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NEGOTIATION AND SETTLEMENT: AN INSURER'S VIEW OF COMPARATIVE NEGLIGENCE

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At some point after bidding farewell to the absolute bar to recovery arising from contributory negligence and taking those first few steps into a new era of comparative negligence, attorneys must face a cold, hard question: "Now that I've got it, what do I do with it?" This question normally arises immediately after the first tort client has explained his problem and the attorney recognizes that all parties involved were negligent to some degree. Although armed with a thorough understanding of *Bradley v. Appalachian Power Co.*,¹ and an extensive review of the several comparative negligence texts available, each practitioner must still cope with an inevitable flash of doubt when it comes time to apply comparative negligence to a real case.

The real case, of course, is rarely decided in the courtroom. Most tort claims are settled directly between the parties or their insurers. Of the disputes in which either party is represented by an attorney, far more are settled than are ever tried. While statistics on such matters vary with locality, personalities, and issues, most automobile insurers feel that less than 5% of their claims persist to the point of trial.² Accordingly, the practical difficulties of dealing with any change in the law, even a change as significant as the adoption of comparative negligence, lie in a determination of the effect on the day-to-day handling of the "average" negligence action: one which has some discernable negligence on the part of both parties and reasonably ascertainable damages. The "special" case, with unusual legal complexities, can only be answered by the Supreme Court of Appeals of West Virginia. Similarly, the extreme injury case, which has blockbuster potential for both the plaintiff and the defendant, cannot be used to determine the practical effect of the adoption of a comparative negligence rule.

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¹ 256 S.E.2d 879 (W. Va. 1979).

² This statistic is based on claims filed with State Farm Insurance Co. as of August, 1979.

The beginning, and often the end, of research in any changing field of law is the examination of precedent from other jurisdictions. In the matter of comparative negligence, that approach yields something less than satisfactory comfort. Attorneys soon discover that although the majority of the states have adopted comparative negligence in one form or another,³ each has some feature, either in its law or its background, which distinguishes it from West Virginia. These features make it difficult to anticipate which course the West Virginia court will follow in developing the details of the new law through future decisions. Similarly, these distinguishing features make it difficult to draw any conclusions from results in other states on which to make any really reliable predictions.

Of the thirty-five states which have adopted a comparative negligence law, fourteen also have some form of No Fault law.⁴ No fault has far more effect on tort recovery than does comparative negligence. Therefore, any statistical results from these jurisdictions are so clouded that it is impossible to say with any confidence what effect was caused by which change. Of the twenty-one remaining states without No Fault, eighteen adopted comparative negligence by legislative actions.⁵ Any interpretation of their re-

³ Schwartz, *Comparative Negligence: Oiling the System*, TRIAL, July/Aug. 1975, at 58.

⁴ See COLO. REV. STAT. §§ 10-4-701 to -723 (1973); CONN. GEN. STAT. ANN. §§ 38-319 to -351(a) (West Supp. 1979); FLA. STAT. ANN. §§ 627.730-741 (West 1972); GA. CODE ANN. §§ 56-3401b to -3413b (1977); HAW. REV. STAT. §§ 294-1 to -41 (1976); KAN. STAT. ANN. §§ 40-3101 to -3121 (1973); MASS. ANN. LAWS ch. 90, §§ -34A, -34D, -34M, -34N, -34O (Michie/Law. Co-op 1975); MICH. STAT. ANN. §§ 24.13101-13179 (Supp. 1979); MINN. STAT. ANN. §§ 65B.41-.71 (West Supp. 1980); N.J. STAT. ANN. §§ 39:6A-1 to -20 (West 1973); N.Y. INS. LAW §§ 670-678 (McKinney Supp. 1979); N.D. CENT. CODE §§ 26-41-01 to -19 (1978 Replacement Vol.); PA. STAT. ANN. tit. 40, §§ 1009.101-701 (Purdon Supp. 1979); UTAH CODE ANN. §§ 31-41-1 to -13.4 (1974).

⁵ ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); IDAHO CODE § 6-801 (1979); LA. CIV. CODE ANN. art. 2323 (West Supp. 1980); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MISS. CODE ANN. § 11-7-15 (1972); MONT. REV. CODES ANN. § 58.607.1 (Supp. 1977); NEB. REV. STAT. § 25-1151 (1975 reissue); NEV. REV. STAT. § 41.141 (1977); N.H. REV. STAT. ANN. § 507:7a (Supp. 1979); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1979); OR. REV. STAT. § 18.470 (1977); R.I. GEN. LAWS § 9-20-4 (Supp. 1979); S.D. COMP. LAWS ANN. § 20-9-2 (1979 revision); TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1980); VT. STAT. ANN. tit. 12, § 1036 (1973); WASH. REV. CODE ANN. § 4.22.010 (Supp. 1978); WIS. STAT. ANN. § 895.045 (West Supp. 1979); WYO. STAT. § 1-1-109 (1977).

sults must be in light of specific statutory provisions, which West Virginia does not have. Of the remaining three states without No Fault and adopting comparative negligence by court decision, West Virginia stands alone in adopting a modified comparative negligence test. The other two states, California⁶ and Alaska,⁷ have chosen a pure comparative negligence approach.⁸

The uncertainty as to which of the many possible directions the West Virginia court will take on the questions left by *Bradley* points up the validity of the arguments favoring such changes by legislative action rather than judicial action.⁹ With time for study, planning, and drafting of an all-encompassing statutory change, properly considered legislation can address and answer myriad side issues necessarily involved in such an alteration of tort law. The court, while giving indications of its intention in some of the problem areas, is necessarily confined to the specifics of the individual case and cannot answer even the most obvious of additional issues. Those questions must await individually forged decisions.

⁶ *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

⁷ *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975).

⁸ "Under this principal, a plaintiff may recover regardless of the degree of his negligence, but the jury is required to reduce his award in proportion to his contributory negligence." 256 S.E.2d at 883.

⁹ At present, twenty-nine states have enacted comparative negligence statutes of one variety or another. See ARK. STAT. ANN. §§ 27-1763 to 1765 (1979); COLO. REV. STAT. § 13-21-111 (1973); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1979); HAW. REV. STAT. § 663-31 (1976); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258a (1976); LA. CIV. CODE ANN. art. 2323 (West Supp. 1980); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MASS. ANN. LAWS ch. 231, § 85 (Michie/Law. Co-op Supp. 1979); MINN. STAT. ANN. § 604.01 (West Supp. 1979); MISS. CODE ANN. § 11-7-15 (1972); MONT. REV. CODES ANN. § 58.607.1 (Supp. 1977); NEB. REV. STAT. § 25-1151 (1975 reissue); NEV. REV. STAT. § 41.141 (1977); N.H. REV. STAT. ANN. § 507:7a (Supp. 1979); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1979); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1979); OR. REV. STAT. § 18.470 (1977); PA. STAT. ANN. tit. 17, § 2101 (Purdon Supp. 1979); R.I. GEN. LAWS § 9-20-4 (Supp. 1979); S.D. COMP. LAWS ANN. § 20-9-2 (1979 revision); TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1980); UTAH CODE ANN. § 78-27-37 (1977); VT. STAT. ANN. tit. 12, § 1036 (1973); WASH. REV. CODE ANN. § 4.22.010 (Supp. 1978); WIS. STAT. ANN. § 895.045 (West Supp. 1979); WYO. STAT. § 1-1-109 (1977).

Of these states, Louisiana, Mississippi, New York, Rhode Island and Washington have adopted "pure" comparative negligence.

Urgently needed is a decision on the question of apportionment of the loss among joint tort-feasors. The court in *Bradley* makes it clear that joint tort-feasors are still to be held jointly and severally liable.¹⁰ Assuming that the defendants are solvent or insured, and in view of both the decision in *Haynes v. City of Nitro*¹¹ and the interpretation of it in *Bradley* regarding the right of enforced contribution among joint tort-feasors, the inquiry turns on the proportion of contribution to be made. Looking at the fact that courts now must determine liability in terms of the comparative proportion of negligence, and at the *Bradley* language,¹² it seems most logical that, in addition to the plaintiff's recovery being limited by his percentage of negligence, the defendant's payment should be predicated on his percentage of negligence. If joint tort-feasors are equally guilty, equal sharing of the judgment should be proper. If, however, one of two tort-feasors is found to be 30% negligent and the other 70% negligent, a true adoption of comparative negligence would seem to demand that contribution between them be shared 30%/70%. Otherwise, why assign a degree of negligence to each party? Assigning the negligence of the plaintiff alone would suffice if all defendants must still share equally in the verdict.

Beyond the very pressing need for a decision on contribution apportionment, clarification is needed on the application of such doctrines as last clear chance, assumption of risk, imputed negligence, and the other defenses, counter-defenses, and doctrines which are interwoven as part of the fabric of West Virginia tort law. *Bradley* specifically cites the retention of the last clear chance doctrine¹³ but fails to elaborate further. If the plaintiff can establish that the defendant had the last clear chance to avoid an accident, is all of the plaintiff's negligence excused? As last clear chance arose to avoid the harshness of a strict application of contributory negligence, which no longer occurs, does this state now have a comparative last clear chance rule? The most rational extension of comparative negligence seems to direct that

¹⁰ *Id.* at 886.

¹¹ 240 S.E.2d 544 (W. Va. 1977).

¹² "[I]t will be the jury's obligation to assign the proportion or degree of this total negligence among the various parties, beginning with the plaintiff . . ." 256 S.E.2d at 885 (emphasis added).

¹³ *Id.* at 887.

all such doctrines meld into an overall comparison of negligence. There should be neither an absolute bar to recovery nor an absolute excuse to plaintiff's negligence. Rather, there simply should be an overall determination of all activity proximately contributing to the loss, and an overall determination of the degree to which each party contributed.

Perhaps the most critical factor in an attempt to predict the result of a trial is the question of whether the trial court should instruct, or counsel should argue, the effect of the jury's allocation of the percentage of negligence. This has been a problem in all states which have wrestled with the details of comparative negligence, and it is one which must be faced promptly in West Virginia. *Bradley* takes the position that the jury is not to apply the percentage of negligence to the damages. Rather, the jury is to apportion the negligence and separately assess the damages, leaving it to the trial court to reduce the damages by any degree of negligence found against the plaintiff.¹⁴ This suggests that the court recognizes and desires to avoid the overly subjective result that can occur when the same jury both assesses liability and makes the final award of damages. An objective, accurate assessment of the negligence of each party would appear to require that the jury not be advised of the effect of its assessment of negligence.

Recognizing that there will be a great many reversals of field as the Supreme Court of Appeals of West Virginia answers, one by one, the questions which abound, there are conclusions that can be reached so that business may be conducted *almost* as usual.

With regard to bodily injury accidents, there probably will be no appreciable change in result. Despite the criticism that has been made of the harsh result of barring recovery because of contributory negligence, no matter how slight, the agonizing has been primarily theoretical. Even where there was some clear negligence on the plaintiff's part, juries have historically had no difficulty in ignoring the court's instructions by finding for the plaintiff and awarding damages in a lower amount than would have been expected had defendant's negligence been assessed at 100%. In

¹⁴ *Id.* at 885-86.

other words, despite the theoretical revolution apparent in the adoption of comparative negligence, what has really been done is no more than the judicial formalization of what juries have been doing for years in practice. Neither the plaintiff nor the defendant has ever really expected a defendant's verdict where plaintiff's negligence was less than 50%.

The reasoning and the negotiating arguments may be different in the future, but the result will be the same. In the past, the defendant might have argued, "damages should be assessed at around \$10,000, but the plaintiff's negligence means about a fifty/fifty chance of a defendant's verdict so, since you might get \$10,000 or you might get nothing, we'll settle up to \$5,000." Now, the defendant might say, "damages should be assessed at around \$10,000, and will be reduced 45% to 50% by plaintiff's negligence, so we'll settle up to \$5,000." Properly, of course, if plaintiff's negligence is set at 50%, he recovers nothing. However, until the West Virginia court rules on the right of counsel to argue the effect of the jury's apportionment on damages, it seems likely that juries will continue the practice of deciding that the plaintiff should recover something although he was the most negligent. This probably will occur in a case involving relatively substantial injury where the plaintiff is 60-70% negligent and the defendant is 30-40% negligent. Such a case will give rise to a 49%/51% negligence apportionment so long as the trial court instructs, or counsel argues, the effect of the apportionment of negligence.

Certainly there will still be the occasional surprise. However, insurers anticipate that the jury, now freed from the compulsion to ignore the court's instructions and the obligation to make the final determination of the award, will make a straightforward and accurate apportionment of the negligence. Giving due credit to the uncertainties of trial, if a dispassionate appraisal of the evidence suggests a 40%/60% split of negligence, it is expected that a jury will come to that same 40%/60% decision. It is unlikely that any jury will believe it can assess the comparative percentages of negligence at closer than 5% increments. The greater probability is that apportionments will normally run in 10% increments (90%/10%, 80%/20%, 60%/40%). True 50%/50% cases will probably be rendered as 45% plaintiff/55% defendant, with a few 49%/51% cases.

Based on these assumptions, insurers will probably negotiate

and settle bodily injury claims very much as they have in the past. The only flat denials have always been in cases with negligence primarily on the plaintiff, and those are still cases for denial. Settlement evaluations will not change materially, although, as indicated, the reasons may change.

There should be small changes at each end of the payment spectrum which will have an effect on individual cases, but which will probably balance each other out in the long run. At one end is the case involving slight negligence on the plaintiff, for example, 20%. In the past, insurers would have paid 100%. Now they will evaluate as carefully as possible and aim at paying 80%. At the other end, in cases where negligence is essentially 50%/50%, insurers in the past might have declined payment, anticipating a defendant's verdict. Now they will be less likely to decline settlement and aim at paying 50% to 55% of the damages.

The real change resulting from the adoption of a comparative negligence test will occur in cases where the damages are more clearly fixed: for example, repair cost or cash value of a specific item of property. Because of the reasonably foreseeable damages, defendants, particularly insurers, have traditionally been less flexible in negotiation. Either the defendant was liable or not. There was much less compromise and less reason to compromise. If the plaintiff was slightly negligent, 10% to 20%, the claim was probably paid in full. At 30% or more negligence on the plaintiff, doubts began to arise, and at 50% the claim was invariably denied. Now, insurers will be looking much closer at the comparative amount of negligence on such a claim than they did in the past, and, with a reasonably accurate quantum of damages, will be reducing the amount they are willing to pay by that percentage which represents the plaintiff's negligence.

This means two things to the practicing attorney. First, claims for 100% of damages in a fixed amount situation are going to meet much more resistance than in the past. Because of the increased number of claims on which the defendant's insurer offers less than 100% payment, there is going to be an increase in prospective clients in the office, mostly with claims for small amounts of property damage.

In addition to the change in property damage claims and the lack of change in bodily injury claims, insurance carriers will be undergoing some further alterations in their activities from which

some fallout may reach the practicing bar. Initially, there may well be a delay in completing investigations and reaching decisions. This will be due to the need for a full investigation and detailed analysis of the comparative proportion of negligence in far more cases than in the past. To the defense counsel, this will mean more frequent requests for predictions on those vital details which are presently floating in mid-air, and also for clarification in the areas in which *Bradley* gives direction, but with which no one is yet sufficiently comfortable to make a quick decision.

If *Bradley* is the light at the end of the tunnel, as future decisions illuminate the rest of the way, let us hope it turns out to be the end we wanted to reach.