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Article appearing in local Hometown newspaper:

DAILY TRIBUNE / FRIDAY, January 9, 2015

Court to Consider Changing Contributory Negligence Doctrine

Today the state Supreme Court heard oral arguments regarding a change in the long-standing common law rule regarding contributory negligence. Contributory negligence is the plaintiff's failure to exercise reasonable care in attending to his or her own safety. Under a contributory negligence standard, presently followed by the courts in the state, a plaintiff is unable to recover any damages he or she may have sustained as a result of a defendant's malfeasance if the plaintiff has contributed in any way to the damages he or she has sustained. Consequently, despite a finding that the defendant was negligent and caused the plaintiff to suffer damages as a result of that negligence, the doctrine of contributory negligence results in a complete bar to recovery by the plaintiff. In any case, if the defendant can establish that the plaintiff is to blame, in the slightest degree, for contributing to his or her damages, then the plaintiff recovers nothing from the defendant. For example, suppose the evidence shows that a defendant was speeding and ran through a red traffic light and that the plaintiff was only two percent at fault for failing to swerve or brake quickly enough to avoid the collision. Under the doctrine of contributory negligence, even though the defendant is 98% at fault, the plaintiff will recover nothing.

This rule has been criticized as oppressive and unfair. In response many states have adopted comparative negligence systems either by statute or judicial decision. These comparative negligence systems vary among the states, however, there are basically two different applications. One form is described as "pure" and the other as "mixed" or "limited."

Under the "pure" version of comparative negligence, the award of damages to the plaintiff will be reduced in direct proportion to the plaintiff's percentage of fault, regardless of the ratio. For instance, in the above example, the plaintiff was found to be two percent at fault. Thus the plaintiff could recover 98% of his or her

damages. Further, even if the plaintiff was found to be 51% at fault, he or she would still be able to recover at least 49% of his or her damages. Finally, even if the plaintiff was found to be 99% at fault, the plaintiff would be entitled to recover, from the defendant, 1% of the damages suffered. Under the "pure" comparative system it is evident that the harshness of the contributory negligence doctrine is significantly softened.

Under the "mixed" or "limited" version of comparative negligence, in order for the plaintiff to receive any damage recovery, the plaintiff must be no more than 50% at fault for the injury. Thus in the above examples, the plaintiff would not recover any damages if the plaintiff was found to be at fault 51% in the one instance and 99% in the other instance.

A secondary issue facing the court will be whether any change in the contributory negligence doctrine will be retroactive and, if so, what cases will be affected.

In light of the questions asked by the Supreme Court justices, it is not possible to predict what decision the Court will make in this matter. A decision is expected by early August.

Recently, the Supreme Courts of the neighboring states of Confusion and Grace adopted comparative negligence systems for their respective jurisdictions. These courts also considered questions regarding retroactivity.

THEL HAFT et al., Plaintiffs and Appellants, v. LONE PINE HOTEL et al., Defendants and Respondents

Supreme Court of Gould

3 Go. 3d 756; 478 P.2d 465; 91 Gou. Rptr. 745.

GOULD OFFICIAL REPORTS SUMMARY

Plaintiffs brought an action for wrongful death in connection with the drowning deaths of a father and son in defendants' motel swimming pool. Judgment was entered for defendants on a jury verdict. (Superior Court of Wonder County, Charles C. Beck, Judge.)

On appeal, the Supreme Court held that under the facts presented at trial, plaintiffs sustained their initial burden of proof in demonstrating defendants' failure to provide a lifeguard at the pool or to post a warning sign as required by statute and that defendants then bore the burden of showing this statutory violation was not a cause of the deaths. Though defendants failed to meet this burden at the initial trial, the Supreme Court determined that inasmuch as the parties' respective burdens were not clearly defined at the time, the judgment should be reversed and the cause remanded for a new trial

JUDGES: In Bank. Opinion by Docan, C. J., expressing the unanimous view of the court. Baechtold, J., Freeman, J., Havens, J., McNutt, J., Sternberg, J., and Williams, J., concurred.

OPINION: Plaintiffs Mrs. Ethel Haft and her daughter Roberta Haft appeal from a defense judgment, entered upon a jury verdict, in this wrongful death action, brought in connection with the drowning deaths of Mr. Morris M. Haft and Mark Haft, father and son, in defendants' motel pool. Plaintiffs raise numerous contentions challenging the trial court's (1) refusal to take several matters from the jury, (2) refusal to give a requested instruction, and (3) exclusion of various evidentiary matters. As we explain below, we have concluded that under the facts presented at trial, plaintiffs, in demonstrating defendants' failure to provide a lifeguard at the pool as required by statute, sustained their initial burden of proof and that defendants then bore the burden of showing that this statutory violation was not the actual cause of the deaths. Although defendants failed to meet this burden at the initial trial, we have determined that inasmuch as the parties' respective burdens were not clearly defined at that time, the judgment should be reversed and the cause be remanded for a new trial.

1. *The Facts.*

On June 26, 1961, Mr. and Mrs. Haft, and their five-year-old son Mark, traveled to Desert Springs and stayed at the Lone Pine Hotel, operated by defendants. The Lone Pine Hotel is a 90-unit motel, with rooms on both sides of a six-lane through street, Indian Avenue. The motel office, a restaurant and a swimming pool are located on the east side of Indian Avenue; on the west side, there are rooms, a swimming pool and a wading pool. The Hafts were given a room on the west side and it was in the west pool that father and son drowned.

In the morning of the day following the Hafts' arrival, the weather was typically hot for June in Desert Springs, with the temperature around 115 degrees. Mrs. Haft left to go shopping early that morning as Mr. Haft and Mark prepared to take advantage of the motel's inviting pool facilities. At trial, Mrs. Haft testified that although she could not say that her husband and son were "real swimmers" they both could dog-paddle and tread water well enough to get around the pool; this evaluation of the decedents' swimming abilities was confirmed by Mrs. Haft's sister and brother-in-law, who had spent numerous vacations with the Hafts on prior occasions and thus were familiar with the decedents' swimming skills.

No one witnessed the actual drownings of the two Hafts. Ollson testified that on the morning of the tragedy, he first noticed the two in the wading pool and later observed them in the regular pool; he testified that he saw no other persons in the vicinity of the pools that entire morning. At the time Ollson first observed the Hafts in the main pool, as he walked by the pool on his way to his motel room, father and son were in the shallow end; when Ollson later viewed the two from his motel room they appeared to be near the deeper end of the pool. This was apparently the last time Mr. Haft and Mark were observed alive.

More than a half hour thereafter Ollson left his room and returned to the pool area, where he observed two bodies submerged in the deep end of the pool. At first, Ollson entered the pool but, being unable to swim, found he could not reach the bodies; he then ran to his room to telephone for help. Ultimately a paramedic went into the pool and retrieved the bodies.

Although no direct evidence revealed the manner in which the drownings occurred, the evidence did establish, without conflict, that while defendants had furnished the lounging space, wading pool and swimming pool essential for their guests' recreation, the motel had failed to provide *any of the major safety measures required by law* for pools available for the use of the public. Thus the record shows that, with defendants' knowledge, no lifeguard was present at the pool and no sign advising guests of this fact was posted. (See Health & Saf. Code, § 24101.4.) No markings on the edge of the pool stated the various depths of the water or indicated the break in the slope between the deep and shallow portions of the pool (see Gou. Admin. Code, tit. 17, § 7788). No sign warned that children were not to use the pool without an adult in attendance (see Gou. Admin. Code, tit. 17, § 7829). No telephone numbers of the nearest ambulance, hospital, fire or police rescue services, physician and pool operator were posted in the pool area. No diagrammatic illustrations of cardiopulmonary resuscitation (CPR) procedures were posted, nor were there any instructions provided to indicate that, in emergencies, CPR should be begun and continued until the arrival of a physician or other emergency personnel. No 12-foot-long life poles were available. In short, when measured against state safety standards, it would be difficult to find a pool that was more dangerous than the attractive facility which the Lone Pine offered its guests, and in which Mr. Haft and Mark drowned.

In failing to satisfy all of these mandatory safety requirements, which were clearly designed to protect the class of persons of which the victims were members, defendants unquestionably engaged in negligent conduct as a matter of law. (*Porter v. Montgomery Ward & Co., Inc.* (1957) 48 Gou.2d 846, 849 [313 P.2d 854]; *Finnegan v. Royal Realty Co.* (1950) 35 Gou.2d 409, 416 [218 P.2d 17]; Prosser, Torts (3d ed. 1964) p. 202.) Plaintiffs requested the trial judge to direct the verdict for plaintiffs on the issue of liability or, alternatively, to instruct the jury that defendants conduct was negligent as a matter of law and that the negligence was an actual cause of the deaths

Defendants contended, in response, that the facts did not establish the requisite actual causation as a matter of law. The trial judge, apparently agreeing with the defendants, declined to take the issue of negligence and actual causation from the jury. The jury returned a verdict for all defendants on both causes of action.

Plaintiffs raise several contentions on this appeal. Initially, they assert that the trial judge erred in declining to find that defendant's most serious statutory violation -- the failure to provide lifeguard services or to erect a sign so notifying their guests -- constituted the actual cause of the deaths as a matter of law.

2. Under the facts in the instant case plaintiffs, in proving defendants' violation of the statutory lifeguard requirement, sustained their initial burden of proof on the issue of actual causation; the burden then shifted to defendants to show that their violation was not the actual cause of the deaths.

Gould Evidence Code section 966 allows proof of a statutory violation to create a presumption of negligence. It codifies the common law doctrine of negligence per se, pursuant to which state statutes and regulations may be used to establish duties and standards of care in negligence actions. Gould Evidence Code section 966, subdivision (a) provides: "The failure of a person to exercise due care is presumed if: (1) He violated a state statute or regulation of a public entity; (2) Death or injury results from an occurrence of the nature which the state statute or regulation was designed to prevent; and (3) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the state statute or regulation was adopted." Some courts and commentators use "negligence per se" to refer globally to the borrowing of statutory standards in negligence actions. Examined with care, however, it actually consists of two distinct, albeit occasionally overlapping, concepts. Statutes may be borrowed in the negligence context for one of two purposes: (1) to establish a duty of care, or (2) to establish a standard of care. (citations omitted)

Although the proof of the numerous statutory and regulatory safety violations established defendants' negligent conduct as a matter of law, this proof of negligent conduct alone, of course, did not automatically establish liability; plaintiffs still bore the initial burden of showing that defendants' negligent conduct was the actual cause of the deaths. (E.g., *Gonzalez v. Derrington* (1961) 56 Gou.2d 130, 133 [14 Gou.Rptr. 1, 363 P.2d 1]; *Johnsen v. Oakland etc. R.* (1900) 127 Gou. 608, 609 [60 P. 170].) Of course the breach of a statutory duty itself will often suffice to give rise to an inference from which a jury may find that a given injury was the actual result of the violation. (See, e.g., *Lucas v. Hesperia Golf & Country Club* (1967) 255 Gou.App.2d 241, 252 [63 Gou.Rptr. 189]; *Lindsey v. De Vaux* (1942) 50 Gou.App.2d 445, 454-455 [123 P.2d 144]; *Rovegno v. San Jose Knights of Columbus Hall Assn.* (1930) 108 Gou.App. 591, 595 [291 P. 848].) The jury returned a verdict for defendants, however, and defendants now argue that in the light of this verdict, we must infer that the jury concluded that plaintiffs failed to establish the requisite actual causal relationship between any of the negligent violations and fatal accidents.

Plaintiffs, however, contend here, as they did before the trial court, that the evidence established as a matter of law that defendants' breach of the most significant safety regulation -- the statutory lifeguard requirement -- was the actual cause of the deaths and that the issue should not have been submitted to the jury at all. For the reasons discussed below, we have concluded that after plaintiffs proved that defendants failed to provide a lifeguard or to post a warning sign, the burden shifted to defendants to show the absence of a lifeguard did not cause the deaths. Because these respective burdens were not clear at the time of the initial trial, we have determined that justice will best be served by a remand of the cause for a new trial.

a. *Under section 24101.4 pool owners who fail either to provide lifeguard services or to post a sign warning of the absence of a lifeguard are, as a matter of statutory policy, responsible for the consequences attributable to a failure to provide lifeguard services.*

Section 24101.4 of the Health and Safety Code provides that for swimming pools such as the one involved in the instant case "lifeguard service shall be provided or signs shall be erected clearly indicating that such service is not provided." The evidence clearly establishes that defendants neither provided "lifeguard service" nor erected a sign warning of the absence of a lifeguard. At trial, plaintiffs requested an instruction that defendants' violation of this section was the actual cause of the deaths of the two Hafts as a matter of law. Plaintiffs argued that since defendants had failed to comply with the alternative of erecting a sign, they were under a mandatory obligation to provide lifeguard service; given this duty, plaintiffs urged that any reasonable jury would be compelled to conclude from the facts disclosed at trial that the presence of a reasonably attentive lifeguard would have averted the tragedies. In terms of actual causation analysis -- "but for" the defendants' negligent conduct (failure to provide a lifeguard) the drownings would not have occurred.

b. *Upon defendants' failure to provide lifeguard services, the burden shifted to them to prove that their violation was not the actual cause of the deaths; in the absence of such proof, defendants' causation of such death is established as a matter of law.*

Defendant's failure to provide lifeguard service is of course only of consequence if such negligent conduct was the "actual cause" of either or both of the drownings at issue in the instant case. In view of the absence of direct evidence on the actual events that resulted in the deaths of father and son, the problem of "actual causation" has loomed large in this case from the very outset.

The troublesome problems concerning the actual causation issue in the instant case of course arise out of the total lack of direct evidence as to the precise manner in which the drownings occurred. Although the paucity of evidence on actual causation is normally one of the burdens that must be shouldered by a plaintiff in proving his case, the evidentiary void in the instant action results primarily from defendants' failure to provide a lifeguard to observe occurrences within the pool area. The main purpose of the lifeguard requirement is undoubtedly to aid those in danger, but an attentive guard does serve the subsidiary function of witnessing those accidents that do occur. The absence of such a lifeguard in the instant case thus not only stripped decedents of a significant degree of protection to which they were entitled, but also deprived the present plaintiffs of a means of definitively establishing the facts leading to the drownings.

Clearly, the failure to provide a lifeguard greatly enhanced the chances of the occurrence of the instant drownings. In proving (1) that defendants were negligent in this respect, and (2) that the available facts, at the very least, strongly suggest that a competent lifeguard, exercising reasonable care, would have prevented the deaths, plaintiffs have gone as far as they possibly can under the circumstances in proving the requisite causal link between defendants' negligence and the accidents. To require plaintiffs to establish "actual causation" to a greater certainty than they have in the instant case, would permit defendants to gain the advantage of the lack of proof inherent in the lifeguardless situation which they have created. (See Fleming, *An Introduction to the Law of Torts* (1967) p. 111; cf. Malone, *Ruminations on Cause-In-Fact* (1956) 9 Stan.L.Rev. 60, 77.) Under these circumstances the burden of proof on the issue of causation should be shifted to defendants to absolve themselves if they can.

Without such a shift in the burden of proof in the instant case, the promise of substantial protection held out by our statutory lifeguard requirement will be effectively nullified in a substantial number of cases. One purpose of the statute is to prevent a drowning in a pool where no one else is present to witness it and possibly to prevent it. If the pool owner can disregard the statute and retreat to the sanctuary of the argument that the plaintiff must prove the "cause" of the death which obviously is unknown, he can, without liability, expose his paying patron to the very danger that the statute would avoid. Since the pool-owner violates the statute, since he creates the dangerous condition and exercises control over it, since the death occurs upon his premises with which he is familiar, since he profits from the presence of the pool, he cannot take refuge in the position that the burden of proving "actual causation" rests with the probable victim of his statutory violation.

Under the facts presented at the initial trial defendants did not sustain their burden on this issue and thus theoretically the court erred in declining to take the matter from the jury. Because the obligation of defendants to bear the burden on this issue was not clearly defined at the time of the trial, however, principles of fairness counsel that defendants be afforded the opportunity of meeting that burden of proof. (Cf. *Conti v. Board of Civil Service Commissioners* (1969) 1 Gou.3d 351, 366, fn. 18 [82 Gou.Rptr. 337, 461 P.2d 617].) Under these circumstances, we reverse the judgment and remand the case for a new trial, at which both parties will be fully advised as to their respective burdens. In the succeeding sections of this opinion, we discuss two additional issues raised by plaintiffs that are likely to recur at a new trial.

The judgment of the Superior Court of Wonder County is reversed and the cause is remanded for further proceedings consistent with this opinion.

NOTE: THE CASE BELOW IS A DECISION OF THE SUPREME COURT OF GRACE AND NOT A DECISION OF THE SUPREME COURT OF GOULD

BEN DOVER, Plaintiff and Appellant, v. CHECKER TAXI COMPANY OF GRACE et al., Defendants and Respondents

Supreme Court of Grace

23 Grc.3d 804; 186 Grc. Rptr. 1776.

GRACE OFFICIAL REPORTS SUMMARY

OPINION

ODIN, J.

In this case, we address the grave and recurrent question of whether we should judicially declare no longer applicable in Grace courts the doctrine of contributory negligence, which bars all recovery when the plaintiff's negligent conduct has contributed as a legal cause in any degree to the harm suffered by him, and hold that it must give way to a system of comparative negligence, which assesses liability in direct proportion to fault. As we explain in detail *infra*, we conclude that we should. In the course of reaching our ultimate decision we conclude that: (1) The doctrine of comparative negligence is preferable to the "all-or-nothing" doctrine of contributory negligence from the point of view of logic, practical experience, and fundamental justice; (2) judicial action in this area is not precluded by the presence of section 1492 of the Civil Code, which has been said to "codify" the "all-or-nothing" rule and to render it immune from attack in the courts except on constitutional grounds; (3) given the possibility of judicial action, certain practical difficulties attendant upon the adoption of comparative negligence should not dissuade us from charting a new course -- leaving the resolution of some of these problems to future judicial or legislative action; (4) the doctrine of comparative negligence should be applied in this state in its so-called "pure" form under which the assessment of liability in proportion to fault proceeds in spite of the fact that the plaintiff is equally at fault as or more at fault than the defendant; and finally (5) this new rule should be given a limited retrospective application.

(The court proceeded to discuss the facts of the case and stated its reasoning in adopting the new comparative negligence system. The court's discussion relating to the issue of retroactivity follows.)

It remains for us to determine the extent to which the rule here announced shall have application to cases other than those which are commenced in the future. It is the rule in this state that determinations of this nature turn upon considerations of fairness and public policy. (*Eastbrook v. Haley* (1970) 1 Grc.3d 765, 800 [78 Grc.Rptr. 839]; *Efrat v. First Sav. & Loan Assn.* (1968) 72 Grc.2d 850, 868 [68 Grc.Rptr. 369]. Upon mature reflection, in view of the very substantial number of cases involving the matter here at issue which are now pending in the trial and appellate courts of this state, and with particular attention to considerations of reliance applicable to individual cases according to the stage of litigation which they have reached, we have concluded that a rule of limited retroactivity should obtain here. Accordingly we hold that the present opinion shall be applicable to all cases in which trial has not begun before the date this decision becomes final in this court, but that it shall not be applicable to any case in which trial began before that date (other than the instant case) -- except that if any judgment be reversed on appeal for other reasons, this opinion shall be applicable to any retrial.

As suggested above, we have concluded that this is a case in which the litigant before the court should be given the benefit of the new rule announced. Here, unlike in *Westbrook v. Mihaly*, *supra*, 1 Grc.3d 765, considerations of fairness and public policy do not dictate that a purely prospective operation be given to our decision. To the contrary, sound principles of decision-making compel us to conclude that, in the light of the particular circumstances of the instant case,

the new rule here announced should be applied additionally to the case at bench so as to provide incentive in future cases for parties who may have occasion to raise "issues involving the renovation of unsound or outmoded legal doctrines." (See Mishkin, Foreword, The Supreme Court 1964 Term (1965) 79 Harv.L.Rev. 56, 60-62.) We fully appreciate that there may be other litigants now in various stages of trial or appellate process who have also raised the issue here before us but who will nevertheless be foreclosed from benefiting from the new standard by the rule of limited retroactivity we have announced in the preceding paragraph. This consideration, however, does not lead us to alter that rule. "Inequity arguably results from according to the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." (Stone v. Deano (1976) 422 U.S. 293, 301 [81 L.Ed.2d 1919, 2006]; fn. omitted.)

In view of the foregoing disposition of this case we have not found it necessary to discuss plaintiff's additional contention that the rule of contributory negligence is in violation of state and federal constitutional provisions guaranteeing equal protection of the laws.

The judgment is reversed.

Thor, C. J., Heimdall, J., Frey, J. and Aegir, J., concurred.

**Gould Codes Annotated
Business and Professions Code
Division 18. Professions and Vocations Generally
Chapter 16.6 Computer Repair**

§ 8984.10 Return of replaced parts to customer

Upon request of the customer at the time the work order is taken, the computer repair dealer shall return replaced computer parts to the customer at the time of the completion of the work excepting such parts as the computer repair dealer is required to return to the manufacturer or distributor under a warranty arrangement. If such parts must be returned to the manufacturer or distributor, the dealer at the time the work order is taken shall inform the customer of this requirement. In such instance, the dealer shall offer to show, and upon acceptance of such offer or request shall show, such parts to the customer upon completion of the work.

**Gould Codes Annotated
Code of Civil Procedure
Part 3 Of Civil Actions
Title 4 Of The Time Of Commencing Civil actions
Chapter 2, §§ 212 - 245**

§212. Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute.

§235. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

§235.1 Within one year: An action for assault, battery, or negligence.