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GOVERNMENT CONTRACTS—FINALITY CLAUSES—JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS.—Criticism of the holding in *United States* v. *Wunderlich*[1] in 1951 led belatedly to the enactment of Public Law No. 356[2] by Congress in 1954, and restored judicial review of decisions of heads of departments or their representatives where questions of fact arose under the disputes clause in government contracts. *United States* v. *Wunderlich* had held that under Article 15[3] of the standard Government contract, the decision of the head of a department was final and not subject to review, in the absence of proof of conscious wrongdoing on the part of the contracting officer or of the head of the department, or of an intention on their part to cheat or defraud the contractor. The decision would be final, despite the fact that it may have been arbitrary, capricious, grossly in error or unsupported by substantial evidence. Writing for the majority, Mr. Justice Minton held that if the findings under Article 15 were to be set aside on the ground that there was fraud in the administrative determination, the fraud would have to be alleged and proved, as fraud would not be presumed.[4]

In a sharp, separate dissent,[5] Mr. Justice Jackson said: "I think that we should adhere to the rule that where the decision of the contracting officer or department head shows 'such gross mistake as necessarily to imply bad faith,' there is a judicial remedy, even if it has its origin in overzeal for the department, negligence of the deciding official, misrepresentations—however innocent—by subordinates, prejudice against the contractor, or other causes that fall short of actual corruption. Men are more often bribed by their loyalties and ambitions than by money. I still believe one should be allowed to have a judicial hearing before his business can be destroyed by administrative action, although the Court again thinks otherwise."[6]

The majority opinion, however, suggested another approach toward a solution: "If the standard of fraud that we adhere to is too limited, that is a matter for Congress."[7] After an interval of some three years, Congress accepted the Court's open invitation and enacted Public Law 356.

This law provides that no clause in any Government contract which relates to the finality or conclusiveness of a determination by a department or agency shall be pleaded as limiting judicial review of such determination, where it is alleged that the decision is "fraudulent, or capricious or so arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."[8] In a retroactive feature, the act also permitted judicial review of any suit already filed. And Section 2 of the act prohibited inclusion of any provision in a Government contract

[1] 342 U. S. 98, 72 S. Ct. 154, 96 L. ed. 113.

[2] 83rd Cong., 2d Sess., May 11, 1954, 68 STAT. 81.

[3] "Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning question of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

[4] 342 U. S. at 100, 72 S. Ct. at 155, 96 L. ed. at 115.

[5] Mr. Justice Douglas dissented in a separate opinion, in which he was joined by Mr. Justice Reed.

[6] 342 U. S. at 103, 72 S. Ct. at 157, 96 L. ed. at 117.

[7] 342 U. S. at 100, 72 S. Ct. at 156, 96 L. ed. at 116.

[8] *Supra,* note 2.

which would make final the decision of an administrative official, representative or board on a question of law.

Prior to the *Wunderlich* decision, the Court took the position in several cases[9] that administrative decisions were not to be considered as final where they were arbitrary, capricious or so in error as to imply bad faith in their preparation. The action of Congress therefore restored to the jurisdiction of the Supreme Court a segment of judicial review which it had voluntarily relinquished by a strict reading of Government contract legislation. It also reaffirmed the historical separation of powers principle, by denying to the executive division "the assumption of such a duty which normally reposes in the judiciary branch of the Government."[10]

COMPARATIVE NEGLIGENCE STATUTES—FAILURE OF NEW YORK STATE LEGISLATURE TO PASS PROPOSED LEGISLATION.—In its 1954 session, the New York State Legislature once again failed to pass the comparative negligence legislation introduced before it.[1] Such legislation would do away with the strict common-law doctrine of contributory negligence now in effect in this state, which denies recovery to any plaintiff whose negligence, no matter how slight, contributed to his injury.[2]

Dissatisfaction with the contributory negligence rule has been expressed by the Supreme Court of Minnesota in *Haeg* v. *Sprague, Warner and Co.*[3]

"No one can appreciate more than we the hardship of depriving plaintiff of his verdict and of all right to collect damages from defendant; but the rule of contributory negligence, through no fault of ours, remains in our law and gives us no alternative other than to hold that defendant is entitled to judgment non obstante veredicto. It would be hard to imagine a case more illustrative of the truth that in operation the rule of comparative negligence would serve justice more faithfully than that of contributory negligence. . . . But as long as the legislature refuses to substitute the rule of comparative for that of contributory negligence we have no option but to enforce the law in a proper case."

Relaxation or elimination of the doctrine of contributory negligence in the form of comparative negligence legislation would permit an apportionment of the damages between plaintiff and defendant with regard to the degree of fault of each.[4]

In the last two years in New York, two different bills on comparative negligence were introduced in the legislature. Both failed to come to a vote. In the 1953

[9] See Moorman v. United States, 338 U. S. 457, 461, 70 S. Ct. 288, 290, 94 L. ed. 256, 259 (1949); Kihlberg v. United States, 97 U. S. 398, 402, 24 L. ed. 1106, 1108, 13 Ct. Cl. 148 (1878); Sweeney v. United States, 109 U. S. 618, 620, 3 S. Ct. 344, 27 L. ed. 1053 (1883); Ripley v. United States, 223 U. S. 695, 704, 32 S. Ct. 352, 355, 56 L. ed. 614, 619 (1912).

[10] H. Rep. No. 1380, 83rd Cong., 2d Sess. (1954).

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[1] New York State Bar Association, Circular No. 84, p. 335 (May 3, 1954).

[2] The Association of the Bar of the City of New York (Committee on Law Reform), Report on the Comparative Negligence Rule, pp. 1-2 (1953).

[3] 202 Minn. 425, 281 N. W. 261, 263 (1938). See McCulloch v. Horton, 105 Mont. 531, 74 P. 2d 1 (1937).

[4] Peck, REPORT ON JUSTICE, 16-7 (1953); Teller, *Proposed Comparative Negligence Law,* 5 Brooklyn Barrister 100 (1954); 1 Thompson, COMMENTARIES ON THE LAW OF NEGLIGENCE, § 170 (Indianapolis, 1901); quoted with approval in McCulloch v. Horton, *supra.*

session, and again in 1954, Senator Pliny Williamson proposed a bill[5] which provided that:

"In all actions to recover damages for injury to person or property, 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 plaintiff."

The Williamson bill left the finding as to the degree of negligence to the court, and not to the jury. Under this bill the court is not bound to apportion the damages according to the relative degrees of negligence, but may act at its own discretion in so making an apportionment. This bill has thus been criticized as being in violation of Article I, Section 2 of the New York State Constitution[6] since it is contended that the quantum of negligence is a fact and must be subject to determination by a jury.

With the above criticism in view, a modification of the Williamson bill was proposed by Assemblyman Ludwig Teller in the 1954 Session[7] and reintroduced again in 1955.[8] The Teller Bill, which was buried in the Judiciary Committee in 1954 and is in the hands of the Judiciary Committee at the present time, provides that:

"In all actions to recover damages for injury to person or property, the contributory negligence of the plaintiff, providing it is lesser in degree than the negligence of the defendant, shall not bar a recovery, but the damages recoverable shall be reduced by the trier of the facts in proportion to the degree of negligence attributable to the plaintiff. In such cases the trier of the facts shall make known the total amount of damages found, and the amount by which they were reduced."

Under this proposal, the question of the degree of negligence is left to the jury and recovery is permitted only where the plaintiff is less negligent than the defendant. This would bar a plaintiff who was primarily responsible for an accident from recovering from a defendant whose fault was comparatively slight.

These bills must be viewed against the background of two comparative negligence statutes now in effect, and a proposed modification of one of them which typifies several aspects of such legislation.

Mississippi has a so-called "full" comparative negligence statute,[9] which provides:

"In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or the person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be reduced by the jury in proportion to the amount of negligence attributable to the person injured or the owner of the property, or the person having control over the property."

[5] Sen. Int. No. 1097, Pr. 1142 (1954). Sen. Int. Bill No. 25 (1953).

[6] "Trial by jury in all cases in which it has heretofore been guaranteed shall remain inviolate forever." N. Y. CONST., Art. 1, § 2. In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any court of the United States, than according to the rules of common law." U. S. CONST., amend. VII. Holmes, THE COMMON LAW, 122 (Boston, 1923); Kreindler, *Comparative Negligence in New York,* 11 Bar Bull. (N. Y. County Law. Assoc.) 81, 84-5 (1953).

[7] Ass. Int. No. 3066, Pr. A. 3190.

[8] Ass. Int. No. 702, Pr. A. 704.

[9] MISS. CODE OF 1942, § 1454.

This statute permits recovery by a plaintiff, no matter how great his fault, providing he is less than 100 per cent negligent. Thus, a slightly negligent defendant may be required to pay a money judgment over to a much more negligent plaintiff.[10]

On the other hand, the Wisconsin law[11] permits recovery only ". . . if such negligence was not as great as the negligence of the person against whom recovery is sought. . . ." Thus, if a claimant is 49 per cent negligent, he may be awarded the remaining 51 per cent of his damages, but if he is 50 per cent negligent he is denied recovery. Thus, a difference of one per cent in the *quantum* of negligence would determine whether plaintiff would be entitled to a partial verdict or would be denied any judicial relief.[12]

McKinnon, in his article opposing comparative negligence,[13] discusses a suggested modification of the Wisconsin law which would compute the plaintiff's recovery by subtracting his per cent of negligence from the per cent of negligence of the defendant. Thus, if the plaintiff were 49 per cent negligent and the defendant were 51 per cent negligent, the plaintiff would recover the difference, or two per cent of his total damages.

Because of the sharp decline in plaintiff's recovery as his percentage of negligence increased (plus the fact that there would be no recovery where both parties were equally negligent), this type of legislation would be most acceptable to insurance companies and other supporters of the contributory negligence rule.

It is argued on behalf of retaining the contributory negligence rule that where a plaintiff has contributed to an accident he becomes a partner in it and, but for his own negligence, the accident would not have occurred.[14]

It is further contended that the comparative negligence rule would result in a substantial increase in large jury verdicts, thus resulting in higher insurance rates which, in turn would result in a greater percentage of the population without adequate insurance coverage. Consequently, it is argued that there would be a higher percentage of accidents in which the liable party defendant would be judgment proof.[15]

It is further argued for retention of the contributory negligence rule that the jurors would find it extremely difficult, if not impossible, to measure negligence in terms of percentages. In order to make such a calculation, there must be something capable of being measured. In this situation it is contended that the jury is faced with something intangible, the presence or absence of which is difficult enough to ascertain, to say nothing of measurement in terms of amounts or degrees.[16]

Those supporting the rule of comparative negligence contend that it provides a just and equitable division of the burden of the cost of an accident since liability, no matter how great or small, is measured by the degrees of fault of the respective parties.[17]

[10] Crosby Lumber & Mfg. Co. v. Durham, 181 Miss. 559, 562, 179 So. 2d 285, 288 (1938).

[11] WISC. STAT. § 331.045.

[12] Cherney v. Holmes, 185 F. 2d 718, 720 (1950) "under Wisconsin statutory law, 50% negligence bars recovery."

[13] McKinnon, *The Case against Comparative Negligence,* 28 Calif. S. B. J. 23, 29 (1953).

[14] *Id.* at 25.

[15] *Id.* at 31.

[16] *Id.* at 26-7.

[17] Association of the Bar of the City of New York, *op. cit. supra* note 2 at 9. Peck, *op. cit. supra* note 4 at 16.

In addition, Dunaway, in his article on comparative negligence,[18] points out that even though some states have had comparative negligence laws in effect for as long as forty years, there has been no increased insurance rates in those jurisdictions.

Furthermore, actual experience has shown that juries are in fact capable of coping with the problem of apportioning the responsibility for accidents between the parties. New York juries have dealt with the comparative negligence problem on many occasions, without any reported difficulty. In *Fitzpatrick* v. *International Railway Co., Inc.*,[19] for example, a plaintiff, who was injured in Ontario, Canada, brought suit in New York against his employer, a New York Corporation. Under conflicts of law rules, he claimed and received the benefits of the Ontario Contributory Negligence Act.[20] The jury found plaintiff ten per cent negligent and judgment was awarded accordingly. In affirming the decision unanimously, the New York State Court of Appeals said: "Furthermore, courts of this State are not unaccustomed to the application of the law of contributory negligence adopted by the Ontario Act. We have a similar provision under section 3 of the Federal Employers' Liability Act."[21]

Proponents of comparative negligence statutes have also contended that the elimination of the absolute defense of contributory negligence would make defendants more willing to settle out of court. Injured plaintiffs, faced with unpaid bills and prospective litigation costs are frequently "forced" to make disadvantageous settlements, while the insured defendants, freed from financial pressures are more inclined to favor a trial on the off-chance of proving contributory negligence. Adoption of the comparative negligence rule might help clear the overcrowded court calendars and give plaintiffs whose cases must be tried, an opportunity to be heard within a reasonable time.[22]

[18] *Id.* at 41. In effect in Miss. (1910), Neb. (1913), Wis. (1931), S. D. (1941), Ga. (1910); Canada: British Columbia (1925), New Brunswick (1926), Nova Scotia (1926), Ontario (1930), Alberta (1942), Manitoba (1940), Saskatchewan (1944), Prince Edward Is. (1938), Quebec—Civil Law (1909); England (1945).

[19] 252 N. Y. 127, 169 N. E. 112 (1927).

[20] ONT. REV. STAT. (1950) c. 252.

[21] Act of Ap. 22 (1908), c. 149, 35 STAT. 66.

[22] Kreindler, *op. cit. supra* note 6 at 88; Teller, *op. cit. supra* note 4 at 101; but see Peck, *op. cit. supra* note 4 at 17.