Finally, the court increased the level of proof for punitive damages to a clear and convincing standard from a preponderance of the evidence standard. The court concluded that the stigma associated with a penal award required the higher standard.

Tennessee Adopts Comparative Fault Standards

McIntyre v. Balentine, Case No. 1 (Tenn. Sup. Ct., decided May 4, 1992) (Lexis, states lib.)

Joining the vast majority of states, the Tennessee Supreme Court adopted a modified comparative fault standard for negligence. In this case, the plaintiff, McIntyre was struck by the defendant, Balentine, as the former entered a highway. Both had been drinking prior to the accident, and McIntyre had a blood alcohol level of .17. The state law presumption of intoxication was .10. Balentine, on the other hand, was allegedly speeding. McIntyre sued, and Balentine alleged contributory negligence as a complete bar to McIntyre's claim. The jury found the parties to be equally at fault. Under the rule of contributory negligence, McIntyre lost. He appealed, and the Supreme Court agreed to remand the case for a new trial at which a new rule of comparative negligence would be applied.

Until this case, Tennessee followed the rule contributory negligence that barred the plaintiff's recovery if he were at fault in any way. Due to the harshness of the rule, the state had also adopted several exceptions that mitigated its effects. Contributory negligence did not prevent recovery if the defendant had the last clear chance to prevent the accident, the defendant was grossly negligent, or the plaintiff's negligence was a remote cause. Even with these exceptions, however, the court noted that forty-five states had moved to comparative fault as a result of judicial or legislative action. It then noted that it had the authority to change the judicially created doctrine of contributory negligence even if the legislature did not take any action.

Having decided to adopt comparative fault, the court next addressed the form it would apply. Comparative fault standards are either pure or modified. Under a pure system, the plaintiff's recovery is reduced by the full amount of his negligence, even if that negligence is greater than that of the defendant. Under a modified form of comparative fault, the plaintiff's recovery is reduced by the percentage of his fault unless his fault equals or is greater than the defendants. If the plaintiff's fault is equal to or greater than the defendant's, then he is denied any recovery. (The states are split as to whether the amount of the plaintiff's fault must be greater than the defendant's to prevent recovery.)

The court rejected a pure comparative fault rule and instead adopted a "greater than" approach. The court concluded that the plaintiff could recover unless his liability exceeded 49 percent. It adopted this approach because it provided the best balance between the harshness of the old contributory negligence rule and the need to maintain a fault-based system.

Because the jury had not been instructed to make findings about the relative levels of fault, the court remanded the case for a new trial.

The court also provided some additional guidance for trial courts attempting to apply the new rule. First, the court noted that the prior exceptions to the contributory negligence rule such as last clear chance were no longer necessary. Second, the jury would compare the fault of all the defendants to that of the plaintiff in cases in which there were multiple defendants. Third, the court also ended the doctrine of joint and several liability. In the future, each defendant would pay according to its percentage of fault. Finally, the court recognized that defendants could plead that a nonparty to the action was responsible for the plaintiff's damages and thereby reduce their own liability.

Emotional Distress Recoverable Under Comprehensive General Liability Policy

Lavanant v. General Accident Co. of America, Case No. 98 (N.Y. Ct. App., decided June 4, 1992) (Lexis, state lib.).

Mental injury may be within the coverage of a comprehensive general liability policy that provides coverage for bodily injury, according to New York's highest court. In this case, the plaintiffs owned and managed apartments in New York City. During renovations, a portion of a ceiling collapsed. The tenants, though not physically injured, sued for emotional distress and won $400,000. The plaintiffs sought coverage under a general liability policy providing $500,000 of insurance per incident. General Accident argued that its coverage did not extend to emotional distress claims because the policy limited coverage to "bodily injury, sickness and disease." Applying general rules of interpretation to the language, the court found the term ambiguous and resolved doubts in favor of coverage.

The New York court initially noted that none of the state's prior decisions decided the issue. A prior case concerning the recovery for derivative claims such as loss of consortium was not applicable on its facts. Another case denying emotional distress claims under the Warsaw Convention did not control since the treaty was subject to different rules of interpretation. The court further noted that the states addressing the issue were split.

In making its decision, the court began with the standard rules for interpreting an insurance contract. If the terms were plain, then they would be given their ordinary meaning. If the terms were ambiguous, however, doubts would be resolved in favor coverage. The court found the term "bodily injury, sickness and disease" to be ambiguous for two reasons. First, "sickness and disease" to the average reader might include mental as well as physical injury. The insurer could have made the policy more specific in this regard but had not. Second, the court noted that a broader definition was consistent with the case law that increasingly recognized theories of recovery based on emotional distress. This legal development