TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 6 | Number 2 Article 5

1990

The Noseworthy Doctrine: A Threepart Rule for Its Application

Steven D. Jannace

Follow this and additional works at: https://digitalcommons.tourolaw.edu/lawreview

 Part of the Civil Law Commons, Civil Procedure Commons, Courts Commons, Judges Commons, and the Jurisprudence Commons

Recommended Citation

Jannace, Steven D. (1990) "The Noseworthy Doctrine: A Threepart Rule for Its Application," *Touro Law Review*: Vol. 6 : No. 2 , Article 5.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol6/iss2/5

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

THE NOSEWORTHY DOCTRINE: A THREE-PART RULE FOR ITS APPLICATION

Steven D. Jannace*

INTRODUCTION

In New York, a wrongful death plaintiff is entitled to a reduced burden of proof.[1] This doctrine is derived from *Noseworthy v. City of New York*[2] and is commonly called the *Noseworthy* doctrine.[3] This article examines the doctrine, its application and problems, and formulates a three-part rule to be utilized by trial courts in incorporating the doctrine into jury instructions.

I. NOSEWORTHY V. CITY OF NEW YORK

In a deserted subway station, Ernest Noseworthy had somehow gotten down onto the tracks and was struck by a train. The only eyewitness was the motorman who stated that he saw nothing in the way until Mr. Noseworthy suddenly became visible only ten feet in front of the train. The motorman also testified that he immediately applied the brakes and completed an emergency stop within fifteen feet. Unfortunately, the train could not be stopped quickly enough, and it struck Mr. Noseworthy. He was found lying between the rails, and he died from his injuries a few hours later.[4] Mrs. Noseworthy sued the city for causing her husband's death. She claimed that, since

---

* A litigator with Furey, Furey, Lapping, Keller, O'Reilly & Watson, P.C., the author received his J.D., with distinction, in 1987 from Hofstra University School of Law. While at Hofstra, he was Managing Editor of the International Property Law Journal.

1. *See* 1 NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL PJI 1:61 (Committee on Pattern Jury Instructions Supp. Aug. 1989) [hereinafter PJI].

2. 298 N.Y. 76, 80 N.E.2d 744 (1948).

3. Fasano v. State, 113 A.D.2d 885, 888, 493 N.Y.S.2d 805, 807 (2d Dep't 1985).

4. *Noseworthy*, 298 N.Y. at 78-79, 80 N.E.2d at 744-45.

Published by Digital Commons @ Touro Law Center, 2020

the station was well lit and designed in such a way that the train must have travelled 400 feet on a straight level track before the accident, the motorman must have been negligent in not seeing her husband until the train was so close that the accident was inevitable.[5] Unfortunately for Mrs. Noseworthy, her husband was not alive to explain what had happened, and the only testimony at trial came from the motorman. Without Mr. Noseworthy's testimony, the plaintiff's burden of proving her case was insurmountable, and the jury found in favor of the defendant.[6]

The Court of Appeals recognized the inequity of holding a wrongful death plaintiff to the same high burden of proof as an injured plaintiff, who can take the stand and give his version of the accident. Relying upon the reasoning set forth in cases where the burden of proving decedent's contributory negligence had been shifted to the defendant,[7] the court reversed, holding that, "in a death case, a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence."[8]

The purpose of the doctrine is to place the wrongful death plaintiff on equal footing with a personal injury plaintiff.[9] It allows the wrongful death plaintiff "to benefit from every favorable inference."[10] Of course, the doctrine does not shift the burden of proof from plaintiff to defendant, and the plain-

---

5. *Id.*

6. *Id.* at 79, 80 N.E.2d at 745.

7. *Id.* at 80, 80 N.E.2d at 745-46.

8. *Id.*, 80 N.E.2d at 746. Today, the burden of proving decedent's contributory negligence is shifted, by statute, to the defendant. N.Y. EST. POWERS & TRUSTS LAW § 5-4.2 (McKinney 1981).

9. *See* Noseworthy v. City of New York, 298 N.Y. 76, 80, 80 N.E.2d 744, 745 (1948).

10. Rivenburgh v. Viking Boat Co., 55 N.Y.2d 850, 432 N.E.2d 600, 447 N.Y.S.2d 707 (1982); *see* Pedersen v. Balzan, 117 A.D.2d 933, 499 N.Y.S.2d 239 (3d Dep't 1986); Archie v. Todd Shipyards Corp., 65 A.D.2d 699, 410 N.Y.S.2d 69 (1st Dep't 1978); *see also* Sawyer v. Dreis & Kump Mfg., 67 N.Y.2d 328, 493 N.E.2d 920, 502 N.Y.S.2d 696 (1986) (amnesia rather than wrongful death action).

tiff's burden will not be satisfied "if inferences are equally balanced."[11]

In 1971, the Court of Appeals extended the doctrine to include personal injury plaintiffs who suffer from amnesia as a result of the defendant's negligence.[12] The court reasoned that, just as in a wrongful death case, the plaintiff's version of the incident cannot be told.[13]

Despite the apparent simplicity of the doctrine, the courts have struggled over whether, and how, to apply it in certain cases.[14] The problem arises, at least in part, due to the ambiguous language used by the Court of Appeals in *Noseworthy*. The court held that the plaintiff was entitled to a lesser burden of "proof of the cause of action [than in a case] where an injured plaintiff can himself describe the occurrence."[15] Does the use of the phrase "cause of action" mean that the plaintiff is entitled to a reduced burden as to the entire case, or does the phrase "as an injured plaintiff" limit the doctrine to only the details the decedent could have described had he survived?

The Second Department is currently faced with this issue in *Holiday v. Huntington Hospital*.[16] In *Holiday*, the plaintiff's decedent died at the defendant hospital. The plaintiff brought

---

11. *Sawyer*, 67 N.Y.2d at 334, 493 N.E.2d at 923, 502 N.Y.S.2d at 699; *see* Oginski v. Rosenberg, 115 A.D.2d 463, 495 N.Y.S.2d 699 (2d Dep't 1985).

12. Schecter v. Klanfer, 28 N.Y.2d 228, 269 N.E.2d 812, 321 N.Y.S.2d 99 (1971).

13. *Id.* at 232, 269 N.E.2d at 815, 321 N.Y.S.2d at 102.

14. In many of the cases involving the *Noseworthy* doctrine, the courts have failed to undertake any analysis of the doctrine's purpose and effect. The courts have merely used broad language without formulating guidelines for the doctrine's application. *See* Humphrey v. State, 60 N.Y.2d 742, 457 N.E.2d 767, 469 N.Y.S.2d 661 (1983); Wingerter v. State, 58 N.Y.2d 848, 446 N.E.2d 776, 460 N.Y.S.2d 20 (1983); Rivenburgh v. Viking Boat Co., 55 N.Y.2d 848, 432 N.E.2d 600, 447 N.Y.S.2d 707 (1982); Lein v. Czaplinski, 106 A.D.2d 723, 484 N.Y.S.2d 154 (3d Dep't 1984); Vitale v. LaCour, 96 A.D.2d 941, 466 N.Y.S.2d 392 (2d Dep't 1983); Williams v. City of New York, 81 A.D.2d 559, 438 N.Y.S.2d 333 (1st Dep't 1981); Teller v. Fairchild, 67 A.D.2d 1105, 415 N.Y.S.2d 138 (4th Dep't 1979).

15. Noseworthy v. City of New York, 298 N.Y. 76, 80, 80 N.E.2d 744, 746 (1948).

16. Holiday v. Huntington Hosp., No. 85-04498 MM (N.Y. Sup. Ct. Suffolk County Feb. 18, 1988), *appeal docketed*, No. 1740E/89 (2d Dep't 1989). The trial court transcript and record on appeal are on file at the author's law office. The record on appeal is also on file with the Appellate Division, Second Department.

a medical malpractice wrongful death action against the hospital and two attending physicians.[17] At the close of the evidence, the judge instructed the jury that the plaintiff should receive a lesser burden of proof as to only those issues that the decedent could have described had he survived.[18] The jury returned a verdict in favor of all defendants,[19] and the plaintiff appealed, citing error by the court in refusing to charge the jury that the plaintiff was entitled to a lesser burden of proof as to the entire cause of action.[20]

Notwithstanding the ambiguous terminology employed by the Court of Appeals in *Noseworthy* and the broad language used by many of the courts that have applied the doctrine,[21] it appears that the jury was properly instructed in *Holiday*. The purpose of the doctrine is to place a wrongful death plaintiff on equal footing with a personal injury plaintiff.[22] To reduce the wrongful death plaintiff's burden as to the entire case, including expert testimony and facts outside the decedent's knowledge, would place the wrongful death plaintiff in a better position than an injured plaintiff. There is no justification for such a benefit, and it is clearly opposite to that which was intended by the court in *Noseworthy*. It must be remembered that, despite the reference to "cause of action" in the *Noseworthy* holding, the court's purpose was to see that the wrongful death plaintiff was treated "as an injured plaintiff," and not better.[23]

In *Greer v. Ferrizz*,[24] the defendant's employee, Ferrizz, while delivering newspapers, caused a fatal injury to plaintiff's decedent.[25] It was undisputed that Ferrizz was intoxicated at the time, and a verdict was directed against him.[26] Plaintiff

17. Brief for Appellant at 1, Holiday v. Huntington Hosp., (Suffolk County Clerk's Index No. 15221-79).

18. *Id.* Brief at 24-26.

19. *Id.* Brief at 26.

20. *Id.* Brief at 24-26.

21. *See supra* note 14.

22. *See* Noseworthy v. City of New York, 298 N.Y. 76, 80, 80 N.E.2d 744, 745 (1948).

23. *Id.*, 80 N.E.2d at 746.

24. 118 A.D.2d 536, 499 N.Y.S.2d 758 (2d Dep't 1986).

25. *Id.* at 537, 499 N.Y.S.2d at 760.

26. *Id.*

asserted a cause of action against the employer on two theories. The first was negligence based upon the claim that the employer condoned drinking by Ferrizz.[27] The second was based upon *respondeat superior*.[28] During the trial, the judge gave the *Noseworthy* charge, and the jury returned a verdict in favor of the plaintiff. The Appellate Division, Second Department, reversed. The court held that the *Noseworthy* doctrine would only be relevant to the driver, Ferrizz, and the events that occurred at the scene of the accident. The court stated that the issues before the trial court:

> pertained to matters that were distinct in time and place from the actual occurrence, . . . namely, the consumption of the beer and a newspaper delivery assignment. These issues are unrelated to the *Noseworthy* doctrine. The charge which effectively reduced the plaintiff's burden of proof as to these two issues was unwarranted.[29]

In *Smith v. Stark*,[30] the plaintiff sued for personal injuries suffered in a pool accident.[31] Although the plaintiff suffered amnesia as a result of the accident, the Court of Appeals held that the *Noseworthy* doctrine was inapplicable, reasoning that the plaintiff's probable testimony would not involve the issue under consideration—namely, proximate cause.[32]

The doctrine was also rejected in *Shatkin v. McDonnell Douglas*.[33] In that case, involving the death and conscious pain and suffering of a passenger in an airplane crash, the defendants had conceded liability, and the only issue was the proper measure of damages. The Second Circuit held that the district court had properly refused to instruct the jury on the *Noseworthy* doctrine.[34]

Based upon the foregoing, it appears that there is ample support for limiting the doctrine to only those facts or occurrences that a decedent could have described had he survived. Unfortunately, the courts mentioned above took an "all or nothing ap-

---

27. *Id.* at 537, 499 N.Y.S.2d at 760-61.
28. *Id.*, 499 N.Y.S.2d at 761.
29. *Id.* at 538, 499 N.Y.S.2d at 761.
30. 67 N.Y.2d 693, 490 N.E.2d 841, 499 N.Y.S.2d 922 (1986).
31. *Id.* at 694, 490 N.E.2d at 842, 499 N.Y.S.2d at 923.
32. *Id.*
33. 727 F.2d 202 (2d Cir. 1984).
34. *Id.* at 208.

proach" in ruling on the doctrine's applicability. To date, no court has applied a reduced burden of proof to only specific facts or occurrences. What is needed is a rule that could be applied in every case to determine whether, and how, to apply the doctrine. Such a rule would allow for uniform application of the doctrine and provide trial courts with guidance as to its incorporation into jury instructions. This article proposes such a rule.

II. PROPOSED THREE PART RULE

A. Part I

First, the court must determine whether the individual's inability to testify is due to the negligent acts of the defendant. This would apply in all cases, whether wrongful death or personal injury. For example, an amnesiac plaintiff would be entitled to benefit from the doctrine as long as the amnesia was caused by the defendant's negligent act.[35] The doctrine would not be applied in cases where the plaintiff died from unrelated causes since the defendant's acts were not the cause of the decedent's inability to testify.[36]

The rule also would be applied to determine the *Noseworthy* doctrine's applicability to cases involving persons such as infants and imbeciles, who lack capacity. A very young infant decedent would not have been able to describe the occurrence had she survived, and, certainly, the defendant's acts had nothing to do with the infant's incompetency. Accordingly, in such cases, the doctrine should not be applied. However, in *Berg v. State*,[37] the court held that an imbecilic state hospital patient should be held to a lesser burden of proof.[38] Under the proposed rule, there would be an opposite result. Clearly, the defendant's acts had nothing to do with the plaintiff's imbecility. The *Berg* holding is contrary to the purpose of the doctrine. It

35. *See* Schecter v. Klanfer, 28 N.Y.2d 228, 269 N.E.2d 812, 321 N.Y.S.2d 99 (1971).

36. *See* Joffe v. United States, 296 F. Supp. 1368 (S.D.N.Y. 1969); Jordan v. Parrinello, 144 A.D.2d 540, 534 N.Y.S.2d 686 (2d Dep't 1988).

37. 40 Misc. 2d 354, 243 N.Y.S.2d 267 (N.Y. Ct. Cl. 1963).

38. *Id.* at 357, 243 N.Y.S.2d at 270.

incorrectly emphasizes the plaintiff's untold version of the occurrence rather than whether the defendant caused the story to be left untold. Such a decision inappropriately extends the *Noseworthy* doctrine. If the courts were to look solely at the inability of the decedent to give his version of the occurrence as the basis for applying the doctrine, there would be virtually a limitless number of cases in which the doctrine would be applied. For instance, the plaintiff would be entitled to a lesser burden of proof where he suffered amnesia, regardless of its cause, or where the plaintiff died prior to trial, notwithstanding that the death was unrelated to the defendant's acts. Furthermore, the doctrine would be applied in all cases involving infants too young to testify, imbeciles, and individuals who were under anesthesia or otherwise impaired. This is not what was intended by the Court of Appeals in *Noseworthy*. The doctrine was intended to be applied under very specific circumstances. Where the plaintiff or decedent could not have testified due to his incompetence, there is no reason to apply the doctrine. The proposed rule would limit the *Noseworthy* doctrine to specific situations without unnecessarily extending it. Although the *Noseworthy* doctrine would not be applied where the plaintiff or plaintiff's decedent was incompetent, plaintiff might be entitled to benefit from some other doctrine such as *res ipsa loquitur*.[39]

B. Part II

Next, the court would determine the specific acts or occurrences to which decedent, or any personal injury plaintiff who satisfied Part I, could competently testify. The plaintiff would only be entitled to a lesser burden of proof as to those facts or occurrences which decedent could have described had he survived. The plaintiff would not receive the benefit of a reduced burden of proof as to facts outside the decedent's knowledge or

39. *Res ipsa loquitur* is a rule of evidence whereby a defendant is presumed negligent upon the existence of certain circumstances: the instrumentality causing the injury was in defendant's exclusive control and the accident is of the sort that does not ordinarily occur in the absence of negligence. BLACK'S LAW DICTIONARY 1173 (5th ed. 1979).

"distinct in time and place from the actual occurrence."[40] Once again, if the injured plaintiff would not be capable of offering competent testimony on a specific issue, there is no justifiable reason to create a benefit to his distributees due to his death.

Certainly in a medical malpractice action, the plaintiff should not be permitted to obtain a lesser burden of proof as to medical issues. The plaintiff in a medical malpractice case must show that the defendant departed from accepted standards of medical practice.[41] On this issue, expert medical testimony is usually required.[42] As a layperson, the decedent could not have offered any medical testimony as to medical issues if he had survived.[43] Therefore, the plaintiff would not be entitled to a *Noseworthy* charge as to these issues or any other issues requiring expert testimony.

C. Part III

Finally, the court would determine whether the specific facts to which decedent could have offered testimony, but for defendant's negligence, were provided through other sources. If the plaintiff has been able to produce evidence on a specific issue without decedent's testimony, the plaintiff does not need the benefit of the *Noseworthy* charge as to that issue. For example, in *Hager v. Mooney Aircraft, Inc.*,[44] the plaintiff sued for the wrongful death of her husband, who died in an airplane crash. The plaintiff herself was a participant in the occurrence and testified in detail about the physical situation and the acts taken by her husband prior to the crash.[45] The Appellate Division, First Department, held that the *Noseworthy* doctrine was

---

40. Greer v. Ferrizz, 118 A.D.2d 536, 538, 499 N.Y.S.2d 758, 761 (2d Dep't 1986).

41. *See* Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760 (1898); Amsler v. Verrilli, 119 A.D.2d 786, 501 N.Y.S.2d 411 (2d Dep't 1986).

42. *See* Meiselman v. Crown Heights Hosp., 285 N.Y. 389, 34 N.E.2d 367 (1941); Paul v. Boschenstein, 105 A.D.2d 248, 482 N.Y.S.2d 870 (2d Dep't 1984).

43. *See* Shapiro v. Levine, 104 A.D.2d 800, 479 N.Y.S.2d 1006 (2d Dep't 1984).

44. 63 A.D.2d 510, 407 N.Y.S.2d 978 (1st Dep't 1978).

45. *Id.* at 522-23, 407 N.Y.S.2d at 984-85.

inapplicable.[46] The court reasoned that the doctrine is to be applied "when there are no eyewitnesses to the occurrence, and the participant is incapable of testifying either because he is dead or amnesic."[47]

In *Weiner v. Weiner*,[48] a child was killed when the car in which she was a passenger, and which was driven by her mother, collided with a bus. The administratrix of the child brought a wrongful death action against the child's parents and the bus company.[49] At trial, the plaintiff requested the *Noseworthy* charge. The court refused, stating that, at the time of the accident, the child was playing in the back seat with her brother and was in no better position to describe the accident than was her surviving brother. Additionally, the bus driver, as well as the operator and passenger in the following vehicle, and three persons in the Weiner vehicle, including the driver, were available and testified. "It would have been simply irrational to have charged [*Noseworthy*] in the present case."[50]

Similarly, under the proposed rule, the *Hager* and *Weiner* plaintiffs would not be entitled to a lesser burden of proof. Of course, the rule would not be a complete bar to a *Noseworthy* charge in every case where there are eyewitnesses. For example, the presence of eyewitness testimony would not be a bar to applying the *Noseworthy* doctrine where the plaintiff's perception is a relevant issue in the case and one that the eyewitness could not fully describe. The distinction is that the proposed rule would allow a *Noseworthy* charge for only those issues that were not described in detail by the witness.[51] Therefore, the rule would be applied only in situations where the decedent, or any eligible plaintiff, would be the only source of evidence on a specific issue, and his inability to testify would leave

46. *Id.* at 524, 407 N.Y.S.2d at 986.

47. *Id.* (citations omitted). *Accord* Horne v. Metropolitan Transit Auth., 82 A.D.2d 909, 440 N.Y.S.2d 695 (2d Dep't 1981).

48. 386 F. Supp. 951 (E.D.N.Y. 1974), *aff'd*, 535 F.2d 1244 (2d Cir. 1975).

49. *Id.* at 953.

50. *Id.* at 955.

51. *See generally* Schecter v. Klanfer, 28 N.Y.2d 228, 269 N.E.2d 812, 321 N.Y.S.2d 99 (1971).

basic gaps that would preclude the jury from obtaining a thorough understanding of the occurrence.[52]

III. APPLICATION OF THE RULE

Once the trial court had identified the specific issues to which the doctrine should be applied, the court would instruct the jury that the plaintiff should be held to a lesser burden of proof only as to those issues. As to all other aspects of the cause of action, plaintiff's burden of proof would remain unchanged, just "as an injured plaintiff."[53] This would replace the charge contained in the Pattern Jury Instructions,[54] which is used by many courts.[55] That instruction is ambiguous in that it refers to "an injured plaintiff who can himself describe what happened,"[56] yet also refers to "all the evidence."[57] Such an instruction provides no guidance to the jurors. Burdens of proof and preponderance of the evidence are arbitrary concepts incapable of quantification. Ambiguous instructions make the jurors' job all the more difficult. The proposed three-part rule would narrow the jurors' focus and provide guidance.

Of course, utilization of a rule in order to apply a doctrine seems somewhat confusing. However, this is merely a problem of terminology. Since the trial court is the place where the rule is to be applied, it merely will be a rule for creating a jury

---

52. *See* Vitale v. LaCour, 96 A.D.2d 941, 466 N.Y.S.2d 392 (2d Dep't 1983).

53. Noseworthy v. City of New York, 298 N.Y. 76, 80, 80 N.E.2d 744, 746 (1948). *See supra* text accompanying note 15.

54. PJI, *supra* note 1, at 1:61.

> In a death action such as this, however, the plaintiff . . . is not held to as high a degree of proof as is required of an injured plaintiff who can himself describe what happened. If from all the evidence, including any evidence introduced by defendant, you conclude that it is more probable than not that the defendant was negligent and that his negligence proximately caused the [accident], you will find for the plaintiff on this issue. If, however, you do not so conclude, or if you find that the evidence is so evenly balanced that you cannot say that the greater weight of the evidence is on either side of this issue, your verdict must be for defendant.

Id.

55. *See, eg.*, Dobro v. Village of Sloan, 48 A.D.2d 243, 247-48, 368 N.Y.S.2d 621, 625-26 (4th Dep't 1975).

56. PJI, *supra* note 54.

57. *Id.*

charge. Thus, the *Noseworthy* doctrine would be referred to as the *Noseworthy* charge.

CONCLUSION

It is apparent that the proposed rule does not alter existing law except, perhaps, as it applies to imbeciles. The rule merely describes a method of unifying and applying the reasoning set forth in various cases in which the *Noseworthy* doctrine has been applied. The purpose of the rule is to provide guidance at the trial level and create uniformity in the doctrine's application. By following the rule, the *Noseworthy* charge would be given only where it fulfills the policy underlying its development. It would no longer be applied arbitrarily or punitively.