of contribution and indemnity among joint tortfeasors lurk in the background. (See generally Prosser, Comparative Negligence, supra, 41 Cal.L.Rev. 1, 33-37; Schwartz, Comparative Negligence, supra, §§ 16.1 - 16.9, pp. 247-274.)

A second and related major area of concern involves the administration of the actual process of fact-finding in a comparative negligence system. The assigning of a specific percentage factor to the degree of fault attributable to a particular party, while in theory a matter of little difficulty, can become a matter of perplexity in the face of hard facts. It is to be remembered that fault and culpability are the quantities to be measured, not mere physical causation, and such an assessment can involve the personal attitudes and prejudices of individual jurors to a great extent. The temptation for the jury to resort to a quotient verdict in such circumstances can be great. (See Schwartz, supra, § 17.1, pp. 275-279.) These inherent difficulties are not, however, insurmountable. Guidelines might be provided the jury which will assist it in keeping focussed upon the true inquiry (see, e.g., Schwartz, supra, § 17.1, pp. 278-279),

and the utilization of special verdicts[18] or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards and appropriate reverence. (See Schwartz, supra, § 17.4, pp. 282-291; Prosser, Comparative Negligence, supra, 41 Cal.L.Rev., pp. 28-33.)

The third area of concern, the status of the doctrines of last clear chance and assumption of risk, involves less the practical problems of administering a particular form of comparative negligence than it does a definition of the theoretical outline of the specific form to be adopted. Although several states which apply comparative negligence concepts retain the last clear chance doctrine (see Schwartz, supra, § 7.2, p. 134), the better reasoned position seems to be that when true comparative negligence is adopted, the need for last clear chance as a

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18. It has been argued by one of the amici curiae that the use of special verdicts in negligence cases would require amendment of section 625 of the Code of Civil Procedure, which reposes the matter of special findings within the sound discretion of the trial court. (See Cembrook v. Sterling Drug Inc. (1964) 231 Cal.App.2d 52, 62-65.) The argument is frivolous. The delineation by this court of factors which should guide the exercise of section 625 discretion in negligence cases surely need not operate to remove that discretion altogether.

palliative of the hardships of the "all-or-nothing" rule disappears and its retention results only in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault. (See Schwartz, supra, § 7.2, pp. 137-139; Prosser, Comparative Negligence, supra, 41 Cal.L.Rev., p. 27.) As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. "To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence . . . . Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care." (Grey v. Fibreboard Paper Products Co. (1966) 65 Cal.2d 240, 245-246; see also Fonseca v. County of Orange (1972) 28 Cal.App.3d 361, 368-369; see generally,

4 Witkin, Summary of Cal. Law, Torts, § 723, pp. 3013-3014; 2 Harper & James, The Law of Torts, supra, § 21.1, pp. 1162-1168; cf. Prosser, Torts, supra, § 68, pp. 439-441.) We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence. (See generally, Schwartz, supra, ch. 9, pp. 153-175.)

Finally there is the problem of the treatment of willful misconduct under a system of comparative negligence. In jurisdictions following the "all-or-nothing" rule, contributory negligence is no defense to an action based upon a claim of willful misconduct. (see Rest.2d Torts, § 503; Prosser, Torts, supra, § 65, p. 426), and this is the present rule in California. (Williams v. Carr (1968) 68 Cal.2d 579, 583.)[19] As Dean

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19. BAJI No. 3.52 (1971 re-revision) currently provides: "Contributory negligence of a plaintiff is not a bar to his recovery for an injury caused by the wilful or wanton misconduct of a defendant. [¶] Wilful or wanton misconduct is intentional wrongful conduct,

(footnote continued)

Prosser has observed, "[this] is in reality a rule of comparative fault which is being applied, and the court is refusing to set up the lesser fault against the greater." (Prosser, Torts, supra, § 65, p. 426.) The thought is that the difference between willful and wanton misconduct and ordinary negligence is one of kind rather than degree in that the former involves culpability of an entirely different order,[20] and under this conception it might well be urged that comparative negligence concepts should have no application when one of the parties has been guilty of willful and wanton misconduct. It has been persuasively argued, however, that the loss of deterrent effect that would occur upon

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done either with knowledge, express or implied, that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results. An intent to injure is not a necessary element of wilful or wanton misconduct. [¶] To prove such misconduct it is not necessary to establish that defendant himself recognized his conduct as dangerous. It is sufficient if it be established that a reasonable man under the same or similar circumstances would be aware of the dangerous character of such conduct."

20. "Disallowing the contributory negligence defense in this context is different from last clear chance; the defense is denied not because defendant had the last opportunity to avoid the accident but rather because defendant's conduct was so culpable it was different in 'kind' from the plaintiff's. The basis is culpability rather than causation." (Schwartz, supra, § 5.1, p. 100; fn. omitted.)

application of comparative fault concepts to willful and wanton misconduct as well as ordinary negligence would be slight, and that a comprehensive system of comparative negligence should allow for the apportionment of damages in all cases involving misconduct which falls short of being intentional. (Schwartz, supra, § 5.3, p. 108.) The law of punitive damages remains a separate consideration. (See Schwartz, supra, § 5.4, pp. 109-111.)

The existence of the foregoing areas of difficulty and uncertainty (as well as others which we have not here mentioned -- see generally Schwartz, supra, § 21.1, pp. 335-339) has not diminished our conviction that the time for a revision of the means for dealing with contributory fault in this state is long past due and that it lies within the province of this court to initiate the needed change by our decision in this case. Two of the indicated areas (i.e., multiple parties and willful misconduct) are not involved in the case before us, and we consider it neither necessary nor wise to address ourselves to specific problems of this nature which might be expected to arise. As the Florida court stated with respect to the same subject, "it is not the proper function of this Court to decide unripe issues, without the benefit of adequate briefing, not involving an actual controversy,

and unrelated to a specific factual situation." (Hoffman v. Jones, supra, 280 So.2d 431, 439.)

Our previous comments relating to the remaining two areas of concern (i.e., the status of the doctrines of last clear chance and assumption of risk, and the matter of judicial supervision of the finder of fact) have provided sufficient guidance to enable the trial courts of this state to meet and resolve particular problems in this area as they arise. As we have indicated, last clear chance and assumption of risk (insofar as the latter doctrine is but a variant of contributory negligence) are to be subsumed under the general process of assessing liability in proportion to fault, and the matter of jury supervision we leave for the moment within the broad discretion of the trial courts.

Our decision in this case is to be viewed as a first step in what we deem to be a proper and just direction, not as a compendium containing the answers to all questions that may be expected to arise. Pending future judicial or legislative developments, we are content for the present to assume the position taken by the Florida court in this matter: "We feel the trial judges of this State are capable of applying [a] comparative negligence rule without our setting guidelines

in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of a theoretical solution at the appellate level. The trial judges are granted broad discretion in adopting such procedures as may accomplish the objectives and purposes expressed in this opinion." (280 So.2d at pp. 439-440.)

It remains to identify the precise form of comparative negligence which we now adopt for application in this state. Although there are many variants, only the two basic forms need be considered here. The first of these, the so-called "pure" form of comparative negligence, apportions liability in direct proportion to fault in all cases. This was the form adopted by the Supreme Court of Florida in Hoffman v. Jones, supra, and it applies by statute in Mississippi, Rhode Island, and Washington. Moreover it is the form favored by most scholars and commentators. (See, e.g., Prosser, Comparative Negligence, supra, 41 Cal.L.Rev. 1, 21-25; Prosser, Torts, supra, § 67, pp. 437-438; Schwartz, supra, § 21.3, pp. 341-348; Comments on Maki v. Frelk - Comparative v. Contributory Negligence: Should the Court or Legislature Decide?, supra, 21 Vand. L.Rev. 889 (Comment by Keeton at p. 906, Comment by Leflar at p. 918).) The second basic form of comparative

negligence, of which there are several variants, applies apportionment based on fault up to the point at which the plaintiff's culpability is equal to or greater than that of the defendant -- when that point is reached, plaintiff is barred from recovery. Nineteen states have adopted this form or one of its variants by statute. The principal argument advanced in its favor is moral in nature: that it is not morally right to permit one more at fault in an accident to recover from one less culpable. Other arguments assert the probability of increased insurance, administrative, and judicial costs if a "pure" rather than a "50 percent" system is adopted, but this has been seriously questioned. (See authorities cited in Schwartz, supra, § 21.3, pp. 344-346; see also Vincent v. Pabst Brewing Co. (1970) 47 Wis.2d 120, 138 (dissenting opinion).)

We have concluded that the "pure" form of comparative negligence is that which should be adopted in this state. In our view the "50 percent" system simply shifts the lottery aspect of the contributory negligence rule[21] to a different ground. As Dean Prosser

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21. "The rule that contributory fault bars completely is a curious departure from the central principle of nineteenth century Anglo-American tort law -- that wrongdoers should bear the losses they cause. Comparative negligence more faithfully serves that central

 (footnote continued)

has noted, under such a system "[i]t is obvious that a slight difference in the proportionate fault may permit a recovery; and there has been much justified criticism of a rule under which a plaintiff who is charged with 49 percent of the total negligence recovers 51 percent of his damages, while one who is charged with 50 percent recovers nothing at all."[22] (Prosser, Comparative Negligence, supra, 41 Cal.L.Rev. 1, 25; fns. omitted.) In effect "such a rule distorts the very principle it recognizes, i.e., that persons are responsible for their acts to the extent their fault contributes to an injurious result. The partial rule simply lowers, but does not eliminate, the bar of contributory negligence." (Juenger, Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae,

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principle by causing the wrongdoers to share the burden of resulting losses in reasonable relation to their wrongdoing, rather than allocating the heavier burden to the one who, as luck would have it, happened to be more seriously injured." (Comments on Maki v. Frelk, supra, 21 Vand.L.Rev. 889, Comment by Keeton, pp. 91[illegible]-913.)

22. This problem is compounded when the injurious result is produced by the combined negligence of several parties. For example in a three-car collision a plaintiff whose negligence amounts to one-third or more recovers nothing; in a four-car collision the plaintiff is barred if his negligence is only one-quarter of the total. (See Juenger, Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae, Parsonson v. Construction Equipment Company (1972) 18 Wayne L.Rev. 3, 50-51.)

Parsonson v. Construction Equipment Company, supra, 18 Wayne L.Rev. 3, 50; see also Schwartz, supra, § 21.3, p. 347.)

We also consider significant the experience of the State of Wisconsin, which until recently was considered the leading exponent of the "50 percent" system. There that system led to numerous appeals on the narrow but crucial issue whether plaintiff's negligence was equal to defendant's. (See Prosser, Comparative Negligence, supra, 41 Cal.L.Rev. 1, 23-25.) Numerous reversals have resulted on this point, leading to the development of arcane classifications of negligence according to quality and category. (See cases cited in Vincent v. Pabst Brewing Co., supra, 47 Wis.2d 120, at p. 137 (dissenting opinion).) This finally led to a frontal attack on the system in the Vincent case, cited above, wherein the state supreme court was urged to replace the statutory "50 percent" rule by a judicially declared "pure" comparative negligence rule. The majority of the court rejected this invitation, concluding that the Legislature had occupied the field, but three concurring justices and one dissenter indicated their willingness to accept it if the Legislature failed to act with reasonable dispatch. The dissenting opinion

of Chief Justice Hallows, which has been cited above, stands as a persuasive testimonial in favor of the "pure" system. We wholeheartedly embrace its reasoning. (See also, Hoffman v. Jones, supra, 280 So.2d 431, 438-439.)

For all of the foregoing reasons we conclude that the "all-or-nothing" rule of contributory negligence as it presently exists in this state should be and is herewith superseded by a system of "pure" comparative negligence, the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the fault of the persons whose negligence has brought such damage about. Therefore, in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of fault attributable to that person. The doctrine of last clear chance is abolished, and the defense of assumption of risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; both of these are to be subsumed under the general process of assessing liability in proportion to fault. Pending future judicial or legislative developments, the trial courts of this state are to use broad

discretion in seeking to assure that the principle stated is applied in the interest of justice and in furtherance of the purposes and objectives set forth in this opinion.

It remains for us to determine the extent to which the rule here announced shall have application to cases other than those which are commenced in the future. It is the rule in this state that determinations of this nature turn upon considerations of fairness and public policy. (Westbrook v. Mihaly (1970) 2 Cal.3d 765, 800; Connor v. Great Western Sav. & Loan Assn. (1968) 69 Cal.2d 850, 868; Forster Shipbldg. Co. v. County of L.A. (1960) 54 Cal.2d 450, 459; County of Los Angeles v. Faus (1957) 48 Cal.2d 672, 680-681.) Upon mature reflection, in view of the very substantial number of cases involving the matter here at issue which are now pending in the trial and appellate courts of this state, and with particular attention to considerations of reliance applicable to individual cases according to the stage of litigation which they have reached, we have concluded that a rule of limited retroactivity should obtain here. Accordingly we hold that the present opinion shall be applicable to all cases in which trial has not begun before the date this decision becomes final in this court, but that it shall not be applicable to any case in which

trial began before that date (other than the instant case) -- except that if any judgment be reversed on appeal for other reasons, this opinion shall be applicable to any retrial.

As suggested above, we have concluded that this is a case in which the litigant before the court should be given the benefit of the new rule announced. Here, unlike in Westbrook v. Mihaly, supra, 2 Cal.3d 765, considerations of fairness and public policy do not dictate that a purely prospective operation be given to our decision.[23] To the contrary, sound principles of decision-making compel us to conclude that, in the light of the particular circumstances of the instant case,[24] the new rule here announced should be applied additionally to the case at bench so as to provide incentive in future cases for parties who may

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23. Indeed, as we have indicated in the preceding paragraph, such considerations have led us to permit application of the new rule to actions which have been commenced but have not yet been brought to trial.

24. Nothing we say here today on this point is intended to overrule, in whole or in part, expressly or by implication, the case of Westbrook v. Mihaly, supra, 2 Cal.3d 765, or any other case involving the prospective or retrospective operation of our decisions.

have occasion to raise "issues involving renovation of unsound or outmoded legal doctrines." (See Mishkin, Foreword, The Supreme Court 1964 Term (1965) 79 Harv.L.Rev. 56, 60-62.) We fully appreciate that there may be other litigants now in various stages of trial or appellate process who have also raised the issue here before us but who will nevertheless be foreclosed from benefitting from the new standard by the rule of limited retroactivity we have announced in the preceding paragraph. This consideration, however, does not lead us to alter that rule. "Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." (Stovall v. Denno (1967) 388 U.S. 293, 301; fn. omitted.)

In view of the foregoing disposition of this case we have not found it necessary to discuss plaintiff's additional contention that the rule of contributory

negligence is in violation of state and federal constitutional provisions guaranteeing equal protection of the laws.

The judgment is reversed.

SULLIVAN, J.

WE CONCUR:

WRIGHT, C.J.
TOBRINER, J.
BURKE, J.**

** Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

C O P Y

NGA LI v. YELLOW CAB CO. OF CALIFORNIA

L.A. 30277

CONCURRING AND DISSENTING OPINION BY MOSK, J.

Although I concur in the judgment and agree with the substance of the majority opinion, I dissent from its cavalier treatment of the recurring problem of the manner of applying a new court-made rule.

In footnote 24 the opinion denies that the court now "is intending to overrule" the case of Westbrook v. Mihaly (1970) 2 Cal.3d 765. Whether or not the majority subjectively intend to overrule Westbrook, the result and the text of the opinion indicate beyond any doubt that they have actually done so. Precedent is established not merely by what a court says; it is created primarily by what a court does. (Norris v. Moody (1890) 84 Cal. 143, 149; Childers v. Childers (1946) 74 Cal.App.2d 56, 61.)

Unfortunately the forthrightness of the majority opinion as a whole is sadly diminished by a curious reluctance to face up to reality by recognizing that this court is finally overruling Westbrook and several other cases on the subject of applying a new court-made rule to the parties at hand.

As recently as People v. Hitch (1974) 12 Cal.3d 641, 654, the majority of this court, while upholding the appellant's contentions, denied him relief on a theory that prospectivity should prevail over retroactive application of a new rule. I pointed out in my dissent (id. at p. 655) that "there is a third, and preferable, alternative: applying the new rule to the aggrieved party responsible for bringing the issue to judicial attention, and thereafter prospectively."

Up to now the majority never deigned to consider the third alternative, but persisted in their erroneous notion that the only choice was between total retroactivity and absolute prospectivity. This occurred in two other cases last year: see my concurring opinion in In re Stewart (1974) 10 Cal.3d 902, 907, and my dissenting opinion in In re Yurko (1974) 10 Cal.3d 857, 867.

In retrospect it is clear that Westbrook v. Mihaly, supra, was the point of departure in which the majority first strayed from the accepted doctrine that a prevailing party is to be awarded the fruits of his victory. In my concurring and dissenting opinion in that case (2 Cal.3d at p. 802) and in Hitch (12 Cal.3d at p. 656) I quoted from Stovall v. Denno (1967) 388 U.S. 293, to the effect that the benefits of a new

rule should apply to the parties to the proceeding which results in the new rule. In the instant case, the majority now quote that same portion of Stovall, this time with approval (ante, p. ___*).

Also, in Westbrook v. Mihaly (2 Cal.3d at p. 804) I noted that if a new rule is to apply prospectively only, "it will tend to deter counsel from presenting 'issues involving renovation of unsound or outmoded legal doctrines,'" citing Mishkin's foreword to the article on the 1964 term of the Supreme Court in 79 Harvard Law Review 56. The majority now adopt the same point based upon the same quotation (ante, p. ___**).

The majority paint their conclusion herein with such broad-brush and standardless terms as "considerations of fairness and public policy" and "sound principles of decision-making," without giving any clue why application of a new rule is fair to Nga Li, but somehow was unfair as applied over the past several years to Westbrook and to the several other litigants who helped us develop new rules of law only to be deprived of the benefits thereof. The most inexplicable previous result was Larez v. Shannon (1970) 2 Cal.3d 813, in which, it will be remembered, the plaintiffs prevailed completely on principle, but the majority went so far as to reverse a judgment in their favor.

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*Multilith opinion, page 48.
**Multilith opinion, pages 47-48.

Nevertheless it is comforting that the majority of the court have finally settled on the third of the three available alternatives in applying a new court-made rule. Despite the majority's gratuitous disclaimer, the bench and bar will understand that this court is now overruling, insofar as they are inconsistent, the following opinions: Westbrook v. Mihaly, supra, 2 Cal.3d 765; Alhambra City Sch. Dist. v. Mize (1970) 2 Cal.3d 806; Larez v. Shannon, supra, 2 Cal.3d 813, Foytik v. Aronson (1970) 2 Cal.3d 818; In re Yurko, supra, 10 Cal.3d 857; People v. Hitch, supra, 12 Cal.3d 641.

MOSK, J.

C O P Y

LI v. YELLOW CAB CO.

L.A. 30277

DISSENTING OPINION BY CLARK, J.

I dissent.

For over a century this court has consistently and unanimously held that Civil Code section 1714 codifies the defense of contributory negligence. Suddenly--after 103 years--the court declares section 1714 shall provide for comparative negligence instead. In my view, this action constitutes a gross departure from established judicial rules and role.

First, the majority's decision deviates from settled rules of statutory construction. A cardinal rule of construction is to effect the intent of the Legislature.[1/] The majority concedes

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1/ Tyrone v. Kelley (1973) 9 Cal.3d 1, 10-11 [106 Cal.Rptr. 761, 507 P.2d 65]; Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 256 [104 Cal.Rptr. 761, 502 P.2d 1049]; Mannheim v. Superior Court (1970) 3 Cal.3d 678, 686 [91 Cal.Rptr. 585, 478 P.2d 17]; Scala v. Jerry Witt & Sons, Inc. (1970) 3 Cal.3d 359, 366 [90 Cal.Rptr. 592, 475 P.2d 864]; Merrill v. Department of Motor Vehicles (1969) 71 Cal.2d 907, 918 [80 Cal.Rptr. 89, 458 P.2d 33].

"the intention of the Legislature in enacting section 1714 of the Civil Code was to state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance." (Ante, p. ___.*) Yet the majority refuses to honor this acknowledged intention --violating established principle.

The majority decision also departs significantly from the recognized limitation upon judicial action --encroaching on the powers constitutionally entrusted to the Legislature. The power to enact and amend our statutes is vested exclusively in the Legislature. (Cal.Const., art. III, § 3; art. IV, § 1.) "This court may not usurp the legislative function to change the statutory law which has been uniformly construed by a long line of judicial decisions." (Estate of Calhoun (1955) 44 Cal.2d 378, 387 [282 P.2d 880].) The majority's altering the meaning of section 1714, notwithstanding the original intent of the framers and the century-old judicial interpretation of the statute, represents no less than amendment by judicial fiat. Although the Legislature intended the courts to develop the working details of the defense of contributory

*Majority opinion page 29.

negligence enacted in section 1714 (see generally, Commentary, Arvo Van Alstyne, The California Civil Code, 6 West Civ. Code (1954) pp. 1-43), no basis exists--either in history or in logic--to conclude the Legislature intended to authorize judicial repudiation of the basic defense itself at any point we might decide the doctrine no longer serves us.

I dispute the need for judicial--instead of legislative--action in this area. The majority is clearly correct in its observation that our society has changed significantly during the 103-year existence of section 1714. But this social change has been neither recent nor traumatic, and the criticisms leveled by the majority at the present operation of contributory negligence are not new. I cannot conclude our society's evolution has now rendered the normal legislative process inadequate.

Further, the Legislature is the branch best able to effect transition from contributory to comparative or some other doctrine of negligence. Numerous and differing negligence systems have been urged over the years, yet there remains widespread disagreement among both the commentators and the states as to which one is

best. (See Schwartz, Comparative Negligence (1974) Appendix A, pp. 367-369 and § 21.3, fn. 40, pp. 341-342, and authorities cited therein.) This court is not an investigatory body, and we lack the means of fairly appraising the merits of these competing systems. Constrained by settled rules of judicial review, we must consider only matters within the record or susceptible to judicial notice. That this court is inadequate to the task of carefully selecting the best replacement system is reflected in the majority's summary manner of eliminating from consideration all but two of the many competing proposals --including models adopted by some of our sister states.[2/]

Contrary to the majority's assertions of judicial adequacy, the courts of other states--with near unanimity--have conceded their inability to determine the best system for replacing contributory negligence, concluding instead that the legislative

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2/ "It remains to identify the precise form of comparative negligence which we now adopt for application in this state. Although there are many variants, only the two basic forms need be considered here." (Ante, p. ___.*)

*Majority opinion page 41.

branch is best able to resolve the issue.[3/]

By abolishing this century old doctrine today, the majority seriously erodes our constitutional function. We are again guilty of judicial chauvinism.

CLARK, J.

I CONCUR:

McCOMB, J.

3/ See, e.g., Codling v. Paglia (1973) 32 N.Y.2d 330, 344-345 [298 N.E.2d 622, 345 N.Y.S.2d 461]; McGraw v. Corrin (Del. 1973) 303 A.2d 641, 644; Bridges v. Union Railroad Company (1971) 26 Utah 2d 281 [488 P.2d 738]; Parsonson v. Constr. Equipment Co. (1970) 386 Mich. 61 [191 N.W.2d 465] (concurring opinion); Krise v. Gillund (N.Dak. 1971) 184 N.W.2d 405; Peterson v. Culp (1970) 255 Ore. 269 [465 P.2d 876]; Vincent v. Pabst Brewing Co. (1970) 47 Wis.2d 120 [177 N.W.2d 513]; Maki v. Frelk (1968) 40 Ill.2d 193 [239 N.E.2d 445]; compare Hoffman v. Jones (Fla. 1973) 280 So.2d 431.

joint tort-feasors by injured party will release all other tort-feasors who contributed to wrong. Id.

An innocent party is to be fully compensated by a joint tort-feasor for his loss. Allstate Ins. Co. v. Clarke (Civ.App.1971) 471 S.W.2d 901, ref. n. r. e.

7. —— Common liability, joint tort-feasors

Where bidder was under no obligation to indemnify owner, pursuant to indemnity provision of contract calling for bidder to undertake certain work on owner's utility lines and poles, for settlement made for injury to bidder's employee in course of job as result of separate acts of negligence of both owner and bidder, whether employee was contributorily negligent was immaterial and submission of special issues relating to contributory negligence of employee, although error, was harmless. Bluebonnet Elec. Co-op., Inc. v. Universal Elec. Const. Co. (Civ.App.1971) 467 S.W.2d 567, ref. n. r. e.

15. Indemnity agreements

McCann Const. Co. v. Joe Adams and Son (Civ.App.1970) 458 S.W.2d 477 [main volume] reversed on other grounds 475 S.W.2d 721.

Generally, indemnity agreement will not protect indemnitee against consequences of his own negligence unless the obligation is expressed in unequivocal terms. Joe Adams and Son v. McCann Const. Co. (Sup. 1971) 475 S.W.2d 721.

Under oil well drilling contract providing that contractor would assume full liability for, and hold oil field leaseholder harmless, against all claims arising as result of accidents incident to drilling operation conducted by contractor, leaseholder was not indemnified for accidents arising out of its own negligence. Coastal States Crude Gathering Co. v. Williams (Civ.App.1972) 476 S.W.2d 339, ref. n. r. e.

General rule is that a contract of indemnity will not afford protection to the indemnitee against the consequences of his own negligence unless the contract clearly expresses such an obligation in unequivocal terms. Ref-Chem Corp. v. El Paso Products Co. (Civ.App.1974) 506 S.W.2d 701.

Contract providing indemnification for owner against claims asserted by contractor, its officers, agents, employees, or any member of the public, arising out of or in connection with the work, except for claims by a member of the public caused by the negligence of the owner without contributory negligence on the part of the contractor, provided indemnification for owner's own negligence, but only with respect to claims of the contractor, its agents and employees or where the claim arose out of the work being done by the contractor. Id.

16. Products liability

Manufacturer of defective intracath needle which was found liable to patient injured thereby was not entitled to contribution from either the packager and distributor if intracath unit of which needle was part or hospital in which patient was staying at time of injury, because both packager and hospital would be entitled to indemnification at common law against manufacturer which was solely liable for judgment and which had breached duty owed to packager and hospital. Vergott v. Deseret Pharmaceutical Co. (C.A.1972) 463 F.2d 12.

Where manufacturer sold dealer a truck with defectively designed cooling system and dealer materially and knowingly aggravated and contributed to condition by installing air conditioner which severely enhanced danger, both operating concurrently to cause accident, dealer could not recover indemnity from manufacturer but could recover contribution. Ford Motor Co. v. Russell & Smith Ford Co. (Civ.App.1971) 474 S.W.2d 549.

17. Landlord and tenant

Where pipeline owner which held easement over oil field for its pipeline created potentially dangerous condition in not marking location of underground pipeline but no injury would have resulted therefrom in absence of active negligence of oil field leaseholder in having water pit dug in preparation for well drilling at place over pipeline whose location leaseholder either knew or should have known, resulting in rupturing of pipeline and resulting fire in which plaintiffs' decedent, as operator of bulldozer digging water pit, died, pipeline owner was entitled to common law indemnity from leaseholder. Coastal States Crude Gathering Co. v. Williams (Civ.App. 1972) 476 S.W.2d 339, ref. n. r. e.

18. Contract provisions for contributions

Where indemnity contract between railroad and LP gas supplier provided that railroad was entitled to full indemnity if damages were caused by negligent acts or omissions of producer and that producer would share equally with the railroad in payment of loss if damages were caused by their joint or concurring negligence, and where neither was guilty of active negligence but they both, due to failure of each to act, were guilty of passive negligence which was joint and concurrent with sole cause not being attributable to either, railroad was entitled to contribution from producer for one-half of recovery by railroad employee against railroad in employee's action under Federal Employers' Liability Act (45 U.S.C.A. § 51 et seq.) against railroad for injuries sustained when he inhaled LP gas. Atchison, T. & S. F. Ry. Co. v. Denton (Civ.App.1971) 475 S.W.2d 821, ref. n. r. e.

19. Contractors and subcontractors

McCann Const. Co. v. Joe Adams and Son (Civ.App.1970) 458 S.W.2d 477 [main volume] reversed 475 S.W.2d 721.

Provision in contract between general contractor and subcontractor whereby subcontractor would indemnify general contractor for any injuries sustained by parties through or on account of any act or in connection with the work of the subcontractor did not entitle general contractor to indemnification from subcontractor for judgment entered against general contractor for injuries sustained by subcontractor's employees when concrete forms erected by general contractor before subcontractor began doing its work of pouring concrete collapsed solely by the fault of the general contractor. Joe Adams & Son v. McCann Const. Co. (Sup.1971) 475 S.W.2d 721.

30. Release

Where it did not appear that owner or operator of automobile which ran over infant plaintiff, or hospital where plaintiff was treated by physician, were joint tort-feasors with physician, settlement with and release of parties other than physician did not require reduction of damages recoverable from physician. Leong v. Wright (Civ.App.1972) 478 S.W.2d 839, ref. n. r. e.

38. Summary judgment

Evidence generated genuine issue of material fact whether trust agreement, which had been entered into between uninsured motorist carrier and its insured following automobile accident, which made insured trustee as to any recovery insured might make against uninsured motorist but which was silent as to insured being trustee as to any recovery he might make against joint tort-feasor, superseded trust agreement, which was contained in policy and which gave insurer right of reimbursement from any recovery against joint tort-feasor, precluding summary judgment for insurer, which had intervened in insured's suit against joint tort-feasor. Allstate Ins. Co. v. Clarke (Civ.App.1971) 471 S.W.2d 901, ref. n. r. e.

40. Evidence

In action against leaseholder and drilling contractor for wrongful death of operator of bulldozer whose blade struck and ruptured subterranean crude oil pipeline while digging water pit preparatory to well drilling operation for leaseholder, master drilling contract executed after date of accident by leaseholder and well drilling contractor which sought indemnity against leaseholder was properly excluded. Coastal States Crude Gathering Co. v. Williams (Civ.App. 1972) 476 S.W.2d 339, ref. n. r. e.

40.5 Jury questions

Where there was no showing that field personnel of general contractor were authorized to agree to indemnity obligation or that indemnity clause printed on work orders prepared by equipment supplier had been subject of negotiations between general contractor and equipment supplier, and executive of general contractor testified that he had no knowledge of indemnity clause printed on face of work order signed by general contractor's field superintendent after job for which cranes had been hired and during which damage to bridge tee occurred and that general contractor considered work orders as nothing more than receipts given in field after accomplishment of work, determination of whether contract of indemnity existed should have been left to jury as trier of fact. Hawa & Garrett General Contractors, Inc. v. Gorbett Bros. Welding Co. (Sup.1972) 480 S.W.2d 607.

45. Judgment, in general

Where under "trust agreement" insured agreed to hold any recovery he made against uninsured motorist for benefit of uninsured motorist insurer, insurer was not, on theory of contribution, entitled to recover its payments out of judgment insured had obtained against joint tort-feasor. Allstate Ins. Co. v. Clarke (Civ.App. 1971) 471 S.W.2d 901, ref. n. r. e.

Art. 2212a. Comparative negligence; contribution among joint tort-feasors

Texas 50%

Modified comparative negligence

Section 1. Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.

Contribution among joint tort-feasors

Sec. 2. (a) In this section:

(1) "Claimant" means any party seeking relief, whether he is a plaintiff, counterclaimant, or cross-claimant.

(2) "Defendant" includes any party from whom a claimant seeks relief.

(b) In a case in which there is more than one defendant, and the claimant's negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant.

(c) Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him.

(d) If an alleged joint tort-feasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or nonsuited after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants.

(e) If an alleged joint tort-feasor makes a settlement with a claimant but nevertheless is joined as a party defendant at the time of the submission of the case to the jury (so that the existence and amount of his negligence are submitted to the jury) and his percentage of negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tort-feasor.

(f) If the application of the rules contained in Subsections (a) through (e) of this section results in two claimants being liable to each other in damages, the claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant.

(g) All claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant.

(h) This section prevails over Article 2212, Revised Civil Statutes of Texas, 1925, and all other laws to the extent of any conflict.

Acts 1973, 63rd Leg., p. 41, ch. 28, §§ 1, 2, eff. Sept. 1, 1973.

Section 3 of the 1973 Act amended section 1 of article 6701b; §§ 4, 5 thereof provided:

"Sec. 4. Saving clause. This Act does not apply to any cause of action arising before its effective date.

"Sec. 5. Severability clause. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

Comparative Laws:

STATE	CITATION
Arkansas	Ark.Stats. § 27-1730.2
Connecticut	Laws 1973, c. 622
Maine	14 M.R.S.A. § 156
Massachusetts	M.G.L.A. c. 231, § 85
Minnesota	M.S.A. § 604.01
Mississippi	Code 1942 § 1454
Nebraska	R.R.S. § 25-1151
New Hampshire	R.S.A. 507:7-a
New Jersey	N.J.S.A. 2A:15-5.1 to 2A:15-5.3
Oklahoma	23 Okl.St.Ann. §§ 11, 12
Rhode Island	Gen.Laws 1956, § 9-20-4

Comparative Laws:

STATE	CITATION
South Dakota	SDCL § 20-9-2
Vermont	12 V.S.A. § 1036
Washington	Laws 1973, c. 138(X)
Wisconsin	W.S.A. § 895.045

Law Review Commentaries

Automobile insurance rate changes under comparative negligence. Jerry D. Todd, 36 Texas Bar J. 1153 (1973).

Automobile reparations reform bills. John M. Lawrence III, 36 Texas Bar J. 1117 (1972).

Comparative negligence. Frank T. Abraham and Don R. Riddle, 25 Baylor L.Rev. 411 (1973).

Comparative negligence in Texas. 11 Houston L.Rev. 101 (1973).

Negligence law, no-fault, and jury trial. Leon Green and Allen E. Smith, 51 Texas L.Rev. 825 (1973).

Proposed modified comparative negligence statute. Frank T. Abraham, 36 Texas Bar J. 1114 (1972).

Library references

Contribution ⇐5(2).
Negligence ⇐92.
C.J.S. Contribution § 11.
C.J.S. Negligence § 168(2).

Art. 2212b. Indemnity provisions in mineral agreements where negligence attributable to indemnitee

Section 1. The legislature finds that an inequity is fostered on certain contractors by the indemnity provisions contained in some agreements pertaining to wells for oil, gas, or water, or mines for other minerals. It is the intent of the legislature and the purpose of this Act to declare provisions for indemnity in certain agreements where there is negligence attributable to the indemnitee to be against the public policy of the State of Texas.

Sec. 2. Except as specified in Section 4 of this Act, a covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or mine for any mineral, is void and unenforceable if it purports to indemnify the indemnitee against loss or liability for damages arising from either death or bodily injury to persons, or injury to property, or any other loss, damage, or expense arising from either death or bodily injury, injury to property, or loss, damage, or expense, which is caused by or results from the sole or concurrent negligence of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

Sec. 3. The term "agreement pertaining to a well for oil, gas, or water, or mine for any mineral" as used in Section 2 of this Act, means any agreement or understanding, written or oral, concerning any operations related to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or disposing of oil, gas, or other minerals, or water, or designing, excavating, constructing, improving, or otherwise rendering services in or in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.

Sec. 4. (a) The provisions of this Act do not apply to loss or liability for damages, or any other expenses, arising from

(1) death or bodily injury to persons or injury to property resulting from radioactivity;

(2) injury to property resulting from pollution; or

(3) injury to property resulting from reservoir or underground damage.

(b) The provisions of this Act do not affect the validity of any insurance contract or any benefit conferred by the Workmen's Compensation Law of this state and do not deprive an owner of the surface estate of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals of the owner's land.

(c) The provisions of Section 2 of this Act shall not apply to any agreement providing for indemnity with respect to claims for personal injury or death to indemnitor's employees or agents, or the employees or agents of indemnitor's sub-contractors if the parties agree in writing that such indemnity obligation will be supported by available liability insurance coverage to be furnished by indemnitor: provided, however, that such indemnity obligation shall be only to the extent of the coverages and dollar limits of insurance agreed to be furnished; but in no event shall said insurance be required in an amount in excess of twelve times state basic limits for bodily injury, approved by the Board of Insurance Commissioners

and Washington State University during the 1973-75 biennium under the provisions of RCW 66.08.180. If this section is not deleted, the University of Washington will receive $300,000 less than anticipated, Washington State University will receive $200,000 less than anticipated, and the Divison of Health-Department of Social and Health Services will receive $500,000 more than anticipated for alcoholism programs authorized by RCW 70.96.040. Veto Message

Although the language of this section does not contain the word "appropriation," in the absence of any specific language to the contrary, the effect is an appropriation of $500,000 for additional expenditures by the Division of Health. The Alcoholism Program of the Division of Health was funded at the level recommended in my proposed budget for the 1973-75 biennium, and I do not believe the Legislature intended to provide additional funds for that program.

With the exception of the items described above, the remainder of the bill is approved."

CHAPTER 138

[Engrossed Senate Bill No. 2045]

COMPARATIVE NEGLIGENCE--IMPUTED NEGLIGENCE

WASHINGTON "PURE" FORM

AN ACT Relating to civil procedure; creating a new chapter in Title 4 RCW; and declaring an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages caused by negligence resulting in death or in injury to person or property, but any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering.

NEW SECTION. Sec. 2. The negligence of one marital spouse shall not be imputed to the other spouse to the marriage so as to bar recovery in an action by the other spouse to the marriage, or his or her legal representative, to recover damages from a third party caused by negligence resulting in death or in injury to the person.

NEW SECTION. Sec. 3. This act takes effect as of 12:01 a.m. on April 1, 1974.

NEW SECTION. Sec. 4. If any provision of this act or the application thereof to any person or circumstance is held

unconstitutional, the remainder of this act and the application of such provisions to other persons or circumstances shall not be affected thereby, and it shall be conclusively presumed that the legislature would have enacted the remainder of this act without such invalid or unconstitutional provision.

NEW SECTION. Sec. 5. Sections 1 through 4 of this act shall constitute a new chapter in Title 4 RCW.

Passed the Senate March 31, 1973.
Passed the House April 14, 1973.
Approved by the Governor April 23, 1973.
Filed in Office of Secretary of State April 24, 1973.

CHAPTER 139
[Engrossed Substitute Senate Bill No. 2800]
DEPARTMENT OF SOCIAL AND HEALTH
SERVICES BUDGET

AN ACT Adopting the budget for the department of social and health services and allied agencies; making appropriations and authorizing expenditures for the operations of the department and allied agencies for the fiscal biennium beginning July 1, 1973, and ending June 30, 1975; designating effective dates for certain appropriations; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. That a budget is hereby adopted for the department of social and health services and its allied agencies and subject to the provisions set forth in the following sections, the several amounts specified in the following sections, or so much thereof as shall be sufficient to accomplish the purposes designated, are hereby appropriated and authorized to be disbursed for salaries, wages and other expenses and for other specified purposes for the fiscal biennium beginning July 1, 1973, and ending June 30, 1975, except as otherwise provided, out of the several funds of the state hereinafter named.

NEW SECTION. Sec. 2. FOR THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES

General Fund Appropriation: PROVIDED, That
$594,866,929 is from state funds and
$6,541,168 is from private and local funds and
$417,713,198 is from federal funds: PROVIDED,
That any proposal to expend moneys or man years from an appropriated fund or account in excess of appropriations provided by law, based

CHAPTER 507

ACTIONS

507: 1 Partners.

[Repealed 1973, 378: 2, eff. Aug. 29, 1973, superseded by RSA 304-A: 18 et seq. (supp).]

507: 2 Coteñants.

ANNOTATIONS

Library references

Larceny: cotenant taking cotenancy property. 17 ALR3d 1394.

507: 7 False Checks, etc. Any person who makes, draws, utters or delivers any check, draft or order for the payment of money upon any bank or other depository, knowing that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment thereof, and which is not paid in full upon presentation, shall be liable to the person injured thereby.

Source. 1917, 55: 1. PL 328: 12. RL 384: 12. RSA 507: 7. 1971, 227: 5, eff. Aug. 17, 1971.

Amendments—1971. Omitted provisions relating to arrest.

507: 7-a [New] Comparative Negligence. Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury, or property damage, if such negligence was not greater than the causal negligence of the defendant, but the damages awarded shall be diminished, by general verdict, in proportion to the amount of negligence attributed to the plaintiff; provided that where recovery is allowed against more than one defendant, each such defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The burden of proof as to the existence or amount of causal negligence alleged to be attributable to a party shall rest upon the party making such allegation. This section shall govern all actions arising out of injuries and other damages sustained on and after August 12, 1969, and none other.

Source. 1969, 225: 1, eff. Aug. 12, 1969. 1970, 35: 1, eff. May 4, 1970.

Amendments—1970. Added at the end thereof the provision concerning the burden of proof as to comparative negligence.

HAWAII
49%

HAWAII
Regular Session

Act 227, Laws 1969

House Bill No. 857

AN ACT

RELATING TO TORT ACTIONS BASED ON NEGLIGENCE AND AMENDING CHAPTER 663 - HAWAII REVISED STATUTES.

BE IT ENACTEDBY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 663 of the Hawaii Revised Statutes is amended by adding a new Part to be appropriately designated and to read as follows:

Part-------Comparative Negligence

"Section 663 - Contributory negligence no bar; comparative negligence; findings of fact and special verdicts.

"(a) Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.

"(b) In any action to which subsection (a) of this section applies, the court, in a nonjury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict which shall state:

"(1) The amount of the damages which would

have been recoverable if there had been no contributory negligence; and

"(2) The degree of negligence of each party, expressed as a percentage.

"(c) Upon the making of the finding of fact or the return of a special verdict, as is contemplated by subsection (b) above, the court shall reduce the amount of the verdict in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made, provided, however, that if the said proportion is equal to or greater than the negligence of the person against whom recovery is sought, then, in such event, the court will enter a judgment for the defendant."

SECTION 2. The provisions of this Act shall not be retroactive and shall affect only those claims accruing after its effective date.

SECTION 3. This Act shall take effect upon its approval.

Approved, July 14, 1969

AMERICAN INSURANCE ASSOCIATION
85 JOHN STREET
NEW YORK, N. Y. 10038

Legislative Information Service

LAW MEMO 1272

THIS IS NOW LAW

HAWAII REGULAR SESSION 1969 H.B. 857

COMPARATIVE NEGLIGENCE -

Newly provides that contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.

Further provides that in any action to which the above applies, the court, in a non-jury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict which shall state: (1) the amount of damages which would have been recoverable if there had been no contributory negligence; and (2) the degree of negligence of each party, expressed as a percentage.

Further provides that upon the making of the finding of fact or the return of a special verdict, as contemplated above, the court shall reduce the amount of the verdict in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made, provided however that if the said portion is equal to or greater than the negligence of the person against whom recovery is sought, then, in such event, the court will enter a judgment for the defendant.

Provides that the provisions hereof shall affect only those claims accruing the effective date hereof.

ACT 227 Effective July 14, 1969

AG:sgt
9(8)

TEXT OF LAW ATTACHED

Senate Bill No. 524—Committee on Judiciary

CHAPTER 787

AN ACT relating to tort actions; providing for a system of comparative negligence in lieu of the defenses of contributory negligence; providing that multiple defendants shall be severally liable and damages shall be apportioned in accordance with negligence of each defendant; and providing other matters properly relating thereto.

[Approved May 3, 1973]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 41 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. In any action to recover damages for injury to persons or property in which contributory negligence may be asserted as a defense, the contributory negligence of the plaintiff shall not bar a recovery if the negligence of the person seeking recovery was not greater than the negligence or gross negligence of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person seeking recovery.

2. In such cases, the judge may, and when requested by any party shall instruct the jury that:

(a) The plaintiff may not recover if his contributory negligence has contributed more to the injury than the negligence of the defendant or the combined negligence of multiple defendants.

(b) If the jury determines the plaintiff is entitled to recover, it shall return by general verdict the total amount of damages the plaintiff would be entitled to recover except for his contributory negligence.

(c) If the jury determines that a party is entitled to recover, it shall return a special verdict indicating the percentage of negligence attributable to each party.

(d) The percentage of negligence attributable to the person seeking recovery shall reduce the amount of such recovery by the proportionate amount of such negligence.

3. Where recovery is allowed against more than one defendant in such an action:

(a) The defendants are severally liable to the plaintiff.

(b) Each defendants' liability shall be in proportion to his negligence as determined by the jury, or judge if there is no jury. The jury or judge shall apportion the recoverable damages among the defendants in accordance with the negligence determined.

Assembly Bill No.

CH

AN ACT relating to justices of the townships; and providing

[Ap

The People of the State of Nev do e

SECTION 1. NRS 4.020 is

4.020 1. [There shall be o of the state having a populatio the last preceding national ce United States Department of peace shall be elected by the qu eral state election in November

2. There shall be one just state having a population of preceding national census of States Department of Comm shall be elected by the qualif state election to be held in N election held every 4 years the

3.] *There shall be one ju state for which there shall be at a general state electio ceding, the following numb population of the township as census of the Bureau of the Commerce:*

(a) If the population is less

(b) If the population is 60,

2. The term of office of j on the 1st Monday in Ja

[3.] *3.* Justices of the pe boards of county commiss

[4.] *4.* The clerk of the after the election or a peace, certify under se ment and qualification be filed in the office of t character of such officer.

2. The board of cou a township of such justice of the pe a justice of the peac 1975.

Section 2 of this 1973. Section 1 of thi

#2

CS for HB 176

Sec. 09.65. CONTRIBUTORY NEGLIGENCE NO BAR TO ACTION: MODIFIED COMPARATIVE NEGLIGENCE. (a) In any action to recover damages for death or for injury to persons or property in which contributory negligence may be asserted as a defense, ~~the~~ contributory negligence ~~of the plaintiff~~ shall not bar a recovery if the negligence of the person seeking recovery was not greater than the negligence or gross negligence of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person seeking recovery.

(b)

Sec. 09.65.140. JURY INSTRUCTIONS. In such cases, the judge may, and when requested by any party shall instruct the jury that:

(1) The ~~plaintiff~~ claimant may not recover if his contributory negligence has contributed more to the injury than the negligence of the defendant or the combined negligence of multiple defendants.

(2) If the jury determines the plaintiff is entitled to recover, it shall return by general verdict the total amount of damages the ~~plaintiff~~ claimant would be entitled to recover except for his contributory negligence.

(3) If the jury determines that a ~~party~~ person is entitled to recover, it shall return a special verdict indicating the percentage of negligence attributable to each ~~party~~ person.

(4) The percentage of negligence attributable to the person seeking recovery shall reduce the amount of such recovery by the proportionate amount of such negligence.

Sec. 09.65. MULTIPLE PARTIES. (a) Each defendant is jointly and severally liable for the entire amount of the judgment awarded the caaimant.

(b) Contribution among jointly liable defendants shall be as provided in AS 09.16.

* Section 2. AS 09.16 is amended to read:

Sec. 09.16.020. PRO RATA SHARES. In determining the pro rata shares of tortfeasors in the entire liability

(1) their relative degrees of fault shall [NOT] be considered;

(2) if equity requires, the collective liability of some as a group constitutes a single share; and

(3) principles of equity applicable to contribution generally shall apply./

MODEL STATUTE COMPARATIVE NEGLIGENCE

Section 1. GENERAL RULES. (a) In all actions based on strict liability, negligence or recklessness, the fact the party bringing the action was at fault because that person was negligent or reckless or unreasonably and impliedly assumed the risk, shall not necessarily bar recovery; rather, the person's damages shall be diminished by the trier of fact in proportion to the amount of fault attributable to that person.

(b) The principles set forth in Subsection A shall also apply in actions for wrongful death with respect to the negligence of the plaintiff and his or her decedent.

(c) The principles set forth in Subsection A shall apply regardless of whether either party violated a criminal safety statute or had the last clear change to prevent the injury.

Section 2. PROCEDURAL RULES. (a) In any action to which this Act applies, the court in a non-jury trial shall make findings of fact, or in a jury trial, the jury shall answer special questions indicating:

(1) The amount of damages which the party bringing the action would be entitled to recover had that person not been at fault;

(2) The amount of the party's fault that had a bearing on that person's damages, expressed as a percentage.

The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering. The jury may, however, upon request of a party, be informed of the legal effect of their answers to the special questions.

(b) A court may make a limited reversal of a jury's verdict on the ground that its answer under (1) or (2) of subsection (a) was wholly unreasonable. The court may then determine a proper amount of damage or percentage of fault, utilizing the principles of additur and remittitur properly used in this state.

Section 3. MULTIPLE PARTIES. (a) This act in no way modifies the common-law principle that joint tortfeasors are jointly and severally liable for their torts.

(b) In all actions subject to this act, the trier of fact shall allocate fault on the basis of parties who are represented in court.

(c) In actions for contribution, damages shall be allocated on the basis of the relative fault of the parties to the contribution action.

Section 4 EFFECTIVE DATE. This act shall take effect_____,____, and shall apply only to actions arising out of events which occur on or after that date.

MICHIGAN LAW REVIEW

Vol. 51 FEBRUARY, 1953 No. 4

COMPARATIVE NEGLIGENCE*

William L. Prosser†

IN these days the ordinary legislature[1] is likely to find on its calendar a bill, sometimes approved and sponsored by the state bar association, which does away with contributory negligence as a complete defense in any negligence action, and substitutes instead something commonly miscalled "comparative negligence,"[2] which involves some method of dividing the damages between the parties. Such a bill is of course no novelty, as the ample literature on the subject indicates.[3]

* This article is one of the Thomas M. Cooley lectures delivered by Dean Prosser at the University of Michigan Law School, February 2-6, 1953. The series, "Selected Topics on the Law of Torts," will eventually be published in book form by the University of Michigan Law School.—Ed.

† Boalt Professor of Law and Dean of the Law School, University of California, Berkeley.—Ed.

1 "We understand that legislation of this type was introduced this year [1951] in the following 16 states: Arizona, Arkansas, California, Colorado, Kansas, Massachusetts, Michigan, Missouri, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah and Washington." Lipscomb, "Comparative Negligence," INS. L.J. No. 344, 667 at 674 (Sept. 1951).

2 "Comparative negligence" properly refers only to a comparison of the fault of the plaintiff with that of the defendant. It does not necessarily result in any division of the damages, but may permit full recovery by the plaintiff notwithstanding his contributory negligence. Traditionally, because of the origin of the term and its early history in Illinois (infra, text at notes 110-119), it has been associated with the idea of degrees of negligence, and a comparison of "slight," "ordinary," and "gross." In the interest of clarity the term should be avoided, and the statutes here in question should be called "damage apportionment" or "comparative damages" acts. See note, 12 CORN. L.Q. 113 (1926). "Comparative negligence" is, however, in much too general use to permit much hope of its elimination.

3 The classic article on the subject is Mole and Wilson, "A Study of Comparative Negligence," 17 CORN. L.Q. 333, 604 (1932). Two recent discussions, both excellent and exhaustive, are Turk, "Comparative Negligence on the March," 28 CHI-KENT L. REV. 189, 304 (1950), and Philbrick, "Loss Apportionment in Negligence Cases," 99 UNIV. PA. L. REV. 572, 766 (1951). A very thorough study, going into all the complications, especially of the multiple-party problem, is the book by Gregory, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936). See also Gregory, "Loss Distribution by Comparative Negligence," 21 MINN. L. REV. 1 (1936); Berg, "Comparative Negligence—A Substitute for the Rule of Contributory Negligence," 9 S. D. B. J. 200 (1941); comment, 22 So. CAL. L. REV. 276 (1949). Numerous other articles bearing on particular statutes are cited in the succeeding notes.

Similar bills[4] began to multiply in the legislatures during the decade before the last war, when the pressure of the increasing automobile accident rate compelled consideration of the problem of the uncompensated victim. It led even to proposals for an automobile accident compensation plan, analogous to the workmen's compensation acts and to be administered by some board or commission.[5] In at least one instance a "comparative negligence" act was adopted under threat of such a compensation plan, and after a bill establishing it had passed one house of the legislature at the preceding session.[6] During the war, when gasoline rationing reduced the accident rate, the agitation fell off; but with the slaughter on the highways resumed and accelerated, it has been revived in full vigor. A conservative prophet would have no difficulty in predicting the adoption of damage apportionment acts in several additional states within the next few years.

The United States is virtually the last stronghold of contributory negligence. The last vestige of the complete defense disappeared long since from all of continental Europe, which divides the damages.[7]

[4] In addition to the statutes adopted, the following unsuccessful bills have received mention in print:

New York, 1930. See Mole and Wilson, "A Study of Comparative Negligence," 17 CORN. L.Q. 333, 604 at 643 (1932); GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 59 (1936).

Minnesota, 1940. See PROCEEDINGS OF MINNESOTA STATE BAR ASSN., 12-17 (1940).

Pennsylvania, 1943. See note, 17 TEMPLE L.Q. 276 (1943).

New York, 1947. See note, 22 N.Y. UNIV. L.Q. REV. 458 (1947).

Michigan, 1947. See Neef, "Comparative Negligence," 27 Mich. S. B. J. 34 (May, 1948).

Illinois, 1949. See 30 CHICAGO BAR REC. 391, 394 (1949).

[5] Such a compensation plan is now in effect in Saskatchewan. Sask. Stats. (1947) c. 15.

[6] "Yet that very theory prevailed in Wisconsin when the legislature passed our comparative negligence law in 1931, which followed the introduction into our 1929 legislature of a bill placing the entire field of compensation for accidents under the jurisdiction of a commission, which bill passed the Wisconsin senate but did not reach the house for action before the termination of the legislature. It has been fairly stated, I believe, that were it not for the comparative negligence doctrine, adopted by the Wisconsin legislature in 1931, there is little question but that serious effort would have been made in the succeeding legislature of 1933 to put the entire field of damages, arising as the result of an accident, under the jurisdiction of a commission, and it was aptly said by the author of Wisconsin's comparative negligence law that: 'With comparative negligence as the rule applicable to automobile litigation in Wisconsin, there was no immediate need, if any, for the adoption of any commission form of administration of automobile legislation.'" Hayes, "Rule of Comparative Negligence and Its Operation in Wisconsin," 23 Or. STATE BAR ASSN. REP. 233 at 234 (1950).

[7] The European history is well reviewed in Turk, "Comparative Negligence on the March," 28 CHI-KENT L. REV. 189 at 238-244 (1950).

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Chemical Co. v. Lefebvre, 42
23 Que. K.B. 459 (1915).

[10] New Zealand Stat. (1

[11] Western Australia Sta
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[13] 11 East 60, 103 Eng.

Great Britain,[8] all of the Canadian provinces,[9] New Zealand[10] and Western Australia[11] now have come to the same result, so that very little of the British Empire is left with the common law rule. Even in the United States there is far more in the way of division of damages than is generally realized. There are some forty statutes[12] on the books, and apparently in successful operation; and it is a fair estimate that there are about twelve hundred cases in which they have been applied. Almost nothing has been written about these decisions; but they represent a body of law of considerable importance, in which a procedure over which there has been much theoretical dispute has been put into practice. It is the purpose of this article to inquire, so far as possible, into the actual operation of the damage apportionment statutes, and to offer some conclusions as to the most desirable form of act for any legislature about to set forth upon these relatively uncharted seas.

The State of the Common Law

The defense of contributory negligence originated in 1809 with the case of *Butterfield v. Forrester*.[13] The defendant, who was repairing his house, had left a pole projecting across part of the highway; and the plaintiff, riding home from a public house in the dusk, did not see the pole, rode into it, and was thrown from his horse and injured. Lord Ellenborough disposed of the matter very briefly with the statement that "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it,

[8] Law Reform Act of 1945, 8 & 9 Geo. 6, c. 28. See WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 533-535, and c. 13 (1951); Williams, "The Law Reform (Contributory Negligence) Act, 1945," 9 MOD. L. REV. 105 (1945).

[9] Most of the Canadian statutes have been amended since their original enactment. Their latest form is found in Alberta Rev. Stat. (1942) c. 116; British Columbia Rev. Stat. (1936) c. 52, amended by Rev. Stat. (1948) c. 68; Manitoba R.S.M. (1940) c. 215; New Brunswick Rev. Stat. (1927) c. 143; Nova Scotia Stat. (1926) c. 3; Ontario Rev. Stat. (1937) c. 212; Prince Edward Island Stat. (1938) c. 5; Saskatchewan Stat. (1944) c. 23. Quebec, with its civil law heritage, divides the damages without a statute. See Nichols Chemical Co. v. Lefebvre, 42 Can. S.C. Rep. 402 (1909); Canadian Pac. Ry. v. Frechette, 23 Que. K.B. 459 (1915).

[10] New Zealand Stat. (1947) No. 3, p. 29. See 23 N.Z. L.J. 215 at 229 (1947).

[11] Western Australia Stat. (1947) No. 23. See Shatwell, "Contributory Negligence and Apportionment Statutes," 1 W. AUST. ANN. L. REV. 145 (1949).

[12] The Report of the Casualty Committee in 18 INSURANCE COUNSEL J. 374 (1951), which contains a useful review of the law of the various states on contributory negligence and contribution, omits any reference to a number of these statutes.

[13] 11 East 60, 103 Eng. Rep. 926 (1809).

if he did not himself use common and ordinary caution to be in the right."[14]

There has been much speculation as to why the rule thus declared found such ready acceptance in later decisions, both in England and in the United States.[15] The explanations given by the courts themselves never have carried much conviction. Most of the decisions have talked about "proximate cause," saying that the plaintiff's negligence is an intervening, insulating cause between the defendant's negligence and the injury.[16] But this cannot be supported unless a meaning is assigned to proximate cause which is found nowhere else. If two automobiles collide and injure a bystander, the negligence of one driver is not held to be a superseding cause which relieves the other of liability; and there is no visible reason for any different conclusion when the action is by one driver against the other. It has been said that the defense has a penal basis, and is intended to punish the plaintiff for his own misconduct;[17] or that the court will not aid one who is himself at fault, and he must come into court with clean hands.[18] But this is no explanation of the many cases, particularly these of the last clear chance, in which a plaintiff clearly at fault is permitted to recover. It has been said that the rule is intended to discourage accidents, by denying recovery to those who fail to use proper care for their own safety; but the assumption that the speeding motorist is, or should be, meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant. Probably the true explanation lies merely in the highly individualistic attitude of the common law of the early nineteenth century. The period of development of contributory negligence was that of the industrial revolution, and there is reason to think that the courts found in this

[14] Continuing: "In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorise another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. 'Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.'" 11 East 60, 61, 103 Eng. Rep. 926, 927 (1809).

[15] See Bohlen, "Contributory Negligence," 21 HARV. L. REV. 233 (1908); Lowndes, "Contributory Negligence," 22 GEORGETOWN L.J. 674 (1934); Green, "Contributory Negligence and Proximate Cause," 6 N.C. L. Rev. 3 (1927).

[16] Bowen, L.J., in Thomas v. Quartermaine, 18 Q.B.D. 685 at 697 (1897); Gilman v. Central Vermont R. Co., 93 Vt. 340, 107 A. 122 (1919); Ware v. Saufley, 194 Ky. 53, 237 S.W. 1060 (1922); Exum v. Atlantic Coast Line R. Co., 154 N.C. 408, 70 S.E. 845 (1911); Chesapeake & Ohio R. Co. v. Wills, 111 Va. 32, 68 S.E. 395 (1910).

[17] Lord Halsbury, L.C., in Wakelin v. London & S.W. R. Co., 12 A.C. 41, 45 (1886).

[18] Owen, C.J., in Davis v. Guarnieri, 45 Ohio St. 470, 15 N.E. 350 (1887).

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defense, along with the concepts of duty and proximate cause, a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds.[19]

Criticism of the denial of all recovery was not slow in coming, and it has been with us for more than a century.[20] The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free. No one ever has succeeded in justifying that as a policy, and no one ever will. Its outrageousness became especially apparent in the cases of injuries to employees, where a momentary lapse of caution after a lifetime of care in the face of the employer's negligence might wreck a man's life and leave him uncompensated as a charge upon society; and the demand for some modification of the rule became an integral part of the movement which finally led to the workmen's compensation acts.

To some limited extent the remedy has been in the hands of the jury. Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff's fault.[21] But the process is at best a haphazard and most unsatisfactory one. There are still juries which understand and respect the court's instructions on contributory negligence, just as there are other juries which throw them out of the window and refuse even to reduce the recovery by so much as a dime. Above all there are many directed verdict cases where the plaintiff's negligence, however slight it may be in comparison with that of the defendant, is still clear beyond dispute, and the court has no choice but to declare it as a matter of law. A striking illustration is the Minnesota case in which a motorist entering an intersection failed to yield the right of way on the mistaken assumption that the speeding defendant would slow down for him, and the supreme court uttered an almost pathetic appeal to a legislature,

[19] Malone, "The Formative Era of Comparative Negligence," 41 ILL. L. REV. 151 (1946); Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 LA. L. REV. 125 (1945).

[20] One of the best statements of the attack on contributory negligence is found in Green, "Illinois Negligence Law," 39 ILL. L. REV. 36, 116, 197 (1944).

[21] "We but blind our eyes to obvious reality to the extent that we ignore the fact that in many cases juries apply it [apportionment] in spite of us." Holt, J., in Haeg v. Sprague, Warner & Co., 202 Minn. 425 at 430, 281 N.W. 261 (1938). See also ULMAN, A JUDGE TAKES THE STAND 30-34 (1933).

which still remains indifferent, to relieve it of the necessity of such decisions by adopting a "comparative negligence" act.[22]

Although the courts almost from the beginning have displayed an uneasy consciousness that something is wrong, they have been slow to move. In only three respects have the rigors of the ordinary rule of contributory negligence been modified at common law. The defense was one to a negligence action only, and it never applied to intentional torts such as assault and battery;[23] and from this there developed the first exception, that mere contributory negligence is no defense where the defendant's conduct is so aggravated that it approaches intent, and can be characterized as "wilful," "wanton," or "reckless."[24] In such a case the plaintiff is barred from recovery only when his own conduct is similarly aggravated, and can be described in the same terms.[25] There is here, of course, a rough balancing of one fault against the other, but the difference is declared to be one of kind rather than of degree. Except in two or three states such as Minnesota,[26] which have misdefined "wilful negligence" to include any negligence whatever after discovery of the peril of another, the exception has applied to relatively few cases, and has had only limited importance.

A second exception, of comparatively recent origin, eliminates the defense of contributory negligence where the action is founded upon the defendant's violation of a statute, such as a child labor act,[27] which

[22] "No one can appreciate more than we the hardship of depriving plaintiff of his verdict and of all right to collect damages from defendant; but the rule of contributory negligence, through no fault of ours, remains in our law and gives us no alternative other than to hold that defendant is entitled to judgment notwithstanding the verdict. It would be hard to imagine a case more illustrative of the truth that in operation the rule of comparative negligence would serve justice more faithfully than that of contributory negligence. . . . But as long as the legislature refuses to substitute the rule of comparative for that of contributory negligence we have no option but to enforce the law in a proper case." Haeg v. Sprague, Warner & Co., 202 Minn. 425 at 430, 281 N.W. 261 (1938).

[23] Ruter v. Foy, 46 Iowa 132 (1877); Steinmetz v. Kelly, 72 Ind. 442, 37 Am. Rep. 170 (1880); Brendle v. Spencer, 125 N.C. 474, 34 S.E. 634 (1899); Birmingham Railway, L. & P. Co. v. Jones, 146 Ala. 277, 41 S. 146 (1906).

[24] Atchison, T. & S.F. R. Co. v. Baker, 79 Kan. 183, 98 P. 804 (1908) ("wanton misconduct"); Ziman v. Whitley, 110 Conn. 108, 147 A. 370 (1929) ("reckless indifference"); Mihelich v. Butte Electric R. Co., 85 Mont. 604, 281 P. 540 (1929) ("wilful or wanton act"); Walldren Express & Van Co. v. Krug, 291 Ill. 472, 126 N.E. 97 (1928) ("conscious indifference to consequences").

[25] Hinkle v. Minneapolis, A. & C. R. Co., 162 Minn. 112, 202 N.W. 340 (1925); Moore v. Lindell R. Co., 176 Mo. 528, 75 S.W. 672 (1903); Osteen v. Atlantic Coast Line R. Co., 119 S.C. 438, 112 S.E. 352 (1923); Elliott v. Philadelphia Transp. Co., 356 Pa. 643, 53 A. (2d) 81 (1947).

[26] See notes, 8 MINN. L. REV. 329 (1924); 24 MINN. L. REV. 81 (1939).

[27] Lenahan v. Pittston Coal Mining Co., 218 Pa. 311, 67 A. 642 (1907); Karpeles v. Heine, 227 N.Y. 74, 124 N.E. 101 (1919); Pinoza v. Northern Chair Co., 152 Wis. 473, 140 N.W. 84 (1913); Dasha v. Virginia & Rainy Lake Co., 145 Minn. 171, 176 N.W. 482 (1920); Louisville, N. & St. L. R. Co. v. Lyons, 155 Ky. 396, 159 S.W. 971 (1913);

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Chicago & N.W. R. Co., 121 Mich.

[29] Dart v. Pure Oil Co., 223
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[30] See Schofield, "Davies v. Ma
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[31] 10 M. & W. 546, 152 Eng. R

[32] "The groans, ineffably and
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is construed as intended to place the entire responsibility on the defendant, and to protect the plaintiff even against the consequences of his own fault.[28] The reason given is the obvious one, that otherwise the intent of the legislature would be defeated. Such acts are, however, few in number and clearly of a special character; and as to the violation of all other statutes, contributory negligence remains effective as a complete defense.[29]

The most important common law modification is that which bears the name of the last clear chance.[30] It originated in 1842 in the case of *Davies v. Mann*,[31] where the plaintiff left his ass fettered in the highway and the defendant drove into it. The doctrine found ready acceptance in the United States;[32] but from its origin it has acquired

Terry Dairy Co. v. Nalley, 146 Ark. 448, 225 S.W. 887 (1920); American Car & Foundry Co. v. Armentraut, 214 Ill. 509, 73 N.E. 766 (1905).

[28] Prohibiting the sale of dangerous articles to minors: Pizzo v. Wiemann, 149 Wis. 235, 134 N.W. 899 (1912); McMillen v. Steele, 275 Pa. 584, 119 A. 721 (1923).

Protection of intoxicated persons: Davies v. McKnight, 146 Pa. 610, 23 A. 320 (1892); Hauth v. Sambo, 100 Neb. 160, 158 N.W. 1036 (1916). Cf. Mayes v. Byers, 214 Minn. 54, 7 N.W. (2d) 403 (1943) (requiring stairways in "on sale" liquor establishments to be well lighted); Bennett Drug Stores v. Mosely, 67 Ga. App. 347, 20 S.E. (2d) 208 (1942) (sale of poison to person who does not know its character).

Factory acts and other statutes for the protection of workmen: Osborne v. Salvation Army, (2d Cir. 1939) 107 F. (2d) 929; Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N.E. 131 (1899); Caspar v. Lewin, 82 Kan. 604, 109 P. 657 (1910); Chicago-Coulterville Coal Co. v. Fidelity & Cas. Co., (D.C. Mo. 1904) 130 F. 957.

Railway fencing acts: Flint & Pere Marquette R. Co. v. Lull, 28 Mich. 510 (1874); Congdon v. Central Vermont R. Co., 56 Vt. 390, 48 Am. Rep. 793 (1883); Welty v. Indianapolis & V. R. Co., 105 Ind. 55, 4 N.E. 410 (1885); Atchison, T. & S.F. R. Co. v. Paxton, 75 Kan. 197, 88 P. 1082 (1907); Quackenbush v. Wisconsin & M. R. Co., 71 Wis. 472, 37 N.W. 834 (1888).

Statutes making railways liable for fires: West v. Chicago & N. W. R. Co., 77 Iowa 654, 35 N.W. 479 (1887); Bowen v. Boston & A. R. Co., 179 Mass. 524, 61 N.E. 141 (1901); Matthews v. Missouri Pac. R. Co., 142 Mo. 645, 44 S.W. 802 (1897); Peter v. Chicago & N.W. R. Co., 121 Mich. 324, 80 N.W. 295 (1899).

[29] Dart v. Pure Oil Co., 223 Minn. 526, 27 N.W. (2d) 555 (1947); Browne v. Siegel, Cooper & Co., 191 Ill. 226, 60 N.E. 815 (1901); Keenan v. Edison Electric Ill. Co., 159 Mass. 379, 34 N.E. 366 (1893); Narramore v. Cleveland, C.C. & St. L. R. Co., (6th Cir. 1899) 96 F. 298; Payne v. Vance, 103 Ohio St. 59, 133 N.E. 85 (1921); Smith v. Central of Ga. R. Co., 165 Ala. 407, 51 S. 792 (1910); Gartin v. Meredith, 153 Ind. 16, 53 N.E. 936 (1899); Gipson v. Southern R. Co., (C.C. Ala. 1905) 140 F. 410; Brown v. Chicago & N.W. R. Co., 109 Wis. 384, 85 N.W. 271 (1901). See Prosser, "Contributory Negligence as Defense to Violation of Statute," 32 MINN. L. REV. 105 (1948).

[30] See Schofield, "Davies v. Mann: Theory of Contributory Negligence," 3 HARV. L. REV. 263 (1890); Bohlen, "Contributory Negligence," 21 HARV. L. REV. 233 (1908); Smith, "Last Clear Chance," 82 CENT. L.J. 425, 55 AM. L. REV. 897 (1916); Lowndes, "Contributory Negligence," 22 GEORGETOWN L.J. 674 (1934); James, "Last Clear Chance: A Transitional Doctrine," 47 YALE L.J. 704 (1938); MacIntyre, "The Rationale of Last Clear Chance," 53 HARV. L. REV. 1225 (1940).

[31] 10 M. & W. 546, 152 Eng. Rep. 588 (1842).

[32] "The groans, ineffably and mournfully sad, of Davies' dying donkey, have resounded around the earth. The last lingering gaze from the soft, mild eyes of this docile animal, like the last parting sunbeams of the softest day in spring, has appealed to and

forever the name of the "jackass doctrine," with whatever implications that may carry. In its original form, it was stated to be that where the defendant had the last, and therefore the better, opportunity to avoid the accident, his negligence superseded that of the plaintiff, and contributory negligence was no defense. As in the case of contributory negligence itself, the explanations given are not at all convincing. It is sometimes said[33] that the later negligence of the defendant must necessarily be the greater negligence, and that it is a rule of comparative fault which is being applied. This may be true in some instances where the defendant discovers the plaintiff's helpless situation and his conduct displays reckless disregard of it; but it can scarcely account for many others in which the negligence consists merely of failure to discover the situation at all,[34] or of slowness, clumsiness, inadvertence or an error in judgment in dealing with it.[35] Most of the courts have talked of proximate cause, which makes no sense at all. If the negligence of the two parties injures a third, as where a collision injures a bystander, it never has been held that the party whose fault is prior in point of time is relieved of responsibility by the mere fact that the negligence of the other is later;[36] and no one ever has offered any reason for a different result where the action is between the negligent parties.

The real explanation would appear to be nothing more than a dislike for the defense of contributory negligence, and a rebellion against its application in a group of cases where its hardship is most apparent. The last clear chance has been called a "transitional doctrine,"[37] a way

touched the hearts of men. There has girdled the globe a band of sympathy for Davies' immortal 'critter.' Its ghost, like Banquo's ghost, will not down at the behests of the people who are charged with inflicting injuries, nor can its groanings be silenced by the rantings and excoriations of carping critics. The law as enunciated in that case has come to stay." McLain, J., in Fuller v. Illinois Central R. Co., 100 Miss. 705 at 717, 56 S. 783 (1911).

[33] Wilson v. Southern Traction Co., 111 Tex. 361, 234 S.W. 663 (1921); Rawitzer v. St. Paul City R. Co., 93 Minn. 84, 100 N.W. 664 (1904); Moreno v. Los Angeles Transfer Co., 44 Cal. App. 551, 186 P. 800 (1920); Dildine v. Flynn, 116 Kan. 563, 227 P. 340 (1924).

[34] Nicol v. Oregon-Washington R. & N. Co., 71 Wash. 409, 128 P. 628 (1912); Pickett v. Wilmington & W. R. Co., 117 N.C. 616, 23 S.E. 264 (1895); Leinbach v. Pickwick Greyhound Lines, 138 Kan. 50, 23 P. (2d) 449 (1933); Independent Lumber Co. v. Leatherwood, 102 Colo. 460, 79 P. (2d) 1052 (1938); Teakle v. San Pedro, L.A. & S.L. R. Co., 32 Utah 276, 90 P. 402 (1907).

[35] As for example in Smith v. Connecticut R. & L. Co., 80 Conn. 268, 67 A. 888 (1907); Clark v. Wilmington & W.R. Co., 109 N.C. 430, 14 S.E. 43 (1891).

[36] Cordiner v. Los Angeles Traction Co., 5 Cal. App. 400, 91 P. 436 (1907); Tetreault v. Gould, 83 N.H. 99, 138 A. 544 (1927); Austin Electric R. Co. v. Faust, 63 Tex. Civ. App. 91, 133 S.W. 449 (1910).

[37] James, "Last Clear Chance: A Transitional Doctrine," 47 Yale L.J. 704 (1938).

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[38] Storr v. New York Centra
R. Co. v. Masterson, 126 Ohio
Watts, 110 Tex. 106, 216 S.W.

[39] Nicol v. Oregon-Washing
Pickett v. Wilmington & W. R.
Pedro, L.A. & S.L. R. Co., 32 U
Leatherwood, 102 Colo. 460, 79
Lines, 138 Kan. 50, 23 P. (2d)

[40] Indianapolis Traction &
(1911); Darling v. Pacific Electr
Webster City, 222 Iowa 849, 27
N.H. 320, 91 A. 179 (1914); Y
(1927).

[41] British Columbia Elec. R
& R. R. Co., 118 N.C. 1010, 2
Morrison, 69 Ark. 289, 62 S.W.
Vt. 523, 116 A. 83 (1922).

[42] See DeMuth, "Derogation
7 ROCKY MT. L. REV. 161 (193

[43] See Gaines, "The Human
(1935); Becker, "The Humanita

station on the road to apportionment of damages; but its effect has been to freeze the transition rather than to speed it. Actually the last clear chance cases present one of the worst tangles known to the law. In some jurisdictions the application of the rule has been limited to cases where the plaintiff is helpless and the defendant has in fact discovered the situation;[38] in others it is extended to cases where the defendant might have discovered it by the exercise of reasonable care.[39] In still others it is applied to situations where the plaintiff is not helpless at all and continues to be negligent, but is unaware of his danger, while the defendant has discovered it.[40] In still others it is applied to cases where the defendant's antecedent negligence, as in driving a car with defective brakes, has rendered him unable to take advantage of the "last clear chance" he would otherwise have had.[41]

Intermingled with these rules there is so much in the way of disagreement over the effect to be given to circumstantial evidence, and whether "ought to have seen" is equivalent to "saw," that there are almost literally forty-eight sets of rules in as many states. There is often the greatest confusion in a single state;[42] and in many jurisdictions, as the defendant's negligence increases the less his liability will be—the man who looks and discovers the danger but is slow in applying his brakes may be liable, where the man who never looks at all or who has no brakes to apply is not. Missouri has developed a fearful and wonderful "humanitarian doctrine," which seems to be comprehensible only in Missouri, if there;[43] and three or four states, such as Illinois,

[38] Storr v. New York Central R. Co., 261 N.Y. 348, 185 N.E. 407 (1933); Cleveland R. Co. v. Masterson, 126 Ohio St. 42, 183 N.E. 873 (1932); St. Louis S.W. R. Co. v. Watts, 110 Tex. 106, 216 S.W. 391 (1919).

[39] Nicol v. Oregon-Washington R. & N. Co., 71 Wash. 409, 128 P. 628 (1912); Pickett v. Wilmington & W. R. Co., 117 N.C. 616, 23 S.E. 264 (1895); Teakle v. San Pedro, L.A. & S.L. R. Co., 32 Utah 276, 90 P. 402 (1907); Independent Lumber Co. v. Leatherwood, 102 Colo. 460, 79 P. (2d) 1052 (1938); Leinbach v. Pickwick Greyhound Lines, 138 Kan. 50, 23 P. (2d) 449 (1933).

[40] Indianapolis Traction & Term. Co. v. Croly, 54 Ind. App. 566, 96 N.E. 973 (1911); Darling v. Pacific Electric R. Co., 197 Cal. 702, 242 P. 703 (1925); Groves v. Webster City, 222 Iowa 849, 270 N.W. 329 (1936); Tyrrell v. Boston & Me. R. Co., 77 N.H. 320, 91 A. 179 (1914); Yazoo & M.V. R. Co. v. Lee, 148 Miss. 809, 114 S. 866 (1927).

[41] British Columbia Elec. R. Co. v. Loach, [1916] 1 A.C. 719; Lloyd v. Albemarle & R. R. Co., 118 N.C. 1010, 24 S.E. 805 (1898); Little Rock Traction & Elec. Co. v. Morrison, 69 Ark. 289, 62 S.W. 1045 (1901); Dent v. Bellows Falls & S.R. St. R. Co., 95 Vt. 523, 116 A. 83 (1922).

[42] See DeMuth, "Derogation of the Common Law Rule of Contributory Negligence," 7 ROCKY MT. L. REV. 161 (1935).

[43] See Gaines, "The Humanitarian Doctrine in Missouri," 20 ST. LOUIS L. REV. 113 (1935); Becker, "The Humanitarian Doctrine," 3 Mo. L. REV. 392 (1938).

Minnesota and South Carolina,[44] repudiate the whole "last clear chance" by name, and then proceed to apply it in cases of discovered peril by miscalling it "wilful negligence," or "proximate cause." It is really a most amazing picture, which could be the work of no one but lawyers.

Quite apart from all this confusion, the real objection to the last clear chance is that it seeks to alleviate the hardships of contributory negligence by shifting the entire loss due to the fault of both parties from the plaintiff to the defendant. It is still no more reasonable to charge the defendant with the plaintiff's share of the consequences of his fault than to charge the plaintiff with the defendant's; and it is no better policy to relieve the negligent plaintiff of all responsibility for his injury than it is to relieve the negligent defendant. The whole floundering, haphazard, makeshift device operates in favor of some plaintiffs by inflicting obvious injustice upon some defendants; but it leaves untouched the greater number of contributory negligence cases in which the necessary time interval or element of discovery does not appear and the last clear chance cannot apply.

When actuaries sit down to calculate liability insurance rates for automobile drivers and other defendants, they must, under the existing state of the law, take into account the certainty that in many cases the insured who negligently injures another will escape all liability; that in others, juries, in partial defiance of the court's instructions, will diminish the damages by some uncertain amount and to that extent divide the loss between the parties; and that in still others, where the last clear chance applies or the instructions are jettisoned completely, the entire loss resulting from the fault of both parties will fall upon the insured. From an actuarial point of view these possibilities undoubtedly, in some unknown degree, balance one another; but as a pattern for the operation of courts and the administration of justice they leave much to be desired.

Apart from the inevitable self-interest of defendants who find an advantage in the present state of the law, proposals for division of the damages meet with two objections. One is that it is impossible to compare fault with fault, and that any apportionment of the loss on the basis of such a comparison can be nothing more than the wildest guess. Obviously any estimate that 40 per cent of the total fault rests with the pedestrian who walks out into the street in the path of an

[44] Walldren Express & Van Co. v. Krug, 291 Ill. 472, 126 N.E. 97 (1928); Anderson v. Minneapolis, St. P. & S.S.M. R. Co., 103 Minn. 224, 114 N.W. 1123 (1908); Clyde v. Southern Public Utilities Co., 109 S.C. 290, 96 S.E. 116 (1918).

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[45] Early admiralty cases, arou
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8th ed., 135 (1923).

[46] Buckham v. Chapman, Ad. C
File 128, No. 350, Ass. Book (June
OF COLLISIONS AT SEA, 8th ed., 19

automobile, and 60 per cent with the driver who is not looking and runs him down, represents nothing resembling accuracy based on demonstrable fact. The estimate might quite as well be anywhere between 25-75 and 75-25. Yet it is equally clear that a division of the plaintiff's damages on any such basis is at least more accurate than one based on the arbitrary conclusion that 100 per cent of the responsibility rests with the plaintiff and none whatever with the defendant, or, if the last clear chance is applicable, 100 per cent with the defendant and none with the plaintiff—both of which are demonstrably wrong. Nor is such an estimate in itself any more foolish, or more difficult, than the one which assigns $2,000 as fair value and compensation for the pain of a broken leg, or the humiliation of a disfigured nose, to say nothing of estimates based on a prognosis of speed of recovery, future earnings or permanent disability. At least the host of cases show that the estimate is being made in practice every day.

The other objection has more substance. It is that juries cannot be trusted to follow an instruction to divide the damages according to fault; that their well-known sympathy for the man on crutches in the courtroom and their proverbial bias against corporations and insurance companies lead them now to ignore convincing evidence of contributory negligence and return a full verdict for the plaintiff, and they will continue to do the same under any apportionment law; and that the proposed change merely robs the defendant of all possibility of a directed verdict without any guarantee that the apportionment will in fact be made. This uneasy distrust of the twelve men, and now women, in the box has bulked large in American negligence law; and it is significant that damage apportionment developed first, and has succeeded best, in courts where there is no jury to contend with. What validity the objection has, and what may be done to meet it, remains to be considered.

Apportionment by the Jury

The simplest possible method of apportionment, and the oldest,[45] is to divide the damages equally between the negligent parties. This is the method developed, around 1700, by the English admiralty courts,[46] which of course had no jury, and were strongly influenced

[45] Early admiralty cases, around 1614, divided the loss evenly where only the defendant's ship was at fault. MARSDEN, A TREATISE ON THE LAW OF COLLISIONS AT SEA, 8th ed., 135 (1923).

[46] Backham v. Chapman, Ad. Ct. Ass. Book (Jan. 20, 1695); Noden v. Ashton, Libels, File 128, No. 350, Ass. Book (June 20, 1706). See MARSDEN, A TREATISE ON THE LAW OF COLLISIONS AT SEA, 8th ed., 195 (1923).

by international rules derived from the civil law. It is still followed by the American courts of admiralty in collision cases.[47] Crude as it is, it probably results, in most instances, in a closer approximation of substantial justice than a denial of all recovery. England continued to adhere to the same rule[48] until 1911, when it conformed to the Brussels Maritime Convention[49] of 1909 by adopting a statute providing for a division of the damages "in proportion to the degree in which each vessel was at fault."[50]

There has been an undercurrent of dissatisfaction with the arbitrary American rule, and several of the lower federal courts have uttered complaints about it where the fault of the two parties was out of all proportion.[51] It has been proposed from time to time[52] that the United

[47] The Schooner Catherine, 17 How. (58 U.S.) 170 (1855); The Atlas, 93 U.S. 302, 23 L. Ed. 963 (1876); The North Star, 106 U.S. 17, 1 S.Ct. 41 (1882); Belden v. Chase, 150 U.S. 674, 14 S.Ct. 264 (1893); Ralli v. Troop, 157 U.S. 386, 15 S.Ct. 647 (1895); The Chattahoochie, 173 U.S. 540, 19 S.Ct. 491 (1899); The New York, 175 U.S. 187, 20 S.Ct. 67 (1899); The Albert Dumois, 177 U.S. 240, 20 S.Ct. 595 (1900); Erie R. Co. v. Erie & W. Transp. Co., 204 U.S. 220, 27 S.Ct. 246 (1906); The Eugene F. Moran, 212 U.S. 466, 29 S.Ct. 339 (1909); White Oak Transp. Co. v. Boston, Cape Cod & N.Y.C. Co., 258 U.S. 341, 42 S.Ct. 338 (1922); United States v. Norwegian Bark Thekla, 266 U.S. 328, 45 S.Ct. 112 (1924); Aktieselskabet Cuzco v. The Sucarseco, 294 U.S. 394, 55 S.Ct. 467 (1935). See Huger, "Proportional Damage Rule in Collisions at Sea," 13 CONN. L.Q. 531 (1927); Sprague, "Divided Damages," 6 N.Y. UNIV. L.Q. 15 (1928); Mole and Wilson, "A Study of Comparative Negligence," 17 CONN. L.Q. 333 at 339-359 (1932); Derby, "Divided Damages in Maritime Cases," 33 VA. L. REV. 389 (1947); Dickinson and Andrews, "A Decade of Admiralty," 36 CALIF. L. REV. 169 (1948); Turk, "Comparative Negligence on the March," 28 CHI-KENT L. REV. 189, 218-238 (1950).

[48] Hay v. La Neve, 2 Shaw Sc. App. Cas. 395 (1824); Cayzer v. Carron, 9 App. Cas. 873 (1884).

[49] See 6 BENEDICT, AMERICAN ADMIRALTY, 6th ed., 4 (1941).

[50] The English Maritime Conventions Act of 1911, 1 & 2 Geo. V, c. 57, §1 provides that: "(1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault: Provided that (a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and (b) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed. . . ."

[51] "We reach this conclusion with regret. The [libellant's] fault was far more egregious. This is a case where the Continental rule of comparative negligence would produce a more just result." Luckenbach S.S. Co. v. United States, (2d Cir. 1946) 157 F. (2d) 250 at 252. See also The City of Chattanooga, (2d Cir. 1935) 79 F. (2d) 23 at 23; The Margaret, (3d Cir. 1929) 30 F. (2d) 923 at 928; Postal S.S. Corp. v. Southern Pac. Co., (2d Cir. 1940) 112 F. (2d) 297 at 298.

[52] The American delegation to the Convention signed the final draft. The President and the Secretary of State proposed legislation, but discontinued their efforts when many protests were raised. In 1922 the Maritime Law Association of the United States apparently favored adoption of the English statute, but reversed its stand in 1927. In 1925 the Committee on Admiralty of the American Bar Association approved the change; but in 1929 the Executive Committee of the Association reported that, as the existing law had operated satisfactorily for so many years, no change should be made. The history is well reviewed

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[55] The apportionment rule
Morris, 137 U.S. 1, 11 S.Ct. 29
[56] The Explorer, (D.C. La. 1
477; The Mystic, (D.C. N.Y. 189
263 F. 523.
[57] See text infra at notes 1
[58] See text infra at notes 120
[59] See text infra at notes 124
[60] See text infra at notes 14
[61] Fla. Stat. Ann. (1944) §7
[62] Md. Acts 1902, c. 412.
[63] Now La. Civ. Code (Dart
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[64] Fleytas v. Pontchartrain R.
(1846); Belle Alliance Co. v. Tex
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126 La. 787, 52 S. 1025 (1910);

States should adopt the English rule, and in 1937 the proposal received a favorable report from the Senate Committee on Foreign Relations,[53] but World War II prevented any action.[54] One important development in the admiralty courts, however, was that when the question arose in cases which did not involve collisions,[55] but negligent injuries to maritime employees, the rule of equal division was not applied, and the libellant's recovery was reduced in proportion to his estimated fault.[56] These admiralty decisions played a significant part in the labor agitation which finally led to legislation.

Apart from admiralty there was little change in the common law rule before 1908. Illinois[57] and Kansas[58] tried, and abandoned, experiments with "degrees" of negligence. Tennessee[59] and Georgia[60] worked out the general idea of apportionment of damages, subject to restrictions later to be considered, and Florida[61] copied the railroad liability section of the Georgia code. Maryland[62] made the apportionment rule applicable to cases of miners and clay workers employed in two counties in the state. Louisiana had a provision in its code,[63] enacted in 1825 by lawyers at least familiar with the civil law, which appeared clearly to call for apportionment in cases of property damage, and might well have led to a general apportionment rule; but the Louisiana courts, under the pressure of expanding industry, as well as the persuasive authority of cases from adjoining jurisdictions and a desire for uniformity, ignored the provision or construed it away,[64] and it has remained a dead letter on the books.

in short space in Turk, "Comparative Negligence on the March," 28 CHI-KENT L. REV. 189, 234-236 (1950).

[53] Executive Report No. 4, Senate, 76th Cong., 1st sess. (1939).

[54] 4 BENEDICT, AMERICAN ADMIRALTY, 6th ed., 4, 49, 262 (1941).

[55] The apportionment rule was not limited to collision cases. The Steamer Max Morris, 137 U.S. 1, 11 S.Ct. 29 (1890); The Scandanavia, (D.C. Me. 1907) 156 F. 403.

[56] The Explorer, (D.C. La. 1884) 20 F. 135; Olson v. Flavel, (D.C. Ore. 1888) 34 F. 477; The Mystic, (D.C. N.Y. 1890) 44 F. 398; Cricket S.S. Co. v. Parry, (2d Cir. 1920) 263 F. 523.

[57] See text infra at notes 110-119.

[58] See text infra at notes 120-121.

[59] See text infra at notes 124, 189-190.

[60] See text infra at notes 146-151, 191-192.

[61] Fla. Stat. Ann. (1944) §768.06, enacted in 1887.

[62] Md. Acts 1902, c. 412.

[63] Now La. Civ. Code (Dart. 1945), art. 2323: "The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently."

[64] Fleytas v. Pontchartrain R. Co., 18 La. 339 (1841); Myers v. Perry, 1 La. Ann. 372 (1846); Belle Alliance Co. v. Texas & Pac. R. Co., 125 La. 777, 51 S. 846 (1910); Ortolano v. Morgan's L. & T. R. & S. Co., 109 La. 902, 33 S. 914 (1903); Burvant v. Wolfe, 126 La. 787, 52 S. 1025 (1910); Legendre v. Consumers' Seltzer & M.W. Co., 147 La.

The apportionment of damages was first brought home to most of the country in 1908 by the Federal Employers' Liability Act,[66] which applied to all negligence actions, in the federal or state courts, for injuries to railroad employees engaged in interstate commerce.[66] It was, of course, an outcome of the prolonged labor agitation, and it preceded by only a few years the wave of workmen's compensation acts. It contained the following provision:[67]

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The example of the Federal Employers' Liability Act set off a flood of labor legislation of the same general kind. The apportionment provision was incorporated by reference[68] into the Jones Act and the Merchant Marine Act, enacted in 1915 and 1920,[69] and applicable to injuries to maritime employees. The provision was repeated in substance in a series of state "employers' liability acts," covering rail-

120, 84 S. 517 (1920); Inman v. Silver Fleet of Memphis, (La. App. 1937) 176 S. 435; Mason v. Price, (La. App. 1947) 32 S. (2d) 853. See Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 LA. L. REV. 125 (1945); Hillyer, "Comparative Negligence in Louisiana," 11 TULANE L. REV. 112 (1936).

[65] 35 Stat. L. 66 (1908), now 45 U.S.C. (1946) §§51-60.

[66] The first statute passed, in 1906, was held unconstitutional because it included railroad employees engaged in intrastate commerce. Employers' Liability Cases, 207 U.S. 463, 28 S.Ct. 141 (1908). With the change made, the second statute was held constitutional in the Second Employers' Liability Cases, 223 U.S. 1, 32 S.Ct. 169 (1912).

[67] 35 Stat. L. 66 (1908), 45 U.S.C. (1946) §53.

[68] The history of the act is reviewed in The Arizona v. Anelich, 298 U.S. 110, 56 S.Ct. 707 (1936).

[69] March 4, 1915, c. 153, §20. 38 Stat. L. 1185; June 5, 1920, c. 250, §33, 41 Stat. L. 1007; now 46 U.S.C. (1946) §688. Applied in Stewart v. United States Shipping Board E.F. Corp., (D.C. N.Y. 1925) 7 F. (2d) 676; Johnson v. United States, (D.C. N.Y. 1934) 7 F. Supp. 133; Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S.Ct. 262 (1939); Beadle v. Spencer, 298 U.S. 124, 56 S.Ct. 712 (1936); Cleveland-Cliffs Iron Co. v. Martini, (6th Cir. 1938) 96 F. (2d) 632; Desrochers v. United States, (2d Cir. 1939) 105 F. (2d) 919; McCauley v. Pacific Atlantic S.S. Co., 167 Ore. 80, 115 P. (2d) 307 (1941); Brown v. Interconatal Fisheries, 34 Wash. (2d) 48, 207 P. (2d) 1205 (1949); Alexander v. Philadelphia Ceiling & Stevedoring Co., (D.C. Pa. 1951) 99 F. Supp. 178.

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[70] Colo. Stat. Ann. (1935) c.

[71] Iowa Code Ann. (1949)
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[72] Kan. Gen. Stat. Ann. (193

[73] Ky. Rev. Stat. (1950) §27
300 Ky. 835, 190 S.W. (2d) 542

[74] Minn. Stat. Ann. (1949)

[75] Mont. Rev. Laws (1947) §
(9th Cir. 1940) 112 F. (2d) 609;
68, 170 P. (2d) 768 (1946). The
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[76] N.C. Gen. Stat. (1943) c.
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[77] N.D. Rev. Laws (1943) §

[78] S.C. Code (1942) §8367.
44 S.E. (2d) 537 (1947).

[79] S.D. Code (1939) §52.094

[80] Tex. Civ. Stat. Ann. (Vern
S.F.&T. R. Co. v. Jenkins, (Tex. C
T. R. Co. v. Bright, (Tex. Civ. App
(Tex. Civ. App. 1914) 166 S.W. 9
Civ. App. 1916) 185 S.W. 901; Lar

[81] Va. Code Ann. (1942) §57

[82] Wyo. Comp. Stat. Ann. (1

[83] Ariz. Code Ann. (1933) §
Chambers, 20 Ariz. 54, 176 P. 83
199, 196 P. 167 (1920).

[84] Fla. Stat. (1941) §769.03.
91 S. 559 (1922); Tampa Electric
Key West Electric Co. v. Higgs, 11

[85] Iowa Code Ann. (1949) §§
Coal Co., 192 Iowa 1280, 184 N.W.
N.W. 229 (1931); Lang v. Hedri
McNeill, 237 Iowa 1120, 24 N.W.

[86] Ore. Comp. Laws Ann. (194
Co., 71 Ore. 249, 142 P. 578 (191
Kuntz v. Emerson Hardwood Co., 9
Washington R. & N. Co., 141 Ore.

[87] Ark. Stat. Ann. (1947) §81
492, 60 S.W. (2d) 572 (1933); L.
83 (1922); Hartman-Clark Bros. C
(1935); Goodin v. Boyd-Sicard Co.
Dierks Lumber & Coal Co. v. Noles,

The legislation soon spread beyond the labor field. The apportionment provision was repeated in a 1920 federal statute[88] covering any death on the high seas. In Florida[89] and Iowa[90] the provision was made applicable to any injury inflicted by a railroad. In Virginia[91] it has been applied to accidents at crossings arising out of the railroad's failure to give the required signals; and an old Tennessee statute[92] has been given the same effect by construction. Several other states[93] have enacted apportionment provisions which apply to labor or to railroad cases with limitations as to the extent of the plaintiff's negligence, to be considered below. Finally, Mississippi adopted in 1910 a general act[94] applying apportionment to all actions for personal injuries, and expanded it in 1920 to include damages to property.[95] Mississippi thus became the first, and is still the only, state to establish apportionment as a general rule. A similar general act is now in force in the Canal Zone.[96]

[88] March 30, 1920, c. 111, §6, 41 Stat. L. 537, now 46 U.S.C. (1946) 766.

[89] Fla. Stat. Ann. (1944) §768.06. Applied in Dina v. Seaboard Air Line R. Co., 90 Fla. 558, 106 S. 416 (1926); Florida East Coast R. Co. v. Townsend, 104 Fla. 362, 140 S. 196 (1932), on rehearing 104 Fla. 371, 142 S. 909 (1932); Atlantic Coast Line R. Co. v. Britton, 109 Fla. 212, 146 S. 842 (1933); Atlantic Coast Line R. Co. v. Pidd, (5th Cir. 1952) 197 F. (2d) 153.

[90] Iowa Code (1946) vol 2, p. 1843, Civil Proc. Rule 97.

[91] Va. Code Ann. (1942) §3959. Applied in State & City Bank & Trust Co. v. Norfolk & W. R. Co., 144 Va. 185, 131 S.E. 331 (1926); Southern R. Co. v. Johnson, 151 Va. 345, 146 S.E. 363 (1929); Norfolk & W. R. Co. v. Hardy, 152 Va. 783, 148 S.E. 839 (1929); Norfolk & W. R. Co. v. White, 158 Va. 243, 163 S.E. 530 (1931); Southern R. Co. v. Whetzel, 159 Va. 796, 167 S.E. 427 (1933); Chesapeake & O. R. Co. v. Pulliam, 185 Va. 908, 41 S.E. (2d) 54 (1947). This has no application when the signals are given. Norfolk & W. R. Co. v. Epling, 189 Va. 551, 53 S.E. (2d) 817 (1949).

[92] Tenn. Code Ann. (Williams, 1934) §2628-30, enacted in 1855. It was construed and applied to Railroad v. Walker, 11 Heisk. (58 Tenn.) 383 (1872); Nashville & C. R. Co. v. Nowlin, 1 Lea (69 Tenn.) 523 (1878); Tennessee Central R. Co. v. Page, 153 Tenn. 84, 282 S.W. 376 (1926); Tennessee Central R. Co. v. Binkley, 127 Tenn. 77, 153 S.W. 59 (1912); Illinois Central R. Co. v. Sigler, (6th Cir. 1941) 122 F. (2d) 279; Southern R. Co. v. Koger, (6th Cir. 1915) 219 F. 702.

[93] See text infra at notes 108-173.

[94] Miss. Laws (1910) c. 135. Held not applicable to property damage in Krebs v. Pascagoula St. R. & P. Co., 117 Miss. 771, 78 S. 753 (1918).

[95] Miss. Laws (1920) c. 312. The amended act is now Miss. Code Ann. (1942) §1454, reading as follows: "In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

Applied in Natchez & S.R. Co. v. Crawford, 99 Miss. 697, 55 S. 596 (1911); Yazoo & M.V. R. Co. v. Carroll, 103 Miss. 830, 60 S. 1013 (1913); Yazoo & M.V. R. Co. v. Williams, 114 Miss. 236, 74 S. 835 (1917); Tallahala Lumber Co. v. Holliman, 126 Miss. 308, 87 S. 661 (1921); Seifferman v. Leach, 161 Miss. 853, 138 S. 563 (1932); Illinois Cent. R. Co. v. Humphries, 174 Miss. 459, 164 S. 22 (1935).

[96] Canal Zone Civ. Code (1934) §977. Applied in Panama R. Co. v. Davis, (5th Cir. 1936) 82 F. (2d) 123.

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[97] Yazoo & M.V. R. Co. v. Carroll, 1
N. R. Co. v. Wene, (7th Cir. 1913) 202
(6th Cir. 1914) 214 F. 952; Pennsylva
Templeton v. Charleston & W.C. R. Co.,
Sweeney, 28 Wyo. 57, 201 P. 165 (1921)
750, 128 S.E. 272 (1925); Humphreys
(1929); Crosby Lumber & Mfg. Co. v. Du
also Yazoo & M.V. R. Co. v. Williams, 114
of $12,000 was reduced to $5,000 by way

[98] Norfolk & Western R. Co. v. Earnes
Air Line R. Co. v. Tilghman, 237 U.S. 49
Co. v. Ballard, (5th Cir. 1940) 108 F. (2d)
Div. 439, 290 N.Y.S. 17 (1936).

"In cases of this character, where the
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such cases." Waina v. Pennsylvania Co., 251

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[99] See for example Waterford Lumber Co.
Solomon v. Continental Baking Co., 172 Miss
188 Miss. 207, 194 S. 506 (1940); Engebre
(1933).

[100] See cases cited infra note 112.

Except where the statute itself provides some limitation, these acts are held to require apportionment of the damages even though the plaintiff's negligence is equal to or greater than that of the defendant, and even though the one is considered "gross" and the other "slight."[97] The apportionment must be made if negligence of both parties is found, and it is error not to instruct the jury to make it.[98] Although there is a great deal of rather casual and careless language to the effect that the plaintiff's recovery must be diminished to the extent that his negligence has been "causal," or has "contributed" to his injury,[99] there seems to be little doubt that, once causation is found, the apportionment must be made on the basis of comparative fault rather than comparative contribution.[100] It is generally agreed, except for two de-

[97] Yazoo & M.V. R. Co. v. Carroll, 103 Miss. 830, 60 S. 1013 (1913); Louisville & N. R. Co. v. Wene, (7th Cir. 1913) 202 F. 887; New York C. & St. L. R. Co. v. Niebel, (6th Cir. 1914) 214 F. 952; Pennsylvania Co. v. Cole, (6th Cir. 1914) 214 F. 948; Templeton v. Charleston & W.C. R. Co., 117 S.C. 44, 108 S.E. 363 (1921); Hines v. Sweeney, 28 Wyo. 57, 201 P. 165 (1921); Gregory v. Seaboard Air Line R. Co., 142 Va. 750, 128 S.E. 272 (1925); Humphreys v. East St. L. & S. R. Co., 253 Ill. App. 450 (1929); Crosby Lumber & Mfg. Co. v. Durham, 181 Miss. 559, 179 S. 285 (1938). See also Yazoo & M.V. R. Co. v. Williams, 114 Miss. 236, 74 S. 835 (1917), where a verdict of $12,000 was reduced to $5,000 by way of apportionment.

[98] Norfolk & Western R. Co. v. Earnest, 229 U.S. 114, 33 S.Ct. 654 (1913); Seaboard Air Line R. Co. v. Tilghman, 237 U.S. 499, 35 S.Ct. 653 (1915); Atchison, T. & S.F. R. Co. v. Ballard, (5th Cir. 1940) 108 F. (2d) 768; Sherry v. Pennsylvania R. Co., 248 App. Div. 439, 290 N.Y.S. 17 (1936).

"In cases of this character, where the evidence justifies a finding that both defendant and plaintiff were guilty of negligence contributing to the accident, the jury should be carefully instructed concerning the rule of comparative negligence established by the Federal Statute. It is the duty of the jury first to determine whether or not the defendant was guilty of causal negligence, for if that issue is determined against the plaintiff there can be no recovery. If the issue of the defendant's negligence is determined in favor of the plaintiff, then the jury should consider whether or not he, too, was guilty of negligence directly contributing to the happening of the accident, and, if they decide that issue against the plaintiff, then, looking at the combined negligence of the plaintiff and defendant as a whole, and using their best judgment based on the evidence before them, the next material subject for the jury to consider is in what ratio should this combined negligence be distributed between the parties to the accident; in other words, how much, or what proportion, of the whole blame, or fault, should be attributable to each. After this problem is solved, the jury must determine the amount of the damages suffered through the combined negligence, and deduct therefrom a proportion corresponding with the share of negligence charged by them against the plaintiff, . . . to be awarded as damages to the plaintiff. We do not mean to say that the method just outlined is the only way in which a jury may proceed to reach its conclusions in the trial of causes involving comparative negligence, but rather simply to indicate an orderly manner for considering and determining such cases." Waina v. Pennsylvania Co., 251 Pa. 213 at 221, 96 A. 461 (1915).

This is the best statement of the instruction to the jury the writer has found.

[99] See for example Waterford Lumber Co. v. Jacobs, 132 Miss. 638, 97 S. 187 (1923); Solomon v. Continental Baking Co., 172 Miss. 388, 160 S. 732 (1935); Avent v. Tucker, 188 Miss. 207, 194 S. 596 (1940); Engebrecht v. Bradley, 211 Wis. 1, 247 N.W. 451 (1933).

[100] See cases cited infra note 112.

cisions that obviously blundered,[101] that the recoverable damages must be reduced in the proportion which the plaintiff's fault, or the extent of his departure from the required standard of conduct, bears to the total fault of plaintiff and defendant; and not in the proportion which the one bears to the other, or to the extent of the difference between them. Thus where the plaintiff's estimated negligence is found to be 20% of the total, and the defendant's 80%, the plaintiff must recover 80% of his damages, and not 75% or 60%.[102]

When one seeks to discover from the appellate decisions some clue as to what juries actually do under the instruction to divide the damages, the information to be gleaned is disappointingly meagre. The cases are rather dismal reading. Normally there are a number of assignments of error, and the one relating to apportionment complains of some alleged vice in the instruction, which is corrected, or found not to exist, or not to be prejudicial. Where the amount of the award is challenged directly, the court often decides that contributory negligence was not so clearly established that it can say as a matter of law that the jury was wrong in failing to apportion at all;[103] or that the figure found is not so clearly the maximum justified by the evidence of damages as to indicate that the jury did not follow the instruction.[104]

[101] In Paluczak v. Jones, 209 Wis. 640 at 643, 245 N.W. 655 (1932), it was said that the plaintiff's damages must be diminished . . . "in such ratio as his negligence bears to the other's." In Cameron v. Union Automobile Ins. Co., 210 Wis. 659, 246 N.W. 420, 247 N.W. 453 (1933), this statement was withdrawn, and it was made clear that the reduction must be in proportion to the combined negligence. *Accord*, Engebrecht v. Bradley, 211 Wis. 1, 247 N.W. 451 (1933).

In Patterson v. Kerr, 127 Neb. 73, 254 N.W. 704 (1934), where the ratio was found to be 1 to 6, it was said that the damages must be reduced by ⅙. The case is out of line with Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N.W. 158 (1920), and Sgroi v. Yellow Cab & Baggage Co., 124 Neb. 525, 247 N.W. 355 (1933), which make it clear that the reduction must be by ⅐.

[102] Norfolk & Western R. Co. v. Earnest, 229 U.S. 114, 33 S.Ct. 654 (1913); Waine v. Pennsylvania R. Co., 251 Pa. 215, 96 A. 461 (1915); Anest v. Columbia & P.S. R. Co., 89 Wash. 609, 154 P. 1100 (1916); Newkirk v. Pryor, (Mo. App. 1916) 183 S.W. 682; Payne v. Lind, 106 Ohio St. 14, 138 N.E. 366 (1922); Louisville & N. R. Co. v. Beck, 196 Ind. 238, 145 N.E. 886, 147 N.E. 776 (1925); Cameron v. Union Automobile Ins. Co., 210 Wis. 659, 246 N.W. 420, 247 N.W. 453 (1933); Sgroi v. Yellow Cab & Baggage Co., 124 Neb. 525, 247 N.W. 355 (1933); Goodman v. Chicago, B. & Q. R. Co., 288 Ill. App. 320, 7 N.E. (2d) 393 (1937); Buchanan v. Chicago & N.W. R. Co., (7th Cir. 1947) 159 F. (2d) 576.

[103] See, for example, among many cases, Jackson v. Rutledge, 188 Ind. 415, 122 N.E. 579 (1917); Union Pac. R. Co. v. Hadley, 246 U.S. 330, 38 S.Ct. 318 (1918); Matthews v. Atchison, T. & S.F. R. Co., 54 Cal. App. (2d) 549, 129 P. (2d) 435 (1942); Missouri Pac. R. Co. v. Zolliecoffer, 209 Ark. 559, 191 S.W. (2d) 587 (1946); Ericksen v. Southern Pac. R. Co., 234 P. (2d) 279 (Cal. 1951); Price v. McNeill, 237 Iowa 1120, 24 N.W. (2d) 464 (1946); Ericksen v. Southern Pacific Co., (Cal. 1952) 246 P. (2d) 642.

[104] See for example, among many cases, Louisville & N. R. Co. v. Wene, (7th Cir. 1913) 202 F. 887; Burke v. Chicago & N.W. R. Co., 131 Minn. 209, 154 N.W. 960 (1915); Godby v. Wilson, 203 Ill. App. 612 (1916); Ruppell v. New York Central R.

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190 S. 478 (1939); Katela v. B
842; Powell v. Proctor, 143 Fla.
(Cal. 1942) 124 P. (2d) 670.

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[106] Atlantic Coast Line R. C
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152 Va. 783, 148 S.E. 839 (1929
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[107] See, for example, among
199 F. 211; Atlantic Coast Line
Atchison, T. & S.F. R. Co., 97 K
Williams, 114 Miss. 236, 74 S. 8
Fla. 701, 82 S. 232 (1919); Atlan
(1920); Tallahala Lumber Co. v.
& N. R. Co. v. Harrison, 84 Fla.
83 Fla. 537, 91 S. 559 (1922); Jo
140 (1923); Edward Hines Yello
(1926); Tampa Electric Co. v. Kn
Line R. Co. v. Watkins, 97 Fla.
Watson, 103 Fla. 477, 137 S. 719
136 S. 639 (1931); Tampa Elect
Florida East Coast R. Co. v. Towr
371, 142 S. 909 (1932); Atlantic
Gulf & S.I. R. Co. v. Bond, 181 M
Co. v. Bramlett, (Miss. 1939) 18
49, 189 S. 203 (1939); Fegan v. L
Missouri Pac. R. Co. v. Haigler, 2
ing Co. v. Brown, 196 Miss. 131,
dell, 209 Ark. 569, 191 S.W. (2d
250 Ala. 431, 34 S. (2d) 848 (19

In these cases it is quite clear that the court simply does not know what the jury did, and in some instances it has said so frankly.[105]

There are, however, a good many cases in which the contributory negligence has been clear as a matter of law, and the sum awarded so definitely equal to the maximum which the evidence would justify that there could be no doubt that the jury did not make the apportionment. Occasionally a new trial has been ordered;[106] more commonly a remittitur.[107] It is difficult to escape the impression that the number of these cases is disproportionately large, and greatly exceeds what is normally to be expected on the issue of damages alone. They appear to lend a great deal of support to the assertion that the jury is not always to be trusted, with an injured man before it, to follow instructions and divide the damages, even where the plaintiff is undoubtedly at fault. They suggest that there must be many more cases in which the apportionment should have been made but was not in fact made, and the

Co., 171 App. Div. 832, 157 N.Y.S. 1095 (1916); Ames v. Western Pac. R. Co., 48 Nev. 78, 227 P. 1009 (1924); Norfolk & W. R. Co. v. White, (Va. 1931) 160 S.E. 218; Texas & N.O. R. Co. v. McGinnis, 130 Tex. 338, 109 S.W. (2d) 160 (1937) affirming (Tex. Civ. App. 1935) 81 S.W. (2d) 200; Tampa Electric R. Co. v. Hardy, 139 Fla. 142, 190 S. 478 (1939); Katela v. Baltimore & Ohio R. Co., (6th Cir. 1939) 104 F. (2d) 842; Powell v. Proctor, 143 Fla. 153, 196 S. 419 (1940); Metz v. Southern Pac. Co., (Cal. 1942) 124 P. (2d) 670.

[105] See for example New York Central & H.R. R. Co. v. Banker, (2d Cir. 1915) 224 F. 351; Katela v. Baltimore & Ohio R. Co., (6th Cir. 1939) 104 F. (2d) 842.

[106] Atlantic Coast Line R. Co. v. Hobbs, 71 Fla. 109, 70 S. 939 (1916); Seifferman v. Leach, 161 Miss. 853, 138 S. 563 (1932). See also Norfolk & W. R. Co. v. Hardy, 152 Va. 783, 148 S.E. 839 (1929), where there was testimony of jurymen that they did not apportion.

[107] See, for example, among many cases, Cain v. Southern R. Co., (D.C. Tenn. 1911) 199 F. 211; Atlantic Coast Line R. Co. v. Weir, 63 Fla. 69, 58 S. 641 (1912); Pyles v. Atchison, T. & S.F. R. Co., 97 Kan. 455, 155 P. 788 (1916); Yazoo & M.V. R. Co. v. Williams, 114 Miss. 236, 74 S. 835 (1917); Florida East Coast R. Co. v. Meacham, 77 Fla. 701, 82 S. 232 (1919); Atlantic Coast Line R. Co. v. Conant, 79 Fla. 668, 84 S. 688 (1920); Tallahala Lumber Co. v. Holliman, 125 Miss. 308, 87 S. 661 (1921); Louisville & N. R. Co. v. Harrison, 84 Fla. 497, 94 S. 382 (1922); Tampa Electric Co. v. Limpus, 83 Fla. 537, 91 S. 559 (1922); Johnson v. Union Pac. R. Co., 111 Neb. 196, 196 N.W. 140 (1923); Edward Hines Yellow Pine Trustees v. Holley, 142 Miss. 241, 106 S. 822 (1926); Tampa Electric Co. v. Knowles, 91 Fla. 1032, 109 S. 219 (1926); Atlantic Coast Line R. Co. v. Watkins, 97 Fla. 350, 121 S. 95 (1929); Seaboard Air Line R. Co. v. Watson, 103 Fla. 477, 137 S. 719 (1931); Key West Electric Co. v. Higgs, 118 Fla. 11, 136 S. 639 (1931); Tampa Electric Co. v. Bryant, 101 Fla. 204, 133 S. 887 (1931); Florida East Coast R. Co. v. Townsend, 104 Fla. 362, 140 S. 196, on rehearing 104 Fla. 371, 142 S. 909 (1932); Atlantic Coast Line R. Co. v. Fogleman, (Fla. 1934) 158 S. 108; Gulf & S.I. R. Co. v. Bond, 181 Miss. 254, 179 S. 355, 181 S. 741 (1938); E. L. Bruce Co. v. Bramlett, (Miss. 1939) 188 S. 532; Louisville & N. R. Co. v. Grizzard, 238 Ala. 49, 189 S. 203 (1939); Fegan v. Lykes Bros. S.S. Co., 198 La. 312, 3 S. (2d) 632 (1941); Missouri Pac. R. Co. v. Haigler, 203 Ark. 804, 158 S.W. (2d) 703 (1944); Gulf Refining Co. v. Brown, 196 Miss. 131, 16 S. (2d) 765 (1944); Missouri Pac. R. Co. v. Yandell, 209 Ark. 569, 191 S.W. (2d) 592 (1946); Atlantic Coast Line R. Co. v. Mangum, 250 Ala. 431, 34 S. (2d) 848 (1948).

court is powerless to interfere because it does not know or cannot prove what has happened. At least the confessed ignorance, in so many cases, of what the jury has done gives a great deal of color to that claim.

The fear of such misbehavior of the jury has played a considerable part in the limitations which a number of the states have placed upon the application of their apportionment acts. They are all more or less obvious compromises between contesting groups in the legislature, which go part of the way along the road to apportionment, but endeavor to stop short at some point where the distrust of the jury becomes acute, or where agreement can be reached. They are, in other words, political in character; and like most political compromises, they are remarkable neither for soundness in principle nor success in operation.

"Slight" and "Gross" Negligence

The oldest of these restrictions is that the damages shall be divided only where the negligence of the plaintiff is found to be "slight," and that of the defendant greater in comparison. The limitation traces back to the old idea that there are "degrees" of negligence, which developed in England in the law of bailments,[108] and still is applied in bailment cases by a number of American courts.[109] Shortly after the middle of the nineteenth century the Supreme Court of Illinois extended this idea to a case of personal injury at the hands of a railroad,[110] and from that decision developed the doctrine that the negligence of the plaintiff would not bar his recovery if it was "slight," in the sense of "a degree of negligence less than a failure to exercise ordinary care,"[111] while the negligence of the defendant was "gross" in comparison.[112] No attempt was made to divide the damages under this "comparative negligence" rule, and where it was applied the effect was full recovery by the plaintiff.

[108] Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1704); JONES, ESSAY ON THE LAW OF BAILMENTS, 3d ed., 1-36 (1828). See Elliott, "Degrees of Negligence," 6 So. CAL. L. REV. 91 at 107-122 (1932).

[109] See, for example, Altman v. Aronson, 231 Mass. 588, 121 N.E. 506 (1919); Lyons First Nat. Bank v. Ocean Nat. Bank, 60 N.Y. 278, 19 Am. Rep. 181 (1875); Dudley v. Camden & P.F. R. Co., 42 N.J.L. 25, 36 Am. Rep. 501 (1880); Cadwell v. Peninsular State Bank, 195 Mich. 407, 162 N.W. 89 (1917).

[110] Galena & Chicago Union R. Co. v. Jacobs, 20 Ill. 478 (1858).

[111] Wabash, St. L. & P. R. Co. v. Moran, 13 Ill. App. 72 at 76 (1883). Recovery was denied if the plaintiff had failed to exercise "ordinary care." City of Chicago v. Stearns, 105 Ill. 554 (1883); Schmidt v. Chicago & N.W. R. Co., 83 Ill. 405 (1876); Hund v. Geier, 72 Ill. 393 (1874); Grand Tower M. & T. Co. v. Hawkins, 72 Ill. 386 (1874); St. Louis & S.E. R. Co. v. Britz, 72 Ill. 256 (1874).

[112] Recovery was also denied if the plaintiff's negligence was found to equal that of the defendant. Indianapolis & St. L. R. Co. v. Evans, 88 Ill. 63 (1878).

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(1874); Illinois Cent. R. Co. v. G
R. Co., 83 Ill. 405 (1876); Illino
R. Co. v. Henks, 91 Ill. 406 (187

[114] Described in Chicago, B.
R.I. & P. R. Co. v. Hamler, 215

[115] Green, "Illinois Negligenc
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[116] An extended, but incomp
Steel Co. v. Martin, 115 Ill. 358,

[117] Calumet Iron & Steel Co.
E.I. R. Co. v. O'Connor, 119 Ill.
Warner, 123 Ill. 38, 14 N.E. 206
16 N.E. 246 (1888).

[118] Lake Shore & M.S. R. Co.

[119] City of Lanark v. Dough
Co. v. Meixner, 160 Ill. 320, 43 N
643, 69 N.E. 79 (1903); Chicago,
(1905); Krieger v. Aurora, E. & C.

[120] Sawyer v. Sauer, 10 Kan.
(1873); Union Pac. R. Co. v. He
Co. v. Davis, 37 Kan. 743, 16 P. 7

[121] Atchison, T. & S.F. R. C
Missouri Pac. R. Co. v. Walters, 7
Co. v. Henry, 57 Kan. 154, 45 P.
156 Kan. 65, 131 P. (2d) 648 (1

[122] Bequette v. People's Trans
R. Co., 8 Ore. 163 (1879). But
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[123] In Stucke v. Milwaukee &

The result was that for some thirty years the courts of Illinois were filled with cases which fought out the issue of "slight" and "gross,"[113] in the midst of a turmoil of confusion.[114] As a mere matter of definition the distinction proved to be unworkable, and it broke down under the sheer weight of the difficulty of applying the bailment rule to the complications of other negligence cases,[115] the multitudinous appeals, and the high proportion of reversals because of some error of the trial court.[116] Finally the Illinois court lost all patience, and proceeded to whittle away the doctrine,[117] and at last to do away with it entirely.[118] No trace of it remains in that state.[119] Kansas, in the eighties, followed exactly the same path, attempting the same experiment with "slight" and "gross" negligence,[120] and repudiating it in the same way.[121] Early ventures in the same direction in Oregon,[122] Wisconsin,[123] and Tennessee[124] died more or less by default.

[113] See, among many other cases, St. Louis A. & T.H. R. Co. v. Todd, 36 Ill. 409 (1865); Chicago, B. & Q. R. Co. v. Payne, 59 Ill. 534 (1871); Illinois Cent. R. Co. v. Cragin, 71 Ill. 177 (1873); Illinois Cent. R. Co. v. Hall, 72 Ill. 222 (1874); Chicago & A. R. Co. v. Mock, 72 Ill. 141 (1874); Illinois Cent. R. Co. v. Hammer, 72 Ill. 347 (1874); Illinois Cent. R. Co. v. Goddard, 72 Ill. 567 (1874); Schmidt v. Chicago & N.W. R. Co., 83 Ill. 405 (1876); Illinois Cent. R. Co. v. Hammer, 85 Ill. 526 (1877); Wabash R. Co. v. Henks, 91 Ill. 406 (1879).

[114] Described in Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 512 (1882); Chicago, R.I. & P. R. Co. v. Hamler, 215 Ill. 525, 74 N.E. 705 (1905).

[115] Green, "Illinois Negligence Law," 39 ILL. L. REV. 36 at 51 (1944), suggests the further reason that the great increase in cases of injuries to employees would have resulted in heavier liability on employers than the courts were willing to impose. Elliott, "Degrees of Negligence," 6 So. CAL. L. REV. 91 at 136 (1933), suggests also the very hostile reception of the Illinois doctrine at the hands of other courts and text writers. There is an excellent review of the whole history in Malone, "The Formative Era of Contributory Negligence," 41 ILL. L. REV. 151 (1946).

[116] An extended, but incomplete, list of such reversals is found in Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N.E. 456 (1885).

[117] Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N.E. 456 (1885); Chicago & E.I. R. Co. v. O'Connor, 119 Ill. 586, 9 N.E. 263 (1887); Chicago, B. & Q. R. Co. v. Warner, 123 Ill. 38, 14 N.E. 206 (1887); Village of Mansfield v. Moore, 124 Ill. 133, 16 N.E. 246 (1888).

[118] Lake Shore & M.S. R. Co. v. Hessions, 150 Ill. 546, 37 N.E. 905 (1894).

[119] City of Lanark v. Dougherty, 153 Ill. 163, 38 N.E. 892 (1894); Cicero St. R. Co. v. Meixner, 160 Ill. 320, 43 N.E. 823 (1896); City of Macomb v. Holcomb, 205 Ill. 643, 69 N.E. 79 (1903); Chicago, R.I. & P. R. Co. v. Hamler, 215 Ill. 525, 74 N.E. 705 (1905); Krieger v. Aurora, E. & C. R. Co., 242 Ill. 544, 90 N.E. 266 (1909).

[120] Sawyer v. Sauer, 10 Kan. 466 (1872); Pacific R. Co. v. Houts, 12 Kan. 328 (1873); Union Pac. R. Co. v. Henry, 36 Kan. 565, 14 P. 1 (1883); Wichita & W. R. Co. v. Davis, 37 Kan. 743, 16 P. 78 (1887).

[121] Atchison, T. & S.F. R. Co. v. Morgan, 31 Kan. 77 at 80, 1 P. 298 (1883); Missouri Pac. R. Co. v. Walters, 78 Kan. 39, 96 P. 346 (1908); Atchison, T. & S.F. R. Co. v. Henry, 57 Kan. 154, 45 P. 576 (1896); Sayeg v. Kansas City Gas & Electric Co., 156 Kan. 65, 131 P. (2d) 648 (1942).

[122] Bequette v. People's Transp. Co., 2 Ore. 200 (1867); Holstine v. Oregon & Cal. R. Co., 8 Ore. 163 (1879). But in Hamerlynck v. Banfield, 36 Ore. 436, 59 P. 712 (1900), without reference to the earlier cases, the court stated the common law contributory negligence rule, which has been followed ever since.

[123] In Stucke v. Milwaukee & Miss. R. Co., 9 Wis. 202 (1859); Dreher v. Town of

Nevertheless, when proposals for the apportionment of damages reached the legislatures, the memory of these old common law fiascoes remained to suggest a possible basis for compromise. As a result the railroad employers' liability acts of the District of Columbia,[125] Nebraska,[126] and Ohio,[127] as well as broader labor acts in Alaska,[128] California[129] and Ohio,[130] carry provisions for apportionment only if the plaintiff's negligence is found to be "slight," so that the defendant's is "gross" in comparison. The same was true of a Wisconsin statute,[131] now repealed,[132] which covered injuries inflicted by a railroad. In 1913

Fitchburg, 22 Wis. 643 (1868); Hammond v. Town of Mukwa, 40 Wis. 35 (1876); Griffin v. Town of Willow, 43 Wis. 509 (1878); and Ditberner v. Chicago, M. & St. P. R. Co., 47 Wis. 138, 2 N.W. 69 (1879), it was said that slight negligence, defined as want of extraordinary care, would not bar the plaintiff's recovery. But in Potter v. Chicago & N.W. R. Co., 21 Wis. 377, 94 Am. Dec. 548 (1867), and Cunningham v. Lyness, 22 Wis. 236 (1867), it was held that any way of ordinary care, however slight, would be a bar; and in Bolin v. Chicago, St. P. M. & O. R. Co., 108 Wis. 333, 84 N.W. 446 (1900), the court, after reviewing the cases, rejected the whole idea of comparative negligence.

[124] Whirley v. Whiteman, 1 Head (38 Tenn.) 610 at 623 (1858); East Tenn. R. Co. v. Fain, 12 Lea (80 Tenn.) 35 at 40 (1883); East Tenn. R. Co. v. Gurley, 12 Lea (80 Tenn.) 46 at 55 (1883). In East Tenn. V. & G. R. Co. v. Hull, 88 Tenn. 33, 12 S.W. 419 (1889), the court expressly repudiated the idea of comparative negligence, and explained that it had been talking about "remote" negligence and proximate cause. See text infra at notes 189-192.

[125] D.C. Code (1940) tit. 44, §402.

[126] Neb. Rev. Stat. (1943) §74-704. Applied in Missouri Pac. R. Co. v. Castle, (8th Cir. 1909) 172 F. 841, affirmed and held constitutional in 224 U.S. 541, 32 S.Ct. 606 (1912). See Jackson v. Chicago, R.I. & P. R. Co., (8th Cir. 1910) 178 F. 432; Chicago, R.I. & P. R. Co. v. Wright, 239 U.S. 548, 36 S.Ct. 185 (1915).

[127] Ohio Gen. Code Ann. (Page, 1945) §9018. Applied in Baltimore & Ohio R. Co. v. McTeer, 55 Ohio App. 217, 9 N.E. (2d) 627 (1936); Detroit & T.S.L. R. Co. v. Seigel, (Ohio App. 1926) 153 N.E. 870; Ross v. Hocking Valley R. Co., 40 Ohio App. 447, 178 N.E. 852 (1931); Norfolk & W. R. Co. v. Riggs, (6th Cir. 1938) 98 F. (2d) 612; Erie R. Co. v. White, (6th Cir. 1911) 187 F. 556.

[128] Alaska Comp. Laws Ann. (1949) §43-2-52, applicable to certain hazardous occupations.

[129] Cal. Labor Code (1937) §2801, applicable to all employees. Applied in Lassen v. Southern Pac. Co., 173 Cal. 71, 159 P. 143 (1916); Tubbs v. Stone & Webster Const. Co., 30 Cal. App. 705, 159 P. 242 (1916); Bruce v. Western Pipe & Steel Co., 177 Cal. 25, 169 P. 660 (1917); Scherer v. Danziger, 178 Cal. 253, 173 P. 85 (1918). See Mantonya v. Bratlie, (Cal. App. 1948) 190 P. (2d) 996, reversed on other grounds in 33 Cal. (2d) 120, 199 P. (2d) 677 (1948); Edwards v. Hollywood Canteen, 27 Cal. (2d) 802, 167 P. (2d) 729 (1945).

[130] Ohio Gen. Code Ann. (Page, 1945) §6245-1, applicable to all employees. Applied in Standard Steel Tube Co. v. Prusakiewicz, 33 Ohio C.C. 133 (1911), affirmed in 87 Ohio St. 472, 102 N.E. 1131 (1911); McKee v. New Idea, Inc., (Ohio App. 1942) 44 N.E. (2d) 697; Zeis v. Kaechele, 29 Ohio App. 54, 163 N.E. 42 (1927); see McMyler Mfg. Co. v. Mehnke, (6th Cir. 1913) 209 F. 5; Bartson v. Craig, 121 Ohio St. 371, 169 N.E. 291 (1929).

[131] Wis. Stat. (1949) §192.29(6). Applied in Gordon v. Illinois Cent. R. Co., 168 Wis. 244, 169 N.W. 570 (1918); Clark v. Chicago, M., St. P. & P. R. Co., 214 Wis. 295, 252 N.W. 685 (1934).

[132] In 1951, as in conflict with Wisconsin's broader apportionment act (infra, text at note 156). See Lipscomb, "Comparative Negligence," INS. L.J. No. 344, 667 at 674

Nebraska[133] extended this to divide the damages, subject to the same limitation, in all actions for personal injuries or damage to property; and in 1941 the Nebraska act was copied in South Dakota.[134]

The result of the limitation has been to a considerable extent a repetition of the Illinois experience. Appeals have multiplied, in which the court is asked to decide whether particular conduct of the plaintiff is, under the circumstances, more than "slight" negligence. "Slight" is the key word, since it is agreed that if the plaintiff's fault does not meet that qualification, the greater negligence of the defendant still will not permit any recovery.[135] The Nebraska court has refused to define the term, saying that "any one of common sense knows that slight negligence actually means small or little negligence, and gross negligence means just what it indicates, gross or great negligence";[136] and South Dakota has done little better, saying that slight negligence means merely "ordinary negligence, small in quantum."[137]

Counsel have not been slow to accept this invitation to argue the issue. The great majority of the appeals have resulted in a decision that the contributory negligence was more than "slight," and all recovery was barred even though the defendant's negligence was the greater of the two; so that the limitation has had the effect of restricting apportionment to a relatively small number of cases. Recovery

(Sept. 1951). It has been held that the railroad act was superseded by the broader statute where the negligence of the plaintiff was more than slight. Hammer v. Minneapolis, St. P. & S.S.M. R. Co., 216 Wis. 7, 255 N.W. 124 (1934).

[133] Neb. Rev. Stat. (1943) §25-1151: "In all actions brought to recover damages to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of the contributory negligence attributable to the plaintiff."

See Wiebusch, "Comparative Negligence in Nebraska," 17 NEB. L.B. 68 (1938); Baylor, "Comparative Negligence in Nebraska," 10 S.D. B.J. 146 (1942).

[134] S.D. Laws 1941, c. 160, p. 184.

[135] Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N.W. 158 (1920); Mitchell v. Missouri Pac. R. Co., 114 Neb. 72, 206 N.W. 12 (1925); McDonald v. Wright, 125 Neb. 871, 252 N.W. 411 (1934); Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N.W. (2d) 252 (1949), affirmed in 153 Neb. 98, 43 N.W. (2d) 609 (1950); Friese v. Gulbrandson, 69 S.D. 179, 8 N.W. (2d) 438 (1943); Roberts v. Brown, 72 S.D. 479, 36 N.W. (2d) 665 (1949); Will v. Marquette, (S.D. 1949) 40 N.W. (2d) 396. Once the plaintiff's negligence is found to be slight, the defendant's negligence need not be "gross" in itself, but only greater in comparison with that of the plaintiff. Roby v. Anker, 151 Neb. 421, 37 N.W. (2d) 799 (1949).

The Nebraska act has been held to apply where the defendant's negligence was "gross" within the automobile guest statute. Landrum v. Roddy, 143 Neb. 934, 12 N.W. (2d) 82 (1943), overruling Sheehy v. Abboud, 126 Neb. 554, 253 N.W. 683 (1934).

[136] Monasmith v. Cosden Oil Co., 124 Neb. 327, 246 N.W. 623 (1933).

[137] Friese v. Gulbrandson, 69 S.D. 179, 8 N.W. (2d) 438 (1943).

has been denied, for example, where the plaintiff has failed to stop, look and listen at a railroad crossing,[138] or to look or to stop or to see what was visible at an intersection,[139] or to drive at a reasonable speed,[140] or at such a speed that he could stop within his range of vision,[141] or to reduce his speed at the appearance of a visible danger,[142] or to avoid a vehicle when crossing the street,[143] as well

[138] Seiffert v. Hines, 108 Neb. 62, 187 N.W. 108 (1922); Haffke v. Missouri Pac. R. Corp., 110 Neb. 125, 193 N.W. 257 (1923); Stanley v. Chicago, R.I. & P. R. Co., 113 Neb. 280, 202 N.W. 864 (1925); Tyson v. Missouri Pac. R. Co., 113 Neb. 504, 203 N.W. 560 (1925); Allen v. Omaha & S.L R. Co., 115 Neb. 221, 212 N.W. 428 (1927); Eggeling v. Chicago, R.I. & P. R. Co., 119 Neb. 229, 228 N.W. 361, 231 N.W. 152 (1929); Rogers v. Chicago, R.I. & P. R. Co., (8th Cir. 1930) 39 F. (2d) 601; Mundt v. Chicago, R.I. & P. R. Co., 136 Neb. 478, 286 N.W. 691 (1939); Fischer v. Megan, 138 Neb. 420, 293 N.W. 287 (1940); Johnson v. Chicago & N.W. R. Co., 71 S.D. 132, 22 N.W. (2d) 725 (1946).

The issue was held to be for the jury in Traphagen v. Lincoln Traction Co., 110 Neb. 855, 195 N.W. 472 (1923); Baker v. Omaha & C.B. St. R. Co., 110 Neb. 246, 193 N.W. 341 (1923); Gordon v. Illinois Cent. R. Co., 168 Wis. 244, 109 N.W. 570 (1918); Clark v. Chicago, M. & St. P. R. Co., 214 Wis. 295, 252 N.W. 685 (1934).

[139] McDonald v. Omaha & C.B. St. R. Co., 128 Neb. 17, 257 N.W. 489 (1934); Nelson v. Plautz, 130 Neb. 641, 265 N.W. 885 (1936); Bergendahl v. Rabeler, 133 Neb. 699, 276 N.W. 673 (1937); Ritter v. Hering, 135 Neb. 1, 280 N.W. 231 (1938); Whittaker v. Hanifin, 138 Neb. 18, 291 N.W. 723 (1940); Klement v. Lindell, 139 Neb. 540, 298 N.W. 137 (1941); Kundert v. B. F. Goodrich Co., 70 S.D. 464, 18 N.W. (2d) 786 (1945); Flanagan v. Slattery, (S.D. 1951) 49 N.W. (2d) 27; Huckfeldt v. Union Pac. R. Co., 154 Neb. 873, 50 N.W. (2d) 110 (1951).

The issue was held to be for the jury in Anderbery v. Katz, 142 Neb. 872, 8 N.W. (2d) 207 (1943); Sgroi v. Yellow Cab & Baggage Co., 124 Neb. 525, 247 N.W. 355 (1933). Miscalculation of the speed of an approaching vehicle was held to be for the jury in Burton v. Lincoln Traction Co., 106 Neb. 521, 184 N.W. 73 (1921); Coburn v. Loetscher, 123 Neb. 407, 243 N.W. 127 (1932).

[140] Anderson v. Altschuler, 125 Neb. 853, 252 N.W. 310 (1934). In Patterson v. Kerr, 127 Neb. 73, 254 N.W. 704 (1934), the issue was held to be for the jury.

[141] Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N.W. (2d) 559 (1945). The issue was held to be for the jury in Day v. Metropolitan Utilities District, 115 Neb. 711, 214 N.W. 647 (1927); Monasmith v. Cosden Oil Co., 124 Neb. 327, 246 N.W. 623 (1933). In Pierson v. Jensen, 148 Neb. 849, 29 N.W. (2d) 625 (1947), the court at first held this to be more than slight as a matter of law, but on rehearing, in 150 Neb. 86, 33 N.W. (2d) 462 (1948), vacated the decision and left the issue to the jury. In Giles v. Welsh, 122 Neb. 164, 239 N.W. 813 (1931), and Audiss v. Peter Kiewit Sons Co., (8th Cir. 1951) 190 F. (2d) 238, failure to see an object in the highway not too clearly visible was held to be for the jury.

[142] Stocker v. Roach, 140 Neb. 461, 300 N.W. 627 (1941); Chana v. Mannlein, 141 Neb. 312, 3 N.W. (2d) 572 (1942); Donald v. Heller, 143 Neb. 600, 10 N.W. (2d) 447 (1943); Doane v. Hoppe, 132 Neb. 641, 272 N.W. 763 (1937); Redwelski v. Omaha & C.B. St. R. Co., 137 Neb. 681, 290 N.W. 904 (1940).

[143] Dodds v. Omaha & C.B. St. R. Co., 104 Neb. 692, 178 N.W. 258 (1920); Troup v. Porter, 126 Neb. 93, 252 N.W. 611 (1934); Travinsky v. Omaha & C.B.St. R. Co., 137 Neb. 168, 288 N.W. 512 (1939); Hughes v. Omaha & C.B. St. R. Co., 143 Neb. 47, 8 N.W. (2d) 509 (1943); Halliday v. Raymond, 147 Neb. 179, 22 N.W. (2d) 614 (1946); cf. Chew v. Coffin, 144 Neb. 170, 12 N.W. (2d) 839 (1944) (pedestrian on sidewalk oblivious of car backing out of driveway).

The issue was held to be for the jury in Francis v. Lincoln Traction Co., 106 Neb. 243, 183 N.W. 293 (1921); Belville v. Bondesson, 130 Neb. 926, 266 N.W. 901 (1936); Thompson v. Buehler, 147 Neb. 811, 25 N.W. (2d) 391 (1946).

as in many other instances of rather ordinary negligence.[144] At the same time it is clear that "slight" is a matter of all the circumstances of the particular case, so that there can be no definite rules; and there are other cases[145] in which conduct of the same kind is held to present a question for the jury. It is, of course, not at all surprising that the appeals continue.

The Nebraska system does not inspire confidence in a stranger to the state. It seems quite apparent that it leads to confusion, and to excessive appeals; and that it results in apportionment in only a relatively small fraction of the cases in which it should be made.

Plaintiff's Negligence "Less" Than Defendant's

A second type of limitation is that there can be apportionment only when the plaintiff's negligence is found to be "less" than that of the defendant, and that if it is equal or greater all recovery is barred. This first appeared in Georgia. After some early language at common law looking in the direction of apportionment,[146] the Georgia Code of 1860-62 introduced a provision, applicable only to personal injuries or damage to property inflicted by a railroad,[147] which required division

[144] Wertz v. Lincoln Liberty Life Ins. Co., 152 Neb. 451, 41 N.W. (2d) 740 (1950) (window washer failing to fasten safety belt); Sodomka v. Cudahy Packing Co., 101 Neb. 448, 163 N.W. 809 (1917) (backing into elevator shaft); Kudrna v. Sarpy County, 125 Neb. 83, 249 N.W. 87 (1933) (riding with inexperienced driver); Tomjack v. Chicago & N.W. R. Co., 116 Neb. 413, 217 N.W. 944 (1928) (passenger failing to warn driver of missing culvert); Frye v. Omaha & C.B. St. R. Co., 106 Neb. 333, 183 N.W. 567 (1921) (skating with improper skates and straps); Haase v. Willers Truck Service, 72 S.D. 353, 34 N.W. (2d) 313 (1948) (obstructing highway with truck); Roger Wurmser, Inc. v. Interstate Hotel Co., 148 Neb. 660, 28 N.W. (2d) 405 (1947) (failure to inform hotel of $200,000 value of jewels); Bixby v. Ayers, 139 Neb. 652, 298 N.W. 533 (1941) (boy turning bicycle into path of car); Gardner v. Metropolitan Utilities District, 134 Neb. 163, 278 N.W. 137 (1938) (falling into open stairway); Eaton v. Merritt, 135 Neb. 363, 281 N.W. 620 (1938) (standing behind truck in excavation); Wentink v. Traphagen, 138 Neb. 41, 291 N.W. 884 (1940) (proceeding in dark basement); Groat v. Clausen, 139 Neb. 689, 298 N.W. 563 (1941) (getting too close to ensilage cutter).

The following were held to be for the jury: La Fleur v. Poesch, 126 Neb. 263, 252 N.W. 902 (1934) (standing in front of stalled truck on highway without required red light); Disher v. Chicago, R.I. & P. R. Co., 93 Neb. 224, 140 N.W. 135 (1913) (attempting to remove handcar from track in path of train); McCarthy v. Village of Ravenna, 99 Neb. 674, 157 N.W. 629 (1916) (using short handled brush around machinery in motion).

[145] See cases cited in notes 146 152.

[146] In Macon & Western R. Co. v. Winn, 26 Ga. 250 at 254 (1858); Macon & W. R. Co. v. Davis, 27 Ga. 113 at 119 (1859); Flanders v. Meath, 27 Ga. 358 at 362 (1859). The history is well traced in Turk, "Comparative Negligence on the March," 28 CHI-KENT L. REV. 189, 304, 326-333 (1950).

[147] Ga. Code Ann. (1936) §94-703: "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him."

of the damages. By a rather remarkable process of construction, not justified by anything appearing in the provision itself,[148] it was first of all extended to actions against other defendants than railroads,[149] and then limited to cases where the plaintiff's negligence was "less."[150] One looks in vain for any explanation of the limitation,[151] and it appears to have arisen from nothing more than timidity in the application of the statute.

Half a century of Georgia history suggested this compromise too to other legislatures, and it was adopted in the railroad employers' liability acts of Arkansas,[152] Michigan[153] and Wisconsin,[154] in which "slight" negligence does not even go to reduce the damages; and in an apportionment act in Arkansas[155] which covers all personal injuries inflicted by a railroad. In 1913 Wisconsin carried the limitation over into its general statute providing for apportionment in all cases of negligent personal injury or property damage.[156]

[148] When Florida copied the Georgia act, it refused to accept the limitation. Florida, C. & P. R. Co. v. Foxworth, 41 Fla. 1, 25 S. 338 (1899).

[149] Berry v. Jowers, 59 Ga. App. 24, 200 S.E. 195 (1938); Elk Cotton Mills v. Grant, 140 Ga. 727, 79 S.E. 836 (1913); Wynne v. Southern Bell Tel. Co., 159 Ga. 623, 126 S.E. 388 (1925); Moore v. Sears, Roebuck & Co., 48 Ga. App. 185, 172 S.E. 680 (1934); Lamon v. Perry, 33 Ga. App. 248, 125 S.E. 907 (1924); City of Ocilla v. Luke, 28 Ga. App. 234, 110 S.E. 757 (1922).

[150] Christian v. Macon R. Co., 120 Ga. 314, 47 S.E. 923 (1904); Brunswick R. Co. v. Wiggins, 113 Ga. 842, 39 S.E. 551 (1901); Southern Stages, Inc. v. Clements, 71 Ga. App. 169, 30 S.E. (2d) 429 (1944); Whatley v. Henry, 65 Ga. App. 668, 16 S.E. (2d) 214 (1941); Southern R. Co. v. Parkman, 61 Ga. App. 62, 5 S.E. (2d) 685 (1939); Pollard v. Heard, 53 Ga. App. 623, 186 S.E. 894 (1936); Central of Ga. R. Co. v. Larsen, 19 Ga. App. 413, 91 S.E. 517 (1917).

[151] The limitation appears to have originated in Central R. & B. Co. v. Newman, 94 Ga. 560, 21 S.E. 219 (1894), where the facts were stated, and the court reversed without an opinion. This case was relied on, and the rule first stated, in Southern R. Co. v. Watson, 104 Ga. 243, 30 S.E. 818 (1898), where the only reason given was that the rule was established. Both cases were followed, with no better explanation, in Brunswick R. Co. v. Wiggins, 113 Ga. 842, 39 S.E. 501 (1901).

[152] Ark. Stat. Ann. (1942) §73 916. Applied in Missouri Pac. R. Co. v. Brown, 195 Ark. 1060, 115 S.W. (2d) 1083 (1938); Kansas City & M. R. Co. v. Huff, 116 Ark. 461, 173 S.W. 419 (1915).

[153] Mich. Comp. Laws (1948) §419.52. Applied in Bruce v. Michigan Cent. R. Co., 172 Mich. 441, 138 N.W. 362 (1912); English v. Michigan Cent. R. Co., 188 Mich. 286, 154 N.W. 98 (1915).

[154] Wis. Stat. (1949) §192.50 (3). Applied in Zeratsky v. Chicago, M. & St. P. R. Co., 141 Wis. 423, 123 N.W. 904 (1909); Jensen v. Wisconsin Cent. R. Co., 145 Wis. 326, 128 N.W. 982 (1910); Tidmarsh v. Chicago, M. & St. P. R. Co., 149 Wis. 590, 136 N.W. 337 (1912).

[155] Ark. Stat. Ann. (1947) §73-1004. Applied in St. Louis-San Francisco R. Co. v. Kirkpatrick, 155 Ark. 632, 245 S.W. 35 (1922); St. Louis-San Francisco R. Co. v. Hovley, 199 Ark. 853, 137 S.W. (2d) 231 (1940); Phillips v. Kurn, (8th Cir. 1944) 145 F. (2d) 908. The act has no application to property damage. Baldwin v. Waters, 191 Ark. 377, 86 S.W. (2d) 172 (1935); Missouri Pac. R. Co. v. Binkley, 208 Ark. 933, 188 S.W. (2d) 291 (1945).

[156] Wis. Stat. (1949) §331.045: "Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to p... the negligence of the person aga... shall be diminished in the proport... recovering."

See Padway, "Comparative ... "Wisconsin's Comparative Negligence ... parative Negligence Statute," 20 ... ligence," [1938] Wis. L. Rev. 4... [1941] Wis. L. Rev. 289; Hayes, ... Wisconsin," 23 Ohio S.B.A. Re... Negligence," 23 Ohio S.B.A. Re...

[157] Bradley v. Missouri Pac. ... S.W. R. Co., 178 Ark. 578, 11 S... O. R. Co., 219 Wis. 124, 262 N.W. ... 830, 125 S.W. (2d) 785 (1939); ... (2d) 645 (1939); Patterson v. ... 63 (1940); Evanich v. Milwaukee ... McGlothin v. Thompson, 347 Mo... fusion in the Arkansas cases); Mis... (2d) 912 (1942); Missouri Pac. ... (1942); Missouri Pac. R. Co. v. ... souri Pac. R. Co. v. Dawson, 205 ... Louis S.W. R. Co., 207 Ark. 154... R. Co., 183 Tenn. 471, 192 S.W. ... 220 S.W. (2d) 23 (1949).

[158] Memphis, D. & G. R. Co. ... Powell v. Jonesboro, L.C. & E. ... Missouri Pac. R. Co., 170 Ark. 6... French, 181 Ark. 777, 27 S.W. ... Cir. 1933) 67 F. (2d) 424; Misso... 34 (1933); Missouri Pac. R. Co. v. ... Missouri Pac. R. Co. v. Dotson, ... Southern R. Co., (5th Cir. 1937) ... 194 Ark. 884, 110 S.W. (2d) 51...

The practical effect h... "gross" negligence. Again... is asked to determine wh... is fault at least "equal" to... pend not only upon all th... conduct of both parties, b... it is obvious that each dec... that either the losing def... couragement to raise the ... semblance of consistency ... type. In about half of the ... railroad crossing without ... or seeing a visible train, ... as a matter of law to th... warning.[157] In about as m... find that the plaintiff's neg...

The practical effect has been very similar to that of "slight" and "gross" negligence. Again appeals have multiplied, in which the court is asked to determine whether the particular conduct of the plaintiff is fault at least "equal" to that of the defendant. Since this must depend not only upon all the circumstances of the case as they affect the conduct of both parties, but upon a comparison of one with the other, it is obvious that each decision must be upon the individual facts, and that either the losing defendant or the losing plaintiff has ample encouragement to raise the issue. It is not surprising that there is no semblance of consistency to be discerned in cases of the same general type. In about half of the cases in which the plaintiff has driven onto a railroad crossing without stopping, looking, listening, reducing speed or seeing a visible train, his negligence has been held at least equal as a matter of law to that of the railroad in failing to give proper warning.[157] In about as many cases it has been held that the jury may find that the plaintiff's negligence is the lesser of the two.[158] The same

sulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering."

See Padway, "Comparative Negligence," 16 MARQ. L. REV. 3 (1931); Campbell, "Wisconsin's Comparative Negligence Law," 7 WIS. L. REV. 222 (1932); Whelan, "Comparative Negligence Statute," 20 MARQ. L. REV. 189 (1936); Whelan, "Comparative Negligence," [1938] WIS. L. REV. 465; Campbell, "Ten Years of Comparative Negligence," [1941] WIS. L. REV. 289; Hayes, "Rule of Comparative Negligence and its Operation in Wisconsin," 23 OHIO S.B.A. REP. 233 (1950); Grubb, "Observations on Comparative Negligence," 23 OHIO S.B.A. REP. 237 (1950).

[157] Bradley v. Missouri Pac. R. Co., (8th Cir. 1923) 288 F. 484; Jemell v. St. Louis S.W. R. Co., 178 Ark. 578, 11 S.W. (2d) 449 (1928); Zenner v. Chicago, St. P., M. & O. R. Co., 219 Wis. 124, 262 N.W. 581 (1935); Missouri Pac. R. Co. v. Davis, 197 Ark. 830, 125 S.W. (2d) 785 (1939); Missouri Pac. R. Co. v. Price, 199 Ark. 346, 133 S.W. (2d) 645 (1939); Patterson v. Chicago, St. P., M. & O. R. Co., 236 Wis. 205, 294 N.W. 63 (1940); Evanich v. Milwaukee Elec. R. & L. Co., 237 Wis. 111, 295 N.W. 44 (1941); McGlothin v. Thompson, 347 Mo. 708, 148 S.W. (2d) 558 (1941) (reviewing the confusion in the Arkansas cases); Missouri Pac. R. Co. v. Carruthers, 204 Ark. 419, 162 S.W. (2d) 912 (1942); Missouri Pac. R. Co. v. Howard, 204 Ark. 253, 161 S.W. (2d) 759 (1942); Missouri Pac. R. Co. v. Dennis, 205 Ark. 28, 166 S.W. (2d) 886 (1942); Missouri Pac. R. Co. v. Dawson, 205 Ark. 404, 168 S.W. (2d) 1105 (1943); Lloyd v. St. Louis S.W. R. Co., 207 Ark. 1[illegible] S.W. (2d) 651 (1944); Snyder v. Missouri Pac. R. Co., 183 Tenn. 471, 192 S[illegible] 1008 (1946); Tepel v. Thompson, 359 Mo. 1, 220 S.W. (2d) 23 (1949).

[158] Memphis, D. & G. R. Co. v. Thompson, 138 Ark. 175, 210 S.W. 346 (1919); Powell v. Jonesboro, L.C. & E. R. Co., 166 Ark. 252, 266 S.W. 78 (1924); Huff v. Missouri Pac. R. Co., 170 Ark. 665, 280 S.W. 648 (1926); Chicago, R.I. & P. Co. v. French, 181 Ark. 777, 27 S.W. (2d) 1021 (1930); Southern R. Co. v. Wilbanks, (5th Cir. 1933) 67 F. (2d) 424; Missouri Pac. R. Co. v. Brown, 187 Ark. 1163, 59 S.W. (2d) 34 (1933); Missouri Pac. R. Co. v. Westerfield, 192 Ark. 558, 92 S.W. (2d) 862 (1936); Missouri Pac. R. Co. v. Dotson, 195 Ark. 286, 101 S.W. (2d) 785 (1937); Thomas v. Southern R. Co., (5th Cir. 1937) 92 F. (2d) 445; Missouri Pac. R. Co. v. Henderson, 194 Ark. 884, 110 S.W. (2d) 516 (1937) (passenger failing to warn driver); St. Louis-

kind of variation is found in cases of a pedestrian walking into the path of a train,[159] or a vehicle whose driver has failed in his duty as to speed, warning or lookout;[160] a trespasser on the right of way struck by a train;[161] the various kinds of negligence of drivers colliding at intersections;[162] and miscellaneous other situations.[163] The Georgia courts have displayed a remarkable tendency to leave the issue to the

San Francisco R. Co. v. Hovley, 199 Ark. 853, 137 S.W. (2d) 231 (1940); St. Louis-San Francisco R. Co. v. Beasley, 205 Ark. 688, 170 S.W. (2d) 667 (1943); Missouri Pac. R. Co. v. Walden, 207 Ark. 437, 181 S.W. (2d) 24 (1944); Missouri Pac. R. Co. v. Shell, 208 Ark. 70, 185 S.W. (2d) 81 (1945); Smith v. Missouri Pac. R. Co., 208 Ark. 40, 184 S.W. (2d) 951 (1945); Webster v. Roth, 246 Wis. 535, 18 N.W. (2d) 1 (1945).

[159] Held at least equal as a matter of law in Southern R. Co. v. Parkman, 61 Ga. App. 62, 5 S.E. (2d) 685 (1939); Allnutt v. Missouri Pac. R. Co., (8th Cir. 1925) 8 F. (2d) 604. Held for the jury in Missouri Pac. R. v. Trotter, 184 Ark. 790, 43 S.W. (2d) 762 (1931); Missouri Pac. R. Co. v. Rogers, 184 Ark. 725, 43 S.W. (2d) 757 (1931).

[160] Held equal as a matter of law in Burant v. Studzinski, [illegible] Wis. 455, 282 N.W. 3 (1938); Hustad v. Evetts, 230 Wis. 292, 282 N.W. 595 (1938); Nayes v. Milwaukee Elec. R. & L. Co., 237 Wis. 141, 294 N.W. 812 (1940); Post v. Thomas, 240 Wis. 519, 3 N.W. (2d) 344 (1942); Crawley v. Hill, 253 Wis. 294, 34 N.W. (2d) 123 (1948); Ninneman v. Schwede, 258 Wis. 408, 46 N.W. (2d) 230 (1951).

Held for the jury in De Goey v. Hermsen, 233 Wis. 69, 288 N.W. 770 (1939); Wilson v. Pollard, 62 Ga. App. 781, 10 S.E. (2d) 407 (1940); Doepke v. Reimer, 217 Wis. 49, 258 N.W. 345 (1935); Schwandt v. Milwaukee Elec. R. & T. Co., 244 Wis. 251, 12 N.W. (2d) 18 (1943); Kleiner v. Johnson, 249 Wis. 148, 23 N.W. (2d) 467 (1946); Baggett v. Jackson, 79 Ga. App. 460, 54 S.E. (2d) 146 (1949).

[161] Held equal as a matter of law in St. Louis-San Francisco R. Co. v. Williams, 180 Ark. 413, 21 S.W. (2d) 611 (1929). Held for the jury in Hunt v. Western & A. R. Co., 49 Ga. App. 33, 174 S.E. 222 (1934).

[162] Held equal as a matter of law in Kilcoyne v. Trausch, 222 Wis. 528, 269 N.W. 276 (1936); Grasser v. Anderson, 224 Wis. 654, 273 N.W. 63 (1937); Langworthy v. Reisinger, 249 Wis. 24, 23 N.W. (2d) 482 (1946); Geyer v. Milwaukee Elec. R. & L. Co., 230 Wis. 347, 284 N.W. 1 (1939); Campanelli v. Milwaukee Elec. R. & T. Co., 242 Wis. 505, 8 N.W. (2d) 390 (1943); J. W. Cartage Co. v. Laufenberg, 251 Wis. 301, 28 N.W. (2d) 925 (1947); Kloss v. American Indemnity Co., 253 Wis. 476, 34 N.W. (2d) 816 (1948); Dinger v. McCoy Transp. Co., 254 Wis. 447, 37 N.W. (2d) 26 (1949).

Held for the jury in Paluczak v. Jones, 209 Wis. 640, 245 N.W. 655 (1932); Head v. Georgia Power Co., 70 Ga. App. 32, 27 S.E. (2d) 339 (1943).

[163] Held equal as a matter of law: Manitowoc Trust Co. v. Boutil, 220 Wis. 627, 265 N.W. 572 (1936) (plaintiff on running board of defendant's automobile); Schulz v. General Cas. Co., 233 Wis. 118, 288 N.W. 803 (1939) (two motorists approaching top of hill in middle of road; plaintiff reduced speed and defendant did not); Konow v. Gruenwald, 241 Wis. 453, 6 N.W. (2d) 208 (1942) (head-on collision, plaintiff on wrong side); Piesik v. Deuster, 243 Wis. 598, 11 N.W. (2d) 358 (1943) (head-on collision, both drivers over center line); Saley v. Hardware Mut. Cas. Co., 246 Wis. 647, 18 N.W. (2d) 342 (1945) (plaintiff on wrong side, defendant driving at excessive speed); McCord v. Atlantic Coast Line R. Co., (5th Cir. 1950) 185 F. (2d) 603 (riding with intoxicated driver, collision with train); Phillips v. Haring, (Wis. 1952) 54 N.W. (2d) 200 (rear end collision).

Held for the jury: Hansberry v. Dunn, 230 Wis. 626, 284 N.W. 556 (1939) (both drivers on wrong side, too fast and no lookout); Atlantic Greyhound Corp. v. Loudermilk, (5th Cir. 1940) 110 F. (2d) 596 (turning into path of speeding bus); United States v. Fleming, (5th Cir. 1940) 115 F. (2d) 314 (unable to stop within range of vision, collision with unlighted vehicle parked on highway); McDowall Transport, Inc. v. Gault, 80 Ga. App. 445, 56 S.E. (2d) 161 (1949) (same); Engebrecht v. Bradley, 211 Wis. 1, 247 N.W. 451 (1933) (same).

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[164] As, for example, in Lewis
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[165] Evanich v. Milwaukee Elec.
Langworthy v. Reisinger, 249 Wis. 2
Wis. 598, 11 N.W. (2d) 358 (1943
[166] McGuiggan v. Hiller Bros., 20
210 Wis. 345, 244 N.W. 630 (193
451 (1933); Doepke v. Reimer, 217 W
228 Wis. 53, 279 N.W. 702 (1938).
[167] Hansberry v. Dunn, 230 Wis.
Wis. 398, 291 N.W. 850, 293 N.W.
[168] Geyer v. Milwaukee Elec. R.
v. Hardware Mut. Cas. Co., 246 Wis.
Transp. Co., 254 Wis. 447, 37 N.W.
[169] Grasser v. Anderson, 224 Wis.
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[170] Schmidt v. Leary, 213 Wis. 58
Wis. 208, 38 N.W. (2d) 514 (1949).
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zinski, 230 Wis. 455, 282 N.W. 3, 12
6 N.W. (2d) 208 (1943).
[171] In Head v. Georgia Power Co.,
Hunt v. Western & A. R. Co., 49 Ga. A
slight difference in fault would justify
Central of Georgia R. Co., 38 Ga. App.
was upheld on this basis. The Georgia
theory of allowing the plaintiff the differe

jury in all cases,[164] and in effect have nullified the limitation except as an element of the instructions.

Wisconsin at one time attempted to state some kind of rule by saying that negligence of the same kind, as where both parties failed to keep a proper lookout, would be treated as equal,[165] but that where the parties were at fault in different respects, as where failure to look out must be balanced against excessive speed, the court could not rule and the issue must be left to the jury.[166] It has been compelled to retreat from that position, and to recognize not only that juries may find that negligence of the same kind differs in degree,[167] but also that the plaintiff's negligence of a different kind may be as a matter of law at least equal to that of the defendant.[168] Likewise where the plaintiff has been negligent in one respect and the defendant in two or three, it has been held that the fault is at least equal,[169] and where the plaintiff has failed in two or three respects and the defendant in one the jury has been permitted to find that the plaintiff is still less at fault.[170]

It is obvious that a slight difference in the proportionate fault may permit a recovery;[171] and there has been much quite justified criticism

[164] As, for example, in Lewis v. Powell, 51 Ga. App. 129, 179 S.E. 865 (1935), where the plaintiff drove into the side of a train.

[165] Evanich v. Milwaukee Elec. R. & L. Co., 237 Wis. 111, 295 N.W. 44 (1941); Langworthy v. Reisinger, 249 Wis. 24, 23 N.W. (2d) 482 (1946); Piesik v. Deuster, 243 Wis. 598, 11 N.W. (2d) 358 (1943).

[166] McGuiggan v. Hiller Bros., 209 Wis. 402, 245 N.W. 97 (1932); Brown v. Haertel, 210 Wis. 345, 244 N.W. 630 (1932); Engebrecht v. Bradley, 211 Wis. 1, 247 N.W. 451 (1933); Doepke v. Reimer, 217 Wis. 49, 258 N.W. 345 (1935); Callaway v. Kryzen, 228 Wis. 53, 279 N.W. 702 (1938).

[167] Hansberry v. Dunn, 230 Wis. 626, 284 N.W. 556 (1939); Fronczek v. Sink, 235 Wis. 398, 291 N.W. 850, 293 N.W. 153 (1940).

[168] Geyer v. Milwaukee Elec. R. & L. Co., 230 Wis. 347, 284 N.W. 1 (1939); Saley v. Hardware Mut. Cas. Co., 246 Wis. 647, 18 N.W. (2d) 342 (1945); Dinger v. McCoy Transp. Co., 254 Wis. 447, 37 N.W. (2d) 26 (1949).

[169] Grasser v. Anderson, 224 Wis. 654, 273 N.W. 63 (1937); Hustad v. Evetts, 230 Wis. 292, 282 N.W. 595 (1938); Rosenow v. Schmidt, 232 Wis. 1, 285 N.W. 755 (1939). But such facts may justify a jury's conclusion that the plaintiff's fault is less in exact proportion to the number of elements of negligence. Horn v. Snow White Laundry & D.C. Co., 240 Wis. 312, 3 N.W. (2d) 380 (1942).

[170] Schmidt v. Leary, 213 Wis. 587, 252 N.W. 151 (1934); Kirchen v. Tisler, 255 Wis. 208, 38 N.W. (2d) 514 (1949). But the fact that plaintiff has been negligent in more respects than defendant has been held to require the conclusion that his fault was at least equal. Kilcoyne v. Trausch, 222 Wis. 528, 269 N.W. 276 (1936); Burant v. Studzinski, 230 Wis. 455, 282 N.W. 3, 128 (1938); Konow v. Gruenwald, 241 Wis. 453, 6 N.W. (2d) 208 (1943).

[171] In Head v. Georgia Power Co., 70 Ga. App. 32, 27 S.E. (2d) 339 (1943), and Hunt v. Western & A. R. Co., 49 Ga. App. 33, 174 S.E. 222 (1934), it was said that a slight difference in fault would justify recovery of "a small amount"; and in Evans v. Central of Georgia R. Co., 38 Ga. App. 146, 142 S.E. 909 (1928), a verdict for 12 cents was upheld on this basis. The Georgia courts evidently were following some unstated theory of allowing the plaintiff the difference between the proportions of fault.

of a rule under which a plaintiff who is charged with 49 per cent of the total negligence recovers 51 per cent of his damages, while one who is charged with 50 per cent recovers nothing at all.[172] Actually, of course, juries almost never indulge in such refined hair-splitting,[173] and the criticism really goes to the directed verdict. It has been said that the restriction is necessary to prevent the jury from giving the plaintiff something in every case, even where the defendant may not be negligent at all, or is at fault to the extent of only 1% of the total. But this ignores the fact that the court still has control over an unjustified apportionment, and that a 1% recovery will be insignificant, and less than the nuisance value of the suit. Actually the writer has found no such cases. It appears impossible to justify the rule on any basis except one of pure political compromise. It is difficult to be happy about the Wisconsin cases, or to escape the conclusion that at the cost of many appeals they have succeeded merely in denying apportionment in many cases where it should have been made.

Proximate Cause

"Proximate cause" has been something of a problem under the apportionment statutes. The Federal Employers' Liability Act, when it was first enacted, said nothing about assumption of risk,[174] and it was held that that defense remained available to the defendant as a complete bar to recovery,[175] until the act was amended in 1939 to eliminate it entirely.[176] Quite apart from this, the Supreme Court quite unexpectedly held[177] in 1916 that a railroad employee who had violated a company rule or order was charged with the "primary duty," and could not recover, on the ground that his own negligence was

[172] See in particular the articles cited in note 156.

[173] In special verdict cases the juries, with rare exceptions, have found percentages of fault in even multiples of 5 or 10, or else in simple fractions, such as ⅓ or the like.

[174] See Peterson, "The Joker in the Federal Employers' Liability Act," 80 CENT. L.J. 5 (1915); Buford, "Assumption of Risk Under the Federal Employers' Liability Act," 28 HARV. L. REV. 163 (1914); notes, 32 COL. L. REV. 1384 (1932); 6 TULANE L. REV. 315 (1932).

[175] Seaboard Air Line R. Co. v. Horton, 233 U.S. 492, 34 S.Ct. 635 (1914).

[176] "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 53 Stat. L. 1404 (1939), 45 U.S.C. (1946) §54. First applied in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S.Ct. 444 (1943).

[177] Great Northern R. Co. v. Wiles, 240 U.S. 444, 36 S.Ct. 406 (1916).

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[178] Unadilla Valley R. Co. v. C

[179] Frese v. Chicago, B. & Q. R
M. & O. R. Co. v. Arnold, (8th Cir.
(4th Cir. 1915) 230 F. 88; Unadill
239; Hayes v. Chicago, B. & Q. R.
Chicago, R.I. & P. R. Co., 178 Mi

[180] Davis v. Kennedy, 266 U.S.
blood, 286 U.S. 313, 52 S.Ct. 518
346, 52 S.Ct. 520 (1932); Bradley
(2d) 683; Van Derveer v. Delaware
Southern R. Co. v. Hylton, (6th Ci
R. Co., (6th Cir. 1937) 87 F. (2d)
43 F. (2d) 908.

[181] "One of these [problems] w
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Coast Line R. Co., 318 U.S. 54 at

[182] Keith v. Wheeling & L.E. R
U.S. 763, 68 S.Ct. 67 (1947). Acc
431, 34 S. (2d) 84 (1948); Miss
1950) 229 S.W. (2d) 204; Le
(2d) 37 (1943). *Contra:* Chicago,
160 F. (2d) 1002; Walker v. Lyl
Kurn v. Reese, 192 Okla. 78, 133 P.

[183] See text supra at note 36.

the "sole proximate cause" of his injury, so that the negligence of the defendant was not to be regarded as contributing at all. The result was a series of decisions refusing to apportion the damages in the case of such violations. In one of them the plaintiff had himself ordered the negligent conduct of a fellow servant for which he was seeking to recover,[178] but in others he had merely failed to perform a specific duty of his own,[179] or to obey a specific order.[180]

In 1943 the Supreme Court, quite as unexpectedly, declared[181] that the "primary duty" rule was in reality a form of assumption of risk, which it never had been called before, and that the 1939 amendment had eliminated it. A subsequent decision of the Sixth Circuit,[182] to which certiorari was denied, has confirmed this conclusion, although there are still decisions which refuse to accept it. It is idle to comment on such intellectual gymnastics; but the whole thing is likely to prove something of a puzzle to future historians, since the rule itself would appear to be neither required nor justified by anything in the original statute, and its abolition equally uncalled for by the amendment.

The very questionable "proximate cause" explanation of the last clear chance[183] has resulted in the survival of that doctrine under the apportionment acts, on the theory that its effect is that the plaintiff's

[178] Unadilla Valley R. Co. v. Caldine, 278 U.S. 139, 49 S.Ct. 91 (1928).

[179] Frese v. Chicago, B. & Q. R. Co., 263 U.S. 1, 44 S.Ct. 1 (1923); Chicago St. P., M. & O. R. Co. v. Arnold, (8th Cir. 1947) 160 F. (2d) 1002; Virginian R. Co. v. Linkous, (4th Cir. 1915) 230 F. 88; Unadilla Valley R. Co. v. Dibble, (2d Cir. 1929) 31 F. (2d) 239; Hayes v. Chicago, B. & Q. R. Co., 131 Neb. 687, 269 N.W. 623 (1936); Feurt v. Chicago, R.I. & P. R. Co., 178 Minn. 395, 227 N.W. 212 (1929).

[180] Davis v. Kennedy, 266 U.S. 147, 45 S.Ct. 33 (1924); Southern R. Co. v. Youngblood, 286 U.S. 313, 52 S.Ct. 518 (1932); St. Louis S.W. R. Co. v. Simpson, 286 U.S. 346, 52 S.Ct. 520 (1932); Bradley v. Northwestern Pac. R. Co., (9th Cir. 1930), 44 F. (2d) 683; Van Derveer v. Delaware, L. & W. R. Co., (2d Cir. 1936) 84 F. (2d) 979; Southern R. Co. v. Hylton, (6th Cir. 1930) 37 F. (2d) 843, affd. in Hylton v. Southern R. Co., (6th Cir. 1937) 87 F. (2d) 393; Paster v. Pennsylvania R. Co., (2d Cir. 1930) 43 F. (2d) 908.

[181] "One of these [problems] was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk. Unadilla Valley Ry. Co. v. Caldine, 278 U.S. 139; Davis v. Kennedy, 266 U.S. 147. . . . It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called." Justice Black, in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 at 63-64, 63 S.Ct. 444 (1943).

[182] Keith v. Wheeling & L.E. R. Co., (6th Cir. 1947) 160 F. (2d) 654, cert. den. 332 U.S. 763, 68 S.Ct. 67 (1947). *Accord:* Atlantic Coast Line R. Co. v. Mangum, 250 Ala. 431, 34 S. (2d) 848 (1948); Missouri-Kansas-Texas R. Co. v. Webb, (Tex. Civ. App. 1950) 229 S.W. (2d) 204; Leet v. Union Pac. R. Co., 60 Cal. App. (2d) 814, 142 P. (2d) 37 (1943). *Contra:* Chicago, St. P. M. & O. R. Co. v. Arnold, (8th Cir. 1947) 160 F. (2d) 1002; Walker v. Lykes Bros. S.S. Co., (2d Cir. 1952) 193 F. (2d) 772; Kurn v. Reese, 192 Okla. 78, 133 P. (2d) 880 (1943). See note, 62 Yale L.J. 111 (1952).

[183] See text supra at note 36.

negligence has not contributed "proximately" at all. This has been true under the Federal Employers' Liability Act,[184] the various state statutes where the question has been considered,[185] and most of the Canadian apportionment acts.[186] The decisions may perhaps be justified, on the ground that the statutes all are silent on the last clear chance, and the common law stands until it is clearly changed. But the very probable reason for the silence is that the question simply never occurred to the legislatures at all;[187] and the result is that the system of apportionment breaks down in an important group of cases, where a loss from the fault of two parties still is visited entirely upon one. Any necessity for the last clear chance as a palliation of the hardships of contributory negligence obviously disappears when the loss can be apportioned; and the statute becomes jug-handled in favor of the plaintiff, allowing the cases of injustice to the defendant to stand.[188] This windfall to the plaintiff must inevitably be reflected in liability insurance rates. At least, in any future statutes there should be specific provision one way or the other as to the last clear chance, and it should not be allowed, as in the past, to go by default.

Tennessee has developed, at common law, a peculiar rule under which negligence of the plaintiff which contributes concurrently, or

[184] Gray v. Southern R. Co., 167 N.C. 433, 83 S.E. 849 (1914), reversed on other grounds in 241 U.S. 333, 36 S.Ct. 558 (1916); Soles v. Atlantic Coast Line R. Co., 184 N.C. 283, 114 S.E. 305 (1922); Washington & O.D. R. Co. v. Weakley, 140 Va. 796, 125 S.E. 672 (1924); Barnes v. Red River & G. R. Co., 14 La. App. 188, 128 S. 724 (1930); Hamilton v. Chicago, B. & Q. R. Co., 211 Iowa 924, 234 N.W. 810 (1931); St. Louis & S.W. R. Co. v. Simpson, 184 Ark. 633, 43 S.W. (2d) 251 (1931), reversed on other grounds in 286 U.S. 346, 52 S.Ct. 520 (1931); Chicago, R.I. & P. R. Co. v. Adams, 187 Ark. 816, 62 S.W. (2d) 947 (1933).

[185] Seiffert v. Hines, 108 Neb. 62, 187 N.W. 108 (1922); Stanley v. Chicago, R.I. & P. R. Co., 113 Neb. 280, 202 N.W. 864 (1925); Wilfong v. Omaha & C.B. R. Co., 129 Neb. 600, 262 N.W. 537 (1935); Wilson's Admx. v. Virginia Portland R. Co., 122 Va. 160, 94 S.E. 347 (1917). An exception is Wisconsin, which did not recognize the last clear chance. Switzer v. Detroit Investment Co., 188 Wis. 330, 206 N.W. 407 (1925).

[186] Walker v. Forbes, 27 O.W.N. 459, 56 Ont. L. Rep. 532, [1925] 2 D.L.R. 725; Farber v. Toronto Transp. Co., 20 O.W.N. 464, 56 Ont. L. Rep. 537, [1925] 2 D.L.R. 729; Key v. British Columbia Elec. R. Co., 43 B.C. Rep. 288 (1930); Chambers v. Sampson, 44 B.C. Rep. 134 (1931); McLaughlin v. Long, [1927] Can. S.C. Rep. 303, [1927] 2 D.L.R. 186; Foster v. Kerr, [1940] 2 D.L.R. 47; Wilson v. Cline, [1946] 3 W.W.R. 353; Carter v. Van Camp, [1930] Can. S.C. Rep. 156; McDonald v. Thomas, 41 Man. Rep. 657 (1933).

[187] An exception is the British Act, where a Law Revision Commission reported recommending retention of the last clear chance. See Williams, "The Law Reform (Contributory Negligence) Act," 9 Mod. L. Rev. 105 at 126-130 (1946).

[188] See Weir, "Davies v. Mann and Contributory Negligence Statutes," 9 Can. B. Rev. 470 (1931); MacDonald, "The Negligence Action and the Legislature," 13 Can. B. Rev. 535 (1935); MacIntyre, "The Rationale of the Last Clear Chance," 53 Harv. L. Rev. 1225 (1940); Williams, "The Law Reform (Contributory Negligence) Act," 9 Mod. L. Rev. 105 (1946); Wright, "The Law of Torts," 26 Can. B. Rev. 46 at 70 (1948); Gregory, Legislative Loss Distribution in Negligence Actions 126-133 (1936).

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[190] Bejach v. Colby, 141 Tenn. 68
Tenn. App. 118, 118 S.W. (2d) 891 (
163 S.W. 804 (1913); Memphis Street
(1904); Hansard v. Ferguson, 23 Tenn
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precautions of railroads. See supra, note

[191] Dush v. Fitzhugh, 2 Lea (70 T
Fain, 12 Lea (80 Tenn.) 35 at 40 (188
(2d) 505 (1950); Bejach v. Colby, 141
Carter, 22 Tenn. App. 118, 118 S.W. (2

[192] Ga. Code Ann. (1936) §105-603

[193] Western & A. R. Co. v. Ferguso
R. Co. v. Luckie, 87 Ga. 6, 13 S.E. 105
S.E. 894 (1936); Georgia R. & B. Co. v.
Central of Ga. R. Co. v. Larsen, 19 Ga.
v. Wilbanks, (5th Cir. 1933) 67 F. (2d)
115 F. (2d) 314.

[194] Technically a special verdict req
issues, without any general verdict for pl
asked in addition to the instruction to ret
jury's conclusions. Either may be appropr

"proximately" or "directly" to his injury will bar all recovery,[189] but if his negligence is "remote" the damages will be reduced in proportion to it.[190] In its practical operation this has resulted in apportionment only in cases where the defendant has the last clear chance. Georgia has a statute[191] providing that "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover"; and under the Georgia apportionment rule this has resulted in a reverse application of the last clear chance, to the plaintiff instead of the defendant.[192]

Special Verdicts

All of these limitations merely cut down the scope of apportionment, without going at all to the root of the difficulty, the unreliable and irresponsible jury. A more realistic approach to that basic problem is the procedure which requires a special verdict, or answers to special interrogatories,[193] bearing on the apportionment of damages. As this procedure is applied to the apportionment issue in Wisconsin, for example, the jury is not asked to return a general verdict for the plaintiff with assessment of the recoverable damages, or for the defendant, but is asked instead a series of specific questions, which, with their answers, might run in a typical case as follows:

> 1. In operating his automobile at the time of and immediately preceding the collision, was the defendant Smith negligent with respect to the speed of his car? Yes.

[189] Bejach v. Colby, 141 Tenn. 686, 214 S.W. 869 (1919); Anderson v. Carter, 22 Tenn. App. 118, 118 S.W. (2d) 891 (1938); Grigsby & Co. v. Bratton, 128 Tenn. 597, 163 S.W. 804 (1913); Memphis Street R. Co. v. Haynes, 112 Tenn. 712, 81 S.W. 374 (1904); Hansard v. Ferguson, 23 Tenn. App. 306, 132 S.W. (2d) 221 (1939). There is, however, a special rule apportioning the damages under the statute requiring certain precautions of railroads. See supra, note 92.

[190] Dush v. Fitzhugh, 2 Lea (70 Tenn.) 307 at 309 (1879); East Tenn. R. Co. v. Fain, 12 Lea (80 Tenn.) 35 at 40 (1883); McClard v. Reid, 190 Tenn. 337, 229 S.W. (2d) 505 (1950); Bejach v. Colby, 141 Tenn. 686, 214 S.W. 869 (1919); Anderson v. Carter, 22 Tenn. App. 118, 118 S.W. (2d) 891 (1938).

[191] Ga. Code Ann. (1936) §105-603.

[192] Western & A. R. Co. v. Ferguson, 113 Ga. 708, 39 S.E. 306 (1901); Americus R. Co. v. Luckie, 87 Ga. 6, 13 S.E. 105 (1891); Pollard v. Heard, 53 Ga. App. 623, 186 S.E. 894 (1936); Georgia R. & B. Co. v. Stanley, 38 Ga. App. 773, 145 S.E. 530 (1928); Central of Ga. R. Co. v. Larsen 9 Ga. App. 413, 91 S.E. 517 (1917); Southern R. Co. v. Wilbanks, (5th Cir. 1933) 67 F. (2d) 424; United States v. Fleming, (5th Cir. 1940) 115 F. (2d) 314.

[193] Technically a special verdict requires answers to specific questions only on the issues, without any general verdict for plaintiff or defendant. Special interrogatories are asked in addition to the instruction to return a general verdict, and as a check upon the jury's conclusions. Either may be appropriate to the apportionment of damages.

2. If you answer Question 1 "Yes," then answer this: Was the defendant Smith's negligence a cause of the collision? Yes.

3. In operating his automobile at the time of and immediately preceding the collision, was the plaintiff Jones negligent with respect to failure to stop before entering the intersection? Yes.

4. If you answer Question 3 "Yes," then answer this: Was the plaintiff Jones's negligence a cause of the collision? Yes.

5. If you answer all of Questions 1, 2, 3 and 4 "Yes," then answer this: What percentage of the total negligence was attributable to the defendant Smith? 60%. To the plaintiff Jones? 40%.

6. What is the amount of the damages plaintiff Jones has sustained? $10,000.

With the information thus given, the court is in a position to make the apportionment itself, and proceeds to enter judgment for the plaintiff Jones in the amount of 60% of the damages found, or $6,000. The jury are not told the effect of the answers, although they may well understand what it will be; and it has been held to be error to permit counsel to read the apportionment statute to the jury in order to let them know.[104]

Such is the Wisconsin procedure, which calls for a special verdict, with the court making the final entry. Obviously, however, the same questions would serve equally well as special interrogatories, put, along with full instructions as to the law, as a check upon the jury's conclusions under the ordinary general verdict. And if, as has often been the case in jurisdictions where all this is entirely unfamiliar, new and alarming, even these few and simple questions appear unduly complicated and confusing, they might be made even simpler still. For special interrogatories on the issue of division of damages, Questions 5 and 6 above are all that are really needed. Or the whole matter might be reduced to the lowest possible terms, as follows:

Q. What is the full amount of the damages sustained by the plaintiff? A. $10,000.

[104] De Groot v. Akkeren, 225 Wis. 105, 273 N.W. 725 (1937). General instructions are not given where the special verdict is used, and instructions on the special issues are limited to those necessary or appropriate to enable the jury to understand the questions. Connellee v. Nees, (Tex. Civ. App. 1924) 266 S.W. 502; Robertson & Mueller v. Holden, (Tex. Comm. App. 1928) 1 S.W. (2d) 570; Tidal Western Oil Co. v. Blair, (Tex. Civ. App. 1931) 39 S.W. (2d) 1103; Texas Pipe Line Co. v. Bridges, (Tex. Civ. App. 1931) 39 S.W. (2d) 1109; Byington v. City of Merrill, 112 Wis. 211, 88 N.W. 26 (1901); Banderob v. Wisconsin Cen. R. Co., 133 Wis. 249, 113 N.W. 738 (1907); Gendler v. Cleveland R. Co., 18 Ohio App. 48 (1924).

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(1944); Frank, "The Case for

[107] Barnes v. Williams, 24
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132 N.W. 873 (1911); Boulg
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[108] See Ward v. Busack,
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[109] See Hartford Fire Ins.
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[200] As in Wis. Stat. (19
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Q. What is the amount of plaintiff's damages as diminished by reason of any negligence attributable to him? A. $6,000.[105]

Both special verdicts and special interrogatories have long been authorized and permissible, either by statute or under the common law, in nearly all of our jurisdictions.[106] They have been discretionary with the trial court, and actually they have been little used—seldom requested by counsel, and more seldom given when asked. One reason has been the traditional inertia of the bar toward any innovation in procedure. Another was the unfortunate holding, in a few early cases of special verdicts, that all controverted facts not found specifically must be taken to be found against the party having the burden of proof.[107] Because of this, counsel, out of an excess of caution, began to swamp the jury with detailed questions; and the special verdict became so unwieldy, confusing and unworkable that complaints were voiced by the courts.[108] There were instances[109] of appeals on a record where thirty to fifty questions had been asked in a single case. It was only when it was provided[200] or held that facts not found spe-

[105] This was done under the Wisconsin statute in Honore v. Ludwig, 211 Wis. 354, 247 N.W. 335 (1933), and was held to be proper. Padway, "Comparative Negligence," 16 MARQ. L. REV. 1 at 16-17, 23-24 (19), gives this form of verdict and objects to percentages under the Wisconsin act; but as the case cited indicates, percentage questions are used almost universally in Wisconsin.

[106] See generally, as to special verdicts and special interrogatories, Sunderland, "Verdicts, General and Special," 29 YALE L.J. 253 (1920); Morgan, "A Brief History of Special Verdicts and Special Interrogatories," 32 YALE L.J. 575 (1923); Wicker, "Special Interrogatories to Juries in Civil Cases," 35 YALE L.J. 296 (1926); Green "A New Development in Jury Trial," 13 A.B.A.J. 715 (1927); Staton, "The Special Verdict as an Aid to the Jury," 13 J. AM. JUD. SOC. 176 (1930); note, 34 ILL. L. REV. 96 (1939); Lipscomb, "Special Verdicts Under the Federal Rules," 25 WASH. UNIV. L.Q. 185 (1940); Dooley, "The Use of Special Issues Under the New State and Federal Rules," 20 TEX. L. REV. 32 (1941); Nordbye, "Use of Special Verdicts Under Rules of Civil Procedure," 2 F.R.D. 138 (1943); McCormick, "Jury Verdicts Upon Special Questions in Civil Cases," 2 F.R.D. 176 (1943); Hyde, "Fact Finding by Special Verdict," 24 J. AM. JUD. SOC. 144 (1941); Rossman, "The Judge-Jury Relationship in the State Courts," 3 F.R.D. 98 (1944); Frank, "The Case for the Special Verdict," 32 J. AM. JUD. SOC. 142 (1949).

[107] Barnes v. Williams, 24 U.S. 415, 6 L. Ed. 508 (1826); Prentice v. Zane's Admrs., 49 U.S. 470, 12 L. Ed. 1160 (1850); Graham v. Bayne, 59 U.S. 60, 15 L.Ed. 265 (1855); Hodges v. Easton, 106 U.S. 408, 1 S.Ct. 307 (1882). This remains the rule in many states, in the absence of special provision. Mulvaney v. Burroughs, 152 Iowa 439, 132 N.W. 873 (1911); Boulger v. Northern Pac. R. Co., 41 N.D. 316, 171 N.W. 632 (1918); Wilson v. Commercial Union Ins. Co., 15 S.D. 322, 89 N.W. 649 (1902); Hildman v. Phillips, 106 Wis. 611, 82 N.W. 566 (1900).

[108] See Ward v. Busack, 46 Wis. 407, 1 N.W. 107 (1879); Texas Electric Service Co. v. Anderson, (Tex. Civ. App. 1932) 55 S.W. (2d) 142.

[109] See Hartford Fire Ins. Co. v. Post, (Tex. Civ. App. 1900) 62 S.W. 140 (50 questions); Oriental Inv. Co. v. Barclay, (Tex. Civ. App. 1901) 64 S.W. 80 (32 questions); St. Louis, B. & M. R. Co. v. Jenkins, (Tex. Civ. App. 1915) 172 S.W. 984 (35 questions).

[200] As in Wis. Stat. (1949) §270.28; Tex. Rev. Stat (Vernon, 1936) art. 2190; Federal Rules of Civil Procedure, Rule 49(a).

cifically must be deemed to support the judgment if there was any evidence to sustain it, that simplicity was restored and the special verdict gave satisfaction. Statutes in a few states now provide that the court must submit special verdicts[201] or special interrogatories[202] at the request of either party. In Wisconsin, North Carolina and Texas the special issue has become standard procedure;[203] and there is a history of more than twenty years of its application to the Wisconsin general apportionment act.[204]

When the apportionment provision of the Federal Employers' Liability Act first reached the courts, some of them strongly recommended[205] that the issue of the division of damages be put specially to the jury, as a control upon the verdict and a remedy for the court's ignorance of what the jury might do. In a few instances this was done;[206] but it remained discretionary with the trial court,[207] and for

[201] Ohio Gen. Code Ann. (Page, 1926) §11460; R.I. Laws (1938) c. 534, §2; Tex. Rev. Stat. (Vernon, 1936) art. 2189; Wis. Stat. (1949) §270.27.

[202] Ill. Rev. Stat. (Smith-Hurd, 1923) c. 110, §79; Ind. Stat. Ann. (Burns, 1914) §572; Iowa Comp. Code (1919) §7253; Kan. Rev. Stat. (1923) c. 60, §2918; Mich. Comp. L. (1915) §12611; Ohio Gen. Code Ann. (Page, 1926) §11463; R.I. Gen. Laws (1923) §4983.

[203] The Texas procedure still has the reputation of creating confusion because of the tendency of Texas attorneys to put complicated questions on over-refined niceties. See Dooley, "The Use of Special Issues Under the State and Federal Rules," 20 TEX. L. REV. 32 (1941); McCormick, "Jury Verdicts Upon Special Questions in Civil Cases," 2 F. R. D. 176 at 180 (1943); Rossman, "The Judge-Jury Relationship in the State Courts," 3 F.R.D. 98 at 109 (1944). McCormick says (p. 179) that in North Carolina "simplicity and directness in the submission by questions to the jury is the key to the success of the method," and that in Wisconsin the questions, although more numerous than in North Carolina, "are apparently held within reasonable limits."

[204] See, for example, Schulz v. General Cas. Co., 233 Wis. 118, 288 N.W. 803 (1939); Tomany v. Camozzi, 238 Wis. 611, 300 N.W. 508 (1941); Horn v. Snow-White Laundry & Dry Cleaning Co., 240 Wis. 312, 3 N.W. (2d) 380 (1942); Campanelli v. Milwaukee Elec. R. & T. Co., 242 Wis. 505, 8 N.W. (2d) 390 (1943); Webster v. Roth, 246 Wis. 535, 18 N.W. (2d) 1 (1945).

[205] New York Cent. & H.R. R. Co. v. Banker, (2d Cir. 1915) 224 F. 351; McAuliffe v. New York Cent. & H.R. R. Co., 172 App. Div. 597, 158 N.Y.S. 922 (1916). In the last named case the court refers to this as "the more recently adopted method of returning verdicts under this statute in the United States District Courts." (158 N.Y.S. at 927). See also Wolf v. Baltimore & Ohio R. Co., 239 App. Div. 95, 267 N.Y.S. 199 (1933).

[206] Saar v. Atchison, T. & S.F. R. Co., 97 Kan. 441, 155 P. 954 (1916); Kalashian v. Hines, 171 Wis. 429, 177 N.W. 602 (1920); Richter v. Chicago, M. & St. P. R. Co., 176 Wis. 188, 186 N.W. 616 (1922); Hanley v. Erie R. Co., 273 App. Div. 257, 77 N.Y.S. (2d) 153 (1948); Texas & Pac. R. Co. v. Mix, (Tex. Civ. App. 1946) 193 S.W. (2d) 542; Bennett v. Denver & R.G.W. R. Co., (Utah 1950) 213 P. (2d) 325. See also Missouri, K. & T. R. Co. of Texas v. Pace, (Tex. Civ. App. 1916) 184 S.W. 1051, under the Texas state railroad employers' liability act.

[207] Refusal to put the special issue was held not to be error in Fried v. New York, N.H. & H.R. R. Co., 183 App. Div. 115, 170 N.Y.S. 697 (1918), aff'd. in 230 N.Y. 619, 130 N.E. 917 (1921); Wolf v. Baltimore & Ohio R. Co., 239 App. Div. 95, 267 N.Y.S. 199 (1933); Dallas Ry. & Term. Co. v. Sullivan, (5th Cir. 1940) 108 F. (2d) 581; Goodman v. Chicago, B. & Q. R. Co., 289 Ill. App. 320, 7 N.E. (2d) 393 (1937). In the last named case the refusal was justified on the remarkable ground that the special answer could not control the general verdict.

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[210] The special interrogatory pr
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[211] Skidmore v. Baltimore & O
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[213] See Sunderland, "Verdicts,
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more & Ohio R. Co., (2d Cir. 194

no discernible reason other than pure inertia the practice never became popular. When the Federal Rules of Civil Procedure provided for both special verdicts[208] and special interrogatories,[209] they were still left to the discretion of the judge, and they have had no apparent effect upon cases arising under the act.[210] In 1948 Judge Frank, in a characteristic opinion,[211] copiously ornamented with footnotes, urged vigorously and at length the use of the special issue in all such cases; but there is as yet no indication that he has made many converts. There has been no written opposition whatever to the procedure under the Federal Rules,[212] and the failure of the federal courts to make use of it in apportionment cases remains something of a mystery.

The advantages claimed for the special issue are many.[213] So far as they are pertinent to the apportionment of damages, the most

[208] Rule 49 (a): "Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

[209] Rule 49 (b): "General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and the answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

[210] The special interrogatory procedure was used and upheld in Bolen v. Lehigh Valley R. Co., (2d Cir. 1948) 167 F. (2d) 934. Refusal to put the special issue was held not to be error in Skidmore v. Baltimore & Ohio R. Co., (2d Cir. 1948) 167 F. (2d) 54.

[211] Skidmore v. Baltimore & Ohio R. Co., (2d Cir. 1948) 167 F. (2d) 54. Judge Learned Hand concurred briefly, as to the desirability of putting the special issue.

[212] Driver, "A More Extended Use of the Special Verdict," 9 F.R.D. 495 (1950).

[213] See Sunderland, "Verdicts, General and Special," 29 YALE L.J. 253 (1920); Wicker, "Special Interrogatories to Juries in Civil Cases," 35 YALE L.J. 296 (1926); Staton, "The Special Verdict as an Aid to the Jury," 13 J. AM. JUD. SOC. 176 (1930); Frank, "The Case for the Special Verdict," 32 J. AM. JUD. SOC. 142 (1949); Skidmore v. Baltimore & Ohio R. Co., (2d Cir. 1948) 167 F. (2d) 54.

important is of course that the jury is no longer given a free hand in a cloak of secrecy, and the court is informed as to what it has done. If the instructions have been thrown out of the window, if they have been misunderstood, if there has been error in applying them, even in arithmetic, it may be corrected rather than allowed to stand. The court is told whether the jury has found contributory negligence at all, whether it has divided the damages, and if so, in what proportion. If the process or the result is wrong, a remittitur may save a complete new trial. Beyond this, the jury is forced to give detailed consideration to the issue, rather than to jump at a general conclusion without paying any attention to it. A jury which on general principles would return a large verdict in favor of a pretty woman and against a railroad company may well hesitate to return special findings which it knows to be against the evidence. Finally, the special verdict may, in many cases, avoid the necessity of long and complicated instructions,[214] incomprehensible to anyone but a lawyer, and in themselves a fertile source of error.

All of these advantages clearly operate in favor of the defendant in the majority of apportionment cases, and the proposal for compulsory special verdicts or special interrogatories has met with no enthusiasm at all on the part of the plaintiffs' attorneys who usually introduce the apportionment bills into the legislature. Yet the report of the Wisconsin

[214] Staton, "The Special Verdict as an Aid to the Jury," 13 J. AM. JUD. SOC. 176 at 181 (1930), gives the following horrible example, which was one of several involved instructions given in Payne v. Healey, 139 Md. 86, 114 A. 693 (1921): "The defendant prays the court to instruct the jury that it was the duty of the plaintiff to look and listen for approaching trains, as he approached the tracks of the defendant on the occasion of the injuries complained of and to continue to look and listen until the said tracks were reached and to further instruct the jury that if they shall find from the evidence that the view of plaintiff of said tracks, as he then and there approached the same, was in either direction in any way obstructed, then it was the duty of the plaintiff to stop, look and listen for the approaching train or trains before attempting to cross the said tracks; and to further instruct the jury that if they shall further find that the plaintiff did not so look and listen, or did not stop, look and listen, if they shall find that the view of the plaintiff of said tracks was in either direction obstructed and shall further find that his failure to so look and listen or to so stop, look and listen, directly contributed to the collision between the engine and the defendant and the automobile which the plaintiff was then and there driving, then the plaintiff is not entitled to recover, unless the jury shall further find from the evidence that the defendant, its agents or employees, in charge of the engine and train which collided with the automobile of the plaintiff could have by the exercise of reasonable care and caution on his or their part, after he or they or any of them became aware of the peril, the plaintiff had by his negligence, if the jury shall so find, placed himself, avoided the consequences of the plaintiff's said negligence and prevented the injuries complained of or unless they further find that the engineer in charge of said engine could by the exercise of reasonable care have discovered the position or peril of the plaintiff while the plaintiff was upon the Antietam street crossing and that the said engineer could by the exercise of reasonable care have avoided injury to the plaintiff or his property after he ought to have discovered the peril of the plaintiff if the jury so find."

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lawyers, for both plaintiffs and defendants, in response to inquiries from drafting committees,[215] has been for many years that the combination of the special issue procedure and the apportionment act has worked very well in Wisconsin, that they regard the one as indispensable to the successful operation of the other, and that they would not like to see a return to the common law. In particular, their report has been that the increase in the number of recoveries which must inevitably result from the abrogation of the complete defense has been to a considerable extent balanced and compensated by some reduction in the size of verdicts, as juries apportion the damages instead of refusing to find contributory negligence at all; and that liability insurance rates have remained within reasonable bounds. Of the various possible compromises, this seems to be the only one which is both reasonable and effectiv

Multiple Parties

Complications arise when apportionment involves multiple parties. Where, for example, the automobiles of two negligent drivers collide and injure the plaintiff, who is a bystander or a passenger in one of the cars, it is obvious that no complete and substantial justice can be done to the situation by any division of the damages between the plaintiff and one driver alone, in an action to which only those two are parties. There remain the problems of evaluation of the contributing fault of one who is not a party to the action, of the second suit against him in which the first is not res judicata and a new jury may come to a very different conclusion, and finally of contribution between the joint tortfeasors. The only completely satisfactory method of dealing

[215] The writer has seen some sixty such letters, in connection with the work of drafting committees in Minnesota in 1939, and California in 1951.

"Another difficulty in the practical operation of the statute in Mississippi is that we do not have special verdicts, but general lump-sum verdicts only. There is no way in which it can be known, for instance, that the jury found that the plaintiff had been damaged $1,000, that the plaintiff himself was guilty of 25 per cent of the negligence, and that the jury awarded $750 for this reason. Thus, the appellate court has a most difficult time in dealing with pleas of excessiveness or inadequacy.

"An automobile damage suit is usually a swearing contest. The appellate court has no way of knowing whether the jury believed or disbelieved the testimony offered to establish that the plaintiff was guilty of negligence. If the verdict seems to be unsually large the court may assume that the jury did not believe that the plaintiff was guilty of contributory negligence where that fact is in dispute when, as a matter of fact, the jury might not have considered the comparative negligence statute at all in arriving at the verdict. We have not had much experience with special verdicts, because there never has been any provision for them in this state, but in our humble opinion a provision for special verdicts should go along with a comparative negligence statute as one of the Siamese twins goes along with the other." Lipscomb, "Comparative Negligence," INS. L.J. No. 344, 667 at 673 (Sept. 1951).

with the situation is to bring all the parties into court in a single action, to determine the damages sustained by each, and to require that each bear a proportion of the total loss according to his fault.

The English[216] and some of the Canadian[217] acts have proceeded on this basis. With liberal procedure for joinder of parties at the instance of either plaintiff or defendant, as well as for counterclaims and cross-complaints, they have provided for apportionment of all damages among all parties in proportion to their respective faults, including contribution between defendants. Professor Gregory, in a very able book,[218] has argued convincingly the superiority of these statutes over any other existing acts. There can be no doubt that, from the point of view of pure theory and abstract justice, they achieve a more satisfactory result in cases of multiple parties than ever has been accomplished in the United States.

Practical operation is, however, a very different thing from pure theory; and it may well be questioned whether the very complex Canadian procedure is capable of being adapted to the American jury. The jury has virtually disappeared from tort litigation both in England and in Canada,[219] and the success of the Canadian method has been due in no small part to its administration by very intelligent judges. The cases of multiple parties can, and do, become extremely involved, as is indicated by the very condensed statements of two of them given by Professor Gregory:[220]

1. Collision between I's automobile and M's truck, the truck being parked on a highway at night with rear light on. I and I, Jr. suffer damage of $283.10 and $200, respectively, and M's damage was $35.75. I and I, Jr. sued M, who apparently counterclaimed against I. I was found 25 per cent and M 75 per cent negligent. Appeal by I and cross-appeal by M from judgment of trial court dismissed. Court said damages were added, totaling $518.85, of which I must bear 25 per cent and M 75 per cent. M pays I, Jr. $200, and the balance of his share $189.13 to I, I pay nothing to

[216] Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30; Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28. See WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE (1951).

[217] In particular the statutes of Ontario, Alberta, British Columbia, Manitoba and Saskatchewan, supra note 9.

[218] GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1935). See also Gregory, "Loss Distribution by Comparative Negligence," 21 MINN. L. REV. 1 (1936).

[219] "In 1935, of some 1400 actions tried in the King's Bench in London, it is said that about 300 were tried before juries. I have no Canadian statistics, but it is easy to believe that the percentage of jury trials is even lower in Canada." O'Halloran, "Problems in the Modern Appeal in Civil Cases," 27 CAN. B. REV. 259 at 253 (1949).

[220] GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 181, 186 (1936).

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2. Collision of automol
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FH's and SH's damages
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LW, under the statute
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It appeared that HH ha
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GH and HH neglecte
anything they might have

Net result:

FH against LW—$648
SH against LW—$750
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LW against HH and G
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$648 plus $750)

If they had requested it
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this is doubtful in view
volved.[222]

[221] The case is Steele v. Ferguson

[222] The case is Haines v. Willia

M. The court apparently figured that M's share was ¾ of $200, plus ¾ of $283.10, plus ¾ of $35.75, and I's share ¼ of this total, in proportion to their negligence, and that I, Jr.'s recovery should not be affected because he was not negligent at all.[221]

2. Collision of automobiles driven by GH and JW, belonging to HH and LW, respectively, accident occurring at a road crossing. HH and LW, as owners, were responsible vicariously under the Motor Vehicles Act for the negligence of their bailees. GH and JW alone were negligent, being 1/3 and 2/3 negligent, respectively.

FH's and SH's damages were $648 and $750 each, for which they got judgment against LW. HH suffered $300 damages, which she claimed by counterclaim against LW, she being entitled to 2/3 thereof, since the negligence of GH is attributed to her as contributory negligence and as a basis of liability for damages.

LW, under the statute, suffered $1,000 damages for loss of services of his deceased wife and, in his personal capacity, $291.80. The court held that inasmuch as the damages were for LW himself, they were to be reduced by 2/3 because of his responsibility for JW's negligence, under the Motor Vehicles Act, both as contributory negligence and as a basis of liability for damages. LW was also entitled to contribution from HH and GH of 1/3 of anything he paid to FH and SH.

It appeared that HH had added JW as a third party and filed a cross-complaint for damages to her car. On this she was entitled to judgment for 2/3 of her damages, just as she was on her contribution against LW.

GH and HH neglected to ask for contribution from JW to anything they might have to pay to LW.

Net result:

FH against LW--$648
SH against LW—$750
HH against LW and JW—$200
LW against HH and GH—$861.20
LW against HH and GH—$466 as contribution (1/3 of $648 plus $750)

If they had requested it, HH and GH might have had, as contribution from JW, $574.66, although [says Professor Gregory] this is doubtful in view of the close domestic relationship involved.[222]

[221] The case is Steele v. Ferguson, [1931] Ont. L. Rep. 427.
[222] The case is Haines v. Williams, 47 B.C. Rep. 69 (1933).