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legislature.¹⁹ But, in West Virginia the Supreme Court of Appeals has inherent power as well as statutory authorization to prescribe, promulgate, and amend rules of procedure.²⁰ Consequently, even if the West Virginia court takes the view that the doctrine of *forum non conveniens* is purely a procedural matter, recognition of the doctrine would be directly within the rule making power of the court.

Whether the West Virginia court will adopt the doctrine of *forum non conveniens* in the shadow of the good cause statute is a question yet to be answered. Two arguments that could be made for such an adoption would be the handling of the matter in other states with good cause statutes and the inherent common law power of courts to decline to exercise jurisdiction when a more appropriate forum exists. But the reasoning in *Trahan* could also be set forth, and perhaps convincingly enough to influence the court to render a similar decision.

Peter Thomas Denny

Torts—Comparative Negligence Adopted by Judicial Decision

Wrongful death action was brought for the death of *P*'s decedent. *P* failed to allege that decedent exercised ordinary care for his own safety at the time of the accident.¹ *P* did allege that if there was any negligence on the part of the decedent, it was less than the negligence of the *P* when the two were compared. The *D* moved to dismiss for failure to state a cause of action. Motion allowed, and *P* appealed to the Supreme Court of Illinois. The Supreme Court transferred the case to the Appellate Court for the Second District stating that the question of whether the rules that contributory negligence barred recovery should be changed, as a matter of justice and public policy, was a matter that needed consideration. *Held*, the action could not be defeated by negligence of *P*'s decedent unless such negligence was at least equal to that of defendant; but, *P*'s damages would be diminished in proportion to the amount of negligence

¹⁹ 200 So. 2d 118, 122 (La. 1967).

²⁰ Order of the Supreme Court of Appeals of W. Va., Oct. 13, 1959, promulgating the W. Va. Rules of Civil Procedure for trial courts of record, 144 W. Va. xii; W. VA. CODE ch. 51, art. 1, § 4a (Michie 1966).

¹ In Illinois the plaintiff has the burden of showing that he was not contributorily negligent. *Aurora Branch R.R. v. Grimes*, 13 Ill. 585, 587 (1852); *Clubb v. Main*, 65 Ill. App. 2d 461, 470, 213 N.E.2d 63, 67 (1965).

attributable of *P*'s decedent. *Maki v. Frelk*, 229 N.E.2d 284, (Ill. App. Ct. 2d Dist. 1967).

The doctrine of contributory negligence was historically a creature of the courts, not of the legislature.² The Illinois Appellate Court for the Second District found the doctrine to be unsound and unjust under present conditions, and stated that the courts not only had the right but the duty to abolish contributory negligence as a complete defense. The doctrine that contributory negligence is a complete bar to recovery originated³ in the English case of *Butterfield v. Forrester*.⁴ There it was held that two elements were necessary to support the action of negligence: (1) negligence on the part of the defendant; and (2) "no want of ordinary care" on the part of the plaintiff.⁵ The asserted hardship of the contributory negligence doctrine is that the plaintiff is completely barred from recovery if his own negligence has *to any degree* contributed as a proximate cause to the act causing the injury.⁶ Contributory negligence will not defeat recovery if it remotely caused the injury, however recovery will be barred if the contributory negligence is the proximate or concurrent cause of the injury.⁷ Contributory negligence "places upon one party the entire burden of a loss for which two are, by hypothesis, responsible."⁸

Comparative negligence may be defined as follows: even though the plaintiff was negligent and even though his negligence, concurring with the negligence of the defendant, proximately caused his injury, he may still recover.⁹ That is, in comparative negligence the causative character of plaintiff's act will not bar recovery, subject to certain limitations.¹⁰ Whether plaintiff's act was a contributing,

² *Maki v. Frelk*, 229 N.E.2d 284, 291 (Ill. App. Ct. 2d Dist. 1967).

³ Turk, *Comparative Negligence on the March*, 28 CHI-KENT L. REV. 189 (1950); Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36 (1944); W. PROSSER, *THE LAW OF TORTS*, 426 n. 1 (3d ed. 1964).

⁴ 11 East. 60, 103 Eng. Rep. 926, 19 Eng. Rul. Cas. 189 (1809).

⁵ *Id.* at 61, Eng. Rep. at 927, Eng. Rul. Cas. at 190.

⁶ Turk, *Comparative Negligence on the March*, 28 CHI-KENT L. REV. 189, 199 (1950). See, e.g., *McMicken v. Province*, 141 W. Va. 273, 90 S.E.2d 348, 59 A.L.R.2d 470 (1958); *Smith v. Gould*, 110 W. Va. 579, 159 S.E. 53, 92 A.L.R. 23 (1934); *Haeg v. Sprague, Warner and Co.*, 281 N.W. 261, 263, 202 Minn. 425 (1938) (discussing the "hardship" of the doctrine).

⁷ Annot., 114 A.L.R. 830, 831 (1938). The annotation defines the doctrine of contributory negligence and comparative negligence but other than the basic definitions used, the annotation is inaccurate and outdated in the discussion of the forms of comparative negligence.

⁸ *THE LAW OF TORTS*, *supra* note 3, at 443.

⁹ Annot., 114 A.L.R. 830, 831 (1938).

¹⁰ *Id.*

proximate or concurring cause is unimportant as long as it is not the sole cause.

The limitation which will bar recovery depends on which one of the three forms of comparative negligence the particular jurisdiction has adopted. The pure form of comparative negligence is demonstrated by the Federal Employers' Liability Act,¹¹ which applies to negligence actions in federal or state courts, as a result of an injury to a railroad employee engaged in interstate commerce.¹² Contributory negligence may be used to diminish the damages in proportion to the amount of negligence attributable to plaintiff.¹³ Under the pure form of comparative negligence a defendant guilty of 1% of the total negligence is liable for 1% of the total damages.¹⁴ The defendant is liable in proportion to the percentage of the total negligence attributable to him.

Another form of comparative negligence is the modified form. This is the type adopted by the court in the principal case. Plaintiff is entitled to recovery unless his own negligence is at least equal to the defendant's; but plaintiff's damages may be reduced by the proportion of the negligence attributed to him.¹⁵ That is, a plaintiff whose negligence was 49% of the total, as compared with defendant's 51%, may recover 51% of the damages; but if plaintiff were guilty of 50% of the negligence he could recover nothing.¹⁶ Wisconsin¹⁷ is one of the states which have adopted this form by statute.¹⁸

¹¹ 45 U.S.C. §§ 51-60 (1964).

¹² Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 478 (1953); McGivern v. Northern Pacific Ry., 132 F.2d 213 (8th Cir. 1942).

¹³ Keller v. Penn R. R., 100 F. Supp. 50, 51 (W.D. Penn. 1951); Wetherbee v. Elgin, J. & E. Ry., 191 F.2d 302, (7th Cir. 1951); Hutchins v. Akron, Canton & Youngstown R. R., 162 F.2d 189 (6th Cir. 1947); Alabama Great Southern R. R. v. Baum, 249 Ala. 442, 31 So. 2d 366 (1947).

¹⁴ Atten, *Should Illinois Adopt a Comparative Negligence Statute? Yes!*, 51 LL. B. J. 194, 201 (1962). For a discussion of the method of damage apportionment when two parties are injured see Turk, *Comparative Negligence on the March*, 28 CHI-KENT L. REV. 189, 207 (1950). Some additional problems are raised which are beyond the scope of this comment, when more than two parties are injured. A discussion of this can be found in C. GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE CASES* (1936).

¹⁵ Maki v. Frelk, 229 N.E.2d 284, 291 (Ill. App. Ct. 2d Dist. 1967).

¹⁶ Atten., *supra* note 14, at 201.

¹⁷ WISCONSIN STATUTES ANNOTATED 895.045 (West 1966). "Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering."

¹⁸ For illustrative cases see Grana v. Summerford, 12 Wis. 2d 517, 107 N.W.2d 463 (1961) holding that the comparison of negligence is deter-

The third type is the "slight and gross" form of comparative negligence.¹⁹ Under this view the doctrine of contributory negligence is modified only where plaintiff's negligence is "slight" and that of the defendant's is "gross" in comparison. However this form has little to recommend it since it shifts the entire loss from the plaintiff to the defendant, when both parties are still at fault.²⁰ That is, there is no attempt to divide damages and if the rule applies²¹ plaintiff gets full recovery.²² This form of comparative negligence no longer exists at common law,²³ although it is embodied in a few statutes.²⁴

There are three principal arguments for adopting some form of comparative negligence. First, it is a general principle that when the reason for a rule has disappeared, the court will reconsider the law. Some argue that the doctrine of contributory negligence was created to protect growth of industry and it is contended that this is no longer a valid justification for retaining it as an absolute defense.²⁵ Second, comparative negligence will tend to induce pretrial settlement.²⁶ Third, the doctrine of comparative negligence produces a more just distribution of loss.²⁷ There are two parties, both by hypothesis responsible for a loss; plaintiff's negligence may have been slight, but plaintiff is completely barred from recovery and must bear the entire loss himself under a contributory negligence rule.²⁸

The arguments against comparative negligence are similarly varied. First, the harsh doctrine of contributory negligence is compromised by the jury and these compromised verdicts mitigate any harshness of the contributory negligence doctrine.²⁹ Authorities agree that this occurs.³⁰ However, at least one commentator states that such

mined by the degree of contribution to the total negligence; see *Taylor v. Western Cas. & Sur. Co.*, 270 Wis. 408, 71 N.W.2d 363 (1955); *Dinger v. McCoy Transportation Co.*, 251 Wis. 265, 29 N.W.2d 60 (1947).

¹⁹ This was the form of comparative negligence used in Illinois from 1858 to approximately 1894. The form was abandoned because of the problems involved. For a discussion see Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36 (1944).

²⁰ THE LAW OF TORTS, *supra* note 3, at 444.

²¹ *Id.*, Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 484 (1953).

²² *Id.*

²³ THE LAW OF TORTS, *supra* note 3, at 445.

²⁴ THE LAW OF TORTS, *supra* note 3, at 445, n. 56.

²⁵ *Maki v. Frelk*, 229 N.E.2d 284, 286 (Ill. App. Ct. 2d Dist. 1967).

²⁶ *Atten.*, *supra* note 14, at 197.

²⁷ *Id.*

²⁸ THE LAW OF TORTS, *supra* note 3, at 443.

²⁹ *Atten.*, *supra* note 14, at 197.

³⁰ Keeton, *Creative Continuity In the Law of Torts*, 75 HARV. L. REV. 463, 506 (1962); *accord*, *Haeg v. Sprague, Warner & Co.*, 202 Minn. 425, 281 N.W. 261, 263 (1938).

duplicity is a reason for *adopting* comparative negligence since the compromised verdict is a "corroding influence" on the public attitudes about law and legal institutions.³¹ Secondly, comparative negligence will not encourage settlements because plaintiff is more likely to recover something, and thus insurance and defense costs will increase.³² The third argument is that a case of questionable liability is more likely to be filed for trial and thus create more congestion in the courts.³³

Apparently the Illinois Appellate Court in the principal case felt that the argument for the adoption of comparative negligence was the better view. In response to the transfer order from the Supreme Court of Illinois the appellate court rejected the common law defense of contributory negligence as an absolute bar by judicial decision rather than by action of the state legislature.³⁴ The Illinois code adopts the common law of England "prior to the fourth year of James the First" as the law of Illinois except as modified by the legislature.³⁵ The fourth year of James the First began 1606.³⁶ The doctrine of contributory negligence was created in the English case of *Butterfield v. Forrester* in 1809³⁷ and therefore was not part of the common law as adopted from England. Contributory negligence was established by judicial decision in Illinois in 1852,³⁸ and thus there was no constitutional bar to the abrogation by the court of the defense as a bar to recovery.

As late as 1955, there were 26 states which had adopted a rule of comparative negligence in one type of action or another.³⁹ West Virginia would be in the minority in being one of the fewer states that has no form of comparative negligence.⁴⁰

³¹ Keeton, *supra* note 30, at 506.

³² Atten., *supra* note 14, at 197.

³³ *Id.* These last two arguments are the converse of the view that comparative negligence will encourage pretrial settlement. The results of a survey on these questions are found in Atten., *supra* note 14, at 202.

³⁴ *Maki v. Frelk*, 229 N.E.2d 284, 291 (Ill. App. Ct. 2d Dist. 1967).

³⁵ SMITH-HURD ILLINOIS ANNOTATED STATUTES 28-1 (1934). (There are certain exceptions not pertinent to this discussion).

³⁶ *Lasier v. Wright*, 304 Ill. 130, 135, 136 N.E. 545, 547 (1922).

³⁷ 11 East. 60, 103 Eng. Rep. 926, 19 Eng. Rul. Cas. 189 (1809).

³⁸ *Aurora Branch R. R. v. Grimes*, 13 Ill. 585 (1852). Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 43 (1944).

³⁹ Atten., *supra* note 14, at 196.

⁴⁰ Workmen's Compensation laws abolish the defense of contributory negligence and allow damages. But because of the social policy and underlying theory of the statutes they are not considered comparative negligence statutes.

The West Virginia courts have clearly held that comparative negligence does not apply in West Virginia.⁴¹ A judicial reversal of this view, as in the principal case, would appear to be contrary to the constitution and laws of the state. The constitution⁴² and laws⁴³ of West Virginia adopt as the law of West Virginia, the common law of England, except as altered by the Virginia Assembly prior to June 20, 1863, or has been, or shall be altered by the legislature of this state. Therefore if the common law rule existed at the time of the adoption of the present⁴⁴ West Virginia Constitution, then it is still the law of the State, and apparently can only be changed by the Legislature.⁴⁵ *Butterfield v. Forrester* was decided in 1809 and the present West Virginia Constitution was adopted in 1872.

Therefore, it would appear on first impression, that if comparative negligence were to be adopted in West Virginia it must be done by legislative action; however, there is a possibility of judicial determination of the question. The West Virginia Supreme Court of Appeals has held that under the common law when the reason for a rule ceases, the rule itself ceases.⁴⁶ Under this rule, it appears that notwithstanding the applicable constitutional and statutory provisions, the court may change the common law as adopted by West Virginia without legislative action.⁴⁷ This raises the question of whether such

⁴¹ *Eastern Gas and Fuel Associates v. Midwest-Raleigh Inc.*, 253 F. Supp. 954, 963 (N.D. W. Va. 1966); *McMicken v. Province*, 141 W. Va. 273, 279, 90 S.E.2d 348, 352, 59 A.L.R.2d 470 (1955); *Otte v. Miller*, 125 W. Va. 317, 325, 24 S.E.2d 90, 94 (1943).

⁴² W. VA. CONST. art. VIII, § 21. "Such parts of the common law, and of the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the Legislature. . . ."

⁴³ W. VA. CODE ch. 2, art. 1, § 1 (Michie 1966). "The common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, by the legislature of this State."

⁴⁴ *Adkins v. St. Francis Hospital*, 149 W. Va. 705, 720, 143 S.E.2d 154, 163 (1965).

⁴⁵ *Seagraves v. Legg*, 147 W. Va. 331, 338, 127 S.E.2d 605, 608 (1962); *State v. Arbogast*, 133 W. Va. 672, 675, 57 S.E.2d 715, 717 (1950); *Leros v. Parker*, 79 W. Va. 700, 704, 91 S.E. 660, 661 (1917).

⁴⁶ *Currence v. Ralphsnyder*, 108 W. Va. 194, 151 S.E. 700, 702 (1929); *See Wyckoff, Our Changing Common Law*, 48 W. VA. L. Q. 24 (1941).

⁴⁷ *But see State v. Arbogast*, 133 W. Va. 672, 674, 57 S.E.2d 715, 717 (1950). The court rejected the contention that when the reason for the rule had ceased, the court could change the rule. The Court held that under the Constitution and laws only the Legislature could change the common law rule. However it apparently was *not contended* that the maxim of abolishing the rule when the reason ceases to exist, was itself part of the common law. No West Virginia case has been found where this contention was made.

a view of the common law would be void as repugnant to the constitution.⁴⁸ The West Virginia court has also stated that they are "unmistakably enjoined to leave drastic changes in the common law to the legislative branch of the State government."⁴⁹ The questions of whether the adoption of comparative negligence by the court would be a drastic change, or whether such action violates the principle of separation of powers, would themselves be questions for the West Virginia court to resolve.

Martin Joseph Glasser

**Torts—Licensed Driver's Assumption of Risk While Instructing
an Unlicensed Operator**

P was giving *D*, a novice driver, driving instructions when the car ran off the road and *P* was injured. *P* sued *D* for her injuries and the trial court entered a judgment *non obstante verdicto* in favor of *D*, and *P* appealed. *Held*, reversed. One who accompanies a driver who possesses only a learner's permit for the purpose of giving driving instructions does not assume the risk of injury as a *matter of law*. *Chalmers v. Willis*, 231 A.2d 70 (Md. 1967).

The dissenting judge felt that there was no valid factual question as to the cause of the accident and that the accident was the result of the defendant's inexperience which was the very factor of which the plaintiff, as a matter of law, had assumed the risk.¹ The majority conceded that when the undisputed facts allow it, a plaintiff may be said to have assumed the risk as a matter of law. The court felt, however, that in this case and the great majority of cases there are several factual determinations which must be made by the jury before the law can be applied to the particular case.² The jury might have to determine any one or more of these factual questions: whether the plaintiff was accompanying the defendant to satisfy a statutory provision or to give active instructions; whether the driver, based on his experience doing the act that caused the accident, could still properly be held negligent in spite of his inexperience; whether the plaintiff, based on the facts, could have reasonably

⁴⁸ W. VA. CONST. art. VIII, § 21.

⁴⁹ *Cunningham v. County Court of Wood County*, 148 W. Va. 303, 308, 134 S. E.2d 725, 728 (1964).

¹ *Chalmers v. Willis*, 231 A.2d 70, 76 (Md. 1967) (dissenting opinion).

² *Chalmers v. Willis*, 231 A.2d 70, 73 (Md. 1967).