Comparative Negligence in Ohio: Prospective or Retrospective Application

Beth Whitmore

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the state has affirmatively opted out of the federal exemptions. Thus, the
debtors exemptions and fresh start are protected throughout the United
States. This result reflects the congressional awareness of the unique prob-
lems facing the consumer debtor in our credit-oriented society.

KAREN L. EDWARDS

COMPARATIVE NEGLIGENCE IN OHIO: PROSPECTIVE
OR RETROSPECTIVE APPLICATION

INTRODUCTION

JUNE 20, 1980, the effective date of Ohio Revised Code § 2315.19, is a
watershed in Ohio tort law. It hails a long awaited new era in which
the negligent defendant can no longer exculpate himself entirely because of
the slightest fortuitous fault of the plaintiff. But will the ameliorative im-
 pact of this statute be felt immediately? Will the plaintiff whose injury pre-
cedes this date be touched by its equitable results? The answer to this
question is vital in the transition represented by the statute of limitations
for tort actions. It is an issue which the lower courts are now confronting
and which is unlikely to be resolved until the Ohio Supreme Court settles
the matter.

Section 2315.19 replaces the common law doctrine of contributory
negligence with a more equitable version of this historic, but anachronistic
tort defense. With its enactment, Ohio joined an increasing majority of
jurisdictions. By 1977 there was no longer any doubt; comparative negli-
gence, in one form or another, had replaced contributory negligence in at
least thirty-two states and Puerto Rico. It is now the prevailing doctrine in
the United States.

Under Revised Code § 2315.19, the contributory negligence of the
plaintiff is no longer an absolute bar to recovery. Only where a plaintiff's
fault is greater than that of all defendants combined is that plaintiff pre-
cluded entirely from recovery. Thus under the new Ohio statute, the
possibility of recovery for the negligent plaintiff is significantly enhanced
while at the same time liability exposure of the defendant is proportionately
enlarged. It is therefore of critical importance to determine whether such an
alteration in the relative rights of litigants is constitutional.

2 V. SCHWARTZ, COMPARATIVE NEGLIGENCE 1 (Supp. 1978).
Constitutionality turns on whether the statute may legitimately be enacted in the first place, and if so, whether it may be retroactively applied.

I. On Its Face Revised Code § 2315.19 Is Not An Unconstitutional Abrogation of a Common Law Right

An initial challenge to the new statute is theoretically possible on due process grounds. Advocates of this position would contend that certain basic common law rights are inalienable; that they are in a sense "vested" so that neither the judiciary nor the legislature has power to invade or amend these rights. Included in such a bundle of rights, the argument continues, are legal causes of action and defenses thereto. The advocates claim that the right to bring and defend an action is protected by the United States Constitution and the Ohio Constitution. The defense of contributory negligence is purported to be one of these "vested" rights.

Such a theory ignores credible historical evidence that comparative negligence in fact predated contributory negligence as a legal theory, and is by reason of its earlier origins entitled to equal reverence. Additionally, the theory that contributory negligence is a vested right has been uniformly rejected in Ohio and elsewhere. *Yaple v. Creamer* (hereinafter *Creamer*) is one of the earliest Ohio cases on point. In *Creamer*, direct challenge was made to a new workmen's compensation act which deprived non-participating employers of three common law defenses: namely, the fellow-servant rule, assumption of risk, and contributory negligence. Employers who complied with the Act and voluntarily participated in the state's insurance fund were relieved from liability to respond at common law or by statute for injury or death to an employee, except where the injury was willful or caused by a failure to adhere to a state safety statute. Clearly both the employer and the injured employee lost some measure of their traditional common law rights to bring and defend an action. Yet the Ohio Supreme Court sustained such an infringement as a valid exercise of the police power of the state. Elsewhere it is stated that the state police power implies that private rights are subject to the public welfare. Thus, in *Creamer* there is an early awareness, not singular to Ohio, that the unmiti-

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*See* Yaple v. Creamer, 85 Ohio St. 349, 396, 97 N.E. 602, 606 (1912) (dismissing the contention that it is not within the legislative power to abolish the defense of assumption of risk. The respondent's argument is included in the official reporter. 85 Ohio St. at 371).

*Id.* at 371-75 (respondent's argument).


85 Ohio St. 349, 97 N.E. 602 (1912).

*Id.* at 386, 97 N.E. at 603.

*Id.* at 391, 97 N.E. at 604.

Camfield v. United States 167 U.S. 518 (1897); Phillips v. State, 77 Ohio St. 214, 82 N.E. 1064 (1907).
gated harshness of the defense of contributory negligence was not in the interests of the public good.

That the public good is not to be gainsaid by a technical construction of the United States Constitution was made clear by the United States Supreme Court in *Mondou v. New York, New Haven & Hartford Railroad Co.* (hereinafter *Mondou*). In *Mondou* the Court sustained the constitutionality of the Federal Employers' Liability Act of 1908 wherein contributory negligence yielded to a form of comparative negligence. The Court answered the due process argument with this quote from an earlier decision:

> A person has no property, no vested interest, in any rule of the common law . . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself . . . may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great offices of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.13

It comes as no surprise, therefore, that courts in Ohio and other states have uniformly refused to strike down statutes modifying or eliminating the defense of contributory negligence on the grounds that such statutes impermissibly abrogate a common law right.14 A refusal to maintain the status quo on the theory that comparative negligence is repugnant to either the State or Federal Constitution is not the end of the matter, however.

While the people are at liberty to respond through their legislature to changing times and circumstances, they are not compelled to do so. Nor must the response be uniform. The early responses to contributory negligence were anything but uniform.

Awareness of the harshness of contributory negligence brought about both subtle and direct restraints upon the doctrine. Interestingly, these modifications were more far reaching than present forms of comparative negligence. Rather than apportion damages, as in comparative negligence, the early attempts to evade the doctrine permitted some plaintiffs to recover all of their damages.15 And, significantly, there were no attempts to forestall application of these devices as impermissible invasions of common law rights.

One early direct restraint was that where the defendant's conduct was

11 223 U.S. 1 (1912).
13 223 U.S. at 50 (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).
“reckless” he could not plead contributory negligence in defense.\textsuperscript{16} The defense was also barred where the plaintiff’s injury was the result of the defendant’s violation of a statute designed to protect the public from the very risk at issue.\textsuperscript{17} Another example of a direct restraint upon contributory negligence is the doctrine of last clear chance and its numerous variations.\textsuperscript{18}

One wonders why these methods of evading the harshness of contributory negligence were legally more palatable than an outright abandonment of the doctrine. Professor James first noted that the law treats contributory negligence differently than it does primary negligence.\textsuperscript{19} Thus courts are more apt to send cases to a jury when the question is whether the plaintiff acted reasonably than where the issue is that of the due care of the defendant.\textsuperscript{20} In addition, variations in substantive law have evolved to further the evasion of contributory negligence. For example, mental capacity is theoretically irrelevant on the issue of the defendant’s negligence. Not so, however, with regard to the plaintiff. His mental instability is often a permissible inquiry in determining whether he was contributorily negligent.\textsuperscript{21}

Fortunately the need for the mental gymnastics and tunnel vision that were required to practice these earlier techniques has been lessened to a large degree by modern judicial or legislative adoptions of comparative negligence.\textsuperscript{22} But one issue remains: namely, whether these new statutes should apply retroactively. Will the new standard apply to causes of action which have accrued prior to the effective date of Revised Code § 2315.19? The answer is probably no, but the issue is by no means firmly settled.

\section*{II. The Ohio Constitution and Legislative Mandate Favor a Presumption of Prospectivity}

Article II, § 28 of the Ohio Constitution is a specific constitutional prohibition against retroactive laws. It provides that the General Assembly shall have no power to pass retroactive legislation or laws impairing the obligation of contracts. The latter prohibition has no application to a statute moderating contributory negligence and the former provision has never been strictly construed to prohibit all retroactive legislation. An early distinction was made between laws affecting substantive rights and those affecting procedural/remedial rights.\textsuperscript{23} Only the former are subject to the constitutional

\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 6.
\textsuperscript{19} James, Contributory Negligence, 62 YALE L.J. 691 (1953).
\textsuperscript{20} Schwartz, supra note 2, at 6.
\textsuperscript{21} Id. at 8 and cases cited there.
\textsuperscript{22} There remain some problems depending on the type of comparative negligence statute adopted. For example, what happens to the willful conduct rule or the doctrine of last clear chance?
\textsuperscript{23} See Denicola v. Providence Hosp., 57 Ohio St.2d 115, 387 N.E.2d 231 (1979); Kilbreath v. Rudy, 16 Ohio St. 2d 7, 242 N.E.2d 636 (1968); Holdridge v. Indus. Comm’n, 11
limitation of Section 28.24. The difficulty, of course, lies in divining the difference between substance and procedure. At either end of the continuum there is relatively little difficulty in making the distinction. For laws that fall somewhere in the middle ground, however, these words may have become merely labels disguising the factors which truly motivate the court.

Before this issue of substance versus procedure need be resolved, one must first determine whether the legislature in fact intended particular legislation to operate retrospectively. Revised Code § 1.48 provides, "A statute is presumed to be prospective in its operation unless expressly made retrospective." This statute clearly indicates a legislative preference for prospectivity unless the statute at issue contains express language calling for retroactivity. Just as clearly this statute should not be interpreted in such a way as to make it a vain act. It was not intended merely to give additional force to the prevailing Ohio authorities which follow the substance/procedure distinction. Its enactment must signal some shift away from the then prevailing tendency towards retroactivity. This shift was given the added force of a presumption, but one which was not expressly made conclusive.

No Ohio case exists on the question of whether this Section 1.48 presumption is or is not conclusive, but the very wording of the statute narrowly limits the ways in which it can be rebutted and tends toward conclusiveness. There would be greater latitude to rebut if the statute stated that "a statute is presumed prospective" than if it said "a statute is presumed prospective unless expressly made retrospective." In the former example a simple presumption is raised, leaving open the issue of if and how to rebut. In the latter, the sole method of rebuttal is expressly identified and no room is left for alternative means of defeating the presumption. Under Section 1.48, unless the statute at issue expressly states that it is to be retroactive, it must be limited to prospective operation only. Furthermore, since there is no legislative history in Ohio, unless the statute itself expressly favors retroactivity, there is no way to establish that the legislature intended it to be retroactively applied. Section 2315.19 contains no language indicating that it should be applied retroactively. Simple logic dictates prospective application only.

Such simple logic was not lost on at least one Ohio court. In Young v. Alberts the court was called upon to determine the retroactivity of the

Ohio St.2d 175, 228 N.E.2d 621 (1967); Slaughter v. Indus. Comm'n, 132 Ohio St. 537, 9 N.E.2d 505 (1930).


Ohio Malpractice Act. It refused to reach the issue of substance versus procedure because there was no legislative intent that the statute operate retroactively. The court stated:

This is not a question of whether the General Assembly could, under the Ohio Constitution (and particularly Section 28 of Article II), have the requirements of the Ohio Malpractice Act retroactive, because the General Assembly did not even attempt to do so. Thus, the question of whether the relevant provisions of the Act are substantive law or procedural law is not before the Court.

It is submitted that Young has identified the precise impact of Section 1.48 and has appropriately refused to become embroiled in an unnecessary inquiry into substance over procedure.

Both the Ohio Malpractice Act and Revised Code § 2315.19 are silent on their retroactive application. Thus the reasoning in Young would clearly warrant a finding that the new comparative negligence standard is prospective only. This conclusion can be reached without inquiry into whether alterations in a tort defense are substantive or procedural/remedial. There is additional support for this simple solution in Reed v. Hollen. There the court noted that case law holding the statute of limitations to be procedural and retroactive predated Revised Code § 1.48 and may well have been overruled by its subsequent enactment.

The utility of Section 1.48 as the solution to this matter has been diminished by a recent Ohio Supreme Court case. In Denicola v. Providence Hospital, the issue was whether a statute that was concededly procedural violated Section 1.48 when applied to an action that accrued before the statute's effective date, but not brought to trial until afterwards. The court ruled that it did not, but its rationale is unclear. The court first noted that Article II, Section 28 of the Ohio Constitution was not violated because the appellant conceded the statute to be procedural. At this point the court should have turned to Section 1.48 of the Code and decided whether the term "prospective in operation" means that a statute is to apply only to causes accruing after the effective date or whether the statute can also apply to causes accruing before, but are brought to trial after the effective date. Instead the court dwelled further on the substantive/procedural distinction. It noted case law defining substantive/procedural law which predated the effective date of Section 1.48 and found that a procedural law

28 Id. at 33, 342 N.E.2d at 701.
30 See e.g., Smith v. N.Y. Cent. R.R. Co., 122 Ohio St. 45, 170 N.E. 637 (1930).
31 57 Ohio St. 2d 115, 387 N.E.2d 231 (1979).
is not given retrospective effect where applied to prior accruing causes that are brought to trial after the effective date of the statute. Thus the court seemed to view Section 1.48 as an extension of the old substantive/procedural dichotomy and not as an independent test of legislative intent. If such is the only significance of Section 1.48 then the simple solution proposed by Young is no longer viable. The simplest and strongest support for strictly prospective application being thus weakened, one must consider whether other support exists.

III. Ohio Precedent and the Prevailing Authority in Sister States Stand Against Retroactivity of a Comparative Negligence Statute

A. Ohio Precedent

This is not an issue of first impression in Ohio. Hill v. Pere Marquette Railway Co.33 (hereinafter Hill) was an early case in which the court refused retroactive application to General Code § 9018 which had introduced a modified version of comparative negligence into railroad law. General Code § 9018 applied comparative negligence in actions between employees and employers when the negligence of the employee was "slight" and that of the employer "greater in comparison." Hill was a wrongful death action which accrued prior to the effective date of Section 9018. The court held that because the events giving rise to the cause of action occurred before the effective date of the statute:

The section cannot be applied to this case. If the railroad company immediately after the injury had a good defense under the then existing law by reason of the negligence of Hill having contributed directly to his death, the right to that defense was a vested right which could not thereafter be taken away by statute. It is true the section by its terms purports to apply to all actions brought after its passage, but it must, in order to avoid the constitutional inhibition against retroactive laws, be held to apply only to such causes of action as may arise after its passage.34

That Hill was affirmed by the Ohio Supreme Court without opinion is arguably a strong endorsement of the rationale employed by the lower court. That the Ohio Supreme Court agreed with the Hill reasoning becomes more clear when one considers that the Hill court relied on the supreme court case of Commissioners v. Rosche Brothers35 (hereinafter Rosche). Rosche had rejected the retroactive operation of a statute which was clearly intended by the legislature to be retroactive. The Rosche court reasoned that Article II, Section 28 of the Ohio Constitution prevailed over the legislative intent

33 31-41 Ohio C.C. Dec. 282 (1912), aff'd mem., 88 Ohio St. 599, 106 N.E. 1061 (1913).
34 Id. at 285.
35 30 Ohio St. 103, 50 N.E. 408 (1893).
because the statute was substantive and not procedural. Looking to Rosche, the Hill court reasoned that the defense of contributory negligence was a vested right. Its choice of the word "vested" was inappropriate because under Mondou, no one has a vested right to a rule of law. However, since Hill in fact relied on Rosche wherein the court refused retroactivity because the statute abrogated a substantive right, it is reasonable to conclude that the Hill court used the term "vested" synonymously with the word "substantive." Viewed thus as a substantive right, the defense of contributory negligence cannot constitutionally be applied retroactively.

Under General Code § 9018 the threatened invasion of the defendant's substantive right was minimal in that the new comparative standard was to apply only where the plaintiff's negligence was "slight." Under Revised Code § 2315.19 the defendant's liability exposure and potential obligation to pay is significantly increased. As long as the plaintiff's fault is less than that of the defendants' combined that plaintiff may recover. Thus the modern plaintiff may be more than "slightly" negligent by comparison to the defendant and still recover. Neither Rosche nor Hill would permit even a slight invasion of a substantive right. Since the Ohio Supreme Court endorsed the reasoning of Hill regarding a comparative negligence statute and refused even a slight invasion of the defendant's substantive rights, it can be expected to do so again, against a compelling reason to reverse itself.

B. Prevailing Authority in Sister States

Courts in three states have allowed the retroactive application of a comparative negligence statute. In addition to heavy reliance on a finding of legislative intent favoring complete retroactivity, these cases rest on public policy and a rejection of the vested right theory. In them the public good achieved by abolishing the widely perceived harshness associated with contributory negligence is deemed to outweigh the minimal unfairness in retroactive application of the new law. These authorities do not represent the weight of authority, however, and are distinguishable.

In Peterson v. City of Minneapolis the Supreme Court of Minnesota opted for complete retroactivity of its new comparative negligence statute. Minnesota had a statute similar to Ohio Revised Code § 1.48 which provided "that laws [were] not to be given retroactive effect unless it clearly appears from the act itself that such was the intention of the legislature." The court noted that the legislative history of the Minnesota comparative negligence statute clearly indicated that the question of the date of its application had been thoroughly debated in both houses of the legislature and that the legis-

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36 Id. at 111-13 (the statute was substantive because it created a new right and imposed a new obligation).
38 Id. at 286, 173 N.W.2d at 356 (quoting MINN. STAT. ANN. § 645.21 (West 1947)).
lature had opted for retroactivity. The Minnesota statue raising a presumption of prospectivity does not limit the means of rebuttal as severely as its Ohio counterpart. The words of the Minnesota statute “unless clearly and manifestly so intended by the legislature” leave greater leeway for inquiry into the true intent of the legislature. In Ohio an express statement of retroactivity is required and there is no legislative history to look to.

Another distinguishing factor is that, on its face, the Minnesota comparative negligence statute more clearly indicates retroactivity. It provides that the statute “shall be effective in any action the trial of which is commenced after July 1, 1969.” The Ohio comparative negligence statute is without any explicit language showing an intent to affect any action filed after the effective date of the statute rather than just those actions which accrue after the effective date. Noting such a linguistic distinction between the Minnesota statute and the Montana statute, the Supreme Court of Montana refused to follow the lead of Peterson. Clearly Peterson should not be used as a springboard from which to argue retroactivity in Ohio.

The Rhode Island statute construed in Raymond v. Jenard provided that in “all actions hereafter brought” comparative negligence would control. This language was deemed conclusive of a legislative intent that the new statute be retroactively applied to causes of action which accrued prior to the effective date of the statute. The court also looked to the language of the various versions of the bill to determine legislative intent. Since the Ohio statute on comparative negligence is itself silent as to retroactivity and there is an absence of legislative history, the Raymond case does not support the retroactivity of the Ohio statute.

The third major case favoring retroactivity of a comparative negligence statute is out of Washington. In that state retroactivity of a statute is permissible if it does not affect a contractual or vested right or impose a penalty. Affirming the view that there is no vested right to a tort defense, the court in Godfrey v. State allowed the statute to be applied retroactively. Of the three major cases favoring retroactivity, Godfrey construed a statute most similar to Ohio Revised Code § 2315.19. Each is silent on its effect. The Washington statute, however, is distinguishable by its title: “An Act relating to civil procedure.” While under Washington law the legislative

89 Id.
90 Ch. 624, § 2, 1969 Minn. Laws (included in the code as a note following Minn. Stat. Ann. § 604.01 (West Supp. 1980)).
94 84 Wash. 2d 959, 530 P.2d 630 (1975).
title is not absolutely determinative of whether the named statute is procedural it may be properly considered as an indication of the legislative intent.\textsuperscript{46} Thus the title was a significant factor in the court's finding that the statute was procedural. Once it was so characterized there was no impediment to its retrospective application. Since Ohio Revised Code § 2315.19 is not similarly titled, the impediment to retrospective application is not so easily removed. Because of the distinctions between the statutes considered in Peterson, Raymond, and Godfrey and the Ohio statute, it would be unwise to submit these cases in support of retroactivity in Ohio.

The overwhelming trend among states that have adopted comparative negligence statutes that are silent as to the date of their applicability, has been to deny retroactive effect. These states employ a rationale similar to that of Hill.

The Supreme Court of Oregon, finding that comparative negligence invades a substantive right, applied the presumption against retroactivity in Joseph v. Lowery.\textsuperscript{47} The court stated:

Under the comparative negligence statute, a plaintiff whose negligence is less than that of the defendant is not barred from recovery by virtue of his contributory negligence, but is allowed recovery reduced by the degree of his fault. Therefore, if applied retroactively, the act would affect legal rights and obligations arising out of past actions . . . . If applied retroactively the statute could create a duty to pay which did not exist at the time the damage was inflicted.\textsuperscript{48}

Those who favor retroactivity have argued that the purpose of comparative negligence is to undo years of arbitrary and capricious rulings. Additionally, they argue that since there is no actual reliance placed in the state of the law when a particular defendant acts, it is not unfair to impose the new standard upon all cases, no matter when they have accrued.\textsuperscript{49} Lowery rejected these arguments. Acknowledging that no single individual has an accident "upon the faith of the then existing law," the court continued:

However, it would come as a shock as to someone who has estimated his probable liability arising from a past accident, and who has planned his affairs accordingly, to find his responsibility therefor is not to be determined as of the happening of the accident but is also dependent upon what the legislature \textit{might} subsequently do.\textsuperscript{50}

A Pennsylvania court in Costa v. Lair\textsuperscript{51} rejected retroactivity and agreed with the view that contributory negligence is a substantive matter. Costa also

\textsuperscript{46} Godfrey v. State, 84 Wash. 2d at 966, 530 P.2d at 633.

\textsuperscript{47} 261 Or. 545, 495 P.2d 273 (1972).

\textsuperscript{48} Id. at 549, 495 P.2d at 275.

\textsuperscript{49} \textit{See}, e.g., Raymond v. Jenard, 390 A.2d 358, 361 (R.I. 1978).

\textsuperscript{50} Joseph v. Lowery, 261 Or. 545, 551, 495 P.2d 273, 276.

balanced the harshness of contributory negligence against the public need for stability in the law. The court believed that it is "imperative that the people be able to calculate their legal responsibilities upon the law as it exists when they act."\textsuperscript{52}

Stability and fairness go hand-in-hand. The harshness of the old law of contributory negligence can be amply mitigated through prospective changes alone. The period of overlap wherein previously accruing cases will continue to be governed by the older standard is at most equal to the period of limitations for various tort actions. The number of cases wherein the limitations period is tolled by an incapacity in the plaintiff (either insanity or minority) is \textit{de minimis} when compared to the great mass of litigation which will be controlled by the new law. The existence of a dual standard in these cases may appear unfair, but Ohio courts have applied a dual standard for years, having had to employ comparative negligence in Federal Employers' Liability Act cases. There has been no hue and cry against such duality. Nor has such a dual system placed an overwhelming burden on the judicial system, caused confusion, or undermined the public's confidence.

The Supreme Court of Montana, in \textit{Dunham v. Southside National Bank of Missoula},\textsuperscript{53} considered a comparative negligence statute that was silent regarding its effect.\textsuperscript{54} Montana has a statute similar to Ohio Revised Code § 1.48, creating a presumption of prospectivity absent specific legislative intent to the contrary.\textsuperscript{55} Relying on this statute, and distinguishing the statutes involved in \textit{Peterson} and \textit{Godfrey}, the \textit{Dunham} court ruled against retroactive application of the comparative negligence statute.

The remaining jurisdictions which have comparative negligence statutes which are similar to Ohio's and silent regarding retroactivity, deny retrospective application without substantial comment.\textsuperscript{56} Clearly the prevailing view is to deny retroactivity, but strength of number is not the only reason to do so.

IV. \textsc{Revised Code} § 2315.19 Is \textsc{Not Remedial/Procedural}

Noting the difficulty in defining substantive law versus procedural/remedial law, the Ohio Supreme Court has stated that authorities generally agree that "substantive law is that which creates duties, rights, and obligations,

\textsuperscript{52} Id. at 521, 363 A.2d at 1315.
\textsuperscript{53} 169 Mont. 466, 548 P.2d 1383 (1976).
\textsuperscript{54} MONT. CODE ANN. § 27-1-702 (1979).
\textsuperscript{55} Id. § 1-2-109.
while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress." This definition is essentially the same as that employed by the Oregon Supreme Court in *Lowery* when it deemed a comparative negligence statute to be substantive and so prospective. The Ohio Supreme Court has defined remedial statutes as those providing for rules of practice, courses of procedure or methods of review.

The Ohio authorities do not demand the conclusion that Revised Code § 2315.19 is a remedial/procedural statute. *Denicola v. Providence Hospital* ruled that a statute which enlarged the competency requirements for medical experts was a procedural change and could be retroactively applied. Evidence rules relating to the competency of expert witnesses clearly fall within the "rules of practice" definition of *Kilbreath*. In addition, retroactive application of such a rule does not offend one's sense of justice. Imposing more stringent requirements for expert witnesses should not be equated with eliminating a long-standard tort defense, however. The proponent of the medical testimony can comply with the new procedures without substantial difficulty, infringement of rights, or reduction in the amount of recovery. The defendant deprived of his defense of contributory negligence has no alternative but to suffer the new disability.

*Holdridge v. Industrial Commission* affirmed the retroactivity of a statutory amendment which changed a rebuttable presumption of permanent disability into a conclusive presumption. The court deemed this alteration clearly procedural because it affected only the method of proof. *Holdridge* is an example of those cases where the court uses a substantive or procedural label to justify a result it desired for other reasons. In this case the court wished to construe the statute so as to aid claimants to preserve a previously granted disability status. While the court talked about procedural presumptions as though these had no impact at all upon the parties, it is not hard to see that a conclusive presumption is nothing more than a rule of substantive law in disguise. The amendment prevented the state from proving that an erstwhile permanently disabled individual had sufficiently recovered and no longer needed the same level of assistance. The net effect on the parties would be the same whether the law be termed an irrebuttable presumption or honestly designated a new law giving disabled persons an irrevocable right to lifetime benefits once they have met the threshold test of disability.

58 See notes 47-50, supra and accompanying text.
60 57 Ohio St. 2d 115, 387 N.E.2d 231 (1979).
62 11 Ohio St. 2d 175, 228 N.E.2d 621 (1967).
Even if the reasoning of *Holdridge* is sound, it lends no support to the argument that a shift in contributory negligence is merely procedural. In *Holdridge* the presumption applied only *after* the initial liability issue had been decided and the disability was deemed permanent or temporary. The liability of the defendant was first determined under the same rules of law that existed before the conclusive presumption amendment. Thus the new law resulted in no new liability for the defendant.

*Smith v. New York Central Railroad Co.*[^65] allowed the retroactive application of a "remedial" statute which reduced the statute of limitations. That statute is distinguishable from one abrogating the defense of contributory negligence. The new limitations period permitted a reasonable time within which the plaintiff could have brought an action. While that statute merely reduced the time within which the aggrieved party must file or forever lose his cause of action, the retroactive application of the present comparative negligence statute would substantially deprive the defendant of his defense. There is no reasonable way in which a defendant could, or should, act in order to preserve his right to be free from liability. Additionally, the continued viability of *Smith* is in doubt. It antedates Revised Code § 1.48 and at least one Ohio court has deemed *Smith* to be overruled by the subsequent enactment of Section 1.48.[^66]

Standing against retroactivity and the conclusion that Revised Code § 2315.19 is remedial/procedural are several well-reasoned cases. *Jennyo v. Warner & Swasey Co.*[^67] determined that a statute[^68] which declared an indemnity provision in a construction contract void and was silent as to retroactivity could not, in compliance with Section 1.48, be applied retroactively. *Jennyo* confirmed a result reached in the earlier case of *Linkowski v. General Tire & Rubber Co.*[^69] *Linkowski* was a wrongful death action arising out of an indemnity provision subsequently invalidated by the same statute. *Linkowski* cited both Revised Code § 1.48 and Article II, Section 28 of the Ohio Constitution and confirmed the statutory presumption of prospectivity. The court in *Linkowski* deemed an indemnity provision to be substantive and cited *Smith*. Since *Smith* concluded that the statute of limitations was procedural, the *Linkowski* court must, therefore, have distinguished an indemnity provision from the statute of limitations at issue in *Smith*. This distinction bears out the analysis earlier made of *Smith* and lends greater credence to the suggestion that *Smith* and other pre-Section 1.48 cases may not be solid law.

Finally there are the cases which have construed the Ohio Malpractice

[^65]: 122 Ohio St. 45, 170 N.E. 637 (1930).
[^67]: 57 Ohio St. 2d 13, 385 N.E.2d 630 (1979).
Act and have uniformly refused to give it retroactive effect. These courts reasoned that the statute's placing a ceiling on permissible damages invaded a substantive right of the plaintiff. Logic and equity demand equal consideration for the defendant's substantive right to limit his obligation to pay damages. If a damage recovery is substantive as applied to the plaintiff it must also be substantive when applied to the defendant. Under this analysis the conclusion that the new comparative negligence statute is substantive is inescapable. Revised Code § 2315.19 simultaneously expands the plaintiff's damage recovery and the defendant's liability exposure. It must be prospective only if it is to avoid constitutional proscription.

The dates of the cases favoring procedural/remedial construction and retroactivity are significant. These cases all predate the effective date of Revised Code § 1.48, 1972. Cases since then show a judicial preference for substantive construction and prospectivity. Denicola, a 1979 case, is the only exception. Witness qualification is clearly procedural, however; it is not in that gray area between substance and procedure. Discounting Denicola, it is fair to conclude that recent Ohio cases do not favor remedial/procedural construction nor retroactive application.

CONCLUSION

For those seeking a swift solution to the question, Revised Code § 1.48 can cut the Gordean knot. Revised Code § 2315.19 is completely void of language expressing a retroactive intent. Nor is there legislative history supporting the same. On its face the new comparative negligence statute is prospective only. For those more timid souls, the path is less clear and meanders through the morass of substance over procedure. The prevailing view in states with similar statutes silent as to retroactivity is to apply the statute prospectively. In support of this course of action are Ohio cases that strongly suggest that the alteration of contributory negligence invades a substantive right and may be prospective only. But when all is said and done, plain common sense and justice make prospectivity the better choice. The harshness of the old law is sufficiently mitigated through prospective application. The public interest in the stability of the law and its confidence in being able to plan its affairs according to the law existing when its actions are taken is preserved. There is something not quite fair about changing the rules in the middle of the game. Absent some compelling reason to do so, the Ohio Supreme Court should hesitate to do what the legislature failed to do when it enacted the bill.11

BETH WHITMORE
