519, 252 N.W. 721 (1934); American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 413, 547 P.2d 763, 143 Cal. Rptr. 692 (1978).

[20] Beck v. Wessell, 237 N.W.2d 905 (S.D. 1976).

[21] Kapchuck v. Orlan, 332 So. 2d 671 (Fla. Dist. Ct. App. 1976).

[22] Greenwood v. McDonough Power Equip., Inc., 437 F. Supp. 707 (D.C. Kan. 1977).

[23] 256 S.E.2d at 886-87.

longer be fatal to recovery and it is generally believed that juries appreciate this type of candor. In closing, counsel should again explain the new concept of comparative negligence and the role of the jury in arriving at damages. Counsel for the plaintiff should anticipate a defense argument in a close case of liability that the negligence of the plaintiff and the defendant should be evenly apportioned. There is a proclivity of juries to divide the negligence equally in a case where it is difficult to find exact proportions. This, of course, is a disastrous result under the new rule, so counsel must guard against such an unintended verdict by insuring that the jury is fully aware that an equal apportionment of fault has the same affect as a verdict for the defense.

A review of the court's instructions to the jury would be well advised until both counsel and prospective jury members become thoroughly familiar with the concepts of comparative negligence. The traditional instruction on proximate cause is likely to receive more attention than it has in the past since the defense counsel may rely upon "no proximate cause" as an argument for a complete bar to recovery.

Negligence, regardless of its form, cannot create a cause of action unless it is the proximate cause of the injury. To constitute proximate cause in West Virginia, the negligence charged must be one of the efficient causes of the injury and without which the injury would not have resulted.[24] The court in *Bradley* expressly held that the requirements of proximate cause have not been altered by the adoption of a comparative negligence system.[25] Although the rules governing proximate cause remain unchanged, the plaintiff's counsel should anticipate an increased reliance by the defense on the concept of "sole proximate cause."

Where an intervening cause breaks the chain of causation, it becomes the sole proximate cause and relieves the defendant of liability.[26] Thus, where practical, the defense will seek to avoid an apportionment of fault by asserting that the plaintiff's negligence or the act of a third party was the sole proximate cause of the

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[24] Long v. City of Weirton, 214 S.E.2d 832, 844-45 (W. Va. 1975).

[25] 256 S.E.2d 879, 885 (W. Va. 1979).

[26] Union Livestock Sales Co. Inc. v. Baltimore & O. R.R., 409 F. Supp. 50 (N.D. W. Va. 1976).

injuries.[27] From the plaintiff's view, the converse is equally true. If the defendant's negligence is found to be the sole proximate cause of the accident, the plaintiff will be entitled to full recovery without apportionment.[28]

Under the common law doctrine of contributory negligence, it has been suggested that the negligence of the respective parties was judged by different standards.[29] To avoid injustice due to the harsh results of a strict application of the contributory negligence defense, some courts developed subtle distinctions in the requirements of proximate cause. A party raising the defense faced a potentially greater burden of showing that the negligence of the plaintiff proximately contributed to his own injuries.[30] However, the abrogation of the "however slight" defense of contributory negligence eliminates the necessity of any judicial rule-bending of the proximate cause standard. The adoption of comparative negligence enables the trial court to review the theoretical equality of the proximate cause test for the plaintiff and defendant. As Dean Schwartz states, "[c]omparative negligence itself is flexible enough to provide for a fair disposition of the matter in the context of the fault system; further plaintiff 'helping' is unnecessary."[31]

While in a small number of cases an even application of the proximate cause standard may result in a "new-found" apportionment of fault to the plaintiff, this is certainly a small price to pay

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[27] Even if the defense is unsuccessful in asserting the "sole proximate cause" concept as a complete bar to plaintiff's claim, the proposition may still prove attractive on an "overkill" theory. Although the jury may be unpersuaded that the plaintiff's negligence was the "sole proximate cause" of the injuries suffered, it very well may be convinced that plaintiff's causal negligence was equal to or greater than the defendant's. As a practical matter, the result is the same for the defendant.

The defense also has been successfully employed where the plaintiff, although legally incapable of contributory negligence, was denied recovery on the basis of sole proximate cause. Korbelik v. Johnson, 193 Neb. 356, 227 N.W.2d 21 (1975) (five year old child darting in front of an oncoming vehicle).

[28] Mosca v. Middleton, 342 So. 2d 986 (Fla. 1977).

[29] James, *Contributory Negligence*, 62 YALE L.J. 691 (1953).

[30] *See generally* V. SCHWARTZ, COMPARATIVE NEGLIGENCE 92-96 (1974) and cases cited therein. *See also* Lilly v. Taylor, 151 W. Va. 730, 155 S.E.2d 579 (1967) (disallowing the defense of contributory negligence due to the remoteness of causation).

[31] V. SCHWARTZ, COMPARATIVE NEGLIGENCE 96 (1974).

for the removal of the unduly harsh common law doctrine of contributory negligence.

The introduction of comparative negligence in *Bradley* compels consideration of whether assumption of risk should continue in West Virginia as an absolute defense. Any attempt to resolve this issue necessitates an understanding of the several categories which comprise the overall doctrine of assumption of risk.[32]

Simply put, the thrust of the doctrine holds that "[a] plaintiff who voluntarily assumes a risk of harm arising from the neglect or reckless conduct of the defendant cannot recover for such harm."[33] The doctrine may be separated into two sub-divisions. Express assumption of risk arises in cases where the plaintiff agreed in fact that the defendant would not be held liable for harm resulting from defendant's conduct.[34] Implied assumption of risk is invoked in factual situations where the plaintiff has voluntarily placed himself "in a posture of known danger with an appreciation of such danger."[35]

Express assumption of the risk, which often appears in the form of an exculpatory clause, has remained unaffected in jurisdictions adopting a comparative negligence system.[36] When confronted by a situation where the client's recovery is seemingly barred by such an agreement, counsel should attempt to have the agreement declared void on such grounds as public policy, unequal bargaining position, or unconscionability.[37]

While comparative negligence jurisdictions apparently have retained the express assumption of risk doctrine as an absolute defense, the courts are widely split over the continued viability of the defense of implied assumption of risk. The confu-

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[32] For a thorough discussion of the impact of comparative negligence on the doctrine of assumption of risk and an analysis of judicial treatment in various jurisdictions, see Shaw, *The Role of Assumption of Risk in Systems of Comparative Negligence*, 46 INS. COUNSEL J. 360 (1979) [hereinafter referred to as Shaw]. *See also* V. SCHWARTZ, COMPARATIVE NEGLIGENCE 153-79 (1974).

[33] RESTATEMENT (SECOND) OF TORTS § 496A (1959).

[34] RESTATEMENT (SECOND) OF TORTS § 496B (1959).

[35] Clements v. Stephens, 211 S.E.2d 110, 115 (W. Va. 1975).

[36] V. SCHWARTZ, COMPARATIVE NEGLIGENCE, § 9.2 (1974); Shaw, *supra* note 32 at 361-64.

[37] *See, e.g.*, Lodge Distributing Co. v. Texaco, Inc., 245 S.E.2d 151 (W. Va. 1978) (by analogy).

sion surrounding the defense springs from an inability of the courts to distinguish clearly between contributory negligence and implied assumption of risk.[38] Both are based on the conduct of the plaintiff and it is this conduct which confers upon the plaintiff a degree of responsibility for his own injury. Thus, the distinction between the two concepts is largely one of form rather than substance. Recognition of this fact has prompted the majority of jurisdictions to abolish outright or to merge implied assumption of risk into the overall scheme of comparative negligence.[39]

Retention of the absolute defense of implied assumption of risk would be inconsistent with the purpose of comparative negligence. Instead, trial courts should focus on the reasonableness of the plaintiff's conduct. As recently summarized by a Florida district court of appeals:

> the defense of assumption of the risk is no less 'a primative device of achieving justice between parties who are both at fault' than was contributory negligence. It should meet the same fate as contributory negligence and *not* constitute a complete bar to recovery where comparative negligence is the measuring standard for recovery.[40]

Undoubtedly, the mandates of *Bradley* will force a total reexamination of the status of the common law doctrine of assumption of risk. Consistent with those mandates is the merger of implied assumption of risk within West Virginia's system of comparative negligence.

The court in *Bradley* gave some guidance to the practitioner with respect to the manner in which the new comparative negligence rule is to operate. A jury is required to state, by general

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[38] The West Virginia Supreme Court of Appeals attempted to articulate the difference between the two concepts by stating: "[t]he essence of contributory negligence is carelessness; of assumption of risk, venturousness." Hunn v. Windsor Hotel, Co., 119 W. Va. 215, 217, 193 S.E. 57, 58 (1937).

[39] *See, e.g.*, CONN. GEN. STAT. ANN. § 52-572(h)(c) (Cum. Supp. 1979) (abolishing last clear chance and assumption of risk); Li v. Yellow Cab Co. of Calif., 13 Cal.3d 804, 532 P. 2d 1226, 119 Cal. Rptr. 858 (1975) (merger of assumption of risk into general scheme of assessment of comparative liability). *See generally* SCHWARTZ, COMPARATIVE NEGLIGENCE 165-172 (1974); Shaw, *supra* note 32, at 388-405.

[40] Rea v. Leadership Housing, Inc., 312 So. 2d 818, 822 (Dist. Ct. App. Fla. 1975), aff'd, 348 So. 2d 287 (Fla. 1977).

verdict, the gross amount of damages of each party whom they find entitled to a recovery. The court then authorizes the use of limited special interrogatories for the purposes of assigning the percentage of fault, if any, attributable to each party.[41] After these verdicts are accepted, the trial court will calculate the net amount by deducting the party's percentage of fault from his gross award.[42] On the basis of the specific language of *Bradley* and on general policy grounds, the plaintiff's attorney should object to the use of extensive special interrogatories to the jury beyond those utilized for apportioning the percentage of fault among the parties. Special interrogatories respecting the defense of assumption of risk and addressing proximate causation should be avoided in favor of the general verdict forms which have commonly been used throughout the state prior to the *Bradley* decision. It is also important for the plaintiff's attorney to insure that the jury has been informed as to the effect of its apportionment. If the court's instructions to the jury are not clear, there is danger that the jury will become confused as to whether the dollar amount rendered by them will be reduced by the court or whether they are to reduce it initially by the plaintiff's percentage of negligence. It is also extremely important to advise the jury that the effect of a 50/50 apportionment of negligence is a defense verdict.

With respect to the application of the comparative negligence doctrine, it is clear that the court intended the *Bradley* decision to have full retroactivity.[43] Therefore, the plaintiff's counsel would be well advised to reevaluate recent cases which resulted in a defense verdict in light of the *Bradley* parameters. This is particularly true in those cases where the applicability of comparative negligence was raised during some stage of the litigation.

The comparative negligence rule of *Bradley* should work very favorably for plaintiffs in most cases and result in a more even handed application of the concept of tort liability to all parties in litigation. The *Bradley* decision is but the first step in a dynamic reevaluation of our negligence concept and it is hoped, from a plaintiff's point of view, that the questions to be answered in the

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[41] 256 S.E.2d at 885-86.

[42] *Id.* at 886.

[43] Id. at 887-90. *See also* Cady, *supra* note 5, at 490.

future will grow into a gradual evolution of a pure comparative fault system in West Virgina.