Torts

Page Keeton

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I. TRAFFIC

Violation of Safety Regulations. Two cases of considerable importance were decided during the course of the past year regarding the substantive and procedural law applicable when a litigant is charged with negligence for actions that constitute violations of safety regulations. This matter was last discussed in 1969 when Blades v. Christy1 was noted in this Survey.2 As stated then, there are several views that could or have been taken as to the effect of a violation of a safety regulation. At one extreme, some courts have held that such a violation is negligence as a matter of law and that no excuses for the unsafe conduct proscribed by the legislature are recognized, except those that are written into the legislative measure.3 This means that an actor is often said to be negligent or contributorily negligent when, as a matter of fact, he is being held liable or his recovery is being denied or diminished without respect to fault. This approach seems unsound unless it is concluded that the activity is of the kind that should result in liability without fault in the absence of a safety regulation. At the opposite extreme, is the unsupported position which could be taken that the safety regulation is not material in a tort action for personal injuries, except perhaps as a basis for formulating a ground of negligence to be submitted to the jury. Between these extremes, there is a substantial body of authority for the position that the violation is some evidence to be weighed by the jury with all the other evidence and circumstances in answering the usual inquiry as to whether there was negligence.4 Thus, the fact of the regulation and the evidence related to a possible violation would be given to the jury.

Some jurisdictions that treat the violation as evidence of negligence often go further and permit the trial judge to inform the jury of the regulation and to say that the violation, if any, of such a regulation can be considered, although a finding that there was a violation is not conclusive.5 This is the

1. 437 S.W.2d 376 (Tex. 1969).
5. Morris, supra note 3.
view that I took in 1969 in reviewing Blades v. Christy. The Supreme Court of Texas and a majority of the state supreme courts, however, have attempted to follow the rule adopted in the Restatement of Torts, that the unexcused violation of a safety regulation is negligence per se. This is an intermediate position between that of regarding a violation as negligence per se, and that of regarding a violation as only evidence of negligence, and, therefore, one of the circumstances to consider. Theoretically, there is much to be said for the Restatement rule. Practical considerations related to enforcement of the law often justify the imposition of small fines and penalties upon those who fail to measure up to a particular standard of conduct regardless of the excuse for not doing so. However, preventing a person from recovering anything when seriously injured, or subjecting a person to liability for thousands of dollars presents an entirely different question. Therefore, it is said that "excuses" ought to be recognized. However, if anything that might justify a reasonable person's failure to comply with a statute is recognized as an excuse, the result is not much different, theoretically, from the "evidence of negligence" position. Any recognition of excuses seems to require limitation and definition; thus, the complexities of litigation are magnified.

In Blades v. Christy the supreme court held that when evidence of a violation of a safety regulation is introduced, the trial court must submit to the jury an issue of negligence in terms of the alleged violation of the statute. A finding that the statute has been violated would constitute a finding of negligence in the absence of rebuttal evidence of circumstances giving rise to a recognized excuse. The alleged violator must request an excuse issue and he has the burden of proof on it. The only excuses which have been recognized by the supreme court are those listed in the Restatement of Torts:

(a) the violation is reasonable because of the actor's incapacity;
(b) he neither knows nor should know of the occasion for compliance;
(c) he is unable after reasonable diligence or care to comply;
(d) he is confronted by an emergency not due to his own misconduct;
(e) compliance would involve a greater risk of harm to the actor or to others.

The comments to this Restatement section state that the listed excuses would not necessarily be exclusive, but in Impson v. Structural Metals, Inc. the Texas Supreme Court implied that they were. The mere recitation

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6. Keeton, supra note 2, at 18:
I must say that the complications created by (1) the excuse doctrine, and (2) the complexities of our special issues submission system, have led me to the conviction that the court should overrule the negligence per se doctrine and adopt the view that the violation of safety legislation is only a circumstance to take into account on the issues related to ordinary care requirements.
8. 437 S.W.2d at 381.
of these excuses in the language of the Restatement and Impson demonstrates that each contains concepts that can give rise to litigation about its applicability in any fact situation. Because of the difficulties encountered following the decisions in Blades and Impson, especially those concerning the submission of special issues to the jury, the supreme court overruled Blades in Southern Pacific Co. v. Castro,12 and adopted the following propositions: (1) The substantive doctrine that the unexcused violation of a safety regulation is negligence per se continues as the rule in Texas. (2) A litigant charged with violation of a safety regulation who seeks to escape the application of this doctrine has the burden of coming forward with some evidence to raise an issue with respect to one of the five excuses. If there is no evidence raising such an issue, an issue on violation of the statute is to be submitted. (3) If evidence is submitted raising an excuse, there is to be no submission of an issue as to violation of the statute or as to an excuse for the violation. The only submissible issue is that of common law negligence. (4) Under the common law negligence issue, the trial judge, upon proper request by the appropriate party, must give instructions that would advise the jury (a) as to the standard of conduct prescribed by the legislature or other legislative body, (b) that all persons are charged with knowledge of these safety provisions, and (c) of any excuse which is supported by some evidence and qualifies under the Impson rule.13

In Castro, as well as in Blades, the problem was that of contributory negligence in approaching and attempting to pass over a railroad crossing. In a critical paragraph the court in Castro stated:

In connection with its common law contributory negligence issues, upon proper request, Southern Pacific will be entitled to a definition or instruction which informs the jury the Legislature has established a uniform standard of conduct for those who approach and cross railroad crossings. The court may state the provisions of section 86, article 6701d. . . . The court may further instruct the jury that Castro, as well as the whole public, was charged in law with knowledge of those safety provisions. The court may also give an appropriate definition or instruction concerning any excuse which is supported by some evidence and qualifies under the Impson rule.14

Two justices filed a separate concurring opinion and one did not participate in the decision. As the concurring justices stated, the various holdings of the court result in a new and novel way of dealing with violations of safety regulations. In those jurisdictions where the violation of a regulation is considered to be only some evidence of negligence with respect to which the trial judge can instruct the jury, there are no fixed rules pertaining to excuses. So long as there is a basis for a reasonable difference of opinion about whether an actor in possible violation of a statute is negligent, an issue on common law negligence, framed generally and not necessarily in terms of the statute, should be submitted to the jury. Any reason that

12. 493 S.W.2d 491 (Tex. 1973).
13. Id. at 497-98.
14. Id. at 498.
an ordinary man might give for failure to comply with the safety regulation would need to submit issues on common law negligence, and instructions to the evidence on the so-called excuse for non-compliance. But such was not the holding in Castro. In a safety regulation, especially of the complicated type under consideration involving a motorist approaching a railroad crossing, there will often be conflicting evidence about the existence of a violation. Doubt frequently exists as to whether there is sufficient evidence of a “recognized excuse” within the meaning of Impson. So, in order to avoid the likelihood of a new trial, a trial judge might need to submit issues to ascertain if the statute, as properly interpreted, was violated. He also would need to submit issues on common law negligence, and instructions should be given on the proper interpretation of the statute and on any excuse that might conceivably be raised by the evidence.

It is submitted that either the negligence per se doctrine should be abandoned, a position which I favor, or an issue should be submitted on a “recognized excuse” when raised by the evidence. As two concurring justices observed in Castro, it is novel that when there is no evidence of a recognized excuse an actor should be regarded as negligent per se, but another actor charged with violation of the same statute may escape being found negligent per se if he can raise some evidence of an excuse. This is true even though a jury might well have concluded, if given a chance, that the excuse was not established. Moreover, it is difficult to give instructions about a safety regulation and about excuses without at least implying that the violation of the statute is negligence in the absence of a finding that the recognized excuse was established. Finally, there will inevitably be disagreements between trial and appellate judges as to what constitutes an excuse and whether the evidence raises the issue of excuse.

Before the year was out, these very problems arose in L.M.B. v. Gurecky, a case which dealt with a much simpler traffic regulation and which illustrates the complexities even in a simpler situation. Defendant was on the wrong side of the road when he ran into the car driven by plaintiff. The testimony indicated that a deflated tire caused defendant’s truck to weave. Swerving first to the right, defendant then pulled to the left to avoid a “deep hole” and ditch on the right. This maneuver pulled the truck into the left lane. Defendant then pulled the truck back into the correct lane. As plaintiff’s car approached, defendant applied his brakes hard, and the truck swerved back into the left lane. Subject to four exceptions, the traffic code provides that the driver of a vehicle shall drive upon the right half of the roadway. The trial judge concluded that there was no probative evidence of a legally acceptable excuse within the purview of Impson, but submitted the case on negligence per se because of violation of a statute and common law negligence. The jury found that the statute had been violated but that defendant was not negligent. The trial court disregarded

15. Id. at 501.
the jury's findings on negligence and entered judgment for the plaintiff. The court of civil appeals affirmed, holding that there was no probative evidence of a legally acceptable excuse within the purview of Impson since there was no sudden deflation of the tire confronting the driver with an emergency, the evidence being relevant only to this excuse. The supreme court reversed and remanded, with the following observations: "In our opinion, some of the evidence in this case shows that the events and actions immediately before the impact of the two cars occurred in a matter of a few seconds. . . . In our opinion, a suddenly deflated tire, even in the absence of a blow-out, may constitute a permissible excuse for a car's presence on the wrong side of the road, and there is some evidence which supports this conclusion." The case was remanded, notwithstanding a jury finding that defendant had not been negligent, because at the time the case was tried Castro had not been decided and plaintiff was, therefore, not afforded the opportunity of an instruction regarding the statute and the emergency excuse for the violation of the statute. Three justices dissented, including the two justices who had filed a separate opinion in Castro. It was the view of the dissenters in L.M.B. that a justifiable excuse was not raised by the evidence of the deflated tire and that, in fact, a new traffic situation was created by the application of the brake, which was the immediate cause for the truck being on the left side of the roadway.

A better hypothetical could not be created to illustrate the arguments in support of the view that in submitting a case to the jury, the following guidelines should be observed: (1) The negligence theory should not necessarily be couched in terms of a statute or safety regulation; (2) the negligence issue should be stated in terms of common law negligence; and (3) the trial judge should instruct the jury under the common law negligence issue that the legislature has established a safe standard of conduct by stating the provision of the statute, and that if they find from a preponderance of the evidence that this standard of conduct was violated, this is some evidence, but is not conclusive.

The Automobile Guest. A significant change in the law with respect to the liability of operators of motor vehicles in Texas was made by the legislature in the 1973 regular session. Heretofore, an owner or operator was not subject to liability to a passenger unless harm was intended or caused recklessly when the passenger was a "guest without payment" for the transportation. Hereafter, a driver is subject to liability on proof of ordinary negligence as a proximate cause of his guest's injuries unless the guest is related within the second degree of consanguinity or affinity. A relationship of consanguinity or affinity will not in and of itself preclude recovery, but that rela-

18. L.M.B. Corp. v. Gurecky, 489 S.W.2d 647 (Tex. Civ. App.—Corpus Christi 1972); see text accompanying note 10 supra.
19. 501 S.W.2d at 302.
20. Id. at 55.
Affinity is that relationship which exists between one of the spouses and the kindred of the other spouse. It can generally be said that the relations of a person's spouse are related to such person by affinity in the same degree as they are related to the spouse by consanguinity.\textsuperscript{22} A consanguinity relationship is either lineal or collateral. In establishing a lineal relationship, each generation is counted as one degree. Thus, a grandfather and a grandchild would be related in the second degree. Collateral relationships have not always been determined by the same method, and the two methods which have been employed produce quite different results. The method which apparently originated in the civil law is to count the generation steps up from one of the persons involved to a common ancestor, and then count the generation steps down from the common ancestor to the other person.\textsuperscript{23} The other method, originating perhaps in canon law, is to count down from the common ancestor of both parties, each generation of the longest branch constituting one degree. This method is said to be the appropriate method in Texas for ascertaining whether or not a judge or a prospective juror is qualified to participate in a case involving a party to the suit and who is a relative.\textsuperscript{24} Thus, an uncle would be related to a nephew in the second degree under the second method and the third degree under the first method.\textsuperscript{25} It has been said that most states follow the first or civil law method in determining heirship.\textsuperscript{26} No doubt policy considerations could influence the method followed for a particular problem, but the issue here is with respect to the meaning as intended by the legislature. Since the objective in passing the statute was to restrict narrowly the guest statute, the first or civil law method could be regarded as having been intended. If the method that has been used in Texas for disqualification of judges and jurors is used, the following would all be related within the second degree of consanguinity, lineally or collaterally: parent and child, grandparent and grandchild, brothers, sisters, brother and sister, uncle or aunt and finally nephew or niece.

Since the blood or marriage relationship alone will not prevent recovery by a passenger except when a family immunity is involved, decisions related to the meaning of "guest" without payment for such transportation remain

\textsuperscript{22} Texas Employers' Ins. Ass'n v. McMullin, 279 S.W.2d 699 (Tex. Civ. App.—San Antonio 1955) (jury service disqualification because of the relationship of a prospective juror to a party to the suit).

\textsuperscript{23} See J. Dukeminier & S.M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests and Estate Planning 132 (1972). It is therein stated that the other method originated in canon or church law as regards the problem of incest and permissible intermarriage between persons.

\textsuperscript{24} 1 R. McDonald, Texas Civil Practice § 1.22.2 (1965).

\textsuperscript{25} The diagram with reference to an uncle and a nephew would be as follows:

\[ \text{Father} \]
\[ \downarrow \]
\[ \text{uncle} \]
\[ \downarrow \]
\[ \text{brother} \]
\[ \downarrow \]
\[ \text{passenger nephew} \]

\textsuperscript{26} J. Dukeminier & S.M. Johanson, supra note 23, at 134.
applicable. In *Fernandez v. Kiesling* the supreme court approved the notion that a payment made to the operator by the passenger for transportation will not take a person out of the guest category unless the payment was a motivating cause, but it is not necessary that it be the motivating cause. In *Fernandez* the passenger was riding to work with the defendant, paying twenty cents per trip. Perhaps the operator would not have given the ride to anyone on such a basis but rather was motivated by a desire to accommodate the plaintiff, as well as to receive some compensation from him. If, however, the payment was a "but for" cause for furnishing the transportation, the plaintiff was not a guest without payment for his transportation. This is perhaps as it should be, since the policy is to limit narrowly the coverage of the guest statute.

Courts in other jurisdictions have disagreed about the applicability of the guest statute to very young children who are obviously incapable of entering into legally valid consensual relationships of any kind. It is difficult to understand why such an incapacity should prevent a guardian from making decisions in behalf of the child regarding the child's status while riding in an automobile in the same manner as a guardian normally makes decisions in behalf of children. There are two arguments supporting the guest statute—first, that the passenger is a donee and as such should not be entitled to protection from ordinary negligence, and second, the danger of collusion. However questionable these arguments may be, they are equally applicable when the child is accompanied by a guardian. Two civil appeals decisions involving young children accompanied by a parent or parents held that they were not excluded from the operation of the statute simply because of their inability to enter into voluntary relationships. It could be that if a young child was transported in a car without the consent of one qualified to act in the child's behalf a different result could and should be reached.

II. COMPARATIVE NEGLIGENCE AND CONTRIBUTION

The 63rd Legislature enacted a statute which became effective as of September 1, 1973, providing for a modified comparative negligence doctrine when plaintiff seeks recovery of damages against a defendant or defendants if the basis for recovery is negligence, and the negligence resulted in death or injury to person or property. The basic section is as follows:

Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person or party recovering.

27. 500 S.W.2d 459 (Tex. 1973).
Thus, Texas follows a number of other states in abolishing by legislation the common-law doctrine established in England in 1809,\(^{30}\) which was based primarily on the notion that where both parties are at fault the courts shall leave the parties as they are in the spirit of the equitable doctrine of unclean hands.\(^{31}\)

There are many points to make about the basic section as well as other sections of the statute that deal with the difficult matters of multiple parties to a damaging event and contribution among tortfeasors. First, comparative negligence is provided for only when negligence is the basis for recovery and when death or physical injury to persons or to property is a consequence of the negligence. No change in existing law, whatever it may be, is made when recovery is sought on a theory of strict liability, or when recovery is sought for some kind of loss not attributable to death or physical harm to persons or property. No doubt the adoption of such a policy with respect to the personal injury action based on negligence could be regarded as relevant in the proper solution to the effect of plaintiff's misconduct in other areas, such as when plaintiff seeks recovery against a manufacturer or seller of a product on a strict liability theory.

Second, it is said in the basic section set forth above that contributory negligence is no bar to recovery unless it is greater than that of the defendant or defendants. Thus, of the two principal versions of comparative negligence, Texas has adopted the "modified" form rather than the "pure" form. The latter would allow plaintiff to recover something regardless of the degree of fault,\(^{32}\) whereas the former or modified form would not allow plaintiff a recovery unless his negligence was less than or not greater than that of the defendant or defendants.\(^{33}\) In providing for a modified form of comparative negligence, legislatures in other states have disagreed about what to do when the plaintiff and the defendant, assuming only two parties, are equally at fault, i.e., when each is found to be fifty percent negligent. The decision about this is quite important because this will, and probably should be the most frequently recurring situation. In many situations it is not realistic to attempt a comparison of fault in terms of percentages. This conclusion may be the result of a bias: In my opinion the best solution to the problem of contributory negligence would be to permit a recovery in proportion to the number of those who are legally responsible for the damaging event. Thus, if a claimant and only one other person were legally responsible, claimant would recover one-half of his damage; if claimant and two others were legally responsible, claimant would recover two-thirds of his damages. Such a solution would eliminate the necessity for having the jury

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ascertain a precise percentage of the total negligence for each of the parties to a damaging event. Apparently, in Wisconsin, as a result of a recent amendment, and in New Hampshire, plaintiff can recover if he and the defendant are equally to blame for the damaging event, whereas in Arkansas and Oklahoma plaintiff cannot. The states that have adopted the position that a plaintiff who, along with the defendant, is equally to blame for a damaging event recovers nothing are no doubt motivated by the notion that when plaintiff is in equal fault the parties should be left alone.

Since my preference is for a pure rather than a modified form, I naturally favor a recovery in the situation where the parties are equally at fault. However, the modified form in either version will often result in greater hardship to a negligent party to a collision than the old rule that contributory negligence is a complete bar to recovery. Let us assume jury findings as follows: Driver A was 40% negligent and Driver B was 60% negligent. A’s damages were $50,000 and B’s damages were $100,000. B, who was 60% negligent, will have to bear all of his own damages without recourse against anyone, except for whatever first party insurance he holds, and in addition he will have to pay 60 percent of A’s damages, or $130,000. This is more than 86% of the total damages. In providing A with some recovery, defendant B has been grossly overburdened. The best result would be for each to recover 50% of his damages without a set-off, and the next best result would be for each to recover a proportionate part of his damages without set-off.

A third point about the basic section, as well as the sections which follow, is that it clearly states that multiple defendants are to be treated as a group for the purpose of deciding the basic issue of whether or not a claimant committed the greater negligence. So, if the claimant’s negligence is found to be not greater than the negligence of those against whom recovery is sought, he can recover against each defendant in proportion to that defendant’s negligence, even though one or all of the defendants may have been guilty of less negligence than the plaintiff. Thus, let us assume the following findings: plaintiff is 40% negligent, defendant Jones was 30% negligent, and defendant Smith was 30% negligent. In this illustration plaintiff can recover against each defendant for 30% of his damages. This is the result that Arkansas reached by interpretation of its ambiguous 1961 statute. Apparently, the solution more often adopted has been to regard

34. The statutes of both New Hampshire and Wisconsin state that contributory negligence shall not bar recovery if such negligence was “not greater than” the negligence of the defendant. 4A N.H. Rev. Stat. Ann. § 507.7A (1969); Wis. Stat. § 895.045 (Supp. 1973).

35. The Arkansas and Oklahoma statutes provide that contributory negligence shall not bar recovery if it is of lesser degree than the negligence of the defendant. 3A Ark. Stat. Ann. § 27-1764 (Supp. 1973); Ch. 30, § 1, (1973) Okla. Laws 40.

36. Walton v. Tull, 234 Ark. 98, 356 S.W.2d 20 (Ark. 1962), with a vigorous dissent. The jury in that case apportioned the fault as follows: \( G = 60\% \); \( W = 20\% \); \( B = 10\% \); \( T = 10\% \); T was the claimant. The trial judge refused T any recovery against B because their fault was equal. The court admitted that the statute was open to the interpretation given to it by the trial judge, but the term “any person” was taken to include the plural as well as the singular. The first Arkansas statute allowed a recov-
each defendant separately, and recovery against each defendant is permitted only if plaintiff’s negligence is less than or not greater than that of each defendant. Recovery is then allowed in proportion to that defendant’s negligence.\(^7\)

Many damaging events are the proximate result of the negligence of several persons. Moreover, there are often multiple deaths and injuries. With comparative negligence there are more complications, both substantively and procedurally than there have been when contributory negligence has been a complete bar to recovery. Further, these complications are more severe than they would have been if contributory negligence simply barred recovery by those who were found at the trial to have been legally responsible. At the trial, the parties will often be both claimants and defendants. As to this, the new statute provides:

(b) In a case where there is more than one defendant, and the claimant’s negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant.

c) Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him.\(^8\)

In discussing this subject prior to the passage of the statute, Frank Abraham observed that “for comparative negligence to work effectively in multiple defendant cases, we will need a new Contribution Statute.”\(^9\) While this is true when plaintiff is found to be negligent, it would not have been necessary if contributory negligence simply diminished recovery on the basis of the number of those legally responsible for a damaging event. The statute does indeed alter the contribution statute, but the change seems to contemplate only the situation where the claimant is found to have negligently contributed to his injury. It provides that in a case in which “the claimant’s negligence does not exceed the total negligence of all defendants,” contribution shall be “in proportion to the percentage of negligence attributable to each defendant.” Arguably, the “claimant’s negligence does not exceed the total negligence of all defendant’s negligence” if plaintiff is found not to have been negligent at all. If we are to have a comparative negligence method for contribution when the negligence of two defendants and the plaintiff combine to produce plaintiff’s injury, then it is submitted that it is novel and theoretically unsound to provide for contribution in proportion to the

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\(^8\) This is the rule both in Wisconsin and New Hampshire. See Decker, Some Random Observations About Comparative Negligence and the Trial Process in Wisconsin, 1 CONN. L. REV. 56 (1968); 4A N.H. REV. STAT. ANN. § 507:7A (1969). See also Abraham, Proposed Texas Modified Comparative Negligence Statute: Its Operation and Effect, 35 TEX. B.J. 1114 (1972).

\(^9\) Abrahám, supra note 37, at 1115.
number who are legally responsible when plaintiff is not negligent.\footnote{40}

**Multiple Parties and Joinder.** Heretofore, liability of joint tortfeasors has been joint and several in the sense that the claimant could proceed jointly or separately against parties to a damaging event. If a claimant proceeded separately against one of the parties to an event but did not get complete satisfaction of a judgment for entire damages, he could then file a separate suit against another. Moreover, a party who was proceeded against separately was not required to implead another party in order to obtain contribution.\footnote{41} The complications resulting from the Texas comparative negligence statute, especially because all parties are treated as a unit in deciding whether or not plaintiff committed the greater negligence, seem to be enormous if this practice is allowed in the future. However, the statute seems to contemplate the continuance of such procedural options. It clearly contemplated a separate suit for contribution, because it is provided that “all claims for contribution between named defendants in the primary suit shall be determined in the primary suit except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant.”\footnote{42} Abraham, in his observations prior to the passage of the statute, took the position that all claims for contribution should be determined in the primary suit to prevent a multiplicity of suits and potential inequities in the distribution of responsibility.\footnote{43} Moreover, one commentator writing about Wisconsin's experience has said that some judges have taken the position that the claimant and the original defendant have had their opportunity to bring in all parties, and if they have chosen not to do so, they should not be permitted to bring further litigation.\footnote{44} I would agree with these views, and I would hope that, judicially or legislatively, any participant to the damaging event will be made an “insistible” party, meaning that if he could have been brought into the primary suit, no separate action can be brought against him.\footnote{45}

The statute may be construed to require joinder of a party by the plaintiff if he wishes to argue at any time that such person's negligence was a proximate cause. However, the statute specifically provides for a separate contribution suit, as stated above.\footnote{46} Therefore, the defendant in the separate contribution suit could reopen all the issues regarding the question of negligence of the respective parties, as well as the amount of damages. Perhaps the result would be as follows: (1) The defendant in the primary suit would get contribution only if plaintiff was found to be legally entitled to have recovered against the contribution defendant; (2) the amount of contribution would be that portion of the claimant's damages which represents

\footnotesize{\begin{itemize}
\item \footnote{40} See Abraham, supra note 37.
\item \footnote{41} Callihan Interests, Inc. v. Duffield, 385 S.W.2d 586 (Tex. Civ. App.—Eastland 1965).
\item \footnote{42} TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Supp. 1974) (emphasis added).
\item \footnote{43} Abraham, supra note 37, at 1115.
\item \footnote{44} Decker, supra note 37, at 66.
\item \footnote{45} See Petroleum Anchor Equip., Inc. v. Tyra, 406 S.W.2d 891 (Tex. 1966), discussing the insistible party concept.
\item \footnote{46} TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Supp. 1974).
\end{itemize}}
the percentage of the negligence attributable to the contribution defendant; and (3) claimant's damages would be the amount fixed by the jury in the contribution suit, not to exceed the amount recovered in the primary suit.

**Off-set.** The rule of entire liability of joint tortfeasors, which requires that defendants will be treated as a unit in deciding whether plaintiff is guilty of the lesser negligence, and multiple claims combine to complicate the solution if provision is made for off-set. This is exactly what the legislature has done. The statute provides that if two claimants become liable to each other in damages, "the claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant." \(^47\) This is a major and important difference between the Texas comparative negligence system and that provided for in some states. Where only two parties to the damaging event are found to be negligent and each is injured, the only occasion when this provision becomes relevant is when both parties are equally at fault. No doubt this will be a recurring type of result and is, therefore, an important situation. If the damages of each were the same there would be no recovery at all, and in any case when both are seriously injured this off-set provision will mean that one person is not liable at all. Therefore, the claimant's liability insurer is not obligated to pay, and the other party may be liable for a small amount of the damages. It is submitted that this provision is probably the most objectionable feature of the statute because of the complications resulting from it, the difficulty that will be encountered in trying to evaluate claims, and the unfairness that is produced. Each claimant should have judgment against the other for his damages diminished in proportion to the amount of his negligence without off-set. When multiple parties are involved the computation is somewhat complicated, often requiring a two-step procedure. \(^48\) An example will serve to illustrate the difficulties and consequences of a policy permitting off-set contrasted with that of not allowing an off-set.

As an illustration, the following hypothetical case, set forth in tabular form will be referred to:

<table>
<thead>
<tr>
<th></th>
<th>A</th>
<th>B</th>
<th>C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negligence</td>
<td>30%</td>
<td>40%</td>
<td>30%</td>
</tr>
<tr>
<td>Damages</td>
<td>$80,000</td>
<td>$100,000</td>
<td>$60,000</td>
</tr>
<tr>
<td>Recovery without off-set</td>
<td>$56,000(^a)</td>
<td>$60,000(^b)</td>
<td>$42,000(^c)</td>
</tr>
</tbody>
</table>

\(^a\)from \(B\)—$32,000 \((C-J\*)\); from \(C\)—$24,000 \((B-J)\)

\(^b\)from \(A\)—$30,000; from \(C\)—$30,000

\(^c\)from \(A\)—$18,000 \((B-J)\); from \(B\)—$24,000 \((A-J)\)

\(^*\) J means joint liability

As an example of the method of computation, consider how \(A\)'s final recovery would be arrived at. Once the determination is reached that \(A\)’s

\(^{47}\) Id. § 2(f).

negligence was 30% of the cause of the damaging event, his final recovery may be arrived at by deducting that portion which he caused from his total damage. 30% of $80,000 is $24,000; once this is deducted, it can be seen that $A$ should recover a total of $56,000 from the other parties to the damaging event. The next step is determining what portion of $A$'s damages should be borne by each of the other parties. The amounts in which $B$ and $C$ are liable to $A$ are proportional to the amounts in which their negligence caused the damaging event. Because they jointly caused 70% of the negligence responsible for the accident, and because $B$, for example, individually caused 40% of the negligence, then $B$ must compensate $A$ for $4/7$ths of the amount which $A$ is entitled to recover. $4/7$ths of $56,000 is $32,000. The same computations would then be carried out for the remaining combinations of parties, however $A$ and $C$ would not be jointly liable to $B$. This is because section 2(c) of the statute provides that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of the negligence attributable to him.

The computations involved under the Texas system which requires that offsets be made are more complex. The final results would be as follows:

$$
\begin{array}{ccc}
A & B & C \\
\text{Recovery with offset} & $8,000^a & $6,000^b & 0 \\
\text{from } B & $2,000 (C-J^*) & \text{from } C & $6,000 (B-J) \\
\text{from } C & $6,000^* \\
\end{array}
$$

* $J$ means joint liability

Computation of the basic figures is accomplished as when there is no offset. Once the figures are reached, however, all of the offsets must be computed in order to determine final liability. For example, $A$'s recovery would be determined by comparing the amounts owed him by each party with what he owes each party. While $A$ is liable to $B$ for $30,000, B$ is liable to $A$ for $32,000, hence $B$ will ultimately be liable to $A$ in the amount of $2,000. The same comparison must be made between $A$ and $C$, resulting in $C$'s being ultimately liable to $A$ in the amount of $6,000. $B$ would recover from $C$, but the offset of $B$'s liability vis à vis $A$ would, as stated above, result in $B$ being liable to $A$, hence $B$ will not recover from $A$. $C$, who is equally at fault as $A$, and less at fault than $B$, because of his lesser amount of total damage, would recover from no one once all of the offsets were computed.

Since much of the impetus for the passage of this legislation was to overcome some of the arguments made by those who favor no-fault schemes as a means of compensating victims who have heretofore received no compensation at all, the offset provision tends to defeat its objective.

**Settlements.** The statute speaks specifically to the apportionment of damages when a claimant has settled with one of two or more tortfeasors.\(^{49}\) In using the word "settlement," the legislature undoubtedly intended to refer to

that kind of settlement document that names as the only person to be released, the person with whom the settlement is made. The statute distinguishes between when the alleged tortfeasor is made a party to the suit and when he is not. This distinction was based on the notion that if a settlement was made with a person who was not a party to the suit, that would preclude, or should preclude, submitting to the jury the existence and the amount of his negligence. Failure to join an alleged settling tortfeasor neither precludes nor, arguably, should it preclude the submission of the existence or amount of his negligence. The determination of the existence or amount of his negligence is in no way dependent on his being a party, and there is no value in making him a formal party to the litigation except for procedural and tactical reasons on the part of claimant or defendants. These reasons do not justify making this distinction. The method provided for apportioning the damages when the person with whom the settlement is made is a party seems the appropriate one for both situations, i.e., the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tortfeasor. Under the statute, when the settling tortfeasor is not made a party, each defendant deducts from the amount for which he would otherwise be held liable a percentage of the settlement, based on the relationship the defendant's negligence bears to the total negligence of all defendants. When the settling tortfeasor is made a party, the settlement is a complete release of the portion of the judgment attributable to his negligence. The determination of these matters for making a decision about the rights of the parties to the suit is in no way dependent on the presence of the settler, and the distinction should be between a settlement made with one who was not legally liable and one who was.

**Unresolved Issues.** The adoption of comparative negligence should and will inevitably bring about a re-examination, and no doubt alteration, of several other doctrines related to the claimant's conduct or the conduct of another that has resulted in either a complete recovery or a complete denial of recovery.


(d) If an alleged joint tortfeasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or nonsuited after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants.

(e) If an alleged joint tortfeasor makes a settlement with a claimant but nevertheless is joined as a party defendant at the time of the submission of the case to the jury (so that the existence and amount of his negligence are submitted to the jury) and his percentage of negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tort feasor.
The discovered peril doctrine is a judge-made comparative negligence rule. It is based on the theory that generally a defendant who is negligent after discovery of the plaintiff in peril commits the greater fault and should be held liable for all of the damages suffered by the plaintiff. The doctrine would never have come into existence if contributory negligence had been only a partial bar to recovery. It developed simply as a rough way to compare fault pursuant to a judge-made system that either denied recovery altogether or allowed complete recovery. Courts have concluded that only the legislature could provide for a partial-recovery comparative negligence system. In any event, the discovered peril doctrine shifts the entire loss due to the fault of both parties from the plaintiff to the defendant and inflicts obvious injustice on the defendant. It has no place under a comparative negligence system.

Voluntary assumption of the risk as a defense has been vigorously criticized even when contributory negligence was a complete bar to recovery. There is much less justification for its retention now that fault bars recovery only when claimant is guilty of the greater fault. It must be admitted, however, that the defense is not based on a fault concept, but rather on the idea that there is a manifestation of consent to accept the risk. This subject needs further elaboration and discussion.

Imputed contributory negligence is a doctrine that is based on the theory that a "relationship may exist between an injured person and another which renders it inequitable to permit the injured person to recover from a negligent third person, if the injury resulted in part from the negligence of the other party to the relationship." The question of imputing contributory negligence has arisen most frequently in connection with instances when a passenger and a driver of a motor vehicle are engaged in a so-called "joint enterprise." The doctrine of imputed contributory negligence should be abolished, and it has been in some jurisdictions. There is less justification for its retention under a comparative negligence or comparative fault system. Let us assume the following: passenger enterpriser—20% negligent; driver enterpriser—40% negligent; Driver X—40% negligent. Arguably, if imputed contributory negligence is retained as a doctrine, then the

53. In Florida it has been said that the doctrine of last clear chance has no application under a comparative negligence system. Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973).
passenger could not recover against Driver X because his negligence would be combined with that of his driver to make him guilty of the greater negligence. But this is not what the statute says shall be done, and arguably a proper construction of the statute would be that the doctrine has been legislatively abolished. Again, this is a subject that must be dealt with at greater length.

It is obvious that it will take a number of years to settle many of the questions raised by the legislature in the passage of the comparative negligence statute.