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Kentucky Law Survey: Torts

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Torts
BY JAYNE MOORE WALDROP*

INTRODUCTION

Several significant tort law cases were decided in Kentucky during this survey period.¹ A United States district court applied Kentucky's newly adopted system of comparative negligence² in a manner that, at first glance, blurs the distinction between contributory and comparative negligence.³ In another decision, the Kentucky Supreme Court determined the allowable scope of discovery in libel cases.⁴ This Survey discusses these cases and their impact upon Kentucky law.⁵

I. COMPARATIVE NEGLIGENCE

One of the most important recent tort law decisions was Hilen v. Hays,⁶ in which the Kentucky Supreme Court discarded

¹ The survey period runs from July 6, 1984, through June 30, 1985.
⁴ Lexington Herald-Leader Co. v. Beard, 690 S.W.2d 374 (Ky. 1984).
⁵ Other cases of interest decided during this survey period but not discussed here include: Sublett v. United States, 688 S.W.2d 328 (Ky. 1985) (Certifying the law, the Kentucky Supreme Court determined that (1) the United States is an "owner" under KY. REV. STAT. ANN. § 411.190 (Bobbs-Merrill 1970) [hereinafter cited as KRS], which limits the tort liability of the owner of recreational land open to the public without charge, (2) the statute is constitutional, and (3) though users of such recreational lands should not be considered trespassers, neither should they be considered invitees.); Pepsi-Cola Gen. Bottlers, Inc. v. Dean, No. 84-CA-2031-MR (Ky. Ct. App. June 14, 1985) (no error in jury instruction that omitted language that the product must reach consumer without substantial change before manufacturer may be held strictly liable for injuries caused by the product); Williams v. Fulmer, 695 S.W.2d 411, 414 (Ky. 1985) (privity of contract requirement reaffirmed for products liability cases based upon breach of warranty theory).
⁶ 673 S.W.2d 713 (Ky. 1984).
the absolute defense of contributory negligence. With *Hilen*, Kentucky became the forty-second state to adopt the doctrine of comparative negligence, under which damages claimed in a negligence action are apportioned between the plaintiff and the defendant according to the fault of each.

Although the Court apparently opted for a "pure" form of comparative negligence, it adopted only the portion of the Uniform Comparative Fault Act that was "directly applicable" to *Hilen* and expressed "no opinion as to future application of any portion of the [Uniform Comparative Fault] Act not quoted..." The adoption of comparative negligence was heralded as an "enlightened" decision, but *Hilen* left many unanswered questions and provided little direction.

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7 *Id.* at 719, 720.

8 For a list of those states that have adopted comparative negligence, see Adams, *supra* note 2, at nn.36, 41.


10 673 S.W.2d at 719. See also Adams, *supra* note 2, at 490. Under "pure" comparative negligence, the plaintiff's damages are reduced by the amount of negligence attributed to the plaintiff. For example, if the jury determined that 70% of the plaintiff's damages were due to his own negligence, then the award would be 30% of the total damages. V. *Schwartz, Comparative Negligence* at § 3.2. There are also several "modified" comparative negligence systems in which the plaintiff must prove that the defendant's conduct caused some minimum amount of negligence before the plaintiff can receive any damages. The fifty percent system is the most popular of these. Under this system the plaintiff's negligence must be less than the defendant's for the plaintiff to collect at all. If the plaintiff does collect, his damages are reduced by the percentage of his negligence. *Id.* at § 2.1.


12 673 S.W.2d at 720.


14 Adams, *supra* note 2, at 491.

15 Justice Leibson recognized this problem in his separate concurring opinion. He wrote:

I concur with the majority opinion. But, in addition I would provide guidelines for application of the new rule to other situations that will be
for courts facing unique negligence circumstances.¹⁶

A. Carlotta v. Warner¹⁷

Within six months of *Hilen v. Hays*,¹⁸ the United States District Court for eastern Kentucky considered the effect of comparative negligence upon a claim quite unlike the one in *Hilen*.¹⁹ *Carlotta* involved a nineteen-year-old apartment lessee's personal injury action against the complex's owner.²⁰ The complex included a swimming pool maintained for its tenants' use, and the complex's management prohibited floating objects in the pool. On the day of the accident, the plaintiff brought a large innertube into the pool.²¹ While attempting to dive through the innertube, he struck his head and sustained permanent injuries to his nervous system.²²

In his subsequent lawsuit, the plaintiff claimed that the defendant's negligent enforcement of the pool regulation prohibiting the use of floating objects caused the plaintiff's injuries. The trial court granted the defendant's motion for summary

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affected by the change to comparative negligence. As a general rule, we do not decide in advance collateral issues which eventually will be forthcoming. Those issues are resolved later on in the context of concrete cases. Nevertheless trial courts should have some point of departure for dealing with the complicated issues that will be precipitated by a change of this magnitude.

673 S.W.2d at 720.

¹⁶ Justice Leibson suggested that the Court adopt the entire Uniform Comparative Fault Act, along with its official comments, to provide "appropriate guidance where suitable. Those instances where it is not suitable can be decided on a case by case basis." *Id.* at 721. Three states—Washington, Minnesota and Missouri—had at the time of *Hilen* judicially adopted the Uniform Comparative Fault Act. *Id.*

A recent article discussed other "important issues which should be addressed when comparative negligence is adopted," including apportioning liability among joint tortfeasors, retaining the doctrine of last clear chance, permitting setoff, and limiting jury instructions. See Rogers and Shaw, *A Comparative Negligence Checklist to Avoid Future Unnecessary Litigation*, 72 Ky. L.J. 25, 27 (1983-84). These topics are outside the scope of this Survey.


¹⁸ 673 S.W.2d 713 (Ky. 1984).

¹⁹ For a detailed discussion of the claim in *Hilen*, see generally Adams, *supra* note 2, at 485-92.

²⁰ 601 F. Supp. at 750.

²¹ *Id.* at 751.

²² *Id.*
judgment because the plaintiff had been contributorily negligent in diving through the tube. Although this ruling was made before Kentucky’s adoption of comparative negligence, the case was still pending on other issues when Hilen was decided. The plaintiff moved for reconsideration under the new rules of comparative negligence.2

*Carlotta* involved a situation for which *Hilen* did not provide: “that of the slightly negligent defendant versus the profoundly negligent plaintiff.” The court emphasized that the plaintiff’s claim illustrated a common misconception about comparative negligence:

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23 *Id. Carlotta* involved the common law doctrine of assumption of risk, a form of contributory negligence. The *Restatement (Second) of Torts* § 496B (1965) states that assumption of risk is implied when a plaintiff does not expressly agree to assume a risk, but fully understands the risk of harm and voluntarily chooses to enter or remain within that area of risk. Kentucky abolished the separate assumption of risk defense in *Parker v. Redden*, 421 S.W.2d 586, 592 (Ky. 1967). Other cases that have abolished the assumption of risk doctrine or merged the doctrine into contributory negligence include *Li v. Yellow Cab Co.*, 332 P.2d 1226, 1240-41 (Cal. 1955) (assumption of risk is a variant of contributory negligence); *Blackburn v. Dorta*, 348 So. 2d 287, 293 (Fla. 1977) (affirmative defense of implied assumption of risk is merged into the defense of contributory negligence); *Wilson v. Gordon*, 354 A.2d 398, 401-02 (Me. 1976) (comparative negligence statute abolishes voluntary assumption of risk); *Wentz v. Deseth*, 221 N.W.2d 101, 104-05 (N.D. 1974) (affirmative defense of assumption of risk is abolished); *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975) (voluntary assumption of risk no longer an issue); *Lyons v. Redding Constr. Co.*, 515 P.2d 821, 826 (Wash. 1973) (limited retention of assumption of risk as a form of contributory negligence); *Brittain v. Booth*, 601 P.2d 532, 534 (Wyo. 1979) (assumption of risk as a form of contributory negligence is a basis for apportionment of fault).

For additional examples of the assumption of risk doctrine’s treatment under comparative negligence systems, see *Easterday and Easterday, The Indiana Comparative Fault Act: How Does it Compare With Other Jurisdictions?, 17 IND. L. REV. 883, 894-97 (1984).* 24

24 601 F. Supp. at 751.

25 *Id. at 750. Before Hilen, contributory negligence was a complete defense in such cases. Kentucky adopted contributory negligence in *Newport News & M.V. R. Co. v. Dauser*, 13 Ky. 734, 734 (1892). 673 S.W.2d at 714. The last reported opinion clearly rejecting comparative negligence in favor of contributory negligence is *Houchin v. Willow Ave. Realty Co.*, 453 S.W.2d 560 (Ky. 1970) (“We have not adopted the comparative negligence doctrine in Kentucky.”). For an historical view of contributory negligence in Kentucky, see 673 S.W.2d at 714-17.

26 601 F. Supp. at 750. The *Hilen* Court concluded that comparative negligence should be applied to “all cases tried or retried after the date of filing this opinion” (July 5, 1984) as well as “all cases pending, including appeals, in which the issue had been preserved.” 673 S.W.2d at 720.

27 601 F. Supp. at 751.

28 *Id.*
The doctrine of comparative negligence does not mean that plaintiff is entitled to a recovery in some amount in every situation in which he can show some negligence of the defendant, however slight. If the plaintiff fails to establish that defendant's negligent act or omission was a substantial factor in causing harm to the plaintiff, or if there was a superseding cause, defendant will not be liable in any amount.  

The Carlotta court determined that causation doctrines play an "enhanced" role in comparative negligence jurisdictions, especially in those cases in which one party's negligence is slight in relation to the other party's negligence or to some superseding cause. The court held that the key to a defendant's liability should be proximate causation, not merely causation-in-fact. Noting the Kentucky Supreme Court's recent commitment to the Restatement (Second) of Torts approach to proximate causation, the Carlotta court applied the Restatement model.

The court agreed that the defendant's failure to enforce the pool regulation was a cause-in-fact of the accident, "for if the innertube had been excluded from the pool the plaintiff could not have dived through it." In the traditional and Restatement

30 Id. at 753-54.
31 Id. at 752-54.
32 Id. at 754.
33 Id. at 752. See Deutsch v. Shein, 597 S.W.2d 141, 143-44 (Ky. 1980) (substantial factor test of proximate cause used to find causation-in-fact). See generally Restatement (Second) of Torts §§ 431-32 (1965).
34 Id. at 752-53. Cause-in-fact was determined by applying the "but for" test as it is stated in Restatement (Second) of Torts § 432:
   Negligent Conduct as Necessary Antecedent of Harm
   (1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.
   (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.

In Carlotta, it was obvious that the defendant's failure to enforce the regulation was the reason the innertube was in the pool. Nevertheless, that negligent act was not sufficient in itself to bring about the plaintiff's harm. 601 F. Supp. at 755.
approaches to causation, not only must the defendant's act be a cause-in-fact, but also it must be a proximate, or legal, cause of the plaintiff's injuries. The negligent conduct must be a substantial factor in causing the harm.

The Carlotta court determined that, as a matter of law, the defendant's negligence was "so insignificant as compared to that of the plaintiff that no recovery should be had despite the doctrine of comparative negligence." The defendant's negligence was not a substantial factor in causing the accident.

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37 W. Prosser, supra note 9, § 67, at 474; Restatement (Second) of Torts § 431.

38 Restatement (Second) of Torts § 431, states:

What Constitutes Legal Cause

The actor's negligent conduct is a legal cause of harm to another if

(a) his conduct is a substantial factor in bringing about the harm, and

(b) there is no rule of law relieving the actor of liability because of

the manner in which his negligence has resulted in the harm.

39 601 F. Supp. at 753. See also Restatement (Second) of Torts § 434, which states:

It is the function of the court to determine

(a) whether the evidence as to the facts makes an issue upon which the

jury may reasonably differ as to whether the conduct of the defendant has

been a substantial factor in causing harm to the plaintiff.

Kentucky law allows legal cause to be "a mixed question of law and of fact." Deutsch v. Shein, 597 S.W.2d at 144-45. The determination becomes a matter of law "in some factual situations [in which] the answer to the question is so beyond difference of opinion. . . ." 421 S.W.2d at 593. Accord Mullins v. Bullens, 383 S.W.2d 130, 133 (Ky. 1964) (decedent was negligent to stand on highway at night); Carlisle v. Reeves, 294 S.W.2d 74, 75 (Ky. 1956) (person voluntarily placing himself at risk cannot recover).

40 601 F. Supp. at 753.

41 Id. In determining whether the defendant's act was a substantial factor, the court relied upon the Restatement (Second) of Torts § 433:

Considerations Important in Determining Whether Negligent Conduct is Substantial Factor in Producing Harm.

The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(c) lapse of time. (Emphasis by court).

See 601 F. Supp. at 752. The court also relied upon Restatement (Second) of Torts
because several other factors also produced the harm,\textsuperscript{42} including:

(1) The plaintiff's negligence was active, the defendant's passive.\textsuperscript{43}

(2) The plaintiff's act was deliberate, the defendant's inadvertent.

(3) The plaintiff was a knowledgeable adult, not a minor or other person to whom the defendant owed a special duty.

(4) There was no risk until the plaintiff created it.

(5) The only negligence of defendant was in failing to prevent plaintiff from injuring himself.\textsuperscript{44}

\textsuperscript{42} See 601 F. Supp. at 755-56. See RESTATEMENT (SECOND) OF TORTS § 433(a).

\textsuperscript{43} Using the terms active and passive negligence to distinguish the acts of negligent parties was strongly criticized in State v. Kaatz, 572 P.2d at 785. \textit{Kaatz} criticized "[i]ntroducing various standards and concepts from other areas of tort law and creating from them rigid rules to be used in comparing negligence." \textit{Id.} Such practice destroys one of the "virtues" of comparative negligence—its "greater flexibility." \textit{Id.} On the issue of flexibility, see V. \textsc{Schwartz}, \textit{supra} note 9, at § 21.2. Nevertheless, the \textit{Carlotta} court's use of the active/passive distinction in substantial factor analysis was based upon Kentucky law, which allows a passively negligent defendant to have indemnity from an actively negligent defendant when both are found to be liable.

Brown Hotel Co. v. Pittsburgh Fuel Co., 224 S.W.2d 165, 167 (Ky. 1949) (suit for indemnity), reaffirmed in Burrell v. Electric Plant Bd., 676 S.W.2d 231, 236 (Ky. 1984) (subsequent to \textit{Hilen}). The \textit{Carlotta} court found that, whenever a passive/active negligence distinction can be made, "[t]here is a powerful thrust toward finding that the passively negligent party's negligence is not a substantial factor of the actively negligent party's injury." 601 F. Supp. at 754 n.15.

\textsuperscript{44} 601 F. Supp. at 755-56. These factors are not to be considered all inclusive, but "merely \ldots useful guidelines." \textit{Id.} at 756.
The court found that the plaintiff's negligence was the sole proximate cause of the harm he suffered.\textsuperscript{45} The concept of sole proximate cause is certain to become an important issue in Kentucky's comparative negligence system.

\textbf{B. Sole Proximate Cause in a "Pure" Comparative Negligence System}

For years Kentucky has recognized the doctrine of sole proximate cause in cases involving the overwhelming negligence of one party and the slight negligence of another.\textsuperscript{46} Even under the harsh rule of contributory negligence, a plaintiff could use the sole proximate cause doctrine to gain relief from the effect of his own negligence.\textsuperscript{47} In \textit{Lee v. Dutli},\textsuperscript{48} the Kentucky Court of Appeals held that a defendant who backed his car, which had fogged windows, into the plaintiff's car was the sole proximate cause of the accident.\textsuperscript{49} The defendant claimed that the plaintiff was contributorily negligent by parking in a restricted area.\textsuperscript{50} The Court found that the question of plaintiff's contributory negligence should not have been submitted to the jury.\textsuperscript{51} Thus, the plaintiff's contributory negligence, although a cause-in-fact in the "but for" sense, did not bar his claim.\textsuperscript{52} The court stated:

\begin{quote}
[T]he negligence of [the defendant] in getting into his automobile with the windows fogged up and backing 35 or 40 feet was the sole proximate cause of the accident; that it is equally clear that if there was any negligence on the part of [plaintiff] in parking outside the marked area, it had no proximate causal connection with the accident. . . .
\end{quote}

\textsuperscript{45} \textit{Id.} at 754-55.

\textsuperscript{46} See, e.g., \textit{Lee v. Dutli}, 403 S.W.2d 703, 705 (Ky. 1966); \textit{Lawhorn v. Holloway}, 346 S.W.2d 302, 303 (Ky. 1961) (seventeen-year-old driver lost control and struck parked car).

\textsuperscript{47} \textit{Carlotta v. Warner}, 601 F. Supp. at 754 n.16 and accompanying text.

\textsuperscript{48} 403 S.W.2d 703 (Ky. 1966).

\textsuperscript{49} \textit{Id.} at 704-05.

\textsuperscript{50} \textit{Id.} at 705.

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} For an explanation of the "but for" test, see note 35 \textit{supra}.

\textsuperscript{53} 403 S.W.2d at 705.

\textsuperscript{54} \textit{Id.} at 704-05 (emphasis added).
The sole proximate cause doctrine, although applied under the old law of contributory negligence, remains a viable concept in comparative negligence systems. Several commentators have suggested that it is the best approach to a case in which there is both an overwhelmingly negligent party and a slightly negligent party.

The historical justification for the contributory negligence defense has been that the "plaintiff should not recover when his negligence is the 'proximate cause' of the accident." Much of the dissatisfaction with the defense, however, stemmed from placing "upon one party the entire burden of a loss for which two are, by hypothesis, responsible." Courts developed make-shift doctrines, such as last clear chance, while attempting to ameliorate the harshness of the contributory negligence defense, particularly when the plaintiff's negligence was slight in relation to the defendant's overwhelming negligence. Courts and juries became reluctant to hold the slightly negligent plaintiff liable.

Theoretically, pure comparative negligence allows a plaintiff's recovery for damages attributable to the defendant's negligence "regardless of the extent to which either party's negligence contributed to the plaintiff's harm." Courts have allowed recovery in amounts ranging from minuscule to total recovery. Pure comparative negligence has been hailed as a simple, equitable form of recovery and has been endorsed by several leading commentators. It also is the form employed by the Uniform

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*See V. Schwartz, supra note 9, § 4.4, at 88.
*See id. at 91-92. Nevertheless, Schwartz also thinks that "sole proximate cause" can eviscerate pure comparative negligence, id. at 89.
*V. Schwartz, supra note 9, § 4.4, at 88. See also Annot., 78 A.L.R.3d 339, 345 (1977).
*W. Prosser, supra note 9, § 67, at 468-69.
*Id. at 469.
*Id.; Annot., supra note 57, at 345.
*Id. See also W. Prosser, supra note 9, § 67, at 469.
*Id.
*Annot., supra note 57, at 347.
*V. Schwartz, supra note 9, § 3.2, at 46; W. Prosser, supra note 9, at 471-73.
*V. Schwartz, supra note 9, § 21.3, at 342; Fleming, supra note 9, at 246-50; Keeton, Comment on Maki v. Freik—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?, 21 VAND. L. REV. 906, 911 (1968).
Comparative Fault Act.\textsuperscript{67}

Whereas contributory negligence systems adopted such fairness doctrines as last clear chance to protect the slightly negligent plaintiff, comparative negligence systems have adopted the sole proximate cause doctrine to protect the slightly negligent defendant.\textsuperscript{68} While some courts are willing to extend the traditional rules of proximate cause and allow recovery against a slightly negligent defendant,\textsuperscript{69} others have been reluctant to do so.\textsuperscript{70} Instead, where one party's negligence approaches one hundred percent of the fault, courts have held that the party's conduct was the harm's sole proximate cause.\textsuperscript{71} A defendant may avoid any apportionment of fault by using the sole proximate cause argument,\textsuperscript{72} or by arguing that his acts were not a cause-in-fact of the accident.\textsuperscript{73}

The slightly negligent defendant problem seldom arises in modified comparative negligence systems because, in comparing fault, the plaintiff's fault must be no greater than the defendant's. For a plaintiff to recover under the slight/gross modified comparative negligence system, the plaintiff's fault must be no greater than slight, while the defendant's fault must be gross. In the fifty percent modified system, the plaintiff, to recover, must bear no more than half of the fault. In both systems the ultimate recovery is equal to the plaintiff's damages less the percentage of fault attributed to the plaintiff.\textsuperscript{74}


\textsuperscript{68} W. PROSSER, supra note 9, § 67, at 475; V. SCHWARTZ, supra note 9, § 4.4, at 91-92.

\textsuperscript{69} W. PROSSER, supra note 9, § 67, at 474. See, e.g., Hoyem v. Manhattan Beach City School District, 585 P.2d 851, 852, 858-60 (Cal. 1978) (ten-year-old student/truant struck by motorcycle after leaving school grounds without permission).

\textsuperscript{70} See, e.g., Korbelik v. Johnson, 227 N.W.2d 21, 24 (Neb. 1975) (darting child); Kroon v. Beech Aircraft Corp., 628 F.2d 891, 894 (5th Cir. 1980) (airplane accident).

\textsuperscript{71} W. PROSSER, supra note 9, § 67, at 475.

\textsuperscript{72} See Illinois Cent. R.R. v. Smith, 140 So. 2d 856, 858 (Miss. 1962) (collision caused by car crossing in front of oncoming train); Green v. Gulf, Mobile & Ohio R.R., 141 So. 2d 216 (Miss. 1962) (car collided with train blocking crossing).

\textsuperscript{73} See, e.g., New Orleans & N.E. R.R. v. Dixie Highway Express, Inc., 92 So. 2d 455, 456 (Miss. 1957) (train and truck collided at crossing).

\textsuperscript{74} See H. WOODS, COMPARATIVE FAULT §§ 4:3-4:5 (1978).
The sole proximate cause doctrine introduces a similar threshold of comparative "innocence" over which the plaintiff must pass before collecting. If the defendant's actions are so slight as to be an insubstantial factor, then the plaintiff's actions are deemed the sole proximate cause of the damage. Thus a jury must reduce the damage award in proportion to the negligence attributable to the plaintiff "unless the plaintiff's negligence was the sole proximate cause of harm that befell him." In rare instances, as in *Carlotta*, the court may find the plaintiff's conduct so overwhelmingly negligent that, as a matter of law, reasonable minds could not differ on causation. Thus the plaintiff will recover nothing—just as the plaintiff who is fifty-one percent at fault will come away empty-handed in a modified comparative negligence system.

C. The Future of Comparative Negligence

The *Carlotta* court's approach is sound for several reasons. First, *Hilen v. Hayes* requires that the substantial factor test be used in determining causation.

The trier of fact must consider *both negligence and causation in arriving at the proportion that negligence and causation attributable to the claimant bears to the total negligence that was a substantial factor in causing the damages*.

Thus the *Hilen* Court intended to follow the *Restatement (Second) of Torts* approach, which requires finding that an act was a "substantial factor" in causing the harm before apportioning

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75 V. SCHWARTZ, supra note 9, § 3.2, at 46. See also Annot., supra note 57, at 366; Camurati v. Sutton, 342 S.W.2d 732, 738 (Tenn. 1960) (no jury question when all negligence was the plaintiff's); Stewart v. Kroger Grocery, 21 So. 2d 912, 914 (Miss. 1945) (using instrumentality in improper way can be entire causation); Mississippi Export R.R. v. Summers, 11 So. 2d 429, 430 (Miss. 1943) (plaintiff's negligence was "sole proximate cause" of his death).
76 601 F. Supp. at 753, 755. See, e.g., Vanderweyst v. Langford, 228 N.W.2d 271, 272 ("where the evidence is so clear and conclusive as to leave no room for differences of opinion among reasonable men . . . the issue of causation becomes one of law to be decided by the court").
77 See H. WOODS, supra note 74 at § 4:3.
78 673 S.W.2d 713 (Ky. 1984).
79 Id. at 720 (emphasis added).
If an act is not a substantial factor in causing the harm, damages will be either reduced or not awarded, depending upon whether the plaintiff's or the defendant's act fails to be a substantial factor.

Second, the court's application of the sole proximate cause doctrine does not conflict with Kentucky precedent or the theoretical underpinnings of pure comparative negligence. Comparative negligence has been praised as a fundamentally fair system because of its basic premise: "the extent of fault should govern the extent of liability." But just as contributory negligence fell into disfavor because of its harshness to plaintiffs, comparative negligence could unfairly punish slightly negligent defendants. Courts often have narrowed the definition of contributory negligence to protect slightly negligent plaintiffs. The sole proximate cause doctrine or other refinements in defining causation may be the best method of limiting a defendant's liability when the plaintiff is overwhelmingly negligent. The doctrine also allows a slightly negligent plaintiff to recover one hundred percent of his damages when the defendant's acts are held to be the sole proximate cause of the plaintiff's injuries. Thus, the doctrine provides an additional element of fairness to a pure system of comparative negligence.

Nevertheless, the sole proximate cause doctrine must be applied with caution and only in such rare cases as Carlotta.

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For a discussion of the Reinstatement (Second) of Torts approach to causation, see notes 35-42 supra and accompanying text.

See note 71 supra and accompanying text.

For a discussion of the sole proximate cause doctrine under the prior Kentucky law of contributory negligence, see notes 46-54 supra and accompanying text.

See notes 55-77 supra and accompanying text.

Li v. Yellow Cab Co., 532 P.2d at 1231.


James, Contributory Negligence, 62 YALE L.J. 691, 731-33 (1952-53).


W. Prosser, supra note 9, § 67, at 472 n.37, at 475 n.56.

Id.

601 F. Supp. 749. "[T]he use of sole proximate cause remains viable under comparative negligence, although it will be a rare case where the comparative fault is not submitted to the jury for apportionment. This is, however, one of those rare cases." Id. at 755.
Although the doctrine avoids "placing liability upon a defendant whose responsibility for the occurrence was extremely limited," it could "eviscerate a comparative negligence system." Even those scholars who recognize the doctrine's value warn of its implications.

[T]he linkage between "proximate cause" and contributory negligence can be a potential demon. . . . Even in cases where there are other contributing causes, a court may say that plaintiff's claim is barred because his negligence was the "sole proximate cause" of the accident. In effect, the contributory negligence defense returns under a different name.

There are countless unanswered questions concerning Kentucky's comparative negligence system. As Justice Leibson recommended in his concurring opinion in *Hilen*, adopting the entire Uniform Comparative Fault Act would give trial courts and lawyers a more solid foundation for negligence litigation. The Uniform Comparative Fault Act is considered superior to any existing system of comparative negligence because it reduces "complicated legal theories regarding types and degrees of fault to relatively simple factual determinations."

II. DEFAMATION

A. Scope of Discovery in Libel Cases

Since the landmark libel decision *New York Times v. Sullivan*, courts have struggled with the conflict between the first

\[91\] V. Schwartz, supra note 9, § 4.4, at 91-92.
\[92\] Id. at 89.
\[93\] Id.
\[94\] 673 S.W.2d at 720. See also notes 15-16 supra and accompanying text.
\[95\] 673 S.W.2d at 720. See also note 11 supra and accompanying text.
\[96\] 673 S.W.2d at 721. Justice Leibson stated that "trial courts should have some point of departure for dealing with the complicated issues that will be precipitated by a change of this magnitude." Id. at 720.
\[98\] 673 S.W.2d at 721. Justice Leibson wrote:

Three states, Washington, Minnesota, and now Missouri, have already gone to the Uniform Act as a model. If there can be an advantage to our being among the last to adopt comparative negligence, it should be the advantage of being able to use the broad experience provided by our predecessors to point the way to the best solutions available.

\[99\] Id.

\[100\] 376 U.S. 254 (1964).
amendment guarantee of an "uninhibited, robust, and wide open" press and "the protection of private reputational interests" under defamation laws.\(^{100}\) The \textit{Sullivan} Court balanced private reputational interests against first amendment rights by requiring proof of actual malice.\(^{101}\) In \textit{Lexington Herald-Leader v. Beard},\(^{102}\) the Kentucky Supreme Court tried to balance these two interests to determine the proper scope of discovery.

1. \textit{Lexington Herald-Leader v. Beard}

\textit{Beard} addressed the scope of discovery that is properly allowed in libel cases. The plaintiffs were thirteen former employees of the University of Kentucky's Tobacco and Health Institute who sued the defendant newspaper, claiming that the newspaper had printed false and defamatory statements about them.\(^{103}\) During discovery, the plaintiffs served a subpoena duces tecum on three reporters, requesting all of the materials acquired during the newspaper articles' preparation.\(^{104}\) The newspaper moved to quash the subpoena, alleging that the information was "nondiscoverable, at this time, by virtue of the First Amendment to the United States Constitution and KRS 421.100."\(^{105}\)

\(^{100}\) \textit{Id.} at 270.


\(^{102}\) 376 U.S. at 279-80. The Court defined actual malice as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." \textit{Id.} at 280. "Actual malice" is more closely related to "scienter" than to the old common law "ill will". \textit{Nowak, Rotunda, & Young, Constitutional Law} (1983), at 946 [hereinafter cited as \textit{Nowak}]. \textit{See also W. Prosser, supra note 9, § 111, at 771-72.}

\(^{103}\) 690 S.W.2d 374 (Ky. 1984), \textit{reh'g denied}, 690 S.W.2d 374 (Ky. 1985).

\(^{104}\) \textit{Id.} at 375.

\(^{105}\) \textit{Id.} The subpoena directed the reporters to produce at the deposition: all documents of whatever nature relating to the matters in controversy herein, including but not limited to any memoranda of interviews, records of people interviewed, notes of whatever nature, memoranda of phone calls, reports of independent agencies, and any and all other materials acquired during the course of investigation or preparation of the newspaper stories referred to in the complaint.

\textit{Id.}

\(^{106}\) \textit{Id.} KRS § 421.100 (Bobbs-Merrill 1981) is Kentucky’s shield law for reporters. It states:

\textit{No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding
The trial court denied the motion to quash, but issued a protective order that allowed the newspaper to supply "copies of the reporters' notes in lieu of the original."\textsuperscript{107} In addition, the newspaper was permitted "to delete from the copies . . . such portions of the notes as refer solely to matters other than the issues raised by the allegations of the complaint."\textsuperscript{108} The newspaper was entitled to a further hearing if there were "any doubt as to whether material should or should not be deleted."\textsuperscript{109}

The Kentucky Supreme Court affirmed the substantive validity of the trial court's discovery order,\textsuperscript{110} analogizing the present need for discovery to another Kentucky case,\textsuperscript{111} \textit{Nazareth Literary & Benevolent Institution v. Stephenson}.\textsuperscript{112} There, the Court held that a hospital was required to answer a discovery order involving physicians' statements about a colleague made to an internal review committee.\textsuperscript{113} The hospital had claimed a common-law privilege against disclosing the information, stating that there was an overriding public interest in providing a confidential review procedure for correcting mistakes in hospital or staff practices.\textsuperscript{114} The Court, however, found no common-law or statutory privilege for such matters and refused to create such an "impediment to the discovery of truth."\textsuperscript{115} Also, the Court held that "parties may obtain discovery regarding any matter, not

officer of any tribunal, or his agent or agents, or before the general assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.

\textsuperscript{107} 690 S.W.2d at 375.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 379-80. On review by the Kentucky Court of Appeals, the case was dismissed on procedural grounds because an order granting a subpoena duces tecum is purely interlocutory and is not appealable. \textit{Id.} at 375. \textit{See Claussner Hosiery Co. v. City of Paducah}, 120 S.W.2d 1039 (Ky. 1938). Nevertheless, the Kentucky Supreme Court granted discretionary review "because of the importance of underlying considerations in this case involving the scope of freedom of the press." 690 S.W.2d at 376.
\textsuperscript{111} 690 S.W.2d at 376-77.
\textsuperscript{112} 503 S.W.2d 177 (Ky. 1973).
\textsuperscript{113} Id. at 179.
\textsuperscript{114} Id. at 178-79.
\textsuperscript{115} Id. at 179.
privileged, which is relevant to the subject matter involved in the pending action."

The Beard Court followed these rules of discovery and privilege. It found that the information contained in the requested material was not privileged under common or statutory law, and was relevant to the libel suit's subject matter. To establish liability, the plaintiffs had to prove the newspaper's negligence or reckless disregard for the truth. As is typical in such cases, the Court recognized that "[t]he information in the possession of the newspaper at the time of publication is critical in proving negligence or actual malice. The Court also protected the reporters' confidential sources by allowing the newspaper to delete the sources' names from the requested materials.

By allowing deletion of the sources' names, the Court recognized the statutory privilege embodied in Kentucky's shield law, which requires the disclosure of confidential information but not the source from which it was obtained. In so doing,

116 Id. (citing Ky. R. Civ. P. 26.02) (emphasis added).
117 690 S.W.2d at 377.
118 Id. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 342, 345, 349-50 (1974) (plaintiff who is not a public official or figure may collect actual damages upon proof of negligence; actual malice not required in cases involving private plaintiffs).
120 690 S.W.2d at 377.
121 Id. See also Nowak, supra note 102, at 914. See generally Annot., 99 A.L.R. 3d 37 (1980).
122 690 S.W.2d at 377-78.
123 Id. at 378. See KRS § 421.100. There are other situations involving claims of "newsgatherers privilege." Some involve civil or administrative actions in which a nonparty journalist is called as a witness. See, e.g., Zerilli v. Smith, 656 F.2d 705, 714-15 (D.C. Cir. 1981) (first amendment interest outweighed compelled disclosure); Riley v. City of Chester, 612 F.2d 708, 716 (3d Cir. 1979) (disclosure depends upon need for sources); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977) (must demonstrate need for evidence before it is required); United States v. Steelhammer, 539 F.2d 373, 375 (4th Cir. 1976) (reporter not in contempt if information can be obtained from other sources), reh'g en banc, 561 F.2d 539 (4th Cir. 1977); Baker v. F & F Investment, 470 F.2d 778, 783 (2d Cir. 1972) (disclosure must be essential to public interest or orderly administration of justice), cert. denied, 411 U.S. 966 (1973); Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394, 1396-98 (D.D.C. 1973) (must first exhaust alternative source of evidence); Winegard v. Oxberger, 258 N.W.2d 847, 852 (Iowa 1977) (standards for subordinating newspaper's privilege), cert. denied, 436 U.S.
the Court extended to discovery requests the holdings of a landmark United States Supreme Court case that originated in Kentucky—Branzburg v. Hayes and Branzburg v. Meigs, a related case that was decided by the Kentucky high court.

B. Basis for the Privilege

Although the Beard Court stated that it would not impose rules by which discovery in libel cases would be governed, it actually based its decision upon rules commonly used by other courts. A trial court must weigh, on a case-by-case basis, "the competing interests of a litigant’s right to disclosure with due regard for the importance of freedom of the press." Thus, as

905 (1978).


The issue of newsgatherers’ privilege within the criminal law setting is outside the scope of this Survey. See generally Annot., supra note 121, at 60.


125 Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971) (newsperson must reveal information to grand jury), aff’d, sub nom Branzburg v. Hayes, 408 U.S. 665 (1972).

126 503 S.W.2d 748 (Ky. 1971) (newsperson required to appear before grand jury when subpoenaed).

127 690 S.W.2d at 379 (quoting Justice White in Branzburg v. Hayes).

128 Id.
in *Beard*, the trial court must fashion "a protective order suitable to the circumstances."\(^{129}\) The Court also stated that "discovery [would be allowed] of information *relevant* and *material* to the issues."\(^{130}\) In addition, the Court recognized that the information was not available from alternative sources.\(^{131}\)

The "relevant, material, and no alternative" approach has deep-rooted constitutional and statutory foundations. It is within the liberal interpretation of Kentucky Rule of Civil Procedure 26\(^{132}\) and incorporates the rulings of several landmark first amendment cases.\(^{133}\) The Court followed a route taken by moderate courts who choose "to accommodate the needs of both plaintiffs and of defendants; or at least to assure that the clash between them does not occur unless and until it must."\(^{134}\)

One of *Beard's* roots is *Branzburg v. Hayes*,\(^{135}\) in which the United States Supreme Court refused to find a first amendment privilege allowing a reporter to withhold the identity of a confidential source during grand jury questioning.\(^{136}\) As Mr. Justice White wrote: "[T]he consequential, but uncertain, burden on news gathering"\(^{137}\) created by compelling reporters to testify before grand juries is outweighed by the societal interest in controlling criminal behavior.\(^{138}\) Although *Branzburg* involved a grand jury investigation of a criminal act, it indicated that civil cases would be treated similarly.

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. . . . [O]therwise valid laws serving substantial public interests may be enforced against the press as against others, despite

\(^{129}\) Id.

\(^{130}\) Id. (emphasis added).

\(^{131}\) Id.


\(^{133}\) See, e.g., *Branzburg v. Pound*, 461 S.W.2d at 345; *Branzburg v. Meigs*, 503 S.W.2d at 748.

\(^{134}\) Sack, *Special Discovery Problems in Media Cases*, 6 *Litigation* 21, 23 (Summer, 1980).

\(^{135}\) 408 U.S. at 665.

\(^{136}\) Id. at 708.

\(^{137}\) Id. at 690.

\(^{138}\) Id.
the possible burden that may be imposed. . . . "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."

The *Beard* court also based its decision upon the holding in *Garland v. Torr*, in which actress Judy Garland sued CBS for an allegedly defamatory statement contained in an article written by columnist Marie Torre and attributed to a confidential source. At the deposition, Torre refused to name her source, claiming a first amendment privilege to withhold confidential material from public disclosure in a civil suit. The privilege argument was rejected, and Torre was jailed for contempt.

Judge (later Mr. Justice) Stewart wrote in *Garland* that neither the first amendment nor an evidentiary privilege justified the columnist's refusal to reveal her source's identity. The *Garland* court developed a three-step analysis that was impliedly employed in *Beard*. Under this approach, disclosure is required if (1) the information was not patently frivolous (was material), (2) reasonable efforts to obtain the information were not successful (no alternative source), and (3) the information was relevant because it "went to the heart of the plaintiff's claim."

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139 Id. at 682-83 (quoting Assoc. Press v. NLRB, 301 U.S. 103, 132-33 (1937)) (emphasis added).
140 690 S.W.2d at 379.
142 259 F.2d at 547-48.
143 Id. at 547 n.2.
144 Id. at 549-50. The court stated:
If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."

*Id.* at 549 (quoting Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907)).
146 Id. at 551.
147 Id.
148 Id. at 550.
In *Herbert v. Lando*, the United States Supreme Court considered the conflict between reputational interests and first amendment guarantees in pretrial discovery requests. Holding that the plaintiff in a libel suit should be allowed complete discovery within the limits of the Federal Rules of Civil Procedure, the Court permitted inquiry into the editorial process. Thus, according to some commentators, the Court impliedly "held discovery of the editorial process to be consistent with the first amendment." The Court’s reasoning centered on the plaintiff’s need to prove the *New York Times v. Sullivan* standard for actual malice. Since state of mind is a crucial element in "public figure plaintiff" libel litigation, such plaintiffs naturally seek expanded discovery. As the Court explained in *Lando*:

Although defamation litigation, including suits against the press, is an ancient phenomenon, it is true that our cases from *New York Times* to *Gertz* have considerably changed the profile of such cases. In years gone by, plaintiffs made out a prima facie case by proving the damaging publication. Truth and privilege were defenses. Intent, motive and malice were not necessarily involved except to counter qualified privilege or to prove exemplary damages. The plaintiff’s burden is now considerably expanded. In every or almost every case, the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher. If plaintiffs in consequence now resort to more discovery, it would not be surprising.

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149 441 U.S. 153 (1979). The case involved a “public figure plaintiff’s” libel claim against CBS, reporter Mike Wallace, and Barry Lando, the producer of “60 Minutes.” The plaintiff alleged that the story falsely and maliciously portrayed him as a liar. *Id.* at 156.

150 *Id.* at 169-75. See Note, *supra* note 101, at 1026.

151 The “broad and liberal treatment” of discovery by litigants in any civil trial was extended to libel cases. 441 U.S. at 177 (citing Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964), and Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947)).

152 441 U.S. at 175.

153 Note, *supra* note 101, at 1030. See also 441 U.S. at 172.

154 376 U.S. 254.

155 441 U.S. at 170.

156 *Id.* at 176.

157 *Id.* at 175-76. Of course, increased discovery creates the danger of a “chilling effect” on the press. See *id.* at 191 (Brennan, J., dissenting in part); *id.* at 205 (Marshall, J., dissenting).
As *Lando* indicated, expanded discovery has been a natural progression of the actual malice requirement. Most courts, in light of *Branzburg*, *Garland*, and *Lando*, have still "concluded that a qualified privilege for a journalist to protect the identity of a confidential source exists." Yet, the plaintiff may claim that the identification of a source is required to prove the defendant's negligence or reckless disregard for the truth; the source may help establish fault if she gave the defendant other leads that he did not pursue, or if she later specifically contradicted the statement. The plaintiff may even claim that there is no source. In such instances the plaintiff may force disclosure of a confidential source by showing that disclosure is (1) critical to his claim, and (2) that reasonable alternatives have been explored without success. If the plaintiff is unable to demonstrate a concrete need for the information, and the defendant can establish a good faith belief in the truth of his statement, the court may refuse to order disclosure.

To prevent disclosure, the best and perhaps only protection for a reporter is a statutory privilege, known commonly as a shield law. Kentucky's shield law protects only the source's identity, and not the content of unpublished information. Absent a shield law, however, a reporter's sources are discoverable unless the court finds no real need for the information, or a rare common-law privilege exists. The legislative decision to provide such a privilege has been challenged in several jurisdictions, and some challenges have been successful. Some courts

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159 Id. at 22.
160 Id.
161 Id.
162 Id. Justice Brennan, in his partial dissent in *Lando*, analogized editorial privilege to executive privilege and suggested that the plaintiff must make a prima facie showing of defamatory falsehood before editorial privilege must yield. 441 U.S. at 197.
163 See, e.g., 464 F.2d at 994.
164 Id. at 995.
165 KRS § 421.100.
166 Lexington Herald-Leader v. Beard, 690 S.W.2d at 375-76; 461 S.W.2d at 347.
167 See, e.g., 464 F.2d at 992-93; 259 F.2d at 549-50.
have narrowed broad shield laws to protect only sources, while others have found that the privilege does not apply in criminal cases.

At this point, at least in Kentucky, the "Deep Throats" of civil litigation are safe from discovery. *Beard* represents a proper balance between private reputational interests and the constitutional guarantee of a free press. The approach is an agreeable combination of constitutional, common, and statutory law interpretation.

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170 See, e.g., 461 S.W.2d at 347.
172 690 S.W.2d at 375-76. See generally, Comment, *News Sources*, supra note 124.