

7.22 THIRD PARTY ACTION UNDER LONGSHOREMAN'S AND HARBOR WORKERS COMPENSATION ACT — COMPARATIVE NEGLIGENCE (Approved before 1985)

If in accordance with the principles of law heretofore given you, you find that the defendant was negligent and that plaintiff was contributory negligent, you will apply the following principle of law commonly referred to as the law of comparative negligence.

In an action such as this, to recover damages for personal injuries, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

This provision which deals with the effect of the plaintiff's contributory negligence upon the amount of his/her recovery, states two principles of law:

- The fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery, but
- if the plaintiff is guilty of contributory negligence the effect of such contributory negligence is that the damages the plaintiff is entitled to shall be diminished by you in proportion to the amount of such contributory negligence.

These provisions of law are applicable to the facts in this case in the following manner:

First, ascertain the amount of damages that the plaintiff would be entitled to without reference to his/her contributory negligence.

Second, ascertain the proportion or percentage of such amount of damages which is attributable to plaintiff's contributory negligence.

Third, diminish the amount ascertained in the first step by the proportion or percentage of contributory negligence ascertained in the second step.

The amount remaining is the amount the plaintiff is entitled to.

Alternate Charge

If in accordance with the principles of law heretofore given you, you find that the defendant was negligent and that plaintiff was contributory negligent, you will apply the following principle of law commonly referred to as the law of comparative negligence.

In an action such as this, to recover damages for personal injuries, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

This provision which deals with the effect of the plaintiff's contributory negligence upon the amount of his/her recovery, states two principles of law:

- The fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery, but
- if the plaintiff is guilty of contributory negligence the effect of such contributory negligence is that the damages the plaintiff is entitled to shall be diminished by you in proportion to the amount of such contributory negligence.

To explain how to apply the doctrine of comparative negligence to the facts of this case, I shall use an illustration.

You may determine that the amount of the plaintiff's damages for his/her personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his/her contributory negligence is 50%. You would compute what 50% of X dollars is, that is, 50 cents times each of X dollars, and diminish the amount of X dollars by 50% or 50 cents out of each dollar, which would leave the amount 50% of X dollars to which the plaintiff would be entitled in your verdict.

You may determine that the amount of the plaintiff's damages for his/her personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his/her contributory negligence is 10%. You would compute what 10% of X dollars is, that is, 10 cents

times each of X dollars, and diminish the amount of X dollars by 10% or 10 cents out of each dollar, which would leave the amount of 90% of X dollars to which the plaintiff would be entitled in your verdict.

You may determine that the amount of the plaintiff's damages for his/her personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his/her contributory negligence is 90%. You would compute what 90% of X dollars is, that is, 90 cents times each of X dollars, and diminish the amount of X dollars by 90% or 90 cents out of each dollar, which would leave the amount 10% of X dollars to which the plaintiff would be entitled in your verdict.

Cases:

Reed v. S.S. Yaka, 373 U.S. 410, 10 L.Ed.2d 448, 83 S.Ct. 1349 (1963); *United N.Y. & N.J. Pilots Asso. v. Halecki*, 358 U.S. 613, 3 L.Ed.2d 541, 79 S.Ct. 417 (1959); *Romero v. International Terminal Operat. Co.*, 358 U.S. 354, 3 L.Ed.2d 368, 79 S.Ct. 468 (1959); *Kermarec v. Compagnie Generale Transatlantique*, 348 U.S. 625, 3 L.Ed.2d 550, 79 S.Ct. 406 (1959); *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406, 98 L.Ed. 143, 74 S.Ct. 202 (1953); *Caldarola v. Eckert*, 332 U.S. 155, 91 L.Ed. 1968, 67 S.Ct. 1569 (1947).

NOTE TO JUDGE

Title 33 (Navigation and Navigable Waters) Chapt. 10, Sec. 901 *et seq.* of the *U.S. Code*, is the Longshoremen's and Harbor Workers' Compensation Act.

The remedy under this Act is exclusive and in place of all other liability of such employer to his/her employee or legal representative.

In addition to the foregoing remedy, longshoremen and harbor workers may also have a third-party action against the vessel or its owner grounded on negligence or unseaworthiness or both. Such an action may be and generally is brought in a Federal District Court. However, the action under either theory may also be brought in a state court of the state in whose territorial waters the injury occurred or where jurisdiction over the parties may be obtained. In such cases the Federal Maritime Law prevails with the comparative negligence rule applying.

Third-party actions under the Longshoremen's and Harbor Workers' Compensation Act may be tried in state courts. *See* Title 33 *U.S.C.A.*, Sec. 933; *Paxos v. Jarka Corp.* 314 *Pa.* 148, 171 *A.* 468 (Sup. Ct. 1934); *Kermarec v. Compagnie Generale Transatlantique*, 348 *U.S.* 625, 3 *L.Ed.2d* 550, 79 *Sup Ct.* 406 (1959).

Compensation is payable irrespective of fault in respect to disability or death of an employee if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock).