Fall 1984

Contributory Negligence and Mitigation of Damages: Comparative Negligence Through the Back Door?

Paul A. LeBel

PAUL A. LeBEL

Contributory Negligence and Mitigation of Damages: Comparative Negligence Through the Back Door?

A comparative negligence bill[1] of general applicability is currently pending before the General Assembly. Passed by the House and carried over by the Senate, the bill has, not surprisingly, elicited both praise and condemnation. While attention has been focused on the proposed legislative changes in the effect of a plaintiff's contributory negligence, the Supreme Court of Virginia issued an opinion, *Lawrence* v. *Wirth*,[2] that could represent a significant erosion of the contributory negligence rule. This article first examines the Supreme Court's distorted and totally unnecessary treatment of contributory negligence in *Lawrence*. The article then explores the Court's use of the concept of mitigation of damages to accomplish many of the aims of the comparative negligence doctrine.

Lawrence v. *Wirth*: Revising Contributory Negligence

The Supreme Court's disposition of the contributory negligence issue in *Lawrence* could, if extended to other cases, substantially narrow the scope of operation of the contributory negligence rule. Furthermore, as will be demonstrated, the Court did not need to reinterpret the rule in order to permit recovery by the plaintiff. The sequence of events as recounted by the Court[3] is important for an understanding of what the Court decided and for an appreciation of the alternative ground the Court could have employed to reach the same result. The following narrative has been written in such a way as to highlight the critical facts.

Plaintiff discovered a lump on her breast in June. She consulted a physician who referred her to the defendant after the physician was unsuccessful in aspirating the lump. The defendant did not detect the lump, but he was concerned about a different mass he discovered, and performed a partial mastectomy in August. Immediately after the surgery and again a week later when the sutures were removed, plaintiff called the defendant's attention to the original lump. Although the defendant expressed no concern about those reports, he did advise her to obtain medical attention if she had further problems or detected subsequent changes. In October, the plaintiff noticed that the lump had grown larger, but she delayed seeking medical attention until December, at which time another surgeon performed a total mastectomy. A year later, she was diagnosed as having terminal metastatic bone cancer. Her oncologist identified the August-December interval between surgical procedures as the period when the cancer metastasized. The trial court sent the case to the jury with instructions that included contributory negligence. The judgment entered on the verdict for the defendant was set aside by the Supreme Court, holding that the contributory negligence defense was not available in these circumstances.

The Court based its holding on what was described as "a well-established principle of tort law that, to bar recovery, a plaintiff's negligence must *concur* with the defendant's.[4] The authority cited for that principle provides only the most tenuous support for the proposition.[5] While it is true that the cited case uses the word "concurring," the factual setting of the case and the context in which the word is used make it clear that the authority will simply not bear the burden of supporting the Court's use of the principle. In a recent study of Lon Fuller's work in legal philosophy, Fuller's views on interpreting and applying precedent are said to include the idea that "a judge is not to seize on words and phrases in an opinion, abstract them from their context, and apply them more or less in accord with some assumed literal meaning that they might be thought to have."[6] An examination of other Supreme Court decisions on contributory negligence reveals that the Court in *Lawrence* has acted contrary to Fuller's notion of the proper use of precedent, and has invested the idea of plaintiff's and defendant's concurring negligence with a new meaning.

Two cases decided in the last ten years provide a

dramatic contrast with the "well-established principle of tort law" that the Supreme Court relied on in *Lawrence*. In *Reliable Stores Corporation* v. *Marsh*,[7] the Supreme Court reversed a judgment for a plaintiff who walked into a closed glass door marked with a decal at approximately plaintiff's eye level. Entering judgment for the defendant, the Court held that, as a matter of law, plaintiff was negligent and her negligence was a proximate cause of the injury. The Court similarly approved keeping a contributory negligence issue from the jury in *Reed* v. *Carlyle & Martin, Inc.*,[8] in which the Court affirmed a summary judgment for the defendants. The plaintiff was held to be contributorily negligent as a matter of law when he stood on top of a load of silage while pitchforking the silage into the moving beaters of a piece of equipment that had been manufactured, repaired, and sold by the various defendants. In neither of those cases is it proper to say that the negligent conduct of the plaintiff was precisely concurrent with negligent conduct of the defendant, if, as the *Lawrence* opinion suggests, concurrent conduct is interpreted to mean contemporaneous events. The product liability defendants in *Reed* acted well before plaintiff climbed into the silage, and the employees of the jewelry store in *Reliable Stores* had completed their actions with respect to the glass door prior to plaintiff's collision with it. If, on the other hand, concurrent conduct can be said to exist in *Reliable Stores* and *Reed* in a continuing negligence sense that plaintiffs' conduct occurred while the effects of defendants' wrongful conduct were still in operation, then a fair reading of the *Lawrence* facts would produce the same conclusion that was reached in the two earlier cases. Just as the product defendants in *Reed* created a condition in which plaintiff's conduct became dangerous, the surgeon's conduct in *Lawrence* created a condition in which plaintiff's delay in seeking medical attention after detecting the enlarged lump proved to be dangerous.

Lawrence thus either represents a distorted view of concurring plaintiff and defendant negligence, or it is a radical departure from prior applications of the contributory negligence doctrine—a departure that substantially limits the availability of the doctrine. Tested aganist *Lawrence* standards, neither of the plaintiffs in the two cases used for illustration would be barred from recovery by the contributory negligence defense, because neither plaintiff's conduct precisely concurred with the negligent conduct of the respective dependants.

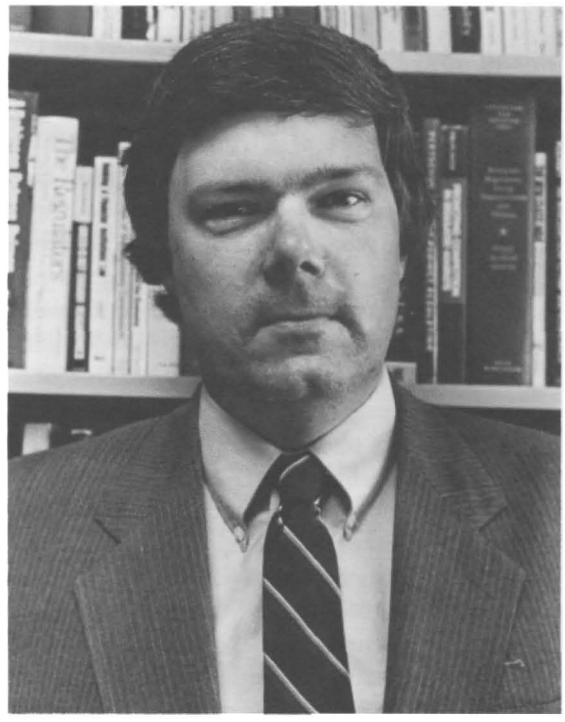
The result-oriented decision in *Lawrence* fits into a broader pattern of appellate court treatment of plaintiff's fault defenses. To the extent that plaintiff's fault issues are deemed to be questions of fact, appellate courts must be willing to live with the results reached by the factfinders,[9] or the courts must tinker with the legal rules so that the issues can be resolved as matters of law. Viewed from this perspective, *Reliable Stores* and *Lawrence* are opposite sides of the same coin: in each case, the factfinders' characterization of the plaintiff's conduct was rejected by the Supreme Court.

The most surprising feature of the Supreme Court's decision in *Lawrence* is the Court's distortion of the contributory negligence doctrine when there existed a way of reaching the same result through a perfectly legitimate application of current doctrine. In order to constitute the affirmative defense of contributory negligence, plaintiff's conduct must meet two requirements: it must be (a) unreasonable[10] and (b) a proximate cause of the plaintiff's injury.[11] Whether plaintiff's conduct was unreasonable is a question as to which there can be a legitimate difference of opinion. As noted earlier, treating such matters as questions of fact requires courts to be satisfied with the result the factfinders reach. While I have little trouble deciding the plaintiff's reliance on the defendant's apparent lack of concern when she inquired about the original lump was a reasonable response to her October discovery that the lump had grown, I also recognize that the plaintiff's testimony about her fear of cancer[12] could lead a factfinder to conclude that plaintiff's delay was both unreasonable and a direct violation of the defendant's advice to seek further attention if she noticed a change in her condition.

Whatever one's view about the reasonableness of plaintiff's conduct, the simple fact is that the issue is not one that should ever be submitted to the factfinder. The second requirement of contributory negligence—the causation element—calls for a decision of that issue for the plaintiff in *Lawrence* as a matter of law. The evidence relied on by the Supreme Court indicated that metastasis occurred sometime between the surgical procedures performed in August and December.[13] Focusing on the October discovery of the enlarged lump as the first date on which plaintiff's conduct could be considered unreasonable, and assuming that her subsequent delay in seeking medical advice was unreasonable, gives the court two relevant periods of time: (a) August-October, when plaintiff's conduct was not unreasonable,[14] and (b) October-December, when it was (assumed to be) unreasonable. For plaintiff's unreasonable conduct to have been a cause of her injury, then, metastasis must have occurred during the latter period. Because contributory negligence is an affirmative defense, the burden is on the defendant to establish each of the

elements of the defense.[15] Having given the defendant the benefit of the doubt on the characterization of plaintiff's conduct as unreasonable, it is nevertheless clear that defendant cannot satisfy his burden of proof on the causation element. The probability that metastasis occurred in the October-December period is at best equally as great as that it occurred during the August-October period. Given the equally probable inferences to be drawn from the evidence, the defendant, as the party with the burden of proof on the contributory negligence defense, must be found to have failed to satisfy that burden as a matter of law. Given this state of the evidence, it would be error to submit the contributory negligence issue to a jury. While plaintiff's conduct might be considered negligent, that negligence was, as a matter of law, not a legal cause of the plaintiff's harm.

My analysis of contributory negligence in *Lawrence* reaches the same result that was obtained by the Supreme Court: the jury may not bar plaintiff's recovery by applying the defense of contributory negligence. The Court reaches that result by deciding that the defense does not apply to the facts of the case. My analysis, on the other hand, finds that the defense does apply to the facts, but concludes that the defendant cannot sustain his burden of proof on the causation element of the defense. The difference between these two approaches is not trivial. The analysis offered in this article is, unlike that used by the Court, consistent with prior rulings on contributory negligence. The Court's approach hints at a new view of contributory negligence that will make the defense unavailable in a wide range of cases where it previously applied.



Paul A. LeBel is Associate Professor of Law at Marshall-Wythe School of Law, College of William and Mary, where he teaches Torts, Products Liability, and Jurisprudence. He received his A.B. degree from George Washington University and his J.D. from the University of Florida. Prior to joining the faculty of William and Mary in 1982, he taught for four years at the University of Alabama. Professor LeBel wishes to thank Professor John Donaldson for calling the *Lawrence* case to his attention.

Mitigation of Damages and Comparative Fault

After holding that contributory negligence was not applicable to the facts of *Lawrence* v. *Wirth*, the Supreme Court then held that the plaintiff's conduct, if unreasonable, could be considered by the jury in mitigation of damages.[16] The remainder of this article will focus on the similarity between this use of mitigation of damages and a general doctrine of comparative negligence.

Viewing the Court's application of mitigation of damages as a thinly disguised form of comparative negligence requires no great leap of imagination. Virginia's railroad-crossing accident statute,[17] acknowledged to be a comparative negligence provision,[18] is worded in terms of mitigation of damages. If the Court's use of mitigation of damages in *Lawrence* were to be widely applied, the result would be that the Court would have adopted by common law a measure that is closer to pure comparative negligence, and thus more favorable to tort plaintiffs, than the version of comparative negligence now pending before the state legislature.

The comparative negligence bill approved by the House is a "51% bar" provision.[19] Plaintiff's recovery is reduced by the proportion of plaintiff's negligence as long as plaintiff's negligence does not exceed 50%. If plaintiff's negligence is greater than that of the other parties,[20] i.e., 51% or more, the contributory negligence rule reenters the case and operates as a total bar to plaintiff's recovery. The Court's use of the mitigation of damages defense in *Lawrence* seems to leave open the possibility that a plaintiff's unreasonable failure to mitigate damages could be held responsible for 51% or more of the damages plaintiff suffered, allowing plaintiff to recover less than 50% of those damages. However, if the unreasonable failure to mitigate were deemed to be negligence on the part

of the plaintiff, then assigning responsibility for 51% or more of the damages to plaintiff's conduct would result in no recovery for the plaintiff under the type of comparative negligence statute currently being considered by the legislature.

The Supreme Court of Virginia may well understand the difference between unreasonable conduct that is negligent and unreasonable conduct that fails to mitigate damages. Similarly, if the comparative negligence statute should be enacted in its present form, the Court may also have occasion to point out the difference between unreasonable conduct that fails to reach the recovery-barring threshold of a 51% bar comparative negligence statute and unreasonable conduct that fails to mitigate, and thus eliminates recovery of, some proportion from 51% to 99% of plaintiff's damages.[21] I do not mean in any way to suggest that those differences do not exist, or that the Court is being specious or disingenuous if it says it recognizes them. But the application of these concepts is normally going to be turned over to a factfinder unfamiliar with, and untrained in making, such fine distinctions. Whether or not the Supreme Court purposely blurs the boundary line between contributory or comparative negligence and mitigation of damages, a common sense appraisal of what jurors are capable of doing suggests that such blurring is an inevitable result of turning such matters over to juries.

The discussion so far has assumed that the Court's use of a mitigation of damages defense was appropriate in *Lawrence*, and that the problematic aspect of such use concerns its likely slippage into a more general practice of comparative fault decisionmaking disguised as something else. But an examination of the *Lawrence* case suggests that the Court is replacing a recovery-barring contributory negligence defense with a recovery-limiting defense in a situation where use of the latter kind of defense is inappropriate. A review of the leading treatises indicates that the preferred label to attach to the defense that the Court uses is "avoidable consequences" rather than "mitigation of damages."[22] The avoidable consequences rule prevents a plaintiff from recovering damages for a harm that could have been avoided had the plaintiff acted reasonably after the commission of the tort.[23] There are a number of technical legal arguments why this rule does not apply to the facts of *Lawrence*.

The avoidable consequences rule is concerned with what a plaintiff could have done "after the commission of the tort."[24] The event described by that last phrase needs to be distinguished from a different event, the defendant's wrongful conduct. If the avoidable consequences rule was framed in terms of plaintiff's conduct after the defendant's wrongful conduct, then a case might be made for applying the rule to Mrs. Lawrence, because her delay in seeking medical attention did occur after the defendant's conduct. But the commission of a tort is not complete upon defendant's conduct. At least when the action is based on a negligence theory of liability, the tort is not complete until the defendant's breach of a duty of care owed to the plaintiff has proximately caused some legally cognizable harm to the plaintiff. Thus, until plaintiff suffers harm, there has been no tort of negligence, even though it might be possible to characterize the defendant's conduct as negligent.[25] In the *Lawrence* situation, the harm produced by the defendant's conduct would be the worsening of plaintiff's condition, i.e., metastasis. It is only upon metastasis that the defendant's tort has been committed. Because the exact date of metastasis cannot be determined, any conclusion that plaintiff's delay in obtaining medical attention occurred after the commission of the tort would be pure speculation. The *Lawrence* situation, given the set of facts described by the Supreme Court, does not satisfy the terms of the avoidable consequences rule.

Prosser offers a different explanation of the avoidable consequences rule, but even under his version, the rule would not be properly applied to the *Lawrence* case. Prosser suggests that the avoidable consequences rule is triggered only when it is feasible to assign damages to the separate negligence of defendant and plaintiff.[26] When such a division of damages is not possible, the appropriate defense is contributory negligence, not avoidable consequences.[27] A consideration of alternative assumptions demonstrates that Prosser's method of applying the avoidable consequences rule ought not to lead to the result reached by the Court in *Lawrence*. Assume first that metastasis occurred prior to October. In that case, the damages from plaintiff's terminal illness are incapable of apportionment between defendant's conduct and plaintiff's conduct. Death is, as Prosser puts it, a "single indivisible result . . . incapable of any reasonable or practical division."[28] The assumption that metastasis occurred between October and December does bring Prosser's version of the avoidable consequences rule into play. If the evidence supported that hypothesis, a factfinder could conclude that metastasis was avoidable by the plaintiff's prompt consultation with another physician who would arrange for surgery to remove the tumor before metastasis. In this effective treatment scenario, those damages attributable to metastasis could be deemed avoidable, with the defendant being held responsible only for such damages as might be connected with the necessity to perform a second mastectomy on the plaintiff. However,

just as was the case under the contributory negligence defense,[29] any choice between the competing assumptions about when metastasis occurred would be arbitrary. As with contributory negligence, the defendant, as the party who bears the burden of proving that damages were avoidable,[30] must have the issue decided against him as a matter of law in this situation where the competing assumptions are equally probable.

Conclusion

This article has focused on the technical flaws in the Supreme Court's consideration of defenses based on the plaintiff's conduct in *Lawrence* v. *Wirth*. As demonstrated above, the facts relied on by the Court do not call for the submission of plaintiff's conduct defenses to the jury. The significance of the Court's decision, however, extends beyond the doctrinal criticism of the Court's treatment of contributory negligence and mitigation of damages.

When dealing with a basis of liability such as negligence, in which community attitudes about proper conduct and appropriate compensation are legitimately expressed through a jury's setting and applying a general standard of reasonable care, appellate courts have a special obligation to display clarity, consistency and coherence. Those attributes are necessary if the assignment of decisionmaking responsibility to the community representatives on the jury is both to work and to be seen to work. The perception of proper functioning may be just as important as the functioning itself, for without that perception, the legitimacy of the body of tort rules, if not of the legal system itself, is put in jeopardy.

Juries should be free to allocate losses within a framework of legal rules that clarify rather than obscure the range of the jury's prerogative and the policy implications of the competing decisions. If the total bar to recovery contemplated by a contributory negligence rule is no longer consistent with the fairness and efficiency goals of tort law, the proper course of action is for the court or the legislature to modify or replace the rule.

Decisions such as *Lawrence* may have the palliative effect of relieving some of the tension between the results that a questionable rule requires and those the decisionmakers want. The harsh recovery-barring effect of the contributory negligence rule is avoided through a narrowing construction of its applicability, while the comparative features of the obvious substitute rule of comparative negligence are injected into the decision under the cover of a mitigation of damages instruction to the jury. But that relief of tension may be accomplished at a substantial cost to the legal profession, trying to understand the legal rules that will govern a particular case, and to the public, which ought to perceive that acceptable results can be achieved because of the rules, rather than in spite of the rules.

Footnotes

1. House Bill No. 107 provides:

   Be it enacted by the General Assembly of Virginia:

   1. That the code of Virginia is amended by adding in Article 3 of Chapter 3 of Title 8.01 a section numbered 8.01-44.2 as follows:

   §8.01-44.2. Contributory negligence not bar to recovery.—In all actions brought hereafter for personal injury, wrongful death or property damage, the fact that the person injured or killed, or the owner of the damaged property or person having control over the property, may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such persons. However, such person shall recover only if such person's negligence is not greater than the combined negligence of all other parties.

   Assumption of risk may still be asserted as a defense where a person fully understands a risk of harm to himself or his property caused by another's negligent conduct and who nevertheless voluntarily chooses to accept that risk.

2. 226 Va. 408, 309 S.E.2d 315 (1983).
3. *Id.* at 410-12, 309 S.E.2d at 316-17.
4. *Id.* at 412, 309 S.E.2d at 317 (emphasis in original).
5. *Chesapeake & O. Ry. Co.* v. *Butler*, 179 Va. 609, 20 S.E.2d 516 (1942).
6. R. Summers, Lon L. Fuller 112 (1984).
7. 218 Va. 1005, 243 S.E.2d 219 (1978).
8. 214 Va. 592, 202 S.E.2d 874, *cert. denied*, 419 U.S. 859 (1974).
9. *See, e.g., Stevens* v. *Ford Motor Co.*, 226 Va. 415, 309 S.E.2d 319 (1983), decided the same day as *Lawrence*, in which the Court held that the ability of reasonable persons to reach different conclusions from the evidence concerning an assumption of risk defense precluded the trial court from deciding that issue as a mattter of law. *See also VEPCO* v. *Winesett*, 225 Va. 459, 303 S.E.2d 868 (1983), holding that plaintiff's decedent's conduct could not be ruled contributory negligence as a matter of law.
10. *See, e.g., Whitfield* v. *Dunn*, 202 Va. 472, 117 S.E.2d 373 (1961).
11. *Reliable Stores Corp.* v. *Marsh*, 218 Va. 1005, 1007, 243 S.E.2d 219, 221 (1978).
12. *See* 226 Va. at 411, 309 S.E.2d at 316.
13. *Id.*
14. Defendant might argue that during this period plaintiff was unreasonable in not obtaining a second opinion. That the Supreme Court was not operating on that premise is apparent from the Court's handling of the concurrent negligence issue. If a failure to obtain a second opinion is to be considered negligent on the part of the plaintiff, that failure did concur, at least in part, with the alleged negligence of the defendant between the surgery and the removal of the sutures. Thus it is not until the October discovery of the enlarged lump that plaintiff's conduct can first be considered unreasonable.
15. *See Burks* v. *Webb*, 199 Va. 296, 99 S.E.2d 683 (1957).
16. 226 Va. at 412-13, 309 S.E.2d at 317-18.
17. Va. Code § 56-416 (1981).

18. *See, e.g., Norfolk & W. Ry.* v. *Gilliam*, 211 Va. 542, 178 S.E.2d 499 (1971); *Chesapeake & O. Ry.* v. *Pulliam*, 185 Va. 908, 916, 41 S.E.2d 54, 58 (1947). Dean Wade uses this provision to identify Virginia as a contributory negligence state that has a statute "applying comparative negligence in a limited area." Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 La. L. Rev. 299, 306 (1980).

19. Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 La. L. Rev. 343, 353 (1980).

20. The bill's reference to "other parties" is unnecessarily ambiguous. *See* Pearson *supra* note 19, at 355-57. *See also Bradley* v. *Appalachian Power Co.*, 256 S.E.2d 879, 885 (W.Va. 1979), holding that "a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other *parties involved in the accident,*" (emphasis added), noted in Cady, *Alas and Alack, Modified Comparative Negligence Comes to West Virginia*, 82 W.Va. L. Rev. 473, 485 n.64 (1980). Consider a 3-car accident, in which Driver A is 35% negligent, B is 40% negligent, and C is 25% negligent. If A sues B and C, the proposed statute would permit A to recover 65% of his damages, despite the fact that A's negligence is greater than that of one of the defendants. However, suppose A is unable to obtain jurisdiction over B, and proceeds to trial solely against C. If the relevant language is interpreted to mean "persons involved in the accident," A's recovery would not be barred, although the court would face the problems associated with determining the proportion of fault properly attributable to a person who is not a party to the action. *See* Chamallas, *Comparative Fault and Multiple Party Litigation in Louisiana: A Sampling of the Problems*, 40 La. L. Rev. 373, 389-91 (1980). If, on the other hand, the langauge means "parties (defendant) to the lawsuit," then A's recovery would be barred.

21. For example, a plaintiff's conduct may be contributorily negligent but only equal to the negligence of the defendant, so that plaintiff's recovery would not be barred. As long as failure to mitigate damages is different from the contributory negligence defense, one could imagine a case in which this hypothetical plaintiff whose recovery is not barred by contributory negligence may end up with a recovery of less than 50% of his damages, after a reduction for failure to mitigate is added to the 50% reduction under the comparative negligence provision. The problem does not arise in a contributory negligence jurisdiction, because once the contributory negligence defense applies, plaintiff's recovery is totally barred, leaving no recovery on which the failure to mitigate defense would operate.

22. D. Dobbs, Handbook on the Law of Remedies 188 (1973); Prosser & Keeton on the Law of Torts 458-59 (5th ed. 1984). Justice Poff's separate opinion notes the correct terminology. *See* 226 Va. at 414, 309 S.E.2d at 318.

23. *See* Restatement (Second) of Torts §918 (1977).

24. *Id.*

25. The key distinction is between negligence as a cause of action and negligence as a way of characterizing conduct. *See* W. Prosser, J. Wade & V. Schwartz, Cases and Materials on Torts 144 (7th ed. 1982). *See also Locke* v. *Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981); *Gray* v. *American Radiator & Standard Sanitary Corp.* 22 Ill. 2d 432, 436, 176 N.E.2d 761, 763 (1961): "To be tortious an act must cause injury. The concept of injury is an inseparable part of the phrase."

26. Prosser, *supra* note 22, at 458-59.

27. *Id.* at 459.

28. *Id.* at 346.

29. *See supra* notes 13-15 and accompanying text.

30. Dobbs, *supra* note 22, at 581.