STATE OF VERMONT
WINDSOR COUNTY, SS.

LORNA LEE AND JOHN MULLER	)	
	)	WINDSOR SUPERIOR COURT
v.	)	DOCKET NO. 19-1-95 Wrcv
	)	
PETER WELCH	)	

NOTICE OF DECISION
DEFENDANT'S MOTION TO AMEND JUDGMENT

Judgement was entered on the jury verdict in favor of Plaintiffs, Lorna Lee and John Muller. Plaintiff Lorna Lee recovered $13,200 on her negligence claim arising out of a ski accident. The jury determined that her damages were $24,000 and that Defendant, Peter Welch, was 55 percent negligent while Ms. Lee herself was 45 percent negligent. The jury also awarded Ms. Lee punitive damages in the amount of $13,000. On Mr. Muller's claim for loss of consortium, the jury found his damages to be $5,000. The case is currently before the Court on Defendant's Motion to Amend the Judgment in order to reduce the $5,000 loss of consortium award to Mr. Muller by 45 percent, the percentage of Ms. Lee's comparative negligence.

DISCUSSION

This case presents the question of whether a spouse's loss of consortium award should be reduced by the percentage of comparative negligence of the primary plaintiff. While the Vermont Supreme Court has ruled that loss of consortium actions are derivative in nature, see De Rosia v. Book Press, Inc., 148 Vt. 217, 220 (1987) (quoting Hay v. Medical Center Hospital, 145 t. 533, 539 (1985)); see also Denton v. Chittenden Bank, 163 Vt. 62, 70 (1994), it has not addressed the issue of whether the loss of consortium award should be reduced by the percentage of comparative negligence. The issue is, therefore, a question of first impression in Vermont.

Both parties have submitted memoranda of law on the issue. Defendant contends that because in Vermont a loss of consortium claim is derivative of the primary plaintiff's claim, the Court should reduce Mr. Muller's award by the percentage of Muller's comparative negligence, in this case 45 percent. Plaintiff argues that loss of consortium claimants are innocent bystanders with no fault of their own, and are entitled to full recovery for their damages.

Historically, at common law, a primary plaintiff's contributory negligence was a complete bar to not only the plaintiff's recovery on the primary claim, but also the plaintiff's spouse's loss of consortium claim. See Baio, Loss of Consortium: A Derivative Injury Giving Rise to a

Separate Cause of Action, 50 Fordham L. Rev. 1344, 1354 n.55 (1982); see also Stannard v. Harris, 135 Vt. 544, 546 (1977) (comparative negligence statute overturned "harsh doctrine of contributory negligence" barring recovery of negligent plaintiff).

With the enactment of the comparative negligence statute, a plaintiff's recovery became no longer completely barred by his or her negligence, but became subject to adjustment according to the extent of his or her responsibility based on comparative negligence. 12 V.S.A. § 1036 (amended 1979). The comparative negligence statute does not, however, address a plaintiff's spouse's derivative claim. Thus, to determine the applicable rule of law, the starting point is the underlying common law of negligence, followed by a consideration of the impact of the comparative negligence statute.

There are several fundamental principles that collectively form the underpinnings of the common law of torts. One of these is that a wrongdoer should be responsible for losses caused by his or her unreasonable actions. See W. Page Keeton, Prosser and Keeton on the Law of Torts §4 (1984). Another is that a wrongdoer should be responsible for such losses to the extent of his or her fault. See id. The element of causation addresses the link between the harm and the extent of a defendant's liability. The doctrine of foreseeability is an effort to implement this principle by providing guidance in establishing the relationship between a defendant's actions, and the extent of his or her responsibility for what ensues. See Dodge v. McArthur, 126 Vt. 81, 83 (1966) (foresight fundamental to finding negligence); see Malloy v. Lane Constr. Corp., 123 Vt. 500, 503 (1963) (liability attaches if damage arises from foreseeable harm). The effort is to adhere to the overriding principle that damages ought to be proportionate to the wrong.

In line with these principles, there has been a general shift in the law of negligence toward comparative negligence and away from the arbitrary constraints of contributory negligence as a complete defense. In some states, as in Vermont, comparative negligence statutes were enacted by the legislature. In many states, however, comparative negligence has been adopted through judicial decisionmaking. In those states, courts found that contributory negligence was a "judicially created doctrine which can be altered or totally replaced by the court which created it." Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) (doctrine of contributory negligence as the law in Illinois). Whether by legislative or judicial action, the trend has been toward comparative negligence in order to more fully implement contemporary notions of apportioning damages relative to comparative levels of fault. See id. "We believe that the concept of comparative negligence which produces a more just and socially desirable distribution of loss is demanded by today's society." Id. at 889.

The policy behind the enactment of Vermont's comparative negligence statute is based on this same principle, i.e. that damages ought to be allocated proportionate to the extent of the wrong. Although the legislature did not address collateral effects of shifting to a comparative negligence standard, such as the effect on loss of consortium claims, it is incumbent upon courts to work in harmony with the legislature in implementing principles enunciated. In this case, both the general trend in the law and the legislative directive as embodied in the comparative negligence statute lead in the same direction: toward primacy of the policy that damages should

be apportioned according to wrong. See Stannard v. Harris, 135 Vt. 544, 548 (1977) (citing Schwenn v. Loraine Hotel Co., 14 Wis. 2d 601, 611, 111 N.W.2d 495, 500 (1961)).

The Colorado Supreme Court adopted this principle as its guidepost in concluding that reduction for comparative negligence is warranted in determining defendant's liability on a loss of consortium claim. It stated that "the loss to [the marital] relationship . . . 'is best distributed among those whose negligence caused it in proportion to the fault of each of them.'" Lee v. Colorado Dept. of Health, 718 P.2d 221, 232 (Colo. 1986) (quoting Eggert v. Working, 599 P.2d 1389, 1391 (Alaska 1979) (finding plaintiff spouse's recovery subject to reduction for primary plaintiff's comparative negligence)). In analyzing the nature of a loss of consortium claim, some courts have characterized it as a claim held by the marital unit so that the plaintiff's negligence is imputed to the spouse. One commentator argues that the concept of the marital relationship as an injured unit is now altogether outmoded, and shall be abandoned. See Baio, supra, at 1359. Whether the spouse's claim is labeled as "derivative," and whether or not the harm is seen as an injury to the individual or to the marital unit, the issue remains: to what extent should the defendant be liable to the plaintiff's spouse if the defendant was responsible for only part of the harm.

Most states are like Vermont in that loss of consortium claims are only allowed if the primary plaintiff spouse succeeds on his or her claim. Research shows that the courts in a majority of those states have held, for different reasons, that any award to the plaintiff's spouse should be reduced by the percentage of the primary plaintiff's comparative negligence. See Maidman v. Stagg, 82 A.D.2d 299, 305, 441 N.Y.S.2d 711, 715 (1981); Blagg v. Illinois F.W.D. Truck & Equip. Co., 572 N.E.2d 920, 926 (Ill. 1991); Eggert, 599 P.2d at 1391; Weaver v. Mitchell, 715 P.2d 1361, 1369 (Wyo. 1986); Lee v. Colorado Dept. of Health, 718 P.2d 221 (Colo. 1986); Tichenor v. Santillo, 527 A.2d 78 (N.J.Super.A.D. 1987).[1]

In this case, the jury has determined that Defendant was 55 percent responsible for the Plaintiff's injury. Thus, for purposes of allocating the responsibility, Defendant's share has been determined at 55 percent. While it is true that Mr. Muller is without personal responsibility for his injuries, Defendant's share of that responsibility is limited by the jury's findings on negligence and causation to 55 percent. The result could potentially be otherwise if the jury were asked to make an independent determination about the relationship between Defendant's negligence, causation and Mr. Muller's injuries, but the jury was not asked to make such a

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[1]In a minority of states, loss of consortium claims are seen as independent claims. All elements of such claims are subject to independent pleading and proof, and the spouse's award is not reduced by the percentage of the primary plaintiff's comparative negligence. See Brann v. Exeter Clinic, Inc., 498 A.2d 334, 338, 127 N.H. 155, 160 (1985); Feltch v. General Rental Co., 421 N.E.2d 67, 71, 383 Mass. 603, 607-608 (1981); Macon v. Steward Constr. Co., 555 F.2d 1, 2 (1st Cir. 1977) (construing New Hampshire law without "positive assurance"). Vermont does not recognize loss of consortium claims as independent causes of action. See generally, Baio, supra. The jury in this case was instructed, without objection, that Mr. Muller's loss of consortium claim depended on the success of Ms. Lee's claim.

determination, and none was made. Limiting defendant's liability by the extent of his comparative negligence most effectively implements the policy that a defendant is liable for damages to the extent of his or her responsibility for causing the harm.

Based on the analysis set forth above, this Court holds that the better rule of law is that Mr. Muller should recover on his loss of consortium claim only the proportion of damages for which Defendant is responsible as determined by the jury under the comparative negligence statute. This result is most in harmony with the development of negligence jurisprudence, and with 28 years of experience in Vermont with comparative negligence.[2]

In this case, the special verdict form presented to the jury asked for "the appropriate amount of damages for Mr. Muller" without indicating to the jury that the amount would be reduced based on the percentage of comparative negligence. The issue discussed in this decision was not raised by either attorney or the Court during the charge conference, but emerged for the first time in the context of this motion after judgment was entered. Despite the fact that this issue of law was not identified prior to the jury verdict, there is no basis to conclude that the $5,000 amount of damages to Mr. Muller was anything other than the jury's decision as to Mr. Muller's total damages.

It is incumbent on the Court to apply the rule of law as now decided, and reduce the $5,000 award to 55 percent of that figure, reflecting the extent of Mr. Welch's responsibility for the harm.

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[2]It should be noted that in the case of Howard v. Spafford, 132 Vt. 434 (1974), the Court held that a defendant found liable for plaintiff's injuries in an automobile collision could not use the comparative negligence statute as a basis to seek indemnity or contribution from a joint tort feasor in a third party action. This is still current law and appears to conflict with the primacy of the comparative negligence principle. Justice Larrow noted the enactment of the comparative negligence statute and acknowledged that comparative negligence in such situations was "logical in theory," but stated that it presented a number of practical problems. The Court chose the path of deferring to the legislature for direction in the specifics of implementation of the principle. The reasons advanced by Justice Larrow for deferring to the legislature have been found not persuasive by other courts. See, e.g., Alvis v. Ribar, supra, and authorities cited therein. For the last 24 years, the Vermont Legislature has not chosen to involve itself in addressing the practical issues discussed in Howard v. Spafford. Thus, the issue of whether or not there should be a right of contribution between joint tortfeasors may be ripe for reexamination, especially considering that the Howard v. Spafford doctrine rests on cases decided in 1869 and 1870, and comparative negligence has become an embedded principle in negligence jurisprudence in the last quarter century. It is not necessary to address the issue in the present case.

CONCLUSION

For the foregoing reasons Defendant's Motion to Amend Judgment is GRANTED.

Judgment previously entered in the amount of $5,000 is vacated, and judgment shall be entered in favor of Plaintiff John Muller in the amount of $2,750.00.

SO ORDERED. Dated this 4th day of ~~February~~ March, 1998.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Court Judge

FILED

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GAIL P. BRADY
WINDSOR COUNTY CLERK