Comments

CONTRIBUTORY NEGLIGENCE INSTRUCTIONS IN ARIZONA

WARREN C. RIDGE, JR.

Article 18, Section 5, of the Arizona Constitution declares: "The defense of contributory negligence . . . shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."[1] Although seemingly uncomplicated, this enactment, because of its latent ramifications, has been a source of considerable concern to the tort lawyers and the courts of our state.

This constitutional mandate is fairly unique, as is evidenced by the fact that apparently only one other state, Oklahoma,[2] has an identical constitutional section. Indiana[3] and Mississippi[4] have statutes which deal with the same subject matter, but their language is sufficiently different[5] from that found in the Arizona provision to jeopardize any comparisons drawn between decisions under these statutes and the opinions of the Arizona court. Therefore, this comment, insofar as similarities to other states are concerned, will be limited to those interpretations emanating from Oklahoma.

The decided cases involving Article 18, Section 5, indicate that it is (1) valid under the United States Constitution,[6] and (2) applicable to all contributory negligence situations in Arizona, notwithstanding the location of this provision in the "Labor" article of our constitution.[7] There is some disagreement remaining with regard to the

---

[1] ARIZ. CONST. art. 18, § 5.

[2] OKLA. CONST. art. 23, § 6.

[3] "All questions of assumption of risk, negligence or contributory negligence shall be questions of fact for the jury to decide, unless the cause is being tried without a jury. . . ." IND. ANN. STAT. § 40-1107 (1952).

[4] "All questions of negligence and contributory negligence shall be for the jury to determine." MISS. CODE ANN. § 1455 (1942).

[5] See statutes cited notes 3 and 4 *supra*.

[6] Heron v. Southern Pac. Co., 283 U.S. 91, 93 (1931). *Accord*, Chicago, R.I. & Pac. Ry. v. Cole, 251 U.S. 54 (1919) (dealing with the Oklahoma provision); Salt River Valley Water Users' Ass'n v. Berry, 31 Ariz. 39, 250 Pac. 356 (1926).

[7] See Davis v. Boggs, 22 Ariz. 497, 507, 199 Pac. 116, 120 (1921), where the court declared:

> The contention of the defendant that, because the provision is found in the article of the Constitution entitled "Labor," it must be limited in its scope and application to the relation of master and servant, cannot be sustained. The language is too broad and comprehensive to admit of such a narrow construction.

latter proposition,[8] but it seems most practical, at least for the purposes of this discussion, to recognize both of the above conclusions, neither of which has ever been successfully attacked.[9]

Assuming the foregoing, there remains the difficulty of forming jury instructions which are consistent with our constitution in cases where contributory negligence is a factor. This constitutional section pervades the entire field of contributory negligence instructions in Arizona, and gives rise to two particular problems, namely:

I. Whether or not the court in its instructions may define contributory negligence in terms of certain hypothetical facts,[10] and

II. Whether the court should instruct the jury that if they find as a fact that the plaintiff was contributorily negligent, then they *may* find for the defendant.[11]

Although both questions find their genesis in the same constitutional section, and both may be combined in a single instruction,[12] they are analytically distinct. The primary distinction between these two problems is that the first is concerned with deciding what is contributory negligence, while the second entails forming an instruction which properly advises the jury of its duty after contributory negligence has

---

[8] See, *e.g.*, Brief for Appellant, pp. 19, 20 & 34, Layton v. Rocha, 90 Ariz. 369, 368 P.2d 444 (1962), in which counsel for the appellant notes, after a thorough discussion of the history of the Arizona constitutional provision, that:

> [I]t seems not merely fair, but absolutely certain that not a soul at our Constitutional Convention ever supposed that this provision had application to anything but the employer-employee relationship, which is of course why it is in the labor section of the Constitution.

Counsel also points out that this provision is a direct descendant of the Federal Employer's Liability Act of 1906, and argues convincingly that the provision was originally offered for the purpose of dealing with the defense of contributory negligence as part of the comparative negligence structure in relation to employer's liability. However, referring to Davis v. Boggs, *supra* note 7, counsel concedes that: "We can well imagine that, whether right or wrong, the court may prefer to let the original ruling stand rather than re-examine the matter at this late date."

[9] *But cf.* Butane Corp. v. Kirby, 66 Ariz. 272, 280, 187 P.2d 325, 331 (1947), which indicates that the court, at least at one time, intended to re-examine the whole basis of this section of the constitution, insofar as its scope of application is concerned. This has apparently never been done.

[10] See, *e.g.*, Wolfswinkel v. Southern Pac. Co., 81 Ariz. 302, 305, 305 P.2d 447, 450 (1956), where the court gave the following instruction:

> [I]f you find from a preponderance of the evidence that Clarence Wolfswinkel [plaintiff] failed to exercise proper vigilance or failed to yield the right-of-way to the approaching train and that such failure contributed, however slightly, to the collision, then you must find Clarence Wolfswinkel to have been guilty of contributory negligence.

[11] See, *e.g.*, Layton v. Rocha, 90 Ariz. 369, 370, 368 P.2d 444, at 444 (1962), in which instruction it was stated that:

> [I]f *both parties were negligent* and such negligence proximately contributed to bringing about the accident the law would leave them where it finds them 'and the plaintiff *may* not be entitled to recover and your verdict *may* be for the defendant.' (Emphasis added.)

[12] See, *e.g.*, Coyner Crop Dusters v. Marsh, 91 Ariz. 371, 374, 372 P.2d 708, 710

been found.[13]

I

As a background to an investigation of the question involving hypothetical-fact instructions, an examination of the history of this constitutional provision seems in order. It was part of our constitution when Arizona was admitted into the Union,[14] having been taken verbatim from Oklahoma.[15] These enactments are opposed to the common law, since generally at common law the courts could withdraw the question of contributory negligence from the jury and determine it as a matter of law when the facts were indisputable.[16] In fact, the United States Supreme Court, while sustaining the constitutionality of the Arizona provision, has admitted that it "cuts deep into the right observed at common law, by which a defendant can obtain a decision by the court, upon a proven state of facts."[17]

Although the court has thus been deprived of its common law power to withdraw questions of contributory negligence from the jury,

---

(1962), which contains the following instruction:

> [I]f you find from the evidence that Mr. Coyner [plaintiff] negligently placed himself in a position of peril by landing or taxiing onto the runway in question when that runway was obstructed by dust, if you find it was obstructed by dust, and that that negligence, if any, contributed in the slightest degree to the collision and his death, then you are instructed to find in favor of the defendants.

The court on appeal held that the word *may* should have been used in this instruction, following Layton v. Rocha, *supra* note 11, and remanded the case for a new trial.

[13] Justice Jennings, in his dissent in Layton v. Rocha, 90 Ariz. 369, 375, 368 P.2d 444, 448 (1962), has aptly differentiated between the two problems with the shorthand terms, (1) "whether contributory negligence" and (2) "what then."

[14] See Varela v. Reid, 23 Ariz. 414, 204 Pac. 1017 (1922).

[15] OKLA. CONST. art. 23, § 6.

[16] See 38 AM. JUR. *Negligence* § 348 (1941). This common law rule should be compared with the following series of Arizona cases which tend toward the same rule notwithstanding our constitutional provision. *E.g.*, in Citizens Utilities Co. v. Firemen's Ins. Co., 73 Ariz. 299, 304, 240 P.2d 869, 872 (1952), the court said that where there is no evidence from which reasonable men might reach differing conclusions, then it is the duty of the court to declare the plaintiff either contributorily negligent or not, as the case may be. Cases which make note of a similar doctrine include: City of Phoenix v. Brown, 88 Ariz. 60, 352 P.2d 754 (1960); Zancanaro v. Hopper, 79 Ariz. 207, 286 P.2d 205 (1955); Scott v. Scott, 75 Ariz. 116, 252 P.2d 571 (1953); Morris v. Aero Mayflower Transit Co., 73 Ariz. 390, 242 P.2d 279 (1952); Arizona Power Co. v. Hayes, 24 Ariz. 322, 209 Pac. 280 (1922); Calumet & Ariz. Mining Co. v. Gardner, 21 Ariz. 206, 187 Pac. 563 (1920). These cases appear to be a dangerous encroachment on the jury's constitutionally granted power. Therefore, it is felt that the doctrine espoused in them should be limited to those situatitons where there is *no evidence* of contributory negligence, and should not be extended to cases where there is, in the court's mind, *insufficient* evidence to go to the jury. This line of reasoning has been followed by Oklahoma as was pointed out in Kelly v. Employers Cas. Co., 202 Okla. 437, 214 P.2d 925 (1950). See also Comment, 6 OKLA. L. REV. 80, 84 (1953).

[17] Heron v. Southern Pac. Co., 283 U.S. 91, 93 (1931), citing Atchison, T. & S.F. Ry. v. Spencer, 20 F.2d 714, 716 (9th Cir. 1927).

the language of the provision does not appear to necessarily preclude the use of hypothetical-fact instructions.[18] Nonetheless, the Oklahoma decisions dealing with the construction of that state's provisions have continually held that under such an enactment the court has no right to tell the jury whether certain facts do or do not constitute contributory negligence.[19] Arizona cases prior to 1957 repeatedly adopted the Oklahoma construction by holding that it is an unconstitutional invasion of the province of the jury for the court to define contributory negligence in terms of certain facts set out in the instructions.[20]

Notwithstanding the long duration of this interpretation of Article 18, Section 5, a recent pair of cases[21] not only cast doubt upon the propriety of this position, but point to its complete abrogation. These decisions appear to unequivocally formulate a new rule which allows the court, in its instructions in cases of common law negligence as well as negligence in consequence of the violation of a statute, to define contributory negligence in terms of hypothetical-fact situations. This new doctrine seems to have originated with the rehearing opinion in *Wolfswinkel v. Southern Pac. Co.*[22] The first decision in that case[23] cited with approval some of the Arizona cases which had held that it is reversible error for a trial court to instruct that certain facts constitute contributory negligence.[24] However, on rehearing, where the court affirmed its previous result, it was noted that nothing in the original opinion prohibits a trial court from instructing as to the legal

---

[18] The power to give hypothetical-fact instructions would seem to be of a lesser magnitude than the right to completely withdraw the question from the jury. The court can never be absolutely certain that a jury will find those hypothetical facts which are set out in the instructions. Therefore, a court cannot with certainty take the question from the jury through the medium of hypothetical-fact instructions. On the other hand, if the court has the power to completely withdraw the question, then the uncertainty of jury findings is totally removed.

[19] See, *e.g.*, Kenty v. Spartan Aircraft Co., 276 P.2d 928 (Okla. 1954); Cole v. Dickinson, 74 Okla. 79, 177 Pac. 570 (1918); Wichita Falls v. Woodman, 64 Okla. 326, 168 Pac. 209 (1917); Pioneer Hardwood Co. v. Thompson, 49 Okla. 502, 153 Pac. 137 (1915).

[20] See, *e.g.*, Varela v. Reid, 23 Ariz. 414, 421, 204 Pac. 1017, 1020 (1922), where the court held that it is reversible error "for the court to state what facts constitute [contributory] negligence. . . ."; and Wolfswinkel v. Southern Pac. Co., 81 Ariz. 302, 306, 305 P.2d 447, 450 (1956), in which the court said: "It is reversible error for a trial court to instruct that certain facts, which contributed to an injury, constitute contributory negligence," citing with approval Varela v. Reid, *supra*. See also, Zancanaro v. Hopper, 79 Ariz. 207, 213, 286 P.2d 205, 210 (1955), in which the court comments that, "This case [Varela v. Reid] is still the law of Arizona. . . ."

[21] Terzis v. Miles, 90 Ariz. 120, 366 P.2d 683 (1961), and Wolfswinkel v. Southern Pac. Co., 82 Ariz. 33, 307 P.2d 1040 (1957), *affirming* 81 Ariz. 302, 305 P.2d 447 (1956).

[22] *Supra* note 21.

[23] Wolfswinkel v. Southern Pac. Co., 81 Ariz. 302, 305 P.2d 447 (1956).

[24] *Id.* at 306, 305 P.2d at 450.

duties of the plaintiff.[25] The court went on to say that the jury is entitled to know what would, as a matter of law, be negligence on the part of the plaintiff, and when that negligence would amount to contributory negligence.[26] This appears to be a definite approval of hypothetical-fact instructions, and if so, it seems to be in direct contradiction to the first *Wolfswinkel* case. It can be argued that the holding of *Wolfswinkel* on rehearing should be limited to the conclusion that the particular hypothetical facts set up by the trial court in that case were not in themselves sufficient to properly define contributory negligence under the law. Granting this, arguendo, and considering the approval of hypothetical-fact instructions to be only dictum, still the fact remains that the court by this dictum indicated that a change in its position was forthcoming. Subsequently, in the 1961 case of *Terzis v. Miles*,[27] the Arizona Supreme Court said:

> We have many times held that the court should declare the law on contributory negligence to the jury and let it decide whether such fact exists. We have also held that the court might properly hypothetically instruct the jury as to what amounts to common law negligence.[28]

The opinion on rehearing of the *Wolfswinkel* case was cited as authority for the instruction quoted from the *Terzis* decision. The language in *Terzis* relating to common law negligence is actually dictum, since the case deals with a statutory violation by plaintiff;[29] but nonetheless, the court, in this case and *Wolfswinkel,* seems to have made clear its intention to replace the rule which forbids hypothetical-fact instructions with a doctrine which admits such instructions, both as to statutory and common law negligence situations.

An example of the court's use of a hypothetical-fact instruction when the plaintiff is allegedly guilty of a violation of a statute[30] is found in *Reichardt v. Albert*,[31] where the court instructed the jury

---

[25] 82 Ariz. 33, 34, 307 P.2d 1040, 1041 (1957).
[26] *Id.* at 35, 307 P.2d at 1041.
[27] 90 Ariz. 120, 366 P.2d 683 (1961).
[28] *Id.* at 122, 366 P.2d at 684.
[29] *Ibid.*. The court speaks of the "safety law herein involved" without referring to it specifically. This writer has assumed that an ordinance or a statute, possibly ARIZ. REV. STAT. ANN. § 28-645 (1956), was involved.
[30] It has long been established in Arizona that the violation of a safety statute by a defendant is negligence per se. See, *e.g.*, Anderson v. Morgan, 73 Ariz. 344, 241 P.2d 786 (1952); City of Phoenix v. Mullen, 65 Ariz. 83, 174 P.2d 422 (1946). See generally, Annot., 132 A.L.R. 863 (1941). In all fairness, notwithstanding the constitutional provision, this doctrine should apply to the plaintiff as well as the defendant.
[31] 89 Ariz. 322, 361 P.2d 934 (1961). This was an automobile collision case in which it was alleged that plaintiff failed to reduce his speed when he observed the defendant about to make a left turn in front of his (plaintiff's) vehicle, and that this conduct violated ARIZ. REV. STAT. ANN. § 28-701(A) & (E) (1956).

that:

> [I]f you find . . . that plaintiff . . . violated these [statutory] provisions, *then that would constitute negligence on her part;* and if you further find that such negligence, if any, proximately contributed in the slightest degree to the accident, then your verdict should be for the defendant. . . .[32] (Emphasis added.)

It ought to be noticed that in the case of the statutory violation a fairly reliable and constant yardstick (the statute itself) is available to define the standard of conduct exacted of the plaintiff, whereas the use of hypothetical facts in common law negligence instructions is "fraught with danger" in that the omission of one essential fact will cause the instruction to be erroneous.[33] This caveat was noted in *Wolfswinkel* on rehearing[34] when the court gave the following warning: "Hypoethical instructions on common law negligence at best are dangerous. The hazards of using an incorrect hypothesis are great. If given, it should be done with extreme care."[35]

Despite this danger of incomplete or incorrect hypotheses, it does not seem unreasonable, under our constitution, to allow such instructions. This type of instruction leaves to the jury the task of finding: (1) the fact of plaintiff's negligence as hypothetically defined by the court, and (2) the further fact that plaintiff's negligence contributed proximately to the injury. Thus, the jury is merely instructed as to what conduct on the part of the plaintiff amounts to contributory negligence under the law. This is consistent with the kind of instruction normally given in the area of primary negligence.[36] Since members of the jury are not expected to know the law prior to their instructions, and cannot properly decide a case without having an adequate knowledge of the law, it appears only reasonable that they be told what the law requires in a given case. Allowing these instructions still leaves to the jury the *final* determination of the *defense* of contributory negligence as required by our constitution.

This conclusion seems proper, unless perhaps, one interprets the constitutional provision as having given to the jury the right to determine the legal standards of contributory negligence as well as its factual existence. This view would lead to the conclusion that Ari-

---

[32] Reichardt v. Albert, 89 Ariz. 322, 324, 361 P.2d 934, 936 (1961). Note also the *should* instruction; and, as to its effect, see *infra* note 48, and text appurtenant thereto.

[33] Coyner Crop Dusters v. Marsh, 91 Ariz. 371, 376, 372 P.2d 708, 711 (1962).

[34] 82 Ariz. 33, 307 P.2d 1040 (1957).

[35] *Id.* at 35, 307 P.2d at 1041.

[36] See, *e.g.*, Wolfswinkel v. Southern Pac. Co., 82 Ariz. 33, 35, 307 P.2d 1040, 1041 (1957); Pearson & Dickerson Contractors, Inc., v. Harrington, 60 Ariz. 354, 137 P.2d 381 (1943).

zona is a comparative negligence state, where, in substance, the jury is given the power to determine the legal standards of care required of both parties.[37] Whether or not Arizona has adopted a comparative negligence standard is the subject of Part II of this comment. Suffice to say at this juncture that apparently no Arizona case has ever *explicitly* approved the doctrine of comparative negligence,[38] save in the statutory field of employers' liability.[39]

II

The Arizona Supreme Court, in an 1883 case, followed the almost universally accepted common law rule that contributory negligence is a bar to a plaintiff's cause of action in a negligence complaint.[40] It was declared in that case that in order for a plaintiff to recover, it must appear that his own negligence has not "in any degree" contributed to his injury.[41] The adoption of this contributory negligence standard has never been expressly overruled. However, a very recent group of cases,[42] beginning with *Layton v. Rocha*,[43] appear to undermine, if not replace this proposition of law by approving instructions which seem to subtly bring Arizona into the comparative negligence camp. For example, in the *Layton* case the court instructed the jury that if

---

[37] See BLACK, LAW DICTIONARY (4th Ed. 1951), wherein comparative negligence is defined in terms adopted from Rogers v. McKinley, 48 Ga. App. 262, 172 S.E. 662, 664 (1934) as follows: "Where negligence by both parties is concurrent and contributes to injury, recovery is not barred under such doctrine, but plaintiff's damages are diminished proportionately, provided his fault is less than defendant's. . . ." It would seem that the power to determine which party's negligence was greater is a right which has inherently imbued in it a power to decide the law of contributory negligence, case by case. In other words, the jury is entitled to set up its own legal standards since they are not guided by any instructions telling them what conduct, under the law, will bar plaintiff's recovery.

[38] Of course there are instances in which the court does, in effect, compare the negligence of the parties, but these situations are not commonly thought of as within the comparative negligence doctrine as defined in note 37 *supra*. They include: (1) defendant's willful or wanton misconduct, as shown in Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, 166 P.2d 816 (1946) and Southern Pac. Co. v. Svendsen, 13 Ariz. 111, 108 Pac. 262 (1910), and (2) last clear chance, as illustrated by the RESTATEMENT, TORTS, § 479 (1934). See also, as to last clear chance, 4 ARIZ. L. REV. 72, 78, n.42 (1962), wherein the author says that if Arizona has adopted comparative negligence, then last clear chance will no longer be a problem.

[39] ARIZ. REV. STAT. ANN. § 23-806 (1956). See also Feffer v. Bowman, 90 Ariz. 48, 365 P.2d 472 (1961), in which the court points out that the State constitution assures that the defense of contributory negligence shall be a jury question in a common law negligence action, and *additionally*, a suit brought under the Employers' Liability Statute will be decided under the doctrine of comparative negligence.

[40] Lopez v. Central Ariz. Mining Co., 1 Ariz. 464, 2 Pac. 748 (1883).

[41] *Id.* at 480, 2 Pac. at 750.

[42] Deering v. Carter, 376 P.2d 857 (Ariz. 1962); Coyner Crop Dusters v. Marsh, 91 Ariz. 371, 372 P.2d 708 (1962); Sisk v. Ball, 91 Ariz. 329, 371 P.2d 594 (1962); Mantovani v. Green, 90 Ariz. 376, 368 P.2d 448 (1962); Layton v. Rocha, 90 Ariz. 369, 368 P.2d 444 (1962).

[43] *Supra* note 42.

both parties were negligent and such negligence proximately contributed to bringing about the accident, then "your verdict *may* be for the defendant."[44]

Instructions using the permissive form *may*, instead of the mandatory form *must*, tell the jury, in effect, that a finding of contributory negligence does not preclude a verdict for the plaintiff. This result seems to open the door to comparative negligence considerations, since it casts the jury onto the sea of decision without the navigational aid of an instruction denying their right to compare the negligence of the parties. The *must* instruction does deny such a right, at least inferentially.

The correctness of the *may* instruction is supported by the majority of the court in the *Layton* case by an interpretation of the 1930 Arizona case of *Dennis v. Stukey*.[45] It was held in *Dennis* that even though the court feels that the undisputed evidence shows plaintiff's negligence did as a fact contribute to the injury, if the jury nevertheless finds for the plaintiff, its verdict is conclusive upon the court.[46] This holding is absolutely correct under our constitution, insofar as the opinion applies to the power of the trial court to set aside a verdict (or the right of the appellate court to reverse); but the holding cannot properly be extended to control an instruction which deals with the problem of the jury's duty once they find contributory negligence. The court in the *Dennis* case speaks in terms of what the undisputed evidence shows, not what the jury found as fact, and simply recognizes that what the jury finds is not always in accord with what the court considers proper under the undisputed evidence. The *Dennis* case did not hold that the jury may find for either party once *they* have found as a fact that contributory negligence existed. The dissent in the *Layton*[47] case gets quickly to the heart of the matter when it states:

> A.R.S. Const. Art. 18, § 5 guarantees litigants the right to have the jury determine the *existence or nonexistence* of contributory negligence. *It does not give the jury the power to arbitrarily set forth the legal consequences of contributory negligence.*[48] (Emphasis added.)

Unless we have abolished the common law standard of contributory negligence, the court should instruct the jury as to the effect of

---

[44] *Id.* at 370, 368 P.2d at 444.
[45] 37 Ariz. 299, 294 Pac. 276 (1930).
[46] *Id.* at 304, 294 Pac. at 278, citing Inspiration Consol. Copper Co. v. Conwell, 21 Ariz. 480, 190 Pac. 88 (1920).
[47] 90 Ariz. 369, 373, 368 P.2d 444, 446 (1962).
[48] *Id.* at 374, 368 P.2d at 447.

contributory negligence, *i.e.*, that it bars plaintiff's recovery. This result is certainly not accomplished by a *may* instruction, and even though *should* instructions have been approved by the court,[49] only the *must* form seems to be grammatically proper, since under the law of contributory negligence, a plaintiff *must* lose if he is negligent in the slightest degree.

It is not intended here to become involved in a discussion of the merits of comparative negligence as contrasted with the doctrine of contributory negligence.[50] However, as mentioned previously, the Arizona court has repeatedly reiterated the rule that contributory negligence is a bar to the plaintiff's action.[51] Such decisions are in accord with the vast majority of United States jurisdictions[52] and the Restatement of Torts.[53] Long after the enactment of our constitution, the Arizona court stated that the doctrine of contributory negligence was based on sound public policy.[54] Our court has also summarily reversed a case in which an express comparative negligence instruction was given.[55] Oklahoma, with its identical constitutional provision, has not seen fit to adopt the comparative negligence theory.[56]

It thus appears that the doctrine of contributory negligence, as opposed to comparative negligence, has been favored in Arizona as well as Oklahoma and elsewhere. This is not to say, however, that the Arizona court could not constitutionally make Arizona a comparative negligence state. Indeed, under the *Layton case* that is in effect

---

[49] See, *e.g.*, Mantovani v. Green, 90 Ariz. 376, 377, 368 P.2d 448, 449 (1962); Layton v. Rocha, 90 Ariz. 369, 371, 368 P.2d 444, 445 (1962); Dennis v. Stukey, 37 Ariz. 299, 303, 294 Pac. 276, 278 (1930) (also involving a hypothetical-fact instruction).

[50] *But cf.* Brief for Appellee, pp. 14-16, Layton v. Rocha, 90 Ariz. 369, 368 P.2d 444 (1962). It is interesting to note that in this brief, counsel urged the court to adopt the comparative negligence theory, contending that this was the intended and proper result of our constitutional provision. However, the court, while finding for the appellee, did not overtly follow this recommendation.

[51] See, *e.g.*, Campbell v. English, 56 Ariz. 549, 110 P.2d 219 (1941); Martinez v. Anderson, 50 Ariz. 95, 69 P.2d 237 (1937); Varela v. Reid, 23 Ariz. 414, 204 Pac. 1017 (1922); Young v. Campbell, 20 Ariz. 71, 177 Pac. 19 (1918).

[52] 38 AM. JUR. *Negligence* § 174 (1941).

[53] "[T]he plaintiff's contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him." RESTATEMENT, TORTS, § 467 (1934).

[54] Womack v. Preach, 64 Ariz. 61, 165 P.2d 657 (1946). *But see* PROSSER, TORTS 284 (2d Ed. 1955) wherein it is mentioned that the doctrine of contributory negligence "has been looked on with increasing disfavor by the courts."

[55] Prescott & Ariz. Cent. Ry. v. Rees, 3 Ariz. 317, 28 Pac. 1134 (1892). The instruction here called for the jury to weigh the negligence of the defendant against the negligence of the plaintiff, and to find for the party least guilty. It should be noted, however, that this case was decided prior to the adoption of our constitution.

[56] See, *e.g.*, Public Service Co. v. Sanders, 362 P.2d 90 (Okla. 1961); Mount v. Nichols, 198 Okla. 282, 177 P.2d 1013 (1947); Gourley v. Oklahoma City, 104 Okla. 210, 230 Pac. 923 (1924).

what has been done.[57] Regardless of one's views as to the propriety of either standard, it must be agreed that if the court intends to adopt a different standard such intention should be clearly expressed.

It is submitted that the dissent in the *Layton*[58] case is sound. It would require the court to inform the jury of the legal consequences of contributory negligence by substituting the *must* instruction for the *may version*. In addition, if the dissent was followed, it would eliminate an anomaly which has long existed in the law of Arizona, *viz.*, an inconsistency in the authority of the court to instruct the jury as to the law of contributory negligence. This inconsistency first appeared in 1922 when it was held improper to define contributory negligence by means of hypothetical-fact instructions,[59] while at the same time it was required to instruct the jury as to the legal effect of contributory negligence.[60] In the past few years the court has reversed its position on both of these questions, thereby perpetuating an anomaly. Now, hypothetical-fact instructions are allowed,[61] whereas instructions properly explaining the effect of plaintiff's negligence are condemned.[62] It would seem to be more logical to either: (1) tell the jury the law of contributory negligence through the means of both hypothetical-fact and "effect" instructions, or (2) refrain from giving the law through either of these instructions. Which of these alternatives is followed depends of course on one's interpretation of Article 18, Section 5. Does that provision make the jury the finder of law as well as fact?

The Arizona Supreme Court has indicated an affirmative answer

---

[57] Layton v. Rocha, 90 Ariz. 369, 368 P.2d 444 (1962) has been cited as controlling authority by the subsequent cases of Deering v. Carter, 376 P.2d 857 (Ariz. 1962); Coyner Crop Dusters v. Marsh, 91 Ariz. 371, 372 P.2d 708 (1962); Sisk v. Ball, 91 Ariz. 329, 371 P.2d 594 (1962); and Mantovani v. Green, 90 Ariz. 376, 368 P.2d 448 (1962), but none of these cases have discussed the comparative negligence aspect of the *Layton* case.

The occasion of such a discussion or of a reversal of the *Layton* doctrine does not appear imminent, despite the fact that the *Layton* case was a three to two decision with Justice Struckmeyer not participating. (He was replaced by retired Justice Windes). Justice Struckmeyer's absence in that case cannot be interpreted as making possible a rapid change in the three to two posture of the court in view of his apparent adherence to the *Layton* principle in the later *Coyner* and *Sisk* cases.

[58] 90 Ariz. 369, 373, 368 P.2d 444, 446 (1962).

[59] Varela v. Reid, 23 Ariz. 414, 204 Pac. 1017 (1922).

[60] This was allowed prior to Layton v. Rocha, 90 Ariz. 369, 368 P.2d 444 (1962).

[61] Wolfswinkel v. Southern Pac. Co., 82 Ariz. 33, 307 P.2d 1040 (1957).

[62] Layton v. Rocha, 90 Ariz. 369, 368 P.2d 444 (1962). For a later decision dealing with the same point, see Deering v. Carter, 376 P.2d 857 (Ariz. 1962), wherein the court reaffirms its position against the *may* instruction. A *must* instruction was given in the trial court and for that reason the case was reversed and remanded for a new trial. Again, there was no discussion of the comparative negligence aspect of the *may* instruction. It should be noted that in this case Justice Jennings, despite his dissent in the *Layton* case, now specially concurs, admitting the Layton doctrine "is now deemed to be the law of this State and for that reason I concur."

to the above query in the very recent case of *American Smelting & Refining Co. v. Wusich.*[63] In a footnote,[64] the court said that "[U]nder Arizona's constitution the legal and factual issues of contributory negligence by the plaintiff are questions for the jury," (citing, *inter alia,* the *Wolfswinkel* and *Layton* cases). Adherence to the spirit of this language would seem to eliminate the inconsistency mentioned earlier by forbidding both hypothetical-fact instructions and also those properly relating the effect of contributory negligence. However, as previously indicated in this comment, the writer suggests that it is preferable under our constitution to instruct the jury as to the law of contributory negligence through the use of "effect" and hypothetical-fact instructions. The contrary practice places the jury in a legal vacuum with respect to the law of contributory negligence, and it therefore appears to reduce the probability of jury verdicts which reflect a proper application of Arizona law.

[63] 375 P.2d 364 (Ariz. 1962).
[64] *Id.* at 369 n.3.