Fordham Law Review

Volume 25 | Issue 1 Article 10

1956

Legislation

LEGISLATION

PROCESS IN DIVERSITY OF CITIZENSHIP CASES

INTRODUCTION

From the first days of the republic the federal courts have been the forums for cases involving suits between citizens of different states. Federal jurisdiction of diversity of citizenship actions is based on the constitutional provision that, "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . .",[1] and its implementing legislation.[2] This constitutional provision sprang from the desire of the founding fathers to guarantee each citizen a fair hearing regardless of the existence of sectional prejudices.[3] Implicit in that desire was the hope that no citizen would be deprived of the opportunity of seeking redress of injuries solely because the injury was sustained at the hands of a person from another state.

In view of the purpose of the constitutional provision it would be expected that litigants would always have resort to the federal courts when the dispute involved citizens of different states. This is not, and never has been, the case. The implementation of the diversity of citizenship provision is subject to rules respecting jurisdiction, venue[4] and service of process which substantially limit its use. The purpose of this article is to examine these rules in an attempt to determine whether the limitations they impose are within the spirit of the original constitutional enactment.

JURISDICTION

At the outset Congress curtailed diversity jurisdiction by requiring that the amount in controversy be not less than $500.[5] Today the jurisdictional amount is fixed at $3,000.[6] The courts imposed further restrictions by requiring that the existence of diversity be pleaded most specifically[7] and by denying jurisdiction

1. U.S. CONST. art. III, § 2, cl. 1.

2. 28 U.S.C.A. § 1332.

3. Chief Justice Marshall in Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, at 87 (1809), stated: "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."

4. Although the terms are oft-times used interchangeably, clarity requires that, throughout this article, "jurisdiction" and "venue" be used only in the original meanings. "Jurisdiction" will refer only to the federal court's general power to decide the issue in suit, i.e., without consideration of service of process. "Venue" will be concerned with the particular federal court entitled to hear the suit.

5. Act Sept. 24, 1789, c. 20, 1 Stat. 73.

6. See note 2 supra.

7. Bingham v. Cabot, 3 U.S. (3 Dall.) 302 (1798); Turner v. Enrille, 4 U.S. (4 Dall.) 6 (1799); Course v. Stead, 4 U.S. (4 Dall.) 20 (1800); Wood v. Wagnon, 6 U.S. (2 Cranch) 1 (1804); Capron v. Van Noorden, 6 U.S. (2 Cranch) 71 (1804); Montalet v. Murray, 8 U.S. (4 Cranch) 29 (1807).

where one plaintiff and one defendant were residents of the same state, although all other parties to the same action were of diverse citizenship.[8]

The decisiveness of these early restrictions left little room for argument and faint hope for a subsequent reversal. The jurisdictional requirements as we know them today are much the same as in the early days of our federal court system. They cannot, however, be said to limit the full use of diversity of citizenship in any save the most reasonable respects.

VENUE

The requirements of venue, in the cases wherein federal jurisdiction is founded on diversity of citizenship alone, are specific and unambiguous. The United States Code provides that, "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."[9] Although the 1948 revision of Title 28 of the United States Code wrought major changes in the title as a whole, the portion of former section 112 of Title 28, which became the diversity venue section of our present code, remained substantially the same. The terms "all plaintiffs" and "all defendants" replaced the words "the plaintiff" and "the defendant" since the latter terms had been so construed,[10] and the word "reside" was substituted for the phrase "whereof he is an inhabitant" for the same reason.[11] Hence the case law from 1911 when the last thoroughgoing amendment took place is still applicable. Barring a waiver of venue[12] the only two places where the action may be brought are those explicitly set forth in the statute.

That a defendant may be sued in the district of his own residence cannot be seriously questioned.[13] It is also clear that the district of the plaintiff's residence is a proper forum for a diversity action.[14] Reason would dictate that where the action is in the plaintiff's district all the defendants need not reside in the same district or state; nor would there be any reason to assume that all the plaintiffs must reside in the same district when suing in the defendant's district. The limitations imposed by venue, viewed in itself, are negligible. They effectively express the original intent of the framers of the Constitution.

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8. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 159 (1806).

9. 28 U.S.C.A. § 1391(a).

10. H.R. Rep. No. 308, 80th Cong., 1st Sess. app. 126 (1947).

11. Ibid.

12. Where an action is based solely upon diversity of citizenship, venue requirements do not predicate the power of the federal court to adjudicate. They are requirements which are designed for the convenience of the parties and may be waived by them. Olberding v. Illinois Cent. R.R., 346 U.S. 338 (1953); Sweeney v. Carter Oil Co., 199 U.S. 252 (1905).

13. Sweeney v. Carter Oil Co., 199 U.S. 252 (1905); Sherman v. Collin, 117 F. Supp. 496 (S.D. Me. 1953); Katz Exclusive Millinery, Inc. v. Reichman, 107 F. Supp. 263 (W.D. Mo. 1952).

14. Camp v. Gress, 250 U.S. 308 (1919); Harris v. Deere & Co., 128 F. Supp. 799 (E.D.N.C. 1955), aff'd, 223 F.2d 161 (4th Cir. 1955); Shaffer v. Tepper, 127 F. Supp. 892 (E.D. Ky. 1955); Rhodes v. Barnett, 117 F. Supp. 312 (S.D.N.Y. 1953).

PROCESS

Service of process is governed by Rule 4(f) which states, "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state."[15]

Thus, in the absence of statutory exceptions,[16] service of process in any state other than the one wherein the court is located is prohibited.[17] Original process to bring in third party defendants is subject to the same limitations. This does not, however, preclude the waiver of objections to service requirements.[18] Nor does it preclude situations which fall within the other provisions of Rule 4 for substituted service under which personal service may be permitted in a state other than the one wherein the district court is located.[19]

Rule 4(f) is an expansion of the previously extant rule governing civil process in the federal courts. Theretofore, except for a limited number of statutory exceptions, process ran only within the district in which it was issued.[20] The extension was the fruit of constant agitation by members of the bar who found the old rule inconvenient and frustrating. Many of the states are divided into several federal judicial districts. Due to the limitation of service of process to the district within which process was issued, the federal courts were rendered powerless to assert jurisdiction over parties in issues of which they would otherwise have taken cognizance. In order to obviate the difficulties arising as a result of this restriction the more extensive Rule 4(f) was adopted.[21]

Yet, even under the extension of Rule 4(f), service of process remains a persistent stumbling block where diversity of citizenship is involved. As stated in our discussion of venue, a citizen of state *A* may bring an action against a citizen of state *B* either in the federal district court of state *A*, the domicile of the plaintiff, or in the federal district court of state *B*, the domicile of the defendant.[22] But, as a practical matter, a plaintiff is often unable to bring an action in his own state because the defendant cannot be found and served therein. Thus, under our present rules, while a federal court may have jurisdiction over the subject matter of an action, a lack of an adequate procedural device to assert that jurisdiction over the person may prevent it from exercising its substantive remedy.

CHANGES

The Federal Rules of Civil Procedure, insofar as they relate to diversity of citizenship actions, create several problems calling for revision of those rules.

15. Fed. R. Civ. P. 4(f).

16. Congress has the power to provide for service of process anywhere in the United States. Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946).

17. See note 15 supra.

18. Orange Theatre Corp. v. Rayherstz Amusement Corp., 130 F.2d 185 (3d Cir. 1942).

19. Fed. R. Civ. P. 4(d), (e).

20. Robertson v. Railroad Labor Board, 268 U.S.619 (1925).

21. Holtzoff, Origin and Source of the Federal Rules of Civil Procedure, 30 N.Y.U.L. Rev. 1057, 1063 (1955).

22. See note 9 supra.

Before revision can be considered, however, let us briefly review the history of the rules to ascertain the agency empowered to promulgate the change.

The Constitution provides, "The judicial power of the United States, shall be vested in one Supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish."[23] This provision seems to establish clearly the Supreme Court as its own master, certainly insofar as promulgation of rules for the regulation of its own judicial affairs. It is less lucid, on the question of rules for regulation of the inferior courts. The power vested in Congress to establish those inferior courts clearly implies that Congress should also have the power to regulate them. A question raised in constitutional law is whether the Congress has the power to delegate its legislative function. It has been held that Congress may delegate rule-making authority so long as sufficient criteria are given the delegate for the exercise of the delegated functions.[24] The most significant occurrences in the development of federal procedure began with an enabling act in 1934, authorizing the Supreme Court to make procedural rules to unite the practice in law and equity.[25] This meant, in addition to the unification, that federal procedure in law actions in the inferior courts would lose its multiform nature, no longer being bound by the procedural rules of the various states.[26] The criterion under which Congress delegated its authority to make rules in this instance was that the rules would "neither abridge, enlarge, nor modify, the substantive rights of any litigant."[27]

As the first step in carrying out the task assigned by Congress, the Supreme Court appointed an Advisory Committee of eminent attorneys to prepare a draft of such rules.[28] The Advisory Committee received help and recommendations from many sources, and while the Supreme Court, for obvious reasons of necessity, delegated much of the actual work to the Advisory Committee, it still exercised close and careful supervision. The adopted rules were submitted to the 75th Congress. Hearings were held by the Judiciary Committees of both houses and Congress adjourned without any adverse legislation. Because of the absence of adverse legislation the Federal Rules of Civil Procedure became effective as of September 16, 1938.[29]

Thus, the rules at present are promulgated by the Supreme Court under a delegation of congressional power. Changes within them can be wrought by the court, subject to the approval of Congress. That approval will be based on whether such changes adhere or fail to adhere to the limitations imposed by the criterion established in the Enabling Act which delegated the power.[30] Any

23. U.S. Const. art. III, § 1.

24. Hampton Co. v. United States, 276 U.S. 394 (1928).

25. Act June 19, 1934, c. 651, §§ 1, 2, 48 Stat. 1064.

26. Procedure in actions at law in the federal courts had prior to this time been determined by the rules of procedure of the courts of the states wherein such federal courts were situated. Act Sept. 29, 1789, c. 21, §2, 1 Stat. 93; Act May 19, 1828, c. 68, § 1, 4 Stat. 278; Act June 1, 1872, c. 255, § 5, 17 Stat. 197. As a result, a multiplicity of federal procedure existed until the adoption of the Federal Rules of Civil Procedure.

27. See note 25 supra.

28. 55 S. Ct. XXXIX (1935).

29. 1, Barron and Holtzoff, Federal Practice and Procedure § 5 (1950).

30. See note 25 supra.

changes which conflict with those limitations are not within the authority of the Supreme Court, but can be made by the Congress itself under its power to regulate the lower federal courts.

As noted, the prime purpose of diversity jurisdiction is to provide an unbiased forum for disputes; to avoid the possibility of sectional prejudices.[31] That purpose is well advanced by the present rules regarding jurisdiction and venue. It appears to be thwarted unreasonably by the rules governing service of process.

Although there are numerous recorded instances of dismissal of diversity actions because of the plaintiff's inability to serve process on individual defendants, their tabulation would not portray realistically the full deterrent of process requirements. More often the effect is realized before litigation and the plaintiff, made aware of the difficulties, does not bring his action.

Even more disturbing is the case where there are two indispensable defendants residing in different states. Although plaintiff may bring his action in the state of one of the defendants, the action will be dismissed because process cannot be effected under Rule 4(f) against the other indispensable defendant.[32] Under such a fact situation, it is impossible for suit to be brought in a federal court.

Because the present rules impose this unwarranted bar upon the institution of a diversity action, it is well to consider the possibility of altering them.

Might not the Federal Rules of Civil Procedure be amended to allow service of process *throughout* the United States and its possessions, in all diversity of citizenship actions wherein the requirements of venue and jurisdiction have been otherwise met? Such an amendment would certainly come closer to the fulfillment of the original purpose of diversity jurisdiction.

The above change alone, however, would be less than adequate. It would foster "plaintiff-favoring" situations. As noted previously under present venue provisions diversity actions are maintainable in either the plaintiff's or the defendant's district.[33] Given unlimited service of process in such actions, virtually every plaintiff would lay his action in his own district. Diversity jurisdiction should favor neither party. Thus, this change, alone, would carry the present injustice to the opposite extreme.

A modification of the venue provisions, made concurrently with the change in process requirements, would resolve the difficulty. All that is required is to substitute for the existing optional venue provision (which grants venue in either plaintiff's or defendant's district) a provision limiting venue to the district wherein the alleged cause of action arose. This would insure that neither plaintiff nor defendant will be forced to litigate in a district in which he has no voluntary prior dealings.

In every diversity case a determination of the locus of the cause of action would first have to be made. Such determination does not present any unusual or extraordinary difficulties. A motion by defendant to dismiss for want of proper venue would involve no more perplexing a problem than that entailed by

31. See note 3 supra.

32. Schadl v. Boyer, 56 F. Supp. 897 (E.D. Pa. 1944).

33. See note 9 supra.

a determination of residence. Certainly the allegation of the locus of the cause of action is no more susceptible to dispute than an allegation of residence.[34]

This proposed venue change would be inapplicable, of course, whenever the cause of action arose *outside* the United States, yet involved citizens of different states. In such cases, the present rule of venue would be the only reasonable solution. Including it as an express exception in this class of cases would do no violence to the Federal Rules of Civil Procedure, which now contain many such exceptions.

Congress is empowered to make these changes. At present, however, Congress has vested the Supreme Court with rule-making power. The present rules, as noted, were promulgated by the Supreme Court and approved, through silence, by Congress. All revisions or additions proposed must fall within the Enabling Act which made the delegation. It is almost certain that the Court is not empowered to bring about *both* changes hereinbefore recommended.

The overriding prohibition of the Enabling Act is that no existing substantive rights of any litigant be abridged by the rules. The extension of service of process from the confines of the federal judicial district to the territorial boundaries of the state was upheld by the Supreme Court to be a procedural rather than a substantive change.[35] The further extension herein suggested would appear to involve a mere difference in degree.

Venue provisions, however, will very probably require legislation. No attempt to alter venue has as yet been made under the Enabling Act. Venue in diversity actions is the subject of express congressional enactment. This factor does not conclusively preclude court alteration of venue. Such alteration would not affect the *right to sue,* which is clearly substantive, but rather the situs of the suit, a seemingly procedural matter. In any event, the change *can* be made. Congress itself definitely has the authority and has exerted it in the past.

The changes proposed, it is felt, would correct an existing inequity. They would, admittedly, tend to increase the number of federal actions. The spirit of the times is adverse to diversity jurisdictions. Many respected authorities have urged its abolition. Mr. Justice Frankfurter has decried the "mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction."[36] On the other hand an increase in the number of federal cases is not an evil in itself, and should not be a damning consideration. At any rate, while we have diversity jurisdiction should it not be consistent with the spirit of the Constitution and the intent of the founding fathers?

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34. As to difficulties in determination of "domicile," see for example, In re Dorrance's Estate, 115 N.J.Eq. 268, 170 Atl. 601 (1934); In re Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932), cert. denied, 287 U.S. 660 (1932). See also Tweed and Sargent, Death and Taxes are Certain—But What of Domicil, 53 Harv. L. Rev. 68 (1939).

35. Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 445 (1945); Industrial Addition Ass'n v. Commissioner, 323 U.S. 310, 314 (1944).

36. Lumbermen's Mutual Casualty Co. v. Elbert, 348 U.S. 48, 54 (1954).

PROPOSED ADOPTION OF COMPARATIVE NEGLIGENCE IN THE STATE OF NEW YORK.*—Comparative negligence has been defined as that negligence attributable to the plaintiff which when joined with the negligence of the defendant in proximately causing the injury of the plaintiff goes in reduction of the recovery in the proportion that the negligence of the plaintiff compares with that of the defendant.[1] This doctrine has take on more important aspects in the United States in the past few decades. Several states have enacted statutes which permit a modified form of comparative negligence to exist in varying degrees.[2] An example of this is the Wisconsin statute which limits recovery to plaintiffs whose negligence ". . . was not as great as the negligence of the person against whom recovery is sought."[3] The state of Mississippi has adopted the "pure" form of comparative negligence[4] under which a person can recover damages regardless of the degree of his own negligence unless, of course, it be the sole cause of the injury.

The immediate factors which prompted this discussion of the subject of comparative negligence are the proposed bills in several of the legislatures of the eastern states, and in particular, the proposed amendments which have been presented to the New York legislature in the past several sessions.[5]

One proposed amendment in the 1956 New York legislative session[6] which would adopt the doctrine of comparative negligence in this state reads, in part, as follows:

"Contributory Negligence; diminution of damages . . . the contributory negligence of the plaintiff shall not bar a recovery, but the damages recoverable shall be reduced to such extent as the court deems just and equitable and having regard to the amount of negligence attributable to the plaintiff."[7]

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* Subsequent to the writing of this article the proposed legislation discussed herein was defeated.

1. Whatley v. Henry, 65 Ga. App. 668, 16 S.E. 2d 214, 220 (1941).

2. Geo. Laws § 105-603; Miss. Code § 1454; 1 Neb. Rev. Stat. § 25-1151; S.D. Laws of 1941 c. 160 p. 184; Wis. Stat. § 331.045.

3. Wis. Stat. § 331.045.

4. Miss. Code § 1454; This form of comparative negligence also exists in certain state and federal statutes which only apply to certain limited fields and are not discussed to any great length because of the differences in scope and application: See Federal Employers' Liability Act, 45 U.S.C.A. § 53; Iowa Code § 8158; Kan. Rev. Stat. Ann. 66:238; Mass. Laws c. 229 §§ 2,2A,20; N.M. Stat. § 22-20-3; Tenn. Code Ann. § 2628-30 (Williams 1934).

5. 178th Session 1955, Assembly Bill Int. no. 2835, Print no. 2970, Senate Bill Int. no. 2572, Print no. 2741; 177th Session 1954, Assembly Bill Int. no. 2086, Print no. 2187, Senate Bill Int. no. 1097, Print no. 1142; 176th Session 1953, Assembly Bill Int. no. 1038, Print no. 1057, Senate Bill Int. no. 25, Print no. 25; 175th Session 1952, Assembly Bill Int. no. 192, Print no. 192, Senate Bill Int. no. 42, Print no. 42; 174th Session 1951, Senate Bill Int. no. 479, Print no. 479, 173rd Session 1950, Assembly Bill Int. no. 189, Print no. 189, Senate Bill Int. no. 277, Print no. 277.

6. 179th Session, Assembly Bill Int. no. 1862, Print no. 1935, Senate Bill Int. no. 39, Print no. 39.

7. Proposed Civil Practice Act amendment § 255b. This language will also be incorporated by this amendment into §§ 119 and 131 of the N.Y. Decedent's Estate Law. Assembly Bill Int. no. 674, Print no. 679 introducing § 426-a amending the Civil Practice

The vast importance of this proposed amendment and its impact on the current law of New York can best be appreciated by contrasting the current law with the law as it would stand if the amendment were enacted.

The Current New York Law

New York has remained a firm advocate of the doctrine of contributory negligence which was first set forth in England in the classic case of *Butterfield v. Forrester*.[8] Under this doctrine a plaintiff whose negligence contributed in any way, no matter how slight,[9] to cause his injury, is barred from any recovery. The defendant, who in many cases is the main cause of the injury, is allowed to escape without any liability whatsoever regardless of the degree of negligence he exhibited as long as it falls short of a willful tort.[10] This exclusionary rule of contributory negligence does not, of course, exclude every negligent plaintiff from recovery. If he is to be precluded, his negligence must have been a proximate cause of his injury.[11] The prime reason for New York's adherence to the contributory negligence rule is the feeling that liability should be confined to the party who has been the proximate cause of the injury; that where the plaintiff's negligence contributed to his injury, it is a proximate cause thereof and bars recovery.[12]

The inflexible rule of contributory negligence, to which New York clings, is not capable of rendering exact justice. Is there any reason to justify absolution of a concededly negligent defendant from his complete lack of care because he can show the plaintiff has also been, to a degree, a proximate cause of the accident? Of course not, but such is the only course under present New York law.

Effect of the Proposed Amendment

The primary effect of the introduction of comparative negligence to the law of New York would be the replacement of the rigid rule of contributory negligence. The scales of justice would not fall from a position of full recovery, in the event of complete freedom from contributory negligence, to no recovery

Act has also been submitted to the 1956 legislative session. This proposed amendment would permit a restricted doctrine of comparative negligence to apply only when there has been a stipulation by the parties and their attorneys for a trial without jury. The plaintiff would be entitled to recovery only if "the degree of negligence or fault on the part of the defendant is found to be greater than that of the plaintiff." If the court found the plaintiff entitled to recover, judgment would be rendered, "in favor of the plaintiff for the total amount of the damages assessed less such proportion as may be allocable to the plaintiff by reason of his negligence."

8. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809).

9. See Fitzpatrick v. International Ry., 252 N.Y. 127, 169 N.E. 112 (1929); Grippens v. New York Cent. R.R., 40 N.Y. 34 (1869); Rydell v. Greenhut & Co., 140 App. Div. 926 (1st Dep't 1910).

10. Tidd v. Skinner, 225 N.Y. 422, 122 N.E. 247 (1919); Chapman v. New Haven R.R., 19 N. Y. 341 (1859).

11. Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920).

12. Grippens v. New York Cent. R.R., 40 N.Y. 34 (1869). But see Arctic Fire Ins. Co. v. Austin, 69 N.Y. 470 (1877).

at all at the slightest trace of contributory negligence,[13] but will come to rest at many different settings depending upon the actual comparative negligence of the parties involved. For example, car operator X by his 10% negligence in not putting out his hand when making a left hand turn, will not be barred from a partial recovery against car operator Y who by his negligent lack of control and lack of observation has contributed 90% of the cause of the accident. The 10% negligence on the part of plaintiff X held to be a proximate cause would only go to the reduction by 10% of his recoverable damages.[14]

Under a literal reading of the proposed amendment, New York would change its position of having the slightest degree of contributory negligence bar recovery[15] to a position where any injured party in an accident would be entitled to a recovery regardless of the degree of negligence he contributed,[16] as long as it was not the sole cause of his injuries. A reading of the Mississippi statute and cases indicate that they also proceed on this theory of recovery regardless of the plaintiff's own negligence. Thus in the aforementioned example of the negligent car operators, the more negligent car operator Y would have a right of recovery for 10% of the damage sustained by him. In the case where Y's damages are a great deal more than X's the ultimate result would be that X would pay instead of receiving compensation for an accident to which he has only contributed 10% of the cause. If in our example X's damage is $100 and Y's damage is $1,000, theoretically the end result would be X's paying Y $10. This result is not harsh or unjust since the plaintiff X has been a proximate cause of the accident and suffered only one-tenth the actual damages Y incurred.

Another change in the current law of New York would be the elimination of having the plaintiff plead and prove his lack of contributory negligence as one of the essential elements of his case.[17] The plaintiff's contributory negligence would be an affirmative defense pro tanto and would only go to the diminution of damages in the proportion to his negligence.[18]

Administration of the Proposed Amendment

In considering the proposed amendment primary concern must be given to the feasibility of its application. To determine just how the amendment would affect the courts of New York in this respect, regard might be given to its application in states which have enacted general comparative negligence statutes.[19] The only state that has a statute as broad in application as the proposed amendment is Mississippi where the statute has operated successfully since its enactment in 1910.[20] In Mississippi the degree of negligence is left

13. See note 9 supra.
14. See note 7 supra.
15. See note 9 supra.
16. See note 7 supra.
17. See Fitzpatrick v. International Ry., 252 N.Y. 127, 169 N.E. 112 (1929).
18. See note 7 supra.
19. See note 2 supra.
20. Miss. Code § 1454, ". . . the fact that the person injured . . . may have been guilty of contributory negligence shall not bar a recovery, but damage shall be diminished . . . in proportion to the amount of negligence attributable to the person injured."

for jury determination.[21] The courts of that state do not consider the practice of submitting special questions to the jury for answers in the form of special verdicts at all essential.[22]

Wisconsin has a more restricted comparative negligence act which limits recovery to a plaintiff whose negligence ". . . was not as great as the negligence of the person against whom recovery is sought."[23] Under this statute, the Wisconsin courts submit special questions on the main points of the case[24] to the jury and they are answered in the form of special verdicts. The reason for these special verdicts has been stated to be the enabling of the trial judge "to evaluate the answers of the jury to the questions of fact and the questions of damages as to conformity to the evidence."[25] In a recent article Gerald P. Hayes,

21. Whiles Lumber & Supply Co. v. Collins, 186 Miss. 659, 192 So. 312 (1939); Tendall v. Davis, 129 Miss. 30, 91 So. 701 (1922). But see Goodman v. Lang, 158 Miss. 204, 130 So. 50 (1930).

22. Ibid.

23. Wis. Stat. § 331.045.

24. Padway, Comparative Negligence, 16 Marq. L. Rev. 1,23 (1931). Form of Special Verdict Relating to Comparative Negligence on Complaint and Counter-Claim.

Question 1: In operating his automobile at the time and immediately preceding the collision was the defendant Smith negligent in respect to speed and control of his car?

Answer: .....

Question 2: If you answer question 1 "Yes", then answer this: Was the defendant Smith's negligence a cause of the collision?

Answer: .....

Question 3: In operating his automobile at the time of and immediately preceding the collision, was the plaintiff, Jones, negligent in respect to the speed of his car?

Answer: .....

Question 4: If you answer question 3 "Yes", then answer this: Was the plaintiff Jones' negligence a cause of the collision?

Answer: .....

Question 5: In the event you answer all of questions 1, 2, 3, and 4 "Yes", then answer this: Was the negligence of defendant Smith greater or less than the negligence of the plaintiff Jones? Answer by writing in the word "greater" or the word "less".

Answer: .....

Question 6: In the event you answer all of questions 1 and 2 "Yes", and 3 or 4 "No", then answer this: What is the full damage Jones has sustained?

Answer: .....

Question 7: In the event you answer all questions 1, 2, 3, 4 "Yes", and 5 "greater", then answer this: What is plaintiff Jones' damage as diminished in the proportion to the amount of negligence attributable to him?

Answer: .....

Question 8: In the event you answer questions 1 or 2 "No", questions 3 and 4 "Yes", then answer this: What is the full damage Smith has sustained?

Answer: .....

Question 9: In the event you answered all of questions 1, 2, 3 and 4 "Yes", and question 5 "less", then answer this: What is defendant Smith's damage as diminished in the proportion to the amount of negligence attributable to him?

Answer: .....

25. Hayes, N.Y. Should Adopt a Comparative Negligence Rule, 27 N.Y.S. Bar Ass'n. Bull. at 289 (July 1955).

former President of the Wisconsin State Bar Association, stated, "a comparative negligence law cannot successfully operate with the use of a general verdict".[26]

In states where the comparative negligence statute requires the jury to distinguish between slight and gross negligence,[27] or other definite divisions of negligence,[28] special verdicts would be advantageous to ascertain whether the jury found the negligence to be within the statutory limitations. When using the less detailed rule of straight comparison, however, which would be in effect under the proposed act of New York, the special verdict might prove more cumbersome than helpful. It would seem that the same result could be more expeditiously accomplished by a charge in which the principle of the comparative negligence doctrine and its application to the particular case would be elucidated.

Whether New York adopts the system of questions and special verdicts or simply relies on a charge to the jury, it seems clear that the added duties placed on the jury should be no deterrent to the enactment of the proposed amendment.

Another effect of the proposed amendment will be the further aggravation of an already existing procedural problem of impleading. As the law in New York now stands, if a plaintiff does not join in his action one of a number of joint tort-feasors, the joint tort-feasors sued do not have the right to implead the absent party[29] and neither do they have a right of contribution from him.[30] This aspect of the law has been criticized[31] but, as a practical matter, the plaintiff usually does join all the tort-feasors to insure satisfaction of any judgment awarded. However under the doctrine of comparative negligence, the practical effect would be completely changed. The plaintiff would find it more advantageous in most situations to sue the joint tort-feasor who has suffered the least damage. In this way the defendant's counter-claim, if permitted, would not be as great and therefore the plaintiff's recovery would be increased. The position of the tort-feasor who has been unfortunate enough to be the least injured and has a relatively high percentage of the negligence is further aggravated when there is more than one person injured, as all parties would sue this same tort-feasor. Consider, for example a three car traffic accident in which A, B and C

26. Ibid.

27. Neb. Rev. Stat. § 25-1151, "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."; S.C. Laws of 1941, c. 160, p. 184; The wording of this statute is the same as the statute in Nebraska.

28. Wis. Stat. § 331.045 (1949) ". . . not as great as. . . ."; Geo. Laws § 105-603 ". . . if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injuries sustained."

29. Fox v. Western New York Motor Lines, Inc., 257 N.Y. 305, 178 N.E. 289 (1931).

30. N.Y. Civ. Prac. Act § 211a. Under this section in order for a party to be liable for contribution, he must have been joined in the action. See Triglianos v. Henry M. & Co., 189 Misc. 157, 71 N.Y.S. 2d 618 (1947).

31. See, Gregory, Tort Contribution Practice in N.Y., 20 Corn. L.Q. 269 (1933).

are damaged in the amounts of $800, $1,000 and $100 respectively and contributed to this damage in the degrees of 20%, 40% and 40% respectively. The course they would follow is clear. A and B would each in separate suits sue C. In the action by A, the court would find A entitled to 80% of his $800 damage and C 60% of his relatively small claim of $100 on the counter-claim. The final judgment would be in favor of A for $580. In a subsequent suit brought by B against C, the court would allow B 60% of his $1,000 claim and C 60% on his claim with the final liability of $540 upon C. In neither of these cases, could C implead and the end result of the actions would find C with a total liability of $1,120.

If an impleader and counter-claim were permitted, C, when sued, would bring in the other party and the result would be as follows:

Party	Recoverable damage	$ Paid to A	$ Paid to B	$ Paid to C	Ultimate recovery or liability
A	$640		$200	$20	+ $420
B	$600	$320		$40	+ $240
C	$60	$320	$400		— $660

This same result may possibly be obtained if the courts interpret section 193 of the Civil Practice Act[32] to be broad enough to permit C to make a motion for a joinder of B as a "conditionally necessary" party. In the event that C is not permitted to make this motion, the inequity of this situation could be rectified by a single change in the Civil Practice Act which would entitle one joint tort-feasor to implead or, in the alternative, have a right of contribution against the other tort-feasor.

The foregoing illustrations show that for the proposed amendment to operate at the highest degree of efficiency, a right of counter-claim is necessary. Under the present New York law once the defendant's negligence is established a counter-claim becomes academic since a defendant guilty of any degree of contributory negligence is automatically barred from recovery. Under the proposed "pure" comparative negligence statute wherein the "contributory negligence of the plaintiff shall not bar a recovery,"[33] the counter-claim becomes most important. If there were no right of counter-claim, the defendant incurring damages would have to bring a separate action which would result in a multiplicity of actions and quite possibly and probably a finding by the second jury of different relative degrees of negligence. On the other hand, if a counter-claim were permitted under the all inclusive language of section 266 of the Civil Practice Act,[34] the damages and degrees of negligence of all concerned parties and the amount of net recovery by one or more of the parties could be ascertained and made res judicata in a single action. For example, in an action brought by P, who incurred a damage of $2,000 and who contributed 10% of

32. N.Y. Civ. Prac. Act § 193.

33. See note 7 supra.

34. "A counter-claim may be any cause of action in favor of the defendant or some of them against the plaintiff's or some of them . . . ."

the negligence to the accident, against D, who incurred damage of $500 and was responsible for the remaining negligence, D would normally counter-claim his damages. The court would settle the rights of both parties concerned by awarding P $1,800 minus the 10% of D's damage ($50) for which plaintiff is responsible.

OBJECTIONS

The additional burden of the increased litigation that the act would supposedly bring to the already overcrowded New York courts has been voiced as an objection.[35] While such might seem to be the logical result when a cause of action is given to a group heretofore precluded from recovery, Wisconsin found the contrary true. There negligence litigation was substantially reduced after enactment of a comparative negligence statute.[36] Such a statute is conducive to out of court settlements. The "all or nothing" attitude is eliminated and the parties, or more likely, their insurance companies, are more likely to recognize the varying degrees of negligence and settle accordingly. Thus many cases are disposed of without litigation.

It has also been argued that the increase settlements or actual verdicts cause an inordinate rise in insurance costs.[37] Even conceding this, may we not ask whether insurance rates should be a deterrent when the settlement or verdict is given only to the individuals who have been negligently injured?

CONCLUSION

The philosophy inherent in the doctrine of comparative negligence has already made deep inroads into the judicial structure of the State of New York. The doctrine of contributory negligence has been supplanted to some extent in the field of employer-employee relationship[38] and entirely in the specific area of Workmen's Compensation.[39] The courts themselves, in their interpretation of the law, have displayed an obvious sympathy for the proposed change. In cases where defendant's negligence is on a relatively high level and plaintiff's contributory negligence relatively small, there is a known tendency to characterize the defendant's acts as willful and to disregard the plaintiff's negligence.[40]

The "last clear chance" doctrine was born of a similar purpose in courts bent on achieving more equitable results than the doctrine of contributory negligence would allow.[41] Under the "last clear chance" rule, a plaintiff may recover his

35. Benson, Can New York State Afford Comparative Negligence?, 27 N.Y.S. Bar Ass'n. Bull. 291 (July 1955).

36. See note 25 supra. See also, Averback, Comparative Negligence Legislation: A Cure for Our Congested Courts, 19 Albany L. Rev. 4, 18 (1955).

37. See note 35 supra.

38. N.Y. Employers' Liability Law; N.Y. General Business Law.

39. N.Y. Workmen's Compensation Law.

40. See, Weld v. Postal Telegraph Cable Co., 210 N.Y. 59, 71, 103 N.E. 957, 961 (1913).

41. Srogi v. New York Cent. R.R., 257 App. Div. 903, 12 N.Y.S. 2d 45 (4th Dep't 1939), aff'd 261 App. Div. 1039, 26 N.Y.S. 2d 508 (4th Dep't 1941), aff'd 287 N.Y. 707, 39 N.E. 2d 307 (1942); Grossman v. Hudson Transit Corp., 276 App. Div. 1074, 96 N.Y.S. 2d 674 (1st Dep't 1950); Esposito v. City of N.Y., 275 App. Div. 912, 89 N.Y.S. 2d 781 (1st Dep't 1949).

damages in full notwithstanding his own negligence when he proves the defendant actually knew[42] of the plaintiff's peril and had the ability to avoid the accident but did not use ordinary care in doing so.[43]

It is submitted that the objections to the proposed amendment lack substantial merit sufficient to overcome the obviously more equitable results which would spring from the change. New York throughout its history has been forward looking in striving for progressive and equitable legislation. Should it now hesitate to embrace an improved doctrine of law which has proven not only to be feasible but clearly equitable and just?

42. Panarise v. Union Ry., 261 N.Y. 233, 185 N.E. 84 (1933).

43. See note 41 supra. See also Restatement, Torts § 479 (1934).