



Pacific Law Journal Review of Selected Nevada Legislative

Volume 1979 | Issue 1

Article 61

1-1-1979

Torts; Comparative Negligence

Wesley Kumagai

Follow this and additional works at: <https://scholarlycommons.pacific.edu/nlr>



Part of the [Legislation Commons](#)

Recommended Citation

Wesley Kumagai, *Torts; Comparative Negligence*, 1979 U. PAC. L. REV. (1979).

Available at: <https://scholarlycommons.pacific.edu/nlr/vol1979/iss1/61>

This Legislative Review is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in Pacific Law Journal Review of Selected Nevada Legislative by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

TORTS; COMPARATIVE NEGLIGENCE

Amends NRS 15.265, 15.295, 17.225, 17.275, 17.305, 41.141

Repeals NRS 17.215, 17.315, 17.325, 698.310

AB 333 (Committee on Judiciary); STATS 1979, Ch 206

Chapter 206 extends comparative fault to the apportionment of liability among tortfeasors in multiple tortfeasor cases by reinstating a form of joint and several liability¹ and modifying the law of contribution.² Chapter 206 also increases jury involvement in comparative negligence cases by adding a requirement that the fact finder return a general verdict of the net sum to be recovered by the plaintiff.³

Multiple Tortfeasors

Chapter 206 makes a major revision in the law of contribution among tortfeasors by amending NRS 17.295.⁴ Previously NRS 17.295(1)⁵ forbade consideration of relative degrees of fault in determining contribution shares; Chapter 206 deletes this provision.

Chapter 206 also modifies the liability of tortfeasors to the tort victim. NRS 41.141(e)⁶ previously made defendants, in multiple tort cases, severally liable, with each defendant's liability in proportion to this negligence. As amended, NRS 41.141(3) makes such defendants jointly and severally liable.⁷

Comparative negligence is a rapidly developing area of law. Because its basic principle is so different from the prior common law, comparative negligence challenges law makers to create imaginative solutions to the problems of harmonizing the new negligence law with related areas of law. One of the greatest challenges is that posed by cases involving multiple tortfeasors.⁸ Chapter 206 addresses this challenge.

In 1973, the legislature enacted NRS 41.141⁹ and 698.310,¹⁰ giving Nevada modified comparative negligence:¹¹ contributory negligence would no longer bar a plaintiff's recovery where the plaintiff was not more negligent than the defendants, but recovery would be reduced in proportion to the plaintiff's negligence.

Prior to Chapter 206, NRS 41.141(3) provided that, in actions where recovery is allowed against more than one defendant, the defendants would be severally liable

to the plaintiff and that each defendant's liability would be in proportion to his negligence.¹² The assurance that each defendant's liability would be in proportion to his fault seems to abrogate the common law rule of joint and several liability of joint tortfeasors whereby one defendant, only partially responsible for a victim's injury, may be held severally liable for the entire amount of damage.¹³

The common law rule conflicts with the basic comparative fault principle that liability should correspond to the extent of fault. Nevertheless, most jurisdictions have retained joint and several liability,¹⁴ presumably because of reluctance to have victims bear the cost of insolvent tortfeasors and fear of escalating collection costs if separate judgments were awarded.¹⁵ However, where joint and several liability is retained, some provision for contribution among joint tortfeasors must be made in order to extend comparative fault to liability among them.¹⁶ Prior to amendment by Chapter 206, NRS 41.141 appeared to accomplish this by making codefendants severally liable for the percentage of total liability corresponding to their respective negligence.¹⁷ However, in 1973, the legislature also enacted a new law of contribution, the 1955 Uniform Contribution Among Tortfeasors Act.¹⁸ This act was apparently applicable to comparative fault cases¹⁹ but stated "in determining pro rata shares of tortfeasors in the entire liability.. their relative degrees of fault shall not be considered" (emphasis added).²⁰ With no consideration of fault, the contribution rule would be the common law type: equal division among all tortfeasors.²¹

Applying pro rata contribution to several liability of tortfeasors produces some strange results. If A, B, and C are tortfeasors 55%, 30% and 5% negligent respectively, with a 10% negligent plaintiff (P) incurring a \$100,000 injury, P can collect no more than \$55,000 from A, \$30,000 from B and \$5,000 from C.²² But since A will then have paid more than his pro rata share of the liability (\$90,000: 3 = \$30,000), he is entitled to contribution from C (who has paid less than his pro rata share).²³ Thus, the least blameworthy defendant was accorded no better treatment than the most blameworthy. Moreover, if one of the tortfeasors was insolvent, P absorbed the entire burden of that defendant's inability to pay.²⁴

Chapter 206 retains contribution among multiple tortfeasors but substantially alters the guidelines for determining their shares. First, defendants will be entitled to contribution whenever they have paid more than their equitable, rather than "pro rata," share of liability to the plaintiff.²⁵ Excising the term "pro rata" also excises any connotations of equal division.²⁶ Chapter 206 further repeals the provisions

forbidding consideration of fault in the determination of shares,²⁷ opening the door to comparative contribution.²⁸ Now joint tortfeasors will contribute according to fault.²⁹

Chapter 206 also adopts a form of joint and several liability.³⁰ Effective July 1, 1979, defendants are jointly and severally liable to the plaintiff,³¹ with one exception. A defendant whose negligence is less than the plaintiff's negligence is only severally liable for damages.³²

This modified joint and several liability has been adopted in Texas³³ and Oregon,³⁴ and has been much commended in the literature as a system which forces some absorption of the risk of tortfeasor insolvency by the tortfeasors themselves, yet protects the slightly negligent defendant from massive liability.³⁵ Where, as in Nevada, the legislature has decided to bar recovery of plaintiffs who are more responsible for their own injuries than are the defendants,³⁶ the liability of any individual less culpable than the plaintiff should naturally be limited. The new law so provides.

In the example above, where tortfeasors A, B, and C are 55%, 30% and 5% negligent, respectively, and P is 10% negligent with a \$100,000 injury, assume that B is insolvent. Thus, we find: a) C is less negligent than P, and therefore is only severally liable to P;³⁷ b) A is more negligent than P and is therefore jointly and severally liable to P;³⁸ c) P may either collect the whole \$90,000 from A, or collect \$85,000 from A and \$5,000 from C;³⁹ and d) if P collects \$90,000 from A, then A may seek \$5,000 contribution from C,⁴⁰ but no more than that because "no tortfeasor is compelled to make contribution beyond his own equitable share."⁴¹

On the other hand, one should note the possibility of a plaintiff winning a judgment against multiple tortfeasors with no single defendant liable for the entire award. Suppose, for example, P has been found 20% negligent and his attorney has joined eight defendants, all of whom have been found equally but independently responsible; each 10% negligent. In such a case, each defendant would be severally liable for the percentage of the damages corresponding to his fault.⁴² For example, 10% of \$100,000 is \$10,000, so each defendant would be severally liable for \$10,000.

ELIMINATION OF SEPARATE MOTOR VEHICLE PROVISION

Chapter 206 repeals NRS 698.310,⁴³ which had established comparative negli-

gence for motor vehicle accident cases using language identical to the general comparative negligence statute, NRS 41.141.⁴⁴ These dual provisions created ambiguity⁴⁵ because of uncertainty as to whether the procedural and multiple tortfeasor provisions contained in NRS 41.141(2) and (3) were to apply to motor vehicle cases.⁴⁶

PROCEDURE

Chapter 206 adds to NRS 41.141(2)(b) a requirement that the jury return a general verdict giving the net sum recoverable by the plaintiff.⁴⁷ Prior to amendment, NRS 41.141(2)(b) required a general verdict of the damages to which the plaintiff is entitled regardless of his contributory negligence,⁴⁸ and a special verdict indicating the percentage of negligence attributable to each party,⁴⁹ from which the net sum could be mechanically calculated by the court. However, the new requirement ensures that the jury is aware of the relationship between its separate findings of raw damages and percentage negligence. This questions of whether or not to inform the jury of the significance of its findings is one over which there is a profound split among the comparative negligence jurisdictions.⁵⁰

Wesley Kumagai

FOOTNOTES

1. 1979 Nev.Stats. ch. 206 (hereinafter "Ch. 206") 6 (amending NRS 41.141).
2. Id. §§1, 2, 3, 4, (amending NRS 17.225, 17.265, 17.275, 17.295).
3. Id. §6 (amending NRS 41.141).
4. Id. §4 (amending NRS 17.295).
5. 1973 Nev. Stats. ch. 693 §10 ¶1, at 1304.
6. 1973 Nev. Stats. ch. 787 §1 ¶3, at 1722.
7. Ch. 206 §6 (amending NRS 41.141).
8. See e.g., Safeway Stores, Inc. v. Nest-Kart, 21 Cal.3d 332, 146 Cal.Rptr. 550, 579 P.2d 441 (1978). See Also Adams, Settlements After Li: But is it "Fair", 10 PAC. L.J. 729 (1979).
9. 1973 Nev. Stats. ch. 787 §1 ¶1, at 1722 (NRS 41.141(1)).
10. 1973 Nev. Stats. ch. 770 §3, at 1657 (NRS 698.310, repealed effective January 1, 1980. See note 44 infra).

11. For distinctions between "modified" and "pure" comparative negligence, see V. SCHWARTZ, COMPARATIVE NEGLIGENCE §3.1 (1st ed., 1974) (hereinafter "Schwartz").
12. 1973 Nev. Stats. ch. 787 §1, ¶ 3, at 1722 (NRS 41.141(3)).
13. See generally, Prosser, Joint Torts and Several Liability, 25 CAL. L. REV. 413 (1936-37); W. PROSSER, LAW OF TORTS §§46-52 (4th ed., 1971).
14. SCHWARTZ, supra note 11, at §16.4, points out that by 1974 no state supreme court which had passed on the question of joint and several liability in a comparative negligence jurisdiction had abolished it. However, in 1978 Oklahoma became the first state to do so. See Laubach v. Morgan, 49 OKLA. B.A.J. 60, 588 P.2d 1071, 1073-74 (1978); McNichols, Judicial Elimination of Joint and Several Liability Because of Comparative Negligence--A Puzzling Choice, 32 OKLA. L. REV. 1. (1979) (hereinafter "McNichols").
15. See American Motorcycle Ass'n v. Superior Court, 20 Cal.3d 578, 580, 146 Cal.Rptr. 182,184, 578 P.2d 899, 901 (1978).
16. SCHWARTZ, supra note 11, at §16.4.
17. 1973 Nev. Stats. ch. 787 §1 ¶1, at 1722 (NRS 41.141(3)).
18. 1973 Nev. Stats. ch. 693 §§1-13, at 1303 (enacting NRS 17.215 to 17.325). See also Uniform Contribution Among Tortfeasors Act, 12 U.L.A. (1975).
19. NRS 17.225 states "...where two or more persons become jointly or severally liable in tort for the same injury...or for the same wrongful death, there is a right of contribution among them..." (emphasis added). Since NRS 41.141(3) stated "...defendants are severally liable..." there appears little doubt that the Uniform Contribution Among Tortfeasors Act applied to comparative negligence cases. For a contrary view, see Beasley, NRS 17.215 and 41.141--A Legislative Framework for a Comprehensive Comparable Fault System, 43 Inter Alia (3) 1 (1979).
20. 1973 Nev. Stats. ch. 693 §10, at 1304 (NRS 17.295).
21. SCHWARTZ, supra note 11, at §16.7; W. PROSSER, LAW OF TORTS §50 (4th ed., 1971).
22. See 1973 Nev. Stats. ch. 693 §3, at 1303 (NRS 17.225(2)).
23. Id.
24. See 1973 Nev. Stats. ch. 787 §1 ¶ 3, at 1722 (NRS 41.141(3)).
25. Ch. 206 §1 ¶ 2 (amending NRS 17.225).
26. See McNichols, supra note 14, at 21, for a discussion of connotations and denotations of the term "pro rata" in the contribution context.

27. Ch. 206 §4 (repealing NRS 17.295(1)).
28. Compare id. with 1973 Nev. Stats. ch. 693 §10, at 1304 (NRS 17.295).
29. Ch. 206 §§1, 4 (amending NRS 17.225, 17.295).
30. Id. §6 (amending NRS 41.141(3)).
31. Id.
32. Id. §6 (amending NRS 41.141(3)(a)).
33. VERNON'S CIV. STAT. art. 2212a §2(c).
34. OREGON REVISED STATUTES §18.485.
35. See e.g., SCHWARTZ, supra note 11, at §16.6.
36. Ch. 206 §6 (amending NRS 41.141(2)(a)).
37. See id. §6 (amending NRS 41.141(3)).
38. Id.
39. Id.
40. See 1973 Nev. Stats. ch. 693 §3, at 1303 (NRS 17.225(1)).
41. Ch. 206 §1 (amending NRS 17.225(2)).
42. See id. §6 (amending NRS 41.141(3)(a)).
43. Ch. 206 §7.
44. Compare 1973 Nev. Stats. ch. 770 §3, at 1657 (NRS 698.310) with 1973 Nev. Stats. ch. 787 §1, at 1722 (NRS 41.141).
45. See Robison, Nevada's Comparative Negligence Statutes, 1 NTLA Newsletter Vol. 1 (9) 1 (January 29, 1977).
46. NRS Ch. 698 is repealed by 1979 Nev. Stats. ch. 660 §9, effective January 1, 1980.
47. Ch. 206 §6 (adding NRS 41.141(2)(b)(3)).
48. Compare Ch. 206 §6 (NRS 41.141(2)(b)(1)) with 1973 Nev. Stats. ch. 787, at 1722 (NRS 41.141(2)(b)).
49. Compare Ch. 206 §6 (NRS 41.141(2)(b)(2)) with 1973 Nev. Stats. ch. 787, at 1722 (NRS 41.141(2)(c)).
50. SCHWARTZ, supra note 11, at §17.5.