ADJUSTING TO COMPARATIVE NEGLIGENCE IN NEBRASKA

BARRY S. GROSSMAN†

With the adoption of Nebraska Legislative Bill Eighty-Eight, Nebraska becomes one of the last states to adopt comparative negligence. The term "comparative negligence" is misleading, however, as Nebraska has retained a form of comparative negligence since 1913.1 This analysis does not in any way attempt to cover the effects of adopting comparative negligence in a contributory negligence jurisdiction. This Article serves as an introduction to the affirmative defense in this state, as a welcome to a perhaps long anticipated system, and as a prediction of the further adjustments that are inevitable to Nebraska tort law.

HISTORY

Ironically, Nebraska was one of the first states to adopt a modified comparative negligence system. In 1907, the law that became known as the Slight-Gross Rule of comparative negligence was adopted to compensate railroad workers.2 Under the statute, the fact that an employee was contributorily negligent would not bar the employee's recovery when the employer's negligence was gross in comparison to the slight contributory negligence of the employee. The damages would be diminished by a jury in proportion to the amount of the employee's contributory negligence.3

This same rule was expanded to apply to all negligence actions in 1913. The rule has undergone little change since that time. In essence, Nebraska has preserved the harsh application of contributory negligence that would bar a plaintiff's recovery. Legal historians have speculated that the creation of the Slight-Gross Rule and the retention of this rule in Nebraska for over eighty years was based on an attempt to incorporate the notions of degrees of negligence that had

† J.D. 1985, University of Nebraska of Lincoln. Mr. Grossman is in private practice in Omaha, Nebraska. Mr. Grossman is the Department Head of Legal Studies at Nebraska College of Business and is a Legal Instructor at Creighton University School of Law.

been used to avoid the harsh rule of contributory negligence.4

The Slight-Gross Rule places an arguably great burden on a jury. The comparison of the slight negligence of the plaintiff to the gross level of the defendant is not based on either an objective standard, a measurement of fault, or a point by point determination. If the claimant's action was not barred, then any recovery would be reduced in proportion to his share of the negligence compared to the total.5

Moreover, the jury would have to examine the performance of the negligent parties in their entirety. The adoption of the new modified system is a natural evolution from the Slight-Gross Rule that attempted to retain contributory negligence in a comparative fault setting.

ADOPTION AND ADJUSTMENT

The newly adopted comparative negligence rule is a modification of the "pure" comparative negligence theory. Under the pure system, the jury apportions the damages between the parties according to their respective fault.6 The choice of modified comparative negligence over the pure system may reflect lawmakers' underlying notions of justice, specifically that a plaintiff equally or more negligent than the defendant should not be allowed compensation for his damages. Such a principle explains the legislative choice of what has been called the "49% Rule." Under the rule and Nebraska's new system, a plaintiff's negligence action against a tortfeasor survives and is apportioned as to fault unless the plaintiff's negligence is greater than or equal to the defendant's negligence. This variation of the modified system is a slightly different version than the "50% Rule" which allows the plaintiff to recover even if his negligence is equal to that of the defendant. The 49% Rule drives home the belief that the law should not force negligent defendants to compensate parties who are at equal or greater fault for their injuries.

The modified comparative fault system and comparative negligence overall have been the substance of debate since the principle of identifying a claimant's own negligence came into being.7 Support

4. 1 COMPARATIVE NEGLIGENCE LAW AND PRACTICE § 2:20[4], at 2-22 to 2-23 (A. Best 1991).
5. Id.
7. The doctrine began to evolve in Butterfield v. Forrester, 103 Eng. Rep. 926, 927 (K.B. 1809). However, many historians trace the origins of comparative negligence to
for a comparative fault system, modified or otherwise, has rested on its ability to apportion damages according to fault. Critics argue that comparative fault variations are more just than the harsh barring rule of contributory negligence. Moreover, by allocating proportionate fault, comparative negligence jurisdictions reflect a more realistic vision of tort law than the win-loss result of contributory negligence.\(^8\)

The mechanics of comparative negligence theoretically allow effective and flexible ways to represent the rights of the client. These arguments may explain the adoption of comparative negligence in almost all the states.\(^9\)

Arguments against comparative negligence have been fewer in recent years. However, jurisdictions like Nebraska which has adopted modified or pure comparative negligence can anticipate the problems that arise with dramatic changes in tort systems that have remained unaltered for several decades.

**JURIES**

One of the more nagging realities of adopting comparative negligence is the struggles of juries in allocating fault. Although jurisdictions that have adopted this system retain a great confidence in their juries, it is highly optimistic to assume that a jury, as well as the trial court, will easily adjust to the mechanics of comparative negligence.\(^10\)

The difficulty in understanding the application of the affirmative defense may lie in several areas. When allocating fault, how may a jury determine causation? Or the duty of each party? The burden of the fact-finder is apparent when one party's duty is a higher degree of care under the law (i.e., the innkeeper v. his injured patron). First, the jury must be able to appreciate the different levels of duty; second, the jury must apportion a measure of fault on the party according to that respective duty; and third, the jury must place both in a perspective that will accurately determine percentages of fault. This task will prove more difficult in trial courts that are accustomed to the Slight-Gross Rule application.

Obviously, the above-mentioned burden placed on a jury will be

\(^8\) Raisin v. Mitchell, 173 Eng. Rep. 979, 981 (C.P. 1839), in which the plaintiff's negligence did not necessarily bar his recovery. See Humphrey, Haas & Gritzner, Comparative Negligence in Iowa - The Time Has Come for the Iowa Supreme Court to Put Its House in Order, 31 Drake L. Rev. 709 (1981-82) (explaining the history of comparative negligence).

\(^9\) Forty-five states have adopted some form of comparative negligence. Lately, the trend towards comparative negligence systems has slowed due to other aspects of tort reform, such as damage caps and protection for the deep pocket defendant. Schwartz, supra note 6, § 1.2, at 4.

alleviated by consistent use of jury instructions. This alleviation may be where attention should be directed in the near future. It will be more imperative than before that any instructions submitted be drafted in a simple and concise manner. Although litigators have become increasingly concerned with this philosophy, the change to comparative negligence may result in a major alteration and redrafting of applicable state jury instructions. At the same time, adjustments that have taken place in other jurisdictions that have adopted comparative negligence may prove invaluable in the next few years.\textsuperscript{11}

**Last Clear Chance and Assumption of Risk**

The adoption of comparative negligence will no doubt cause a major reform in other, age-old defenses that still remain in tort law. The doctrine of Last Clear Chance may not survive the new modified system. Under this theory, the plaintiff's own negligence will not bar his recovery against a defendant who had the "last clear chance" to avoid the accident. This doctrine has been the target of criticism for many years. However, as the states "evolve" beyond contributory negligence into a more comparative negligence system, the last clear chance doctrine proves to be inconsistent. This is especially true when the theory is viewed as another name for contributory negligence.\textsuperscript{12} Barring a party's recovery is in direct conflict with the comparative negligence notion of apportionment. Moreover, the preservation of the last clear chance doctrine in a modified system has been theorized as resulting in absurd applications, contrary to the spirit of the 49\% Rule.\textsuperscript{13}

Proponents of the last clear chance doctrine in a comparative negligence system argue that a state legislature that does not address the last clear chance doctrine is implicitly intending to retain the doctrine.\textsuperscript{14} The language of Nebraska Legislative Bill Eighty-Eight is silent on the theory of last clear chance in its new system. One can only assume that the task of retaining or abolishing the doctrine in

\textsuperscript{11} Kionka, *Comparative Negligence Comes to Illinois*, 70 Ill. B.J. 16, 26-27 (1981-82). The author suggests reforms to the Illinois Pattern Jury Instructions both in the one plaintiff/one defendant case and the joint defendant situation. \textit{Id.} at 27.


\textsuperscript{13} See Sobelsohn, \textit{34 EMORY L.J.} at 71-72. If the plaintiff's fault is equal or greater than defendant's, then the old system of contributory negligence is applied as well as the defense of last clear chance, allowing a plaintiff to fully recover. However, if plaintiff's negligence is measured at less than 50\% than that of the defendant, then the comparative negligence system will only allow a partial recovery. Therefore, it would be more economically sound for the plaintiff to be found more at fault than the defendant.

this jurisdiction will be up to the courts in measuring the viability of the last clear chance doctrine under the 49% Rule of comparative negligence.\textsuperscript{15}

The doctrine of Assumption of Risk does conform, albeit with some difficulty, to the modified comparative negligence system. The theory dictates that a plaintiff will not recover if he has voluntarily exposed himself to a risk.\textsuperscript{16} The doctrine designates two categories of assumption of risk: an express or contractual assumption of risk and an implied assumption of risk that is exemplified in employment and strict liability cases. The difficulty of applying the theory lies in how these categories of assumption of risk are viewed by a court in a comparative negligence jurisdiction. The history of Nebraska's struggle with assumption of risk in its past contributory negligence system has been a point of discussion and analysis by comparative negligence historians.\textsuperscript{17} As of January 1, 1992, that struggle must begin anew as the state adjusts to its new modified system.

Under Legislative Bill Eighty-Eight, the legislature has specifically retained assumption of risk as a viable affirmative defense. Under the language of the law, both express and implied assumption of risk have been retained as separate defenses. Under that interpretation, the question remains as to whether a statute that retains assumption of risk as a separate defense allows for apportionment of damages under the rule. The language of the statute is not unlike the framework of an Oklahoma statute which retains assumption of risk in a section of the law but fails to address apportionment of damages as a part of it.\textsuperscript{18} The interpretation of the Nebraska statute will again be in the hands of the courts to determine whether an assumption of risk defense will bar recovery in the contributory negligence scheme, reduce the damages of the plaintiff consistent with the 49% Rule, or produce a possible hybrid application, depending on the measure of fault. Critics have argued that the ease of applying or not applying assumption of risk will depend upon its classification as express or implied.\textsuperscript{19}

\textbf{Costs}

The final, major adjustment in store as a result of the adoption

\textsuperscript{15} Laird v. Kostman, 229 Neb. 114, 425 N.W.2d 607 (1988) (demonstrating the difficulty in applying the last clear chance doctrine).


\textsuperscript{17} H. Woods, COMPARATIVE FAULT § 6.8, at 159-62 (2d ed. 1987).


\textsuperscript{19} Schwartz, supra note 6, § 9.1, at 154.
of the new modified system is purely economic. Opponents of comparative negligence have argued that adoption of the new system may lead to increased defense costs and greater payouts by insurance companies. Moreover, the complexity of litigation may increase, thereby bringing about a significant cost increase as well. Upon analysis of Legislative Bill Eighty-Eight, the Legislative Fiscal Analyst concluded that government bodies can expect increased litigation and liability costs when they are named as defendants and found liable under the new comparative negligence system. However, on the other side of the coin, the existence of a modified comparative negligence system has been deemed to promote more settlements and to give rise to fewer lawsuits. In addition, jurisdictions that have adopted comparative negligence have not necessarily seen dramatic increases in insurance rates. It may be impossible to accurately predict the cost ramifications of adopting the newly modified system. However, upon weighing the further inconsistencies and disadvantages of retaining the Slight-Gross Rule and its contributorily negligent results, the initial costs of adjusting to the new system may be justifiable.

CONCLUSION

Although the problems and adjustments with the coming of a major change in the tort laws of this jurisdiction remain inevitable, it may be comforting to the legal community to know that the road to change is a well-travelled one. What may be a constant in the process is the growing recognition that contributory negligence and its effects will no longer function in a comparative negligence system. Whether the Slight-Gross Rule's replacement will continue indefinitely remains to be seen. The adoption of a modified comparative negligence system may be only a step in a further progression and evolution in comparative fault law.

20. Abraham, Adopting Comparative Negligence: Some Thoughts for the Late Reformer, 41 Md. L. Rev. 300, 303 (1982).
21. Id.
22. NEBRASKA LEGISLATIVE FISCAL ANALYST, L.B. 88 FISCAL NOTE, at 1 (1991). The Office of Risk Management points out that if the new modified system had been operational in 1990, the law would have required the state to pay a total of $176,000 if the state had been found 5% liable in three claims.
23. See Abraham, 41 Md. L. Rev. at 303 (citing letter from Mr. Michael Walters, Vice President, Insurance Services Office, to Mr. William Martin, Vice President and General Counsel, American Insurance Association (Sept. 26, 1977)).