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## Comparative Negligence—The Nebraska View

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Leading Articles

## Comparative Negligence – The Nebraska View

Robert E. Johnson, Jr.\*

### I. INTRODUCTION

A comparative negligence statute allows a slightly negligent plaintiff a mitigated settlement for his injury; whereas, the common law doctrine of contributory negligence completely denies him a recovery. Although there is staunch opposition to the enactment of such statutes,<sup>1</sup> the growing interest in their adoption should eventually bring their widespread acceptance.<sup>2</sup> England, the mother of the contributory negligence doctrine, accepted the comparative negligence doctrine in 1945.<sup>3</sup> Sixteen states in this country considered such legislation in 1951.<sup>4</sup> Although at present only six states afford

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<sup>1</sup> The 1955 Iowa Legislature defeated a comparative negligence statute holding it to be an "attorney's bill." *Des Moines Register*, Feb. 5, 1955. Cf. McKinnon, *The Case Against Comparative Negligence*, 28 *Calif. S.B.J.* 23 (1953).

<sup>2</sup> The following are some of the more recent works on the subject. Tooze, *Contributory Negligence Versus Comparative Negligence—A Judge Expresses His Views*, 12 *NACCA L.J.* 211 (1954); Teller, *Proposed Comparative Negligence Law and Contribution Among Joint Tortfeasors*, 5 *Brooklyn Bar* 100 (1954); Pound, *Comparative Negligence*, 13 *NACCA L.J.* 195 (1954); Prosser, *Comparative Negligence*, 41 *Calif. L. Rev.* 1 (1953); Snow, *Comparative Negligence*, 235 *Ins. L. J.* 43 (1953); Grubb, *Comparative Negligence*, 32 *Neb. L. Rev.* 234 (1953); Duniway, *California Should Adopt a "Comparative Negligence" Law*, 28 *Calif. S.B.J.* 22, 35 (1953); Musser, *Answer for Kansas—Comparative Negligence*, 21 *J.B.A. Kan.* 232 (1953); Note, *Proposal For Comparative Negligence in the New York*, 27 *St. John's L. Rev.* 303 (1953).

<sup>3</sup> The decisive part of the Law Reform Act of 1945, 8 & 9 Geo. 6, c. 28, reads as follows: "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

<sup>4</sup> See 344 *Ins. L.J.* 667, 674 (Sept. 1951).

the statutory relief, the future looks bright for comparative negligence.<sup>5</sup>

Nebraska adopted a comparative negligence statute in 1913,<sup>6</sup> and in 1955 the Judiciary Committee of the Legislature considered an amendment to it.<sup>7</sup> Our existing statute allows a contributorily negligent plaintiff a recovery of mitigated damages when "... the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison ... *and all questions of negligence and contributory negligence shall be for the jury.*"<sup>8</sup> (Emphasis added). The proposed amendment would have deleted the italicized portion of the statute and added the following stronger language.

... and if there is evidence of negligence in any degree, the question of whether it is slight, ordinary, or gross under the circumstances shall be exclusively for the jury.<sup>9</sup>

The amendment was intended to allow many negligent plaintiffs a jury determination in situations where the court would otherwise control the case by directing a verdict for the defendant upon the ground that the plaintiff was barred because he was guilty of more than slight negligence "as a matter of law."

It is the purpose of this article to inquire into the need for such an amendment by examining the effect of court control on cases arising under the existing statute. This will be done by examining two areas where cases involving mutually negligent parties are not given to the jury for a comparison of the negligent conduct of the parties: the first where a negligent plaintiff is denied recovery by the court's ruling that the plaintiff was more than slightly negligent "as a matter of law"; and the second where the negligent plaintiff, in contrast, is allowed a complete recovery because the defendant had the *last clear chance* of avoiding the accident. An attempt will

<sup>5</sup> See Neb. Rev. Stat. § 25-1151 (Reissue 1956); Ga. Code Ann. § 105-603 (1933); Miss. Code Ann. § 1454 (1942); Wis. Stat. § 331.045 (1951); S.D. Laws, c. 160, p. 184 (1941). In early 1955, the Arkansas Legislature adopted the comparative negligence bill drafted by Dean William Prosser and presented first in 51 Mich. L. Rev. 465, 508 (1952). The bill was signed by the Governor on March 14, 1955. See also the comprehensive Ontario statute, 3 Ont. Rev. Stat. 819-821 (1950). Statutes in some other states provide for comparison of negligence in certain specific actions, such as railroad crossing accidents.

<sup>6</sup> Neb. Rev. Stat. § 25-1151 (Reissue 1956).

<sup>7</sup> L. B. 195, Neb. Legis., 67th Sess. (1955).

<sup>8</sup> See note 6 *supra* (Italics Added).

<sup>9</sup> See note 7 *supra*.

be made to show that these extremes of both recovery and denial can be adjusted, and the Nebraska position may be improved through a more liberal application of the existing comparative negligence statute.

## II. THE COMPARATIVE NEGLIGENCE STATUTE

The purpose of comparative negligence statutes is to relieve the harshness of the contributory negligence doctrine by allowing a negligent plaintiff to recover despite his negligent conduct. The Nebraska statute limits this recovery to slightly negligent plaintiffs.

In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury.<sup>10</sup>

The question, under this statute, is who should determine whether the plaintiff's negligence is only slight—a necessary prerequisite to recovery. The final sentence of the existing statute clearly states that "all questions of negligence and contributory negligence shall be for the jury." But the Nebraska court has held that this imposes no mandatory duty on the court to submit the question to the jury.<sup>11</sup> Instead, the court has adopted two interpretations of the statement that "contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison . . . ." One interpretation is that the court must find the plaintiff's negligence to be no more than slight "as a matter of law" before the jury is allowed to determine if defendant's conduct was "gross in comparison." The other is that in all cases where both parties are negligent, their conduct is to be compared by a jury with no regard for legal definitions applied abstractly to individual conduct. The effect is this: negligence which is abstractly determined to be more than slight "as a matter of law," and thus a bar to recovery under the first concept, might be very slight and permit recovery when compared with another's extreme gross negligence by a jury under the second concept.

<sup>10</sup> Neb. Rev. Stat. § 25-1152 (Reissue 1956).

<sup>11</sup> *Pinches v. Dickens*, 127 Neb. 239, 244, 254 N.W. 877, 879 (1934).

## A. NEBRASKA'S UNCERTAIN POSITION

In 1943 a review of the Nebraska position by F. B. Baylor revealed that:

.... [I]n about 25 cases it has been held that, as a matter of law, the plaintiff had no right of recovery. . . . If the courts of other states should adopt this reasoning it is highly probable that the comparative negligence statute will not bring about a great change in the number of cases submitted to the jury.<sup>12</sup>

Judicial control has given rise to inconsistencies in the decisions as to what type of conduct may be passed upon by a jury. If the court thinks the plaintiff has only miscalculated whether he can safely cross an intersection ahead of an approaching car it may permit the jury to decide the issue of negligence;<sup>13</sup> but if the court decides the plaintiff was inadvertent it may decide the question as a matter of law.<sup>14</sup> Similarly, it is negligence as a matter of law for a motorist to drive a vehicle so fast on the highway that he cannot stop in time to avoid an accident;<sup>15</sup> but the abundance of exceptions provides ample authority to support either submission to the jury or the direction of a verdict.<sup>16</sup> Instead of allowing the jury in all

<sup>12</sup> Baylor, *Thirty Years of Comparative Negligence*, 10 *Ins. Counsel J.* 18, 20 (Apr. 1943).

<sup>13</sup> *Pope v. Tapelt*, 155 Neb. 10, 50 N.W.2d 352 (1951); *Coburn v. Loetscher*, 123 Neb. 407, 243 N.W. 127 (1932); *Burton v. Lincoln Traction Co.*, 106 Neb. 521, 184 N.W. 73 (1921); cf. *Francis v. Lincoln Traction Co.*, 106 Neb. 243, 183 N.W. 293 (1921). But cf. *Donald v. Heller*, 143 Neb. 600, 10 N.W.2d 447 (1943); *Hughes v. Omaha & Council Bluffs St. Ry.*, 143 Neb. 47, 8 N.W.2d 509 (1943).

<sup>14</sup> *Huckfeldt v. Union Pacific R.R.*, 154 Neb. 873, 50 N.W.2d 110 (1951); *Trumbley v. Moore*, 151 Neb. 780, 39 N.W.2d 613 (1949); *Nielsen v. Yellow Cab & Baggage Co.*, 130 Neb. 457, 265 N.W. 420 (1936); cf. *Loudy v. Union Pacific R.R.*, 146 Neb. 676, 21 N.W.2d 431 (1946). But see *Bush v. James*, 152 Neb. 189, 40 N.W. 2d 667 (1950).

<sup>15</sup> In *Roth v. Blomquist*, 117 Neb. 444, 220 N.W. 572 (1928), it was stated: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps"; cf. *Fisher v. Megan*, 138 Neb. 395, 293 N.W. 287 (1940); *Most v. Cedar Co.*, 126 Neb. 54, 252 N.W. 465 (1934).

<sup>16</sup> In *Pierson v. Jensen*, 148 Neb. 849, 853, 29 N.W.2d 625, 628 (1947), the court attempted to classify the exceptions: "If it is possible to classify the exceptions that have since been made, it perhaps could be said that the exceptions apply in those instances when the motorist, acting as a reasonable and prudent person, was justified in believing that no danger existed, or where the situation creating the danger is in the nature of a trap." These exceptions are reviewed in *Buresh v. George*, 149 Neb. 340, 31 N.W.2d 106 (1948).

cases to determine the question, a large body of substantive rules and exceptions has been built which may be applied to individual conduct without reference to the quality of the acts of the negligent defendant. Such a limitation in effect invokes the contributory negligence rule.<sup>17</sup>

In some directed verdict cases the court has stated that it has compared the conduct of the parties before ruling as a matter of law.<sup>18</sup> This would seem to avoid the criticism that the quality of plaintiff's conduct is tested incorrectly when it is compared to substantive law rather than to the conduct of the other party to the accident. But even if it were possible for the court to determine the quality of the two acts when in juxtaposition, case precedent, with no relation to degree of defendant's wrongdoing, is the foundation for the result.

The interpretation of the comparative negligence statute which calls for jury determination has found strong support in some of the more recent cases. In 1948 the Nebraska court refuted the directed verdict argument and held in *Roby v. Auker*<sup>19</sup> that the true purpose of the comparative negligence statute was that there need be no prerequisite showing of slight negligence before plaintiff's conduct is compared with defendant's by the jury. The court attempted to clarify the intention of the statute by stating:

. . . It is the contention of defendant that before the comparative negligence statute can operate it must appear that the negligence of the plaintiff was slight without respect to the degree of negligence on the part of the defendant. . . . We do not think there is merit in defendant's contention. The statute by the use of the words "when the contributory negligence of the defendant was gross in comparison" clearly intended the words "in comparison" as qualifying both of the clauses immediately preceding. The words "slight" and "gross" as used in the statute are comparative terms

<sup>17</sup> See *Klement v. Lindell*, 139 Neb. 540, 298 N.W. 137 (1941); *Whittaker v. Hanifin*, 138 Neb. 18, 291 N.W. 723 (1940); *Bergendahl v. Rabeller*, 133 Neb. 699, 276 N.W. 673 (1937); *Nelson v. Plautz*, 130 Neb. 641, 265 N.W. 385 (1936).

<sup>18</sup> In *Buresh v. George*, 149 Neb. 340, 347, 31 N.W.2d 106, 109 (1948), the court directed a verdict finding that ". . . the plaintiff is guilty of negligence that is more than slight as compared with that of the defendant . . ." Plaintiff's conduct in not stopping in time to avoid a collision was then compared to the general rules of law and their exceptions. The court found plaintiff guilty of negligence more than slight "in comparison" giving no more consideration to defendant's conduct than admitting that he had been negligent. See *Trumbley v. Moore*, 151 Neb. 780, 39 N.W.2d 613 (1949); *Loudy v. Union Pacific R.R.*, 146 Neb. 676, 21 N.W.2d 431 (1946); *Hughes v. Omaha & Council Bluffs St. Ry.*, 143 Neb. 47, 8 N.W.2d 509 (1943).

<sup>19</sup> 151 Neb. 421, 37 N.W.2d 799 (1948).

and the intent of the statute is that the negligence of the parties shall be compared one with the other in determining questions of slight and gross negligence.<sup>20</sup>

This interpretation found strong support in subsequent cases,<sup>21</sup> culminating with the 1953 decision of *Andelt v. County of Seward*,<sup>22</sup> where it seemed the court completely divested itself of any role in characterizing conduct of negligent parties. In that case the plaintiff drove around a saw horse used as a barricade over only half the road, accelerated to about fifty miles per hour, and, upon seeing an excavation in the road, further increased his speed in an attempt to jump the excavation. In an action against the county for damages to the automobile, the jury was allowed to make the determination. If the court intended to retain the function of comparing conduct, here would have been a case where the undisputed facts indicated more negligence on the part of the plaintiff than the defendant.

The *Roby v. Auker* decision did not place all fact determinations in the hands of the jury, however, and in 1954 the court again assumed a major role when it relieved the jury of its duties in two cases. Dismissal of plaintiff's petition was affirmed in *Evans v. Messick*,<sup>23</sup> where the court found the plaintiff who had the directional right of way and who was, as stated by the court, in the favored position, guilty of more than slight negligence because the vision of both parties might have been obstructed by a hedge which plaintiff knew was there. The court stated the rule as follows:

. . . It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight *as compared* with defendant's negligence that it is proper for the trial court to instruct the jury to return a verdict . . . (Emphasis added).<sup>24</sup>

The comparison, however, was only to the conduct of plaintiffs in previous cases, not to the defendant in the case before the court.

*Evans v. Messick* was followed by *Rogers v. Shepherd*<sup>25</sup> in which the defendant came over a narrow snow-packed hill in overdrive at about thirty to forty miles an hour without chains and saw decedent's car about 100 feet ahead. The speed of decedent was unknown, and the side of the highway on which the accident actually happened was controverted. The court, one justice dissenting, held,

<sup>20</sup> Id. at 423, 37 N.W.2d at 800.

<sup>21</sup> See, e.g., *Murray v. Pearson Appliance Store*, 155 Neb. 860, 54 N.W.2d 250 (1951).

<sup>22</sup> 157 Neb. 527, 60 N.W.2d 604 (1953).

<sup>23</sup> 158 Neb. 485, 63 N.W.2d 491 (1954).

<sup>24</sup> Id. at 493, 63 N.W.2d at 496.

<sup>25</sup> 159 Neb. 292, 66 N.W. 2d 815 (1954).

"... the only permissible conclusion is that this evidence shows beyond reasonable dispute that the negligence of plaintiff's decedent was more than slight in comparison with that of the defendant."<sup>26</sup> The verdict of the jury for the plaintiff's decedent was therefore reversed, and the action dismissed. The court determined the facts and attempted to attach abstractly a classification of conduct without allowing a true comparison of the conduct of both parties to the action.

#### B. CRITICISM OF NEBRASKA'S POSITION

By requiring a comparison of the conduct of two parties, the comparative negligence statute should naturally require a determination by the jury.

It is true that courts often take fact questions from the jury after negligence has been evidenced and where reasonable minds cannot differ. But after negligence has been shown and when the question is a comparison of two negligent acts, rarely can a prior case be found where both negligent actors performed as did the parties before the court. Therefore, there is no past experience on which to draw and determine what reasonable minds would do in such a situation.

The supreme court of Wisconsin displays a realization of this by adopting a rule of complete jury determination.

... The negligent acts differ in kind and quality, and we know of no legal yardstick by which we can classify, evaluate, and compare them.<sup>27</sup>

The experience of another state which saw an early theory of negligence comparisons destroyed through court control is evidence of the wisdom of the Wisconsin court. In 1858 the court of Illinois adopted a common law comparative negligence doctrine quite similar to the Nebraska statutory requirement. In *Galena & Chicago Union R. R. v. Jacobs*,<sup>28</sup> the Illinois court stated that "the degrees of negligence must be measured, and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."<sup>29</sup> This common law principle, the same as that embodied in the Nebraska statute, was severely restricted when the court imposed the pre-

<sup>26</sup> Id. at 298, 66 N.W.2d at 819.

<sup>27</sup> Though Wisconsin requires no showings such as "slight" or "gross," this makes no difference in the jury's function but only in the instructions given them.

<sup>28</sup> 20 Ill. 478 (1858).

<sup>29</sup> Id. at 497.



requisite of ordinary care under the circumstances, as contrasted to reasonable care, before the jury could compare the party's conduct.<sup>30</sup> This requirement eventually led to the complete demise of comparative negligence in Illinois<sup>31</sup> since it "reduced the area of operations for comparative negligence to a minimum. In fact, it reduced it to meaninglessness."<sup>32</sup>

Since the inequities and impossibility of fair comparisons by courts in comparative negligence situations has been recognized and since there are inherently dangerous possibilities in rigid control, as witnessed by the Illinois experience, it would seem that all determinations of comparative negligence should be left to the jury.

The inequities which arise when a negligent plaintiff is precluded from recovery because his conduct is held to be more than slightly negligent as a matter of law is recognized in Nebraska. Instead of placing the question in the hands of the jury, the court has applied the doctrine of *last clear chance*. This doctrine allows a negligent plaintiff a complete recovery without comparison to defendant's conduct by a jury. This method of court control in the comparative negligence situation can be as inequitable as the court's determination that the conduct of the plaintiff was more than slightly negligent as a matter of law.

### III. THE LAST CLEAR CHANCE DOCTRINE

The last clear chance doctrine was an attempt to relieve the oppressive contributory negligence rule formulated in *Butterfield v. Forrester*.<sup>33</sup> When the court in the *Butterfield* case held that a plaintiff who contributes to the cause of his injury may not be heard to complain, it ushered in a doctrine which completely barred recovery to many deserving plaintiffs whose negligence was only slight in comparison to defendant's. It cannot be doubted that some comparative relief was necessary from the pernicious effects of this doctrine, but the form in which aid came was strange to behold.<sup>34</sup>

<sup>30</sup> *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N.E. 456 (1885).

<sup>31</sup> *City of Lanark v. Dougherty*, 153 Ill. 163, 38 N.E. 892 (1894).

<sup>32</sup> *Green*, Illinois Negligence Law, 39 Ill. L. Rev. 36, 51 (1944).

<sup>33</sup> 11 East. 60, 103 Eng. Rep. 926 (1809); Prosser, Torts 410 (1941); MacIntyre, The Rationale of Last Clear Chance, 53 Harv. L. Rev. 1225 (1940); James, Last Clear Chance: A Transitional Doctrine, 47 Yale L.J. 704 (1938).

<sup>34</sup> The United States has been unique in holding contributory negligence a complete defense, subject to a few exceptions. "The United States is virtually the last stronghold of contributory negligence. The last vestige of the complete defense disappeared long since from all of continental Europe, which divides the damages." Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 466, 467 (1953).

In 1842, *Davies v. Mann*<sup>35</sup> created an exception to the doctrine of contributory negligence, and allowed recovery to a plaintiff who negligently left his donkey fettered in the highway. The defendant drove into it, though in the exercise of ordinary care he could have avoided the accident; therefore, he was held wholly liable for the damage, since his negligence was *later in point of time* and allowed him "the last clear chance" to avoid the accident.

Manifestly, the doctrine served only to reverse the inequities of the situation. While the unjust rule of contributory negligence charges the plaintiff with the entire burden of his loss, the equally unjust rule of last clear chance charges the defendant with the entire burden. In neither case is there mitigation of the damages according to degree of fault.

With the development of the two doctrines, confusion and inconsistency were imminent. Imposition of total liability upon one of two negligent parties naturally makes the selection of the right rule to apply difficult. That the defendant would be held solely liable for damage the plaintiff helped bring on himself is in itself grounds for limiting application of the rule. But in the automotive age where the highway accident is a fertile area for the application of last clear chance, there are other more compelling reasons for limiting a plaintiff's recovery. Today, a plaintiff, by negligently imperiling himself on the highway, creates a far greater hazard to society than did the plaintiff who negligently left his ass fettered in a lonely roadway traveled only by slow-moving carts. There the danger was primarily to Davies' ass; today, the defendant, who under last clear chance is burdened with the entire loss, may be paying for all the damages suffered by all the parties even though the plaintiff's negligent conduct was highly perilous to the defendant.

#### A. NEBRASKA AND LAST CLEAR CHANCE

Relief from the harsh contributory negligence doctrine through the medium of last clear chance should not be necessary where such relief comes in the form of a comparative negligence statute.<sup>36</sup> Speaking of the influence last clear chance has on the beneficial effects of the Nebraska statute, Gregory states:

.... On top of this, the supreme court of Nebraska has foolishly retained the last clear chance doctrine which most leading jurists

<sup>35</sup> 10 M. & W. 546, 152 Eng. Rep. 588 (1842).

<sup>36</sup> See the recent Florida case of *Loftin v. Nolin*, 81 So.2d 200 (Fla. 1955), holding that the last clear chance doctrine no longer applies if the state has a statute applying a comparative negligence rule to suits involving railroad crossing accidents.

recognize as a sheer expedient to allay the harshness of common-law contributory negligence, a wholly unnecessary adjunct in a state having a comparative statute of any sort. . . .<sup>37</sup>

Prosser also sees a weakness in Nebraska's statute—a weakness created by the last clear chance doctrine.

. . . It is probable that the future development of the law of contributory negligence will lie along the lines of statutory or common law apportionment of the damages, rather than the last clear chance. n(39)—See, however, the seemingly unjustifiable application of the last clear chance doctrine under statutes providing for apportionment. . . . *Seiffert v. Hines*, 1922, 108 Neb. 62 187 N.W. 108; *Stanley v. Chicago, R. I. & P. R. Co.*, 1925, 113 Neb. 280, 202 N.W. 864.<sup>38</sup>

Although Nebraska still applies the last clear chance doctrine, there is some indication that the courts are crystallizing a sounder policy through the use of the comparative negligence statute. And by a further extension of the court's present position, the function of the last clear chance doctrine may be almost wholly transferred to the comparative negligence statute, where the emphasis is placed on the degree of one's negligence, not on the time of its occurrence.

#### B. DEVELOPMENT OF THE NEBRASKA DOCTRINE

The Nebraska court first applied the last clear chance doctrine in *Omaha St. Ry. v. Martin* in 1896.<sup>39</sup> But in 1903 the doctrine was expressly rejected, the court realizing that the basis of the doctrine was to mitigate the effect of the contributory negligence rule and that either one or the other must fall.

. . . To our minds such a requirement [duty created by last clear chance] would be impractical and unjust, but if the "last clear chance" rule is to be adopted it should be done frankly and openly, without any of the delusive limitations and qualifications of the jurisdiction of its origin, which, in practice, do not limit or qualify; and the hitherto prevailing rule as to contributory negligence ought to be explicitly and decisively abrogated and set aside.<sup>40</sup>

The court did not follow this view for long, however, and the last clear chance doctrine was shortly given full recognition in Nebraska as a qualification of the contributory negligence doctrine, and the two began a coexistence.<sup>41</sup>

<sup>37</sup> Gregory, Loss Distribution by Comparative Negligence, 21 Minn. L. Rev. 1, 3 (1936).

<sup>38</sup> Prosser, Torts 416 (1941).

<sup>39</sup> 48 Neb. 65, 66 N.W. 1007 (1896).

<sup>40</sup> *Chicago B. & Q. R.R. v. Lilley*, 4 Neb. (Unofficial) 286, 300, 93 N.W. 1012, 1016 (1903).

<sup>41</sup> *Zelenka v. Union Stock Yards Co.*, 82 Neb. 511, 118 N.W. 103 (1908); *Omaha St. Ry. v. Larson*, 70 Neb. 591, 97 N.W. 824 (1903).

The comparative negligence statute did not mention last clear chance and the doctrine continued to be applied in many cases where the plaintiff's conduct would ordinarily be considered an active proximate cause of his injury. Thus, the plaintiff was allowed recovery under last clear chance where he "...saw the street car coming and turned around and went about 15 feet north, ..." <sup>42</sup> Although the plaintiff actually knew of the imminent danger and could have removed himself from his peril, he was allowed to recover. The court stated the rule:

... It is quite obvious that the last clear chance rule is here controlling, and that questions of contributory negligence are excluded. ... The person who has the last clear chance of avoiding an accident is considered in law solely responsible for the accident notwithstanding the negligence of the person injured. <sup>43</sup>

Importance was not placed on the degree of the contributory negligence but was instead placed on the time of its occurrence. Those who continued to operate their automobiles in a negligent manner were allowed recovery where the defendant had the last chance of avoiding the accident regardless of the continuing and active nature of the plaintiff's negligence. <sup>44</sup> Plaintiffs negligently leaving vehicles on highways when they could have parked them on the shoulders were allowed recoveries. <sup>45</sup> The factor given most importance by the court seemed to be whose negligence was last in point of time. Justification was found in the proximate cause theory, as was emphasized in *Parsons v. Berry*. <sup>46</sup> The court there held that the defendant would be solely liable if he could have avoided the accident, although the plaintiff negligently drove into the intersection.

... The doctrine of *last clear chance* applies where there is

<sup>42</sup> *Wilfong v. Omaha & Council Bluffs St. Ry.*, 129 Neb. 600, 603, 262 N.W. 537, 538 (1935).

<sup>43</sup> *Id.* at 605, 262 N.W. 539.

<sup>44</sup> *Carnes v. DeKlotz*, 137 Neb. 787, 291 N.W. 490 (1940). Plaintiff's car "drifted" over into defendant's lane of traffic, yet plaintiff was allowed a full recovery for an ensuing collision. The court was not impressed by plaintiff's negligent conduct. "We do not deem it necessary to discuss at length the comparative negligence of the parties, in view of the fact that the clear chance doctrine was involved by the plaintiff." *Id.* at 790, 291 N.W. at 492. *Roby v. Auken*, 149 Neb. 734, 737, 32 N.W.2d 491, 494 (1948). The court realized that "negligence is essentially relative and comparative, depending on the surrounding facts and circumstances," yet refused to recognize any liability of the plaintiff who was still operating his auto at the time of the accident. See also *Ross v. Carroll*, 140 Neb. 350, 299 N.W. 477 (1941); *Parsons v. Berry*, 130 Neb. 264, 264 N.W. 742 (1936).

<sup>45</sup> *Remmenga v. Selk*, 150 Neb. 401, 34 N.W.2d 757 (1948); *Folken v. Petersen*, 140 Neb. 800, 1 N.W.2d 916 (1942).

<sup>46</sup> 130 Neb. 264 N.W. 742 (1936).

negligence of the defendant subsequent to the negligence of the plaintiff and the defendant's negligence is the proximate cause of the injury.<sup>47</sup>

The rationale of the rule arose out of the fact that, although the plaintiff was negligent up to the time of the accident, the defendant's failure to avoid the accident was an intervening factor cutting off plaintiff's negligence, which then became merely a remote and not a direct cause of the accident.<sup>48</sup> This, however, is an unconventional application of proximate cause, for negligence is never cut off by an intervening factor unless it is a new and *independent* intervening factor.<sup>49</sup> The fallacy of finding plaintiff's negligence "cut off" upon this ground was pointed out by the report of the California bar committee reporting on the comparative negligence statute.

. . . The majority of the committee believes that this doctrine was developed by the courts to mitigate the harshness of the law of contributory negligence. In this state, the rule is judge made, and is expressed by the courts in terms of proximate cause. The majority of the committee believes, however, that in fact, as the rule has been applied in recent cases, the statement that the negligence of the party having the last clear chance is the sole proximate cause of the injury and that the negligence of the other party is not a proximate cause of the injury, is fictitious. No member of the committee desires to abolish the ordinary rules of proximate cause. A party should not have his recovery diminished if his negligence did not in any way cause the accident. A majority of the committee feels that in most cases to which the doctrine of the last clear chance is applied, the negligence of the party not having the last clear chance was in fact a cause of the injury, and that if a negligent party is to be permitted to recover under the rule of comparative negligence, the doctrine of last clear chance as it exists in California should be abolished. Accordingly the draft of the statute that we present does abolish the doctrine.<sup>50</sup>

Although many decisions in Nebraska seemed to misapply proximate cause, there were decisions which properly refused to apply the last clear chance doctrine to one who was contributorily negli-

<sup>47</sup> Id. at 268, 264 N.W. at 744.

<sup>48</sup> *Zelenka v. Union Stock Yards Co.*, 82 Neb. 511, 118 N.W. 103 (1908). For a general review of similar views in other jurisdictions see Annot., 92 A.L.R. 47 (1934).

<sup>49</sup> "The proximate cause of the injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which result would not have occurred." *Ambrozi v. Fry*, 158 Neb. 18, 21, 62 N.W.2d 259, 262 (1954); see also *Shupe v. Antelope County*, 157 Neb. 374, 59 N.W.2d 710 (1953); *Stark v. Turner*, 154 Neb. 268, 47 N.W.2d 569 (1951); *Dickenson v. Cheyenne County*, 146 Neb. 36, 18 N.W.2d 559 (1945). For a complete discussion see Foster, *The Risk Theory and Proximate Cause—A Comparative Study*, 32 Neb. L. Rev. 72 (1953).

<sup>50</sup> *Duniway, California Should Adopt a Comparative Negligence Law*, 28 Calif. S.B.J. 22, 38 (1953).

gent in the ordinary sense of the term.<sup>51</sup> This had the natural effect of leaving the Nebraska last clear chance doctrine in a state of confusion.

### C. PRESENT NEBRASKA POSITION

If a state has no comparative negligence statute, there is some justification for the last clear chance doctrine. Natural sympathies rebel against denying relief to a slightly negligent plaintiff where there is a grossly negligent defendant. Application of the last clear chance doctrine avoids this result. But where the contributorily negligent plaintiff is given adequate relief by a comparative negligence statute, mere sentiment should not place him in a more favorable position than a contributorily negligent plaintiff in a negligence case where last clear chance is not invoked.

The more recent Nebraska last clear chance cases have limited the application of the doctrine. In the 1948 decision of *Whitehouse v. Thompson*,<sup>52</sup> the Nebraska court specified the elements which must be established before the last clear chance doctrine is available.

... In order to recover under the doctrine of the last clear chance in this state there must be sufficient evidence to sustain a finding (1) that the party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care, (2) that the party against whom it is asserted knew or ought to have known of the other's peril, (3) that the party against whom the doctrine is invoked had the present ability with the means at hand to avoid the accident without injury to himself or others, (4) that the failure to avoid the accident was due to the want of ordinary care on the part of the person against whom the doctrine is invoked and that such want of ordinary care was the proximate cause of the accident, and (5) that the negligence of the party imperiled is neither active nor a contributing factor in the accident.<sup>53</sup>

This test was applied to an automobile collision. The plaintiff was negligently driving too close to railroad tracks. When he heard a train approaching he attempted to stop but due to icy conditions, he slid into a water drain next to the tracks from which he could not extricate himself. The evidence showed that the defendant's engineer saw the car and should have seen plaintiff's predicament in ample time to stop the train. The court therefore held the defendant solely liable under the last clear chance doctrine, since the plaintiff's conduct, although negligent, did not contribute to his harm. The

<sup>51</sup> *Donald v. Heller*, 143 Neb. 600, 10 N.W.2d 447 (1943); *Hughes v. Omaha & Council Bluffs St. Ry.*, 143 Neb. 47, 8 N.W.2d 509 (1943).

<sup>52</sup> 150 Neb. 370, 34 N.W.2d 385 (1948).

<sup>53</sup> *Id.* at 372-73, 34 N.W.2d 386.

reasoning was that a new intervening condition had arisen which changed the duties of the parties. This new intervening condition was the unforeseeable water drain from which the plaintiff could not remove himself. Assuming this, the plaintiff's negligence was correctly held to have been cut off, the same as a defendant's negligence would have been cut off by a new intervening condition in a negligence case where last clear chance is not invoked.

To assume the *Whitehouse* case held that the reason the plaintiff's conduct was not contributory negligence was because of an intervening condition may be invalid. There is, however, support for the assumption in the 1954 decision of *Portis v. Chicago M. St. P. & P. R.R.*<sup>54</sup> The court there held that one who leaves his tractor and trailer unattended on the railroad tracks may not recover under last clear chance if it is later hit by a train. Standing alone, the defendant railroad's negligent act of running into the trailer was insufficient to cut off plaintiff's negligence, since it was not a new and independent intervening cause. Although the case was decided under Minnesota law, the court analogized through dictum to the *Whitehouse* decision, pointing out the failure of the plaintiff to show an intervening factor sufficient to prove that he had not contributed to his own injury.

... There [*Whitehouse* decision] we found that the plaintiff was negligent in driving his car to the place near the tracks. At that point the car became lodged in a water drain in such a manner that the icy condition of the street prevented its removal under its own power. We held that the fact was an "intervening condition" which imposed new duties on the parties irrespective of prior negligence and that the last clear chance doctrine applied. But here there was no new intervening condition which made it impossible for the plaintiff's driver to move the tractor and trailer to a place of safety.<sup>55</sup>

There is little doubt but that the *Whitehouse* and *Portis* cases, together with the restrictive trend developing in the last clear chance area,<sup>56</sup> will deny recovery to many plaintiffs who previously would have recovered.<sup>57</sup> But the crucial question arising out of the new Nebraska decisions is whether the court will go further and deny the last clear chance doctrine to all plaintiff's who have been contributorily negligent.

<sup>54</sup> 158 Neb. 28, 62 N.W.2d 323 (1954).

<sup>55</sup> Id. at 34, 62 N.W.2d 327.

<sup>56</sup> See *Folken v. Petersen*, 140 Neb. 800, 1 N.W.2d 916 (1942).

<sup>57</sup> *Remmenga v. Selk*, 150 Neb. 401, 34 N.W.2d 757 (1948). Those cases where plaintiffs have been allowed recovery when actively and continuously driving negligently have now been placed properly under the comparative negligence statute. See note 43 *supra*.

## D. THE INTERVENING FACTOR

As indicated by the foregoing review, recent Nebraska decisions seem to turn on the presence or absence of a sufficient intervening factor. This will be the point on which the Nebraska courts probably will determine the extent of the application of last clear chance in future cases. The court may continue to apply the ordinary negligence interpretation of an intervening factor, thereby making last clear chance consistent with general negligence law, or it can apply an unconventional interpretation in last clear chance cases.

The arrival of an intervening force may preclude a party's negligence from being the proximate cause of an accident, because the intervening force may bring about a result of an entirely different nature than that which was reasonably anticipated from the original negligent act.<sup>58</sup> For an intervening factor to be sufficient to cut off a party's negligence it must be a new act by a different person producing the injury, an act which was not invited or induced by plaintiff's original negligence.<sup>59</sup> In the *Whitehouse* case the unexpected water drain was a new and independent intervening factor. But in *Parsons v. Berry*,<sup>60</sup> the court applied the proximate cause theory when the intervening factor was not new and independent but was simply the conduct of the defendant, which was invited and induced by plaintiff's original negligence.

It may seem difficult to apply proximate cause correctly in the last clear chance situation. However, Dean Prosser suggests a workable solution to the problem. If a plaintiff imperils himself and the defendant's failure to avoid him causes an accident, the plaintiff should be denied benefit of the last clear chance doctrine if the negligence of the plaintiff was of such a nature that an injured third person could recover from him.<sup>61</sup>

This rule will, of course, severely limit the application of last clear chance, but the doctrine will still have some room in which to operate under such an interpretation. It could be applied in those situations where there is a new, and independent, unforeseen intervening factor coming between the negligence of the plaintiff and his ultimate harm. Assume a plaintiff who, while negligently

<sup>58</sup> *Shupe v. Antelope County*, 157 Neb. 374, 59 N.W.2d 710 (1953).

<sup>59</sup> *Naegle v. Dollen*, 158 Neb. 373, 63 N.W.2d 165 (1954); *Kuska v. Nichols Const. Co.*, 154 Neb. 580, 48 N.W.2d 682 (1951); *McClelland v. Inter-State Transit Lines*, 142 Neb. 439, 6 N.W.2d 384 (1942).

<sup>60</sup> 130 Neb. 264, 264 N.W. 742 (1936).

<sup>61</sup> Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 468 (1953).



walking down a busy highway, is a hit-and-run victim, and is left unconscious on the highway where he is run over by the defendant. Here is a situation which meets the test. The negligent plaintiff is in a position of peril from which he cannot extricate himself; his negligent conduct is not a contributing factor to his injury, because, through general application of intervening causes, the unforeseeable new force of an automobile rendering him unconscious on the highway has come into play, giving rise to new duties and a new standard of care on the part of the defendant.

Although this severely limits application of the last clear chance doctrine, it is only because plaintiff's contributory negligence bars him from meeting the qualifications set down in the *Whitehouse* case; that his negligence is "neither active nor a contributing factor" in the accident. His is a case for the comparative negligence statute. That the contributorily negligent plaintiff may not then receive fair treatment under the law is a result of the inequalities of our comparative negligence statute and its interpretation, not with the last clear chance doctrine.

#### IV. A MORE SCIENTIFIC APPLICATION OF THE COMPARATIVE NEGLIGENCE STATUTE

The existing inequities in Nebraska's law under the comparative negligence statute show the need for change in present policy. But changes of either a statutory or policy nature bring forth objections that loss of court control over the jury would result in more numerous and more remunerative plaintiff recoveries followed by soaring insurance rates. There are indications that this fear is well founded, as illustrated by a report on insurance rates in the comparative negligence state of Wisconsin. The possible ramifications of an uncontrolled jury are also pointed out in the article.

There is no doubt that comparative negligence increases the number of situations in which the plaintiff can recover damages. Society ultimately pays these claims in insurance rates, rates of utilities and indirectly in the cost of living. When insurance rates are forced high enough there is always a clamor for a state monopoly, which I am sure we do not believe would be a desirable development for the public or for the legal profession. In view of the effect upon insurance rates, it can well be doubted whether administration of the comparative negligence rule works to the benefit of the general public.

Several studies of insurance rates made during the last ten years showed that the premiums on automobile liability insurance in Wisconsin were from seventeen to sixty-four per cent higher than in comparable cities or comparable rural communities in Illinois, Michigan and Iowa, from twenty-five to sixty-two and one-half per cent higher in O. L. & T. policies. Inquiry concerning the rates in Nebraska as compared to surrounding states failed to indi-

cate that there was any such difference. Your statute differs considerably from ours as above noted, and possibly your juries are more conservative. Nevertheless, it would seem inevitable that such a statute increases the number of situations where recovery is permitted which would be bound to have an effect on experience and therefore, insurance rates.<sup>62</sup>

Assuming the above statement to be correct, it is still felt that the comparative negligence statute can be much more effectively applied while at the same time maintaining the presumably necessary court control.

It is submitted that the use of special interrogatories to the jury allows the jury to determine the facts while supplying the court information with which it can scientifically evaluate the jury's determination.<sup>63</sup> The effect of this method is to have judicial control asserted *after* the jury determination and based upon its findings, instead of *before*, when the control is based solely on the court's determination that plaintiff's conduct was more than slightly negligent when compared to plaintiffs in previous cases.

Such preliminary questions could be asked the jury as to whether the defendant or the plaintiff was negligent as to any specific acts, and whether such negligence was the proximate cause of the accident. If the jury finds that both were negligent, it could then be asked what percentage of the total causal negligence it attributes to the plaintiff and what percentage to the defendant. The jury could then be asked at what amount they assess the plaintiff's and the defendant's damages.<sup>64</sup> The answers to these questions provide the court with sufficient information to determine whether the jury has in fact decided that plaintiff's negligence was more than slight as a matter of law.<sup>65</sup>

A jury finding that plaintiff's negligence was thirty per cent of the total negligence causing the collision gives the court ample grounds for directing a verdict against the plaintiff.

At present, there seems to be no decision stating what percentage of total negligence might constitute negligence which is more than slight. However, the discussion of this particular point

<sup>62</sup> Grubb, Comparative Negligence, 32 Neb. L. Rev. 234, 246 (1952).

<sup>63</sup> Neb. Rev. Stat. 25-1120 to 25-1122 (Reissue 1956). See Matzke, Special Findings and Special Verdicts in Nebraska, 35 Neb. L. Rev. 523 (1956).

<sup>64</sup> Grubb, *supra* note 62, at 243.

<sup>65</sup> The use of special questions as to comparing negligence in the automobile guest situation is illustrated in an article by Gradwohl, Apportionment of Guest's Damage, 33 Neb. L. Rev. 54, 69 (1954).

in Grubb's article, gives a starting point for the development of such law.

Although the Nebraska Statutes provide that if plaintiff's negligence is greater than slight, that it would be a bar to recovery, as noticed before, the Nebraska court has used four to one as an example in discussion of mitigation of damages. Under this example, plaintiff's negligence would constitute twenty per cent of the total causal negligence. The court was not directing its attention toward the right of recovery and was merely illustrating diminution of damages. In most states one-fifth or twenty per cent of the total causal negligence would, I believe, be considered as greater than slight negligence. The illustration of *Patterson v. Kerr*, supra, that the "plaintiff's slight negligence" being one-sixth of the gross negligence of the defendant would also appear to constitute a degree of negligence considered greater than slight by most courts. *Patterson v. Kerr*, 254 N.W. 704 (Neb. 1934). There is no Nebraska decision whereby the court has attempted to fix a rule for determining by way of comparison whether the plaintiff's negligence is slight, or more than slight, or whether the defendant's negligence is gross, or less than gross, under the Nebraska act.<sup>66</sup>

## V. CONCLUSION

It is felt that the suggested plan for application of the Nebraska statute would provide a more solid foundation for the Nebraska comparative negligence law. The too-generous last clear chance doctrine would no longer be necessary, and the defendant would have complete relief. The negligent plaintiff would be allowed to have his cause presented to the jury, the proper trier of fact. A too-lenient jury could be curbed by a judicial determination that an act was more than slightly negligent "as a matter of law," such determination being based upon the facts as properly found by the jury rather than abstractly by the court.

<sup>66</sup> Grubb, supra note 62, at 239.