

(7) **Evaluating the two systems for apportioning loss.** When tortfeasor A is fully insured and tortfeasor B has neither insurance nor assets, which system is more consistent with tort goals, the joint and several liability system or the comparative apportionment system?

(8) **Recapping.** This is a lot of specialized information to absorb at one time. Maybe the best recap is to try your hand at applying the rules for sharing damages liabilities. Suppose:

(a) Patricia, a single mother often up at night with her child, is sleepy while driving to work. Dunn, driving a truck, attempts to cross the street in front of Patricia. Patricia was probably slow in hitting her brakes. She broadsided Dunn's truck. Dunn wasn't injured but Patricia was. The jury finds that Dunn's fault was 90%, Patricia's 10% and that her damages come to \$10,000. What amount of money must Dunn (or his liability insurance company) pay under the rules followed in most states?

(b) Agatha and Bert are each driving a car. Both are negligent and they collide in a city intersection. The force of the collision causes Bert to lose control. Consequently, his car strikes a pedestrian, Paul. Paul's injury results in medical expense, loss of wages, and pain. The jury assesses his damages at \$100,000 and finds that Agatha's negligence was 75% of the whole, while Bert's was only 25%. (i) In a joint and several liability system, suppose that both Agatha and Bert are insured for liability or otherwise able to pay, but Paul enforces the judgment solely against Bert. What does Bert pay and what contribution rights does he have? (ii) If Agatha is insolvent and uninsured, what is Bert's position in a joint and several liability system? (iii) in a several liability with comparative fault apportionment?

### § 3. PROVING AND EVALUATING CONDUCT

The plaintiff must prove each element of the case by a preponderance of the evidence, that is, by the greater weight of the evidence. Negligence, for example, must be shown to be more probable than not. The trier of facts, in other words, must reasonably believe that the probability of negligence exceeds one-half. See David Kaye, *Probability Theory Meets Res Ipsa Loquitur*, 77 MICH. L. REV. 1456, 1467 (1979).

#### a. Proving Conduct

#### GIFT v. PALMER

Supreme Court of Pennsylvania, 1958.  
392 Pa. 628, 141 A.2d 408.

BELL, JUSTICE.

[Action by Robert Gift for injury. The trial judge entered a nonsuit, the effect of which is similar to a directed verdict for defendant.]

The evidence is very meager. Defendant was driving east along Mt. Oliver Street in Pittsburgh. There was no direct evidence of how the accident (which happened in the middle of the block) occurred. Five

minutes before the accident, Mrs. Jesse (a neighbor), who was a block away, saw Robert Gift, aged 3, and his sister Jeanne, sitting on their front doorstep playing with two little girls.

Robert's mother testified that a couple of days after the accident, defendant came to see her and said that he told her, "coming up our street he said that he felt something hit his front bumper and he had thought it was a stone and kept going until he looked in his rear view mirror and he saw my son lying in the street. . . . Then he stopped and picked him up." The day was clear, the street was 30 feet wide with trolley tracks in the middle, and no cars were parked on the south side. Although the law is clearly settled by countless cases, it seems necessary for us to repeat certain well established pertinent principles. A child three years old cannot be guilty of contributory negligence. The mere happening of an accident is not evidence of negligence. Plaintiff must prove by a fair preponderance of the evidence that the defendant was negligent and that his negligence was the proximate cause of the accident. Negligence is the want of due care which a reasonable man would exercise under the circumstances. Conduct is negligent only if the harmful consequences thereof could reasonably have been foreseen and prevented by the exercise of reasonable care. . . .

In *Finnin v. Neubert*, 378 Pa. 40, 105 A.2d 77, 78, *supra*, this Court directed a nonsuit under the following evidence: When defendant's automobile was about half-way through the intersection of the two streets, his wife yelled to him, "Look out for that kid and then the next thing I knew I then saw his feet were up in front of the windshield." Defendant never saw the plaintiff, who was 11 years old (and who was so badly injured that he could not remember any details of the accident), until his automobile hit him. The accident happened in broad daylight.

In the instant case there was no eye witness to the accident; there was no evidence of the speed of defendant's automobile; there was no evidence where Robert Gift was just prior to the accident; there was no evidence where he was at the time of the accident, when he bumped into the front fender of defendant's car; there was no evidence of facts or circumstances showing as the only reasonable conclusion that defendant could have seen Robert was in a place of danger and was likely to run into or be struck by his automobile and that defendant could have, by the exercise of reasonable care, stopped his automobile in time to avoid the accident.

Deep sympathy for this boy does not justify a Court finding negligence where no negligence was proved.

Judgment of nonsuit Affirmed.

### *Notes*

1. A directed verdict is literally a direction to the jury to sign a verdict for the defendant. In some states the procedure is to "nonsuit" the plaintiff instead, but the effect is much the same.

2. In *Gift* there was *some* proof, but the judge took the case from the jury anyway. Why? Could reasonable persons find the defendant negligent? The problem in *Gift* has to do with the absence of proof about specific conduct. Could a reasonable person listen to the proof in *Gift* and state exactly how the defendant should have altered his conduct to make it safer? Was he driving too fast? Did he fail to keep a proper lookout?