

2221 HAB (EJIE # 2) - HB 176 (EJIE # 3)

century philosophy of justice,¹⁷ the harshness of which is no longer considered acceptable. The theory most frequently advanced in favor of the contributory negligence rule is the notion of "intervening cause"; however, the application of the principle in this context is wholly inappropriate. The issues of foreseeability and proximate causation must be dealt with before a defendant can invoke this doctrine, and merely establishing the existence of contributory negligence does not resolve these issues.¹⁸ In a case of two negligent drivers, each of whose actions constitute a proximate cause of injury to an innocent bystander, one cannot point to the negligence of the other as an intervening cause insulating him from liability. It is irrational to pursue a different approach when the two negligent drivers are labeled "plaintiff and defendant" and the third party element is removed.¹⁹ The fourth reason enumerated above suffers from a similar doctrinal distortion. The "unclean hands" principle operates to deny equitable relief to persons whose conduct relative to the matter in issue is unconscionable or morally reprehensible.²⁰ The failure to exercise reasonable care for one's own safety is not the sort of wrongdoing contemplated under the policy of the rule. Finally, the arguments based on assumptions about behavior of juries are equally fallacious. It has never been conclusively demonstrated that juries tend to be plaintiff-oriented,²¹ and to argue that juries circumvent the rule of contributory negligence through compromise verdicts suggests that continued adherence to the rule fosters disrespect for the courts' instructions.

While all of the foregoing theories have been advanced as justifications for the rule, it is generally conceded that the contributory negligence doctrine is simply a crude mechanism for insuring that a negligent plaintiff does not benefit from his own misconduct.²² The problem with this notion is that it ignores the realities of tort litigation and human experience, since fault is rarely the monopoly of a single party. The rule presupposes a negligent defendant and then causes the entire controversy to be automatically dismissed if the plaintiff is shown to have been negligent as well. Aside from the

¹⁷ See note 28 & accompanying text *infra*.

¹⁸ An extensive analysis of the scope and application of "intervening cause" is not appropriate here. For a thorough review of the doctrine see W. PROSSER, *THE LAW OF TORTS* § 44 (4th ed. 1971).

¹⁹ *Id.* § 65 at 417.

²⁰ See, e.g., *New York Football Giants v. Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471 (5th Cir. 1961).

²¹ On the contrary, an empirical study of 4,000 civil jury cases by the University of Chicago Law School revealed that juries reached the same decision as the judge in 78% of the cases. H. KALVEN & H. VEISEL, *THE AMERICAN JURY* 63 n.4 (1966).

²² See, e.g., Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 *ORE. L. REV.* 38 (1969).

requirement that of the injury,²³ of fault on either side, and the plaintiff's contributory negligence, which is synonymous with the defendant's negligence, thereby accords the plaintiff the right to recover, but the defendant is not liable in order to escape

A more realistic approach to the possible situation of contributory negligence should be adopted where the plaintiff's own negligence is a factor in his own injury, and the defendant's negligence is a factor in that should preclude recovery in situations which that the victim's negligence is a factor in the damages.²⁵ Under the first two ext

B. Historical

Certainly no one would deny that contributory negligence or the rule, an inquiry into the facts of the case, and the expansion of the rule in the twentieth century. While it has been a major element in the development of the law, the desire to protect the plaintiff's right to recover is essential to the rule's response to an injury. The early nineteenth

²³ *Rowe v. Uni*
The court refused to find that the plaintiff was not a party.

²⁴ "It is generally recognized that recovery has denied to the plaintiff in *Helt & Helt, The A.B.A.J.* 933, 936 (1947).

²⁵ This logical conclusion is supported by the opinion in *Butterfield v. Swire*, which held that the defendant's negligent risk created by the plaintiff's negligence embraced the plaintiff's negligence.

²⁶ See Malone, *supra* note 25, 151 (1947).

requirement that the plaintiff's negligence be a contributing cause of the injury,²³ there is no consideration given to the relative degree of fault on either side. Mutual negligence is treated as if it were synonymous with equal negligence, and defendants as a class are thereby accorded an unfair advantage.²⁴ Both the plaintiff and the defendant seek to prove causal negligence on the part of the other, but the defendant need only find a slight degree of carelessness in order to escape all liability.

A more realistic view of concurrent fault would embrace three possible situations. In cases of minor or remote fault a plaintiff's misconduct should be totally ignored. There are other times, as for example where the plaintiff is primarily responsible for causing his own injury, when his carelessness must be treated as a risk factor that should preclude recovery altogether. At still other times, in situations which fall in between the first two cases, it seems obvious that the victim's negligence should serve only to mitigate his damages.²⁵ Unfortunately, contributory negligence recognizes only the first two extremes.

B. *Historical Development*

Certainly no one theory can explain the doctrine of contributory negligence or the reason that it has persisted to this day. Nevertheless, an inquiry into its historical development suggests some important factors which at least encouraged the growth of the rule.²⁶ The expansion of the concept of contributory negligence during the nineteenth century closely paralleled the growth of the Industrial Revolution. While it has not been explicitly recognized by the courts, a major element in the early acceptance of the rule was undoubtedly the desire to protect developing industry, particularly the hazardous yet essential railroads, from unlimited liability in the tort field. In response to an uneasy fear of overly sympathetic juries, courts of the early nineteenth century came to regard the rule of contributory

²³ *Rowe v. United States*, 14 Alaska 463, 116 F. Supp. 553 (D.C. Alaska 1953). The court refused to apply contributory negligence where the negligence of the plaintiff was not a proximate cause of the accident.

²⁴ "It is generally recognized that contributory negligence as a complete bar to recovery has denied justice to more injured persons than any other legal concept." Hest & Hest, *The Two-Layer Cake: No Fault and Comparative Negligence*, 58 A.B.A.J. 933, 936 (1972).

²⁵ This logical three-fold analysis was suggested by Wex S. Malone in *Comments on Maki v. Freik*, 21 VAND. L. REV. 930, 934 (1968). He also expressed the opinion that *Butterfield v. Forrester* (see note 3 *supra*) is an illustration of an extravagant risk created by the plaintiff's conduct and should never have been expanded to embrace misconduct of a lesser degree.

²⁶ See Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1947).

negligence as "a convenient instrument of control over the jury by which the liabilities of rapidly growing industry were curbed and kept within bounds."²⁷

The judicial system exists as an instrument of society, and although these factors may have been very persuasive in their day, societal values now reflect an increased concern for the individual and a desire to see injuries compensated. In addition, if the rule was indeed meant to provide an effective means of controlling plaintiff-oriented juries, its success in achieving that purpose is far from certain.²⁸ The fact that contributory negligence has endured for over 160 years may ultimately be attributed to the principle of stare decisis or to legislative neglect.²⁹

Perhaps the strongest indication of the deficiencies in the contributory negligence rule and the discomfort courts have felt in applying it is the number and wide use of exceptions it has generated. England early developed the first anomaly. In *Davies v. Mann*,³⁰ under a fact situation very similar to that in *Butterfield*,³¹ the plaintiff was allowed to recover because the defendant could have prevented the accident had he used reasonable care. This modification has come to be known as the doctrine of "last clear chance" and is still widely accepted and applied.³² Another legal device which is designed to ease the harshness of the contributory negligence rule is the willful misconduct exception. Courts have refused to allow the defense of contributory negligence in actions for injury resulting from reckless or wanton misconduct on the part of the defendant.³³ Finally, in tort actions based on something other than ordinary negligence (for example, breach of statutory duty, intentional wrongs, nuisance, and strict liability), jurisdictions throughout the country have developed a number of lesser exceptions and modifications to the rule.³⁴ All these adaptations emphasize the shortcomings

²⁷ Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953). See also Turk, *Comparative Negligence on the March*, 28 CIL.-KENT L. REV. 189 (1950).

²⁸ As early as 1934, Professor Charles Lowndes noted that "the tall timber in the legal jungle has been whittled down to toothpick by the sympathetic sabotage of juries." Lowndes, *Contributory Negligence*, 22 CALIF. L. J. 674 (1934).

²⁹ See notes 85-88 & accompanying text *infra*.

³⁰ 152 Eng. Rep. 588 (1842).

³¹ 103 Eng. Rep. 926 (K.B. 1809). See note 3 *supra*.

³² Alaska's use of the last clear chance doctrine is set forth in *Benson v. United States*, 235 F. Supp. 495 (D.C. Alaska 1964). The doctrine is applicable when it appears that the plaintiff has been negligent, that as a result of his negligence he is in a position of peril from which he cannot escape by the exercise of ordinary care, and that the defendant is aware of plaintiff's helplessness, has a clear chance to avoid the injury by exercising ordinary care, and yet fails to do so.

³³ See, e.g., *McLemore v. Harris*, 374 P.2d 410 (Alaska 1962). Only if the plaintiff's own conduct is willful or wanton will it balance against similar conduct by the defendant.

³⁴ See, e.g., *Mayer v. Hyers*, 214 Minn. 54, 7 N.W.2d 403 (1943) (statutory duty exception); *Kassouf v. Lee Bros., Inc.*, 209 Cal. App. 2d 568, 26 Cal. Rptr. 276

of contributory negligence. They operate to prevent recovery by the plaintiff against the defendant, when it

II. COMPARATIVE NEGLIGENCE

A. History and Development

The shortcomings of the contributory negligence rule are readily apparent. The doctrine of recovery to a plaintiff is slight in comparison to the equitable and effective recovery available under negligence on the part of the defendant. To substitute, the plaintiff's negligence as a viable alternative

The broad application of the doctrine has been the subject of the doctrine has been impossible to reform. Instead, it is best to leave the law which is rough on damages. The common law problem presented by barring recovery in comparative negligence is the relative degree of fault, whether, and the contribution to the other.³⁵

In 1910, Michigan adopted comprehensive comparative negligence for personal injuries in actions for damages. In other states

(1962) (Implied warranty of fitness) & *Preston v. United States* (strict liability except gross misconduct and virtually replaced the

³⁵ See Turk, *Comparative Negligence* (1950), for a thorough general theory of application.

³⁶ See Annot., 30 Cal. Rptr. 276, rather than totally bar plaintiff's negligence.

³⁷ Now Miss. Code Ann. § 11-1-1.

³⁸ See note 14 *supra*.

of contributory negligence. Furthermore, like the doctrine itself, they operate to place the entire burden of loss on a single party, the defendant, when in reality both are to some degree at fault.

II. COMPARATIVE NEGLIGENCE—THE SOLUTION

A. *History and State Statutes*

The shortcomings of the contributory negligence rule are readily apparent. In its application, the doctrine denies all right of recovery to an injured plaintiff even though his negligence was slight in comparison to that of the defendant. Obviously a more equitable and effective means of dealing with cases where there is negligence on the part of both parties must be devised. As a complete substitute, the principle of comparative negligence is a desirable and viable alternative.

The broad concept of comparative negligence dates back to the seventeenth century in English admiralty law.³⁵ Since that time the doctrine has taken shape in a variety of forms, so that it is impossible to refer to a single "rule" of comparative negligence. Instead, it is best to conceive of the term as a general principle of law which is roughly equivalent to the theory of apportionment of damages. The concept itself is simply the logical solution to the problem presented by the contributory negligence rule: instead of barring recovery completely in cases of concurrent negligence, "comparative negligence" would include any legal rule under which the relative degree of negligence of the parties is involved in determining whether, and the degree to which, either party should be held liable to the other.³⁶

In 1910, Mississippi became the first state to enact a comprehensive comparative negligence statute applicable to all actions for personal injuries, and expanded that statute in 1920 to include actions for damages to property.³⁷ In the years that followed, eighteen other states adopted broad apportionment statutes.³⁸ All of

(1962) (Implied warranty exception); *Bachner v. Pearson*, 479 P.2d 319 (Alaska 1970) & *Preston v. Up-Right Inc.*, 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (1966) (strict liability exception). When considered in addition to the last clear chance and gross misconduct anomalies, it is not unfair to say that these exceptions have virtually replaced the rule itself.

³⁵ See Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950), for a thorough review of the early history of comparative negligence. The general theory of apportioning damages and liability can be traced to medieval times.

³⁶ See Annot., 32 A.L.R. 3d 463 (1970). In general, comparative negligence, rather than totally barring recovery, reduces the award in a proportion equal to the plaintiff's negligence.

³⁷ Now Miss. CODE ANN. § 1454 (1956).

³⁸ See note 14 *supra*.

these enactments are applicable to any action based on negligence, and therefore each completely supersedes the rule of contributory negligence. Beyond this, however, uniformity ends. The statutes are normally divided into three distinct groups: (1) the "pure" form, (2) the "slight v. gross" form, and (3) the "modified" form.³⁹

Mississippi is the only state which has adopted the "pure" form of comparative negligence.⁴⁰ Under this approach the plaintiff is allowed to recover a portion of his damages equal to the overall percentage of negligence attributable to the defendant, whether or not the plaintiff's negligence is greater than that of the defendant. Thus, in a case where the plaintiff's negligence is determined to have caused 90 percent of the accident, he would recover only 10 percent of his damages. The major criticism of this approach is that it allows a person of greater fault to recover from one of lesser fault under a tort system founded upon individual responsibility. There seems to be little, if any, legal or social justification for such a result.⁴¹

The "slight v. gross" form allows for apportionment of damages only when the negligence of the plaintiff is "slight" and the defendant's "gross" in comparison. Only Nebraska adheres strictly to this approach,⁴² although South Dakota's statute is generally included under the same classification.⁴³ A serious defect in this form of comparative negligence is that the statutes lose their effectiveness in cases where the parties' negligence is approximately equal.⁴⁴ The difficulty of determining the percentage degree of negligence above which the plaintiff's conduct becomes "gross" has engendered numerous appeals and inconsistent holdings.⁴⁵ Finally, should the court

³⁹ Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 484-489 (1953).

⁴⁰ MISS. CODE ANN. § 1454 (1956):

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 . . . may have been guilty of contributory negligence shall not bar recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured . . .

⁴¹ See Ghilardi & Hogan, *Comparative Negligence—The Wisconsin Rule and Procedure*, 18 DEFENSE L.J. 537, 544 n.19, 560 (1969).

⁴² NEB. REV. STAT. § 25-1151 (1964):

In all actions brought to recover damages for injuries 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. . . .

⁴³ S.D. COMP. LAWS § 20-9-2 (1967). In 1964 the statute was amended to eliminate the requirement that the defendant's negligence be "gross." South Dakota now applies the rule of comparative negligence whenever a plaintiff's negligence is "slight" in comparison with that of the defendant.

⁴⁴ W. PROSSER, *THE LAW OF TORTS* § 67 at 437 (4th ed. 1971).

⁴⁵ See, e.g., *Kirchner v. Gast*, 169 Neb. 404, 100 N.W.2d 65 (1959); *Allen v. Kavanaugh*, 160 Neb. 645, 71 N.W.2d 119 (1955); *Roger v. Shepherd*, 159 Neb. 292,

decide that the plaintiff is barred negligence was th

The "modified comparative negligence type ordinarily a plaintiff's negligence. Put another way, his comparative of the other hand, the sustained damages is the type of considered by the Al

66 N.W.2d 815 (1954) (1933).

⁴⁶ At the present "modified" form of Idaho, Maine, Mass., Dakota, Oregon, Utah

⁴⁷ This formulation statutes presently in negligence. See, e.g., H

Contributory negligence or his legal representative death or in injury great as the negligence

The words "not as equal to that of the accepted aspect" of the comparative negligence statute

In 1971, however, the percentage of fault only a small change, negligence exceeds the model for reform has 1973):

Contributory negligence or his legal representative death or in injury than the negligence damages allowed negligence attributable

⁴⁸ SB 166, 8th LEGISLATIVE DAMAGES IN TORT NEGLIGENCE

(a) Contributory person or his legal in the death of a contributory negligence whom recovery is portion to the amount damages.

(b) In an nonjury trial, shall return a special verdict

(1) the

if there had been

(2) the

age.

decide that the plaintiff's negligence was more than slight, the plaintiff is barred from all recovery even though the defendant's negligence was the greater of the two.

The "modified," approach is by far the most popular form of comparative negligence.⁴⁶ Unlike the "pure" form, statutes of this type ordinarily apportion damages only in situations where the plaintiff's negligence is less than the defendant's by comparison. Put another way, a plaintiff would not be allowed any recovery if his comparative degree of fault was 50 percent or greater.⁴⁷ If, on the other hand, the plaintiff was only 25 percent at fault and had sustained damages of \$100,000, his recovery would be \$75,000. This is the type of comparative negligence statute presently being considered by the Alaska Legislature.⁴⁸

66 N.W.2d 815 (1954); *Monasmith v. Cosden Oil Co.*, 124 Neb. 327, 246 N.W. 623 (1933).

⁴⁶ At the present time no less than 16 states of the 19 total have adopted the "modified" form of comparative negligence: Arkansas, Colorado, Georgia, Hawaii, Idaho, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, North Dakota, Oregon, Utah, Vermont, Wisconsin, and Wyoming.

⁴⁷ This formulation of the rule is consistent with the language of the "modified" statutes presently in effect in the majority of states which have adopted comparative negligence. See, e.g., HAWAII REV. STAT. § 663-31 (Supp. 1972):

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

The words "not as great as" simply mean that the plaintiff whose negligence is equal to that of the defendant is denied any recovery. This result was long an accepted aspect of the "modified" approach as exemplified by the Wisconsin comparative negligence statute.

In 1971, however, Wisconsin amended its law to permit recovery in cases where the percentage of fault attributable to each party is equal. Although this represents only a small change, since a plaintiff is still barred from recovery if his share of negligence exceeds the defendant's, it is significant that the state which provided the model for reform has since altered that model. See WIS. STAT. ANN. § 895.045 (Supp. 1973):

Contributory negligence shall not bar recovery in an 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 greater than the negligence of the person against whom recovery is sought, but any damages awarded shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

⁴⁸ Slt 166, 8th Legis., 1st Sess. (1973):

DAMAGES IN NEGLIGENCE ACTIONS INVOLVING CONTRIBUTORY NEGLIGENCE.

(a) Contributory negligence does not bar a recovery in an action by a person or his legal representative to recover damages for negligence resulting in the death of or injury to the person, or injury to his property, if the contributory negligence was not as great as the negligence of the person from whom recovery is sought. Any damages awarded shall be diminished in proportion to the amount of negligence attributable to the person awarded the damages.

(b) In an action to which (a) of this section applies, the court, in a nonjury trial, shall make a finding of fact or, in a jury trial, the jury shall return a special verdict which states:

(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.

Of the three variants, the "modified" form is the most desirable. It does not allow a seriously negligent plaintiff to recover damages from a defendant whose share of fault was minor, and it avoids the semantic and practical difficulties associated with the use of vague labels such as "slight" and "gross." While this type of comparative negligence has been criticized as having the potential for arbitrary results,⁴⁹ it nevertheless retains more elements of a system based on fault than does the "pure" form which, by allowing a plaintiff to recover in situations where his negligence was the major cause of the accident, approaches a system of strict liability.⁵⁰ Finally, proponents of the "modified" version are quick to point out that this type of comparative negligence has proven itself in a number of states over a substantial period of time.⁵¹

Experience has indeed shown that the "modified" rule of comparative negligence can work.⁵² Under the Wisconsin rule, the percentage of negligence attributable to each party is determined by the jury so as to total 100%. This is accomplished by means of a special verdict designed to confine the jury to a series of conclusive issue determinations: (1) defendant's negligence, (2) plaintiff's negligence, (3) causation, and (4) damages suffered. These separate findings are then compiled and mathematically computed by the court to form a general verdict.⁵³ The jury is therefore able objectively to arrive at its findings without knowledge or consideration of the sum; the judge will ultimately award the plaintiff.⁵⁴ Apportion-

(c) Upon the making of the finding of fact or the return of a special verdict, required under (b) of this section, the court shall reduce the amount of the verdict in proportion to the amount of negligence attributable to the person awarded the damages.

⁴⁹ The appellate court in *Maki v. Freik*, 229 N.E.2d 284, 291 (Ill. App. 1967), questioned the effect of allowing the plaintiff who is 49 percent negligent to recover a large share of his damages, and yet allowing nothing to the plaintiff whose negligence is equal to the defendant's.

⁵⁰ See Maloney, *From Contributory to Comparative Negligence, A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958).

⁵¹ A "modified" comparative negligence statute has been in effect in Wisconsin since 1931. See WIS. STAT. ANN. § 895.045 (Supp. 1973).

⁵² See Knoeller, *Review of Wisconsin Comparative Negligence Act*, 41 MARQ. L. REV. 397 (1958); Heft & Heft, *Comparative Negligence: Wisconsin's Answer*, 55 A.B.A.J. 127 (1969).

The Wisconsin statute has been the prototype for legislative reform. Perhaps its single most impressive feature is the provision for a special jury verdict which not only reveals the specific findings of fact relating to the proportion of negligence attributable to each party, but also leaves the actual apportionment of damages in the hands of the court. The proposed Alaskan statute is derived from the Wisconsin example and incorporates this special verdict feature. See note 48 *supra*.

Wisconsin has developed a series of standardized jury instructions for use in all types of civil litigation. The three-volume set, entitled "The Wisconsin Jury Instructions—Civil," may be obtained from University of Wisconsin-Extension, L401 Law School Building, Madison, Wisconsin 53706. The set includes instructions pertaining to comparative negligence.

⁵³ See Heft & Heft, *The Two-Layer Cake: No Fault and Comparative Negligence*, 58 A.B.A.J. 933 (1972).

⁵⁴ For an excellent discussion of the operation of the Wisconsin verdict proce-

ment of fault is difficult than the ample, where a suffering or for gether to fairly gence.

B. Special App

In addition ligence to all n state governmen laws applicable i ity Act⁵⁵ utilize: actions brought merce. Compara for in the Merco statute relating Not less than 3 variety of railv insure recovery Considered in apportionment isolated phenom

C. Criticism o

Criticism o primarily on ob system. While ment is general negligence rule congestion in tl logical explanat instituted, the

ture, see Decker, *the Trial Process in*

⁵⁵ 35 Stat. 69

⁵⁶ 41 Stat. 988

⁵⁷ 41 Stat. 537

⁵⁸ W. PROSSER

ive Negligence on

⁵⁹ See Rosenb

Survey, 13 ARK. L.

67% of the judges

was "helpful" in t

clusion that: "Leg

stantive pros or c

tied to problems of

ment of fault and damage by juries presents no problems more difficult than those encountered in other types of cases as, for example, where a dollar amount must be ascertained for pain and suffering or for the loss of an arm. Judge and jury can work together to fairly and effectively apply a rule of comparative negligence.

B. *Special Applications of the Comparative Negligence Rule*

In addition to the state statutes which apply comparative negligence to all negligence cases, both the federal government and state governments have enacted numerous comparative negligence laws applicable to specific situations. The Federal Employers' Liability Act⁵⁵ utilizes the "pure" form of comparative negligence in all actions brought by railroad employees engaged in interstate commerce. Comparative negligence of the "pure" type is also provided for in the Merchant Marine Act and the Jones Act,⁵⁶ and in the statute relating to death on the high seas from wrongful conduct.⁵⁷ Not less than 30 states have adopted comparative negligence in a variety of railway and other labor acts in an apparent effort to insure recovery by injured workmen as against their employers.⁵⁸ Considered in the aggregate, therefore, these laws suggest that apportionment of damages in the United States is far from an isolated phenomenon.

C. *Criticism of the Rule*

Criticism of the doctrine of comparative negligence has centered primarily on objections regarding the feasibility of adopting such a system. While the desirability of the principle of fault apportionment is generally conceded, it has been argued that a comparative negligence rule would result in increased litigation and corresponding congestion in the courts, but experience has shown otherwise.⁵⁹ The logical explanation for this is that, although more actions may be instituted, the greater likelihood of recovery is conducive to an in-

dure, see Decker, *Some Random Observations About Comparative Negligence and the Trial Process in Wisconsin*, 1 *CONN. L. REV.* 56 (1968).

⁵⁵ 35 Stat. 69 (1908), U.S.C. § 53 (1970).

⁵⁶ 41 Stat. 988, 1007 (1920); 46 U.S.C. § 688 (1970).

⁵⁷ 41 Stat. 537 (1920); 46 U.S.C. § 766 (1970).

⁵⁸ W. PROSSER, *THE LAW OF TORTS* § 67 at 437 (4th ed. 1971); Turk, *Comparative Negligence on the March*, 28 *CHI.-KENT L. REV.* 189 (1950).

⁵⁹ See Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 *ARK. L. REV.* 89 (1959). The results of Rosenberg's survey showed that 67% of the judges responding thought the effect of the comparative negligence rule was "helpful" in terms of problems of judicial administration. This led to the conclusion that: "Legislatures facing the issue should confine themselves to the substantive pros or cons of the contending principles and should rule out arguments tied to problems of court administration." *Id.* at 108.

crease in settlements.⁶⁰ The suggestion that liability insurance rates would rise under a comparative negligence system has also been disputed.⁶¹ The most persistent objections to the comparative negligence rule, that a fair apportionment of degrees of negligence is impossible and that it places too large a burden on the jury, have been considered and rejected as being inconsistent with actual jury practice.⁶² It appears that juries are indeed capable of apportioning the negligence of mutual tortfeasors⁶³ and that the doctrine of comparative negligence constitutes a feasible improvement in the judicial treatment of contributory fault.

III. THE ARGUMENT FOR REFORM IN ALASKA

In evaluating the desirability of abandoning the contributory negligence rule entirely, it is important to consider the erosion of the rule over time. Brief mention has already been made of the various state and federal statutes which apply the principle of comparative negligence to special cases involving mutual fault.⁶⁴ Alaska too has statutes which provide for comparative negligence in specific, narrow situations.

Alaska's employer liability statute provides that contributory negligence shall not be a defense in an action brought by an employee against his employer where the contributory negligence of the employee was slight and the negligence of the employer was gross in comparison. Instead, the damages are diminished by the jury in proportion to the amount of negligence attributable to the employee.⁶⁵ The law is applicable to any person engaged in manufactur-

⁶⁰ Hest & Hest, *Comparative Negligence: Wisconsin's Answer*, 55 A.B.A.J. 127, 130 (1969).

⁶¹ Peck, in *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1960), presents a statistical analysis of the effect of a comparative negligence rule on automobile insurance rates. On the basis of this study he states:

Adoption of a comparative negligence rule, as shown by the Arkansas experience, would not have a catastrophic result upon the insurance rate structure of any state. Indeed, it would not have as much effect as rapid growth of population, increased urbanization, or change to a traffic program with the effective safety record of a neighboring state. Its effect, if any, would probably go undetected in the rates and statistics of the insurance industry.

Id. at 728.

⁶² See Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 339-359 (1932). See also Ghiardi & Hogan, *Comparative Negligence—The Wisconsin Rule and Procedure*, 18 DEFENSE L.J. 537 (1969), for a detailed analysis of the procedural rules used to achieve responsible jury verdicts.

⁶³ In Wisconsin the jury's determination is presumed to be correct and equitable, and its verdict will only be set aside when the reviewing tribunal believes it is against the great weight and clear preponderance of the evidence. *Pruss v. Strube*, 37 Wis. 2d 539, 155 N.W.2d 650 (1968).

⁶⁴ See notes 55-58 *supra*.

⁶⁵ AS 23.25.020 (1972):

In an action against a master or employer under § 10 of this chapter the

ing, mining, cons
tions carried on b
pertaining to en
"slight v. gross"
lems of interpret
may be mitigated
incurred while e
gence is typically

Another ins
in Alaska is in a
the plaintiff was
boat. The court
negligence does
parative neglige
inspired not by
but rather by a
the state courts
negligence in a
in admiralty ca
Maxwell v. Olse
A comparative
the plaintiff has
taken that crit
stumble over a
dant had left o
be applicable. T
remains the sa

fact that the
does not bar
the negligence
be diminished
attributable to

⁶⁶ See AS 23.

⁶⁷ 45 U.S.C. §

⁶⁸ See *Haman*

which the court
parative negligenc
is broader in scop

⁶⁹ In *Haman*
plaintiff was injur
in the head. In a
negligence in the

The Alaskan cou
which the line b

⁷⁰ 468 P.2d

⁷¹ Generally,

means that a
sue in a "ce

such suits, s

would be ap

468 P.2d at 51 (1

ing, mining, constructing, building, or other like hazardous occupations carried on by means of machinery.⁶⁶ Unlike the federal statute pertaining to employers' liability,⁶⁷ Alaska's statute adopts the "slight v. gross" form of comparative negligence.⁶⁸ The usual problems of interpretation associated with the "slight v. gross" approach may be mitigated by the fact that in actions arising out of injuries incurred while engaged in a hazardous occupation employer negligence is typically of a serious nature.⁶⁹

Another instance of the application of comparative negligence in Alaska is in actions based on admiralty law. In *Maxwell v. Olsen*⁷⁰ the plaintiff was injured while disembarking from defendant's ferry boat. The court held that in such cases the plaintiff's contributory negligence does not bar recovery because the federal rule of comparative negligence must be followed.⁷¹ Although this decision was inspired not by a judicial recognition of the merits of the doctrine but rather by adherence to procedural rules, it does suggest that the state courts are capable of applying the notion of comparative negligence in admiralty cases. The nature of the negligence action in admiralty cases need not be unique at all. As a matter of fact, *Maxwell v. Olsen* could have been a non-admiralty negligence action. A comparative negligence rule was applied in that case only because the plaintiff happened to fall as she stepped from a ferry. Had she taken that critical step without incident and instead proceeded to stumble over a hazardously positioned coil of rope which the defendant had left on shore, the strict contributory negligence rule would be applicable. The essential factual character of the negligence action remains the same in both instances; it is simply the existence of a

fact that the employee may have been guilty of contributory negligence does not bar a recovery where his contributory negligence was slight and the negligence of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee.

⁶⁶ See AS 23.25.010 (1972).

⁶⁷ 45 U.S.C. § 53 (1970), *supra* note 55.

⁶⁸ See *Haman v. Allied Concrete Prods., Inc.*, 495 P.2d 531 (Alaska 1972), in which the court notes that Alaska's law and 45 U.S.C. § 53 (1970) adopt a comparative negligence rule in markedly similar language, although the federal statute is broader in scope.

⁶⁹ In *Haman v. Allied Concrete Prods., Inc.*, 495 P.2d 531 (Alaska 1972), the plaintiff was injured when the drive chain on a cement mixer broke and struck him in the head. Inasmuch as the plaintiff was not negligent at all, the employer's negligence in the maintenance of machinery was easily characterized as "gross." The Alaskan courts have not yet been confronted with a case under this statute in which the line between "slight" and "gross" negligence has been difficult to draw.

⁷⁰ 468 P.2d 48 (Alaska 1970).

⁷¹ Generally, the "saving to suitors" clause [of the Judicial Act of 1789] means that a suitor asserting an *in personam* admiralty claim may elect to sue in a "common law" state court through an ordinary civil action. In such suits, state courts are required to apply the same substantive law as would be applied had the suit been brought in admiralty in a federal court. 468 P.2d at 51 (footnotes omitted).

vessel floating on navigable water which distinguishes the two. There is no basis for perpetuating such a distinction, and yet the law requires it.

While comparative negligence has gained a foothold in Alaska, it would be misleading to suggest that the doctrine has ever seriously threatened its common law counterpart. The contributory negligence rule has been, and continues to be, the accepted principle of law in the state.⁷³ But even the most obstinate supporters of the rule cannot deny its propensity toward inflicting severe hardship, and the last clear chance doctrine⁷³ and willful misconduct exceptions⁷⁴ have been judicially recognized in Alaska. In addition, Alaska has departed from the ordinary contributory negligence rule in cases involving strict products liability.⁷⁵

Another indication of the shortcomings of the rule in the Alaska experience is the difficulty which the Alaskan courts have encountered in its application. In the past, the Alaska Supreme Court has held that a jury question is presented as to contributory negligence when fair-minded jurors could differ as to the facts pertaining to this issue.⁷⁶ The problem has been to determine whether the trial judge properly decided to submit the question to the jury,⁷⁷ and if he did correctly do so, whether the instruction itself was correctly stated.⁷⁸

Despite these procedural difficulties, however, the courts cling steadfastly to the theory that a plaintiff's own contributory negligence bars any right of recovery. In *Harris v. Barrett & Lesh, Inc.*⁷⁹ the Supreme Court of Alaska refused to deviate from its previous hold-

⁷³ See, e.g., *Cummins v. King & Sons*, 453 P.2d 465 (Alaska 1969); *Bertram v. Harris*, 423 P.2d 909 (Alaska 1967); *Ogden v. State*, 395 P.2d 771 (Alaska 1964).

⁷⁴ See *Benson v. United States*, 235 F. Supp. 495 (D.C. Alaska 1964), *supra* note 32.

⁷⁵ See *McLemore v. Harris*, 374 P.2d 410 (Alaska 1962), *supra* note 33.

⁷⁶ See, e.g., *Bachner v. Pearson*, 479 P.2d 319 (Alaska 1970). The court limited the application of contributory negligence, as a defense to strict liability in tort, to situations where a plaintiff voluntarily and unreasonably encounters a known risk.

⁷⁷ *Mallonee v. Finch*, 413 P.2d 159, 162 (Alaska 1966); *Otis Elevator Co. v. McLaney*, 406 P.2d 7, 9-10 (Alaska 1965); *Crawford v. Rogers*, 406 P.2d 189, 194 (Alaska 1965); *McCoy v. Alaska Brick Co.*, 389 P.2d 1009, 1010 (Alaska 1964).

⁷⁸ See, e.g., *Cummins v. King & Sons*, 453 P.2d 465 (Alaska 1969). In *Cummins* the plaintiff brought an action for injuries sustained in a fall on icy steps. The supreme court reversed the contributory negligence verdict in the lower court, holding that the facts did not even support submission of the issue to the jury.

It is also interesting to note that the case was remanded because there was no way to know whether the jury, in addition to finding the plaintiff guilty of contributory negligence, had also found that the defendant was negligent. "If we knew that the jury had simply found appellees free from negligence, then the error would be harmless. But we have no way of ascertaining what the jury's findings were on these issues." *Id.* at 467-68. The special verdict feature of the proposed Alaskan comparative negligence statute would eliminate this perplexity.

⁷⁹ See *Mitchell v. Knight*, 394 P.2d 892 (Alaska 1964).

⁸⁰ 426 P.2d 331 (Alaska 1967).

ings to adopt a uninspired supplied and the) the court has n principle of sta judiciary contin these difficulties effectuating the

IV. THE

Once it ha court or the leg that both are system.⁸³ Those the courts arg product of jud vehicle for ref negligence bills inaction appear As to this last that the courts : admitted to the factor on judic

⁸⁰ *Id.* at 334-3

⁸¹ The court doctrine nor did it Instead, it simply policy matter [i.e., treated by appellate (Alaska 1967). The were it squarely pr of the matter by ll

⁸² See note 86

⁸³ See notes 81

⁸⁴ See *Kecton*, 506-09 (1962).

⁸⁵ See *Leflar*, Legislatures, by the

Comparative n

social action g

are, for their

warm about it

accident lawsui

alert to social

needs with no

lobby against

state legislature

Id. at 928.

⁸⁶ See, e.g., H:

"This court's past

tory negligence ba

Mich. 387, 391, 84

ings to adopt a comparative negligence rule for the state.⁸⁰ But its uninspired support of the rule,⁸¹ the exceptions which it has established and the problems in administering the doctrine suggest that the court has maintained its position more out of deference to the principle of stare decisis than to anything else.⁸² Yet because the judiciary continues to apply the contributory negligence rule despite these difficulties, it may be necessary to place the responsibility for effectuating the needed reform in the hands of the legislature.

IV. THE AGENCY OF REFORM—LEGISLATURE V. COURTS

Once it has been determined that reform is desired, should the court or the legislature initiate the change? Experience has shown that both are capable of effectuating a comparative negligence system.⁸³ Those who would delegate the lawmaking responsibility to the courts argue that since the contributory negligence rule is a product of judicial fiat, the common law courts ought to be the vehicle for reform.⁸⁴ In addition, as the history of comparative negligence bills in the Alaska Legislature demonstrates, legislative inaction appears to be a certainty with respect to this kind of issue.⁸⁵ As to this last point, the advocates of legislative adoption contend that the courts suffer the same inefficacy. The courts themselves have admitted to the great influence of prior precedent as a restraining factor on judicial action in this area.⁸⁶ Furthermore, court action

⁸⁰ *Id.* at 334-35.

⁸¹ The court in *Harris* did not attempt to justify the contributory negligence doctrine nor did it offer any arguments against the notion of comparative negligence. Instead, it simply stated: "[W]e are not inclined to rule upon such a significant policy matter [i.e., the comparative negligence question] when it has been so casually treated by appellant's counsel." *Harris v. Barrett & Lesh, Inc.*, 426 P.2d 331, 335 (Alaska 1967). The court's statement seems to imply a willingness to face the issue were it squarely presented, but thus far there has been no further direct treatment of the matter by the Alaska Supreme Court.

⁸² See note 86 *infra*.

⁸³ See notes 89-103 & accompanying text *infra*.

⁸⁴ See Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 506-09 (1962).

⁸⁵ See Leshar, *Comments on Maki v. Freck*, 21 VAND. L. REV. 918 (1968). Legislatures, by their very nature, are not responsive in such areas:

Comparative negligence involves a type of social progress to which no potent social action group is politically committed. The organized liability insurers are, for their own reasons, generally against it; the plaintiffs' bar is lukewarm about it; and the general public, except for the minority involved in accident lawsuits, hardly knows what the problem is. Legislatures are seldom alert to social needs that are not backed up by political pressures. Social needs with no potent lobby behind them, particularly if there is an active lobby against them, ordinarily do not receive much favorable attention in state legislatures. They are the sort of thing that courts have to take care of.

Id. at 928.

⁸⁶ See, e.g., *Harris v. Barrett & Lesh, Inc.*, 426 P.2d 331, 335 n.9 (Alaska 1967): "This court's past decisions have clearly established that a plaintiff's own contributory negligence bars any right of recovery." *Accord*, *Sun Oil Co. v. Seamon*, 349 Mich. 387, 391, 84 N.W.2d 840, 844 (1957).

may be less desirable than legislative enactment when dealing with sweeping social change. In *Maki v. Freck*,⁸⁷ the Illinois Supreme Court decided that the issue ought to be resolved by the legislature. The court overturned a decision of the appellate court to replace contributory negligence with comparative negligence, holding that "such a far-reaching change, if desirable, should be made by the legislature rather than by the court."⁸⁸ The arguments on both sides of the issue are persuasive, and the determination of whether the court or the legislature should properly promulgate a comparative negligence rule may ultimately be dictated by the probability of successful adoption by either body. What has the experience of other states shown?

Expanded interest in the principle of comparative negligence is exemplified by the number of recent writings on the subject as well as by the increase in state legislative proposals and judicial opinions which have contemplated adoption of the rule. Nine states have within the past three years acted to incorporate a comparative negligence system into the law of their jurisdiction.⁸⁹ Two have done so judicially, while the remaining seven have enacted statutes similar to Wisconsin's.⁹⁰ An examination of the differences between these approaches and of their relative strengths and weaknesses will certainly have an instructive value for the Alaska Legislature which is now contemplating parallel reform.

Judicial adoption of a comparative negligence rule applicable to all negligence cases is somewhat of a rarity. For many years, Tennessee was the only state in which comparative negligence had been promulgated entirely by judicial decision.⁹¹ The scope of its rule, however, is even today severely limited.⁹² Recent court decisions in New York and Florida, on the other hand, have established unrestricted forms of comparative negligence. Their importance as precedent for the judicial adoption of the doctrine is therefore con-

⁸⁷ 40 Ill. 2d 193, 239 N.E.2d 445 (1967).

⁸⁸ *Id.* at 195, 239 N.E.2d at 447.

⁸⁹ The states are: Colorado (1971), Florida (1973), Idaho (1971), New Jersey (1973), New York (1972), North Dakota (1973), Oregon (1971), Utah (1973), and Wyoming (1973).

⁹⁰ See notes 50-54 & accompanying text *supra*.

⁹¹ The Tennessee rule was delineated by the court in *Bejach v. Colby*, 741 Tenn. 686, 214 S.W. 869 (1919). The court decreed that if the plaintiff were guilty of negligence which directly and proximately contributed to his injury he could not recover, but if the plaintiff's negligence was only remotely connected with the cause of the injury he could recover, although the damages would be mitigated according to the extent of plaintiff's negligence.

⁹² See, e.g., *Hansard v. Ferguson*, 23 Tenn. App. 306, 132 S.W.2d 221 (1939). Contributory negligence remains a barrier to recovery in cases where the plaintiff's negligence, however slight, is a proximate cause of his injury. The rule may therefore be characterized as one of apportionment of damages under certain conditions rather than a true rule of comparative negligence. Annot., 32 A.L.R.3d 463, 479 (1970).

siderably greater change they have

The New York has not been established the in New York *Chemical Co.*⁹³ introduced the or concurrent decisions were among defendant contributory negligence courts within the plaintiff's negligence to the subject, a *Kelly* decisions approach suggested over, as the court rule as precedent

Florida has negligence to a single case, de of Florida reject "pure" form of

⁹³ 30 N.Y.2d 1

⁹⁴ 31 N.Y.2d 7

⁹⁵ See Sorrenti court stated:

One further perspective of contributory negligence plaintiff's recovery

Id. at 1310. Thus, only that the relation there is no apparent include a plaintiff's

⁹⁶ See Berenge 1972); *Dixon v.* 150 (City Ct. of A

⁹⁷ The lower court expansion of the rule 1026, 341 N.Y.S.2d

Comparative negligence Court of Appeals to

⁹⁸ *Jones v. He*

court held:

We therefore recovery in an amount damages for negligence but any damages to the amount action or on behalf *Id.* at 533. It is no

siderably greater than Tennessee's because of the extent of the change they have introduced.

The New York judicial experience has been confusing and still has not been completely resolved. The State Court of Appeals established the foundation in 1972 for a comparative negligence rule in New York when it handed down its decisions in *Dole v. Dow Chemical Co.*⁹³ and *Kelly v. Long Island Lighting Co.*⁹⁴ These cases introduced the concept of comparative negligence, as between joint or concurrent tortfeasors, into the law of the state. Although the decisions were limited to the issue of apportionment of negligence among defendants, their implication with respect to a plaintiff's contributory negligence was readily apparent.⁹⁵ Accordingly, lower courts within the state soon extended the doctrine to embrace a plaintiff's negligence.⁹⁶ The Court of Appeals has not yet returned to the subject, and it remains to be seen whether or not the *Dole* and *Kelly* decisions have been properly interpreted.⁹⁷ This piecemeal approach suggests a significant difficulty with judicial fiat; moreover, as the court is only deciding the case before it, the value of the rule as precedent for other fact situations is always arguable.

Florida has accomplished the conversion from contributory negligence to comparative negligence in a more direct fashion. In a single case, decided earlier this year, the District Court of Appeals of Florida rejected the contributory negligence rule in favor of a "pure" form of comparative negligence.⁹⁸ The decision has been cer-

⁹³ 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972).

⁹⁴ 31 N.Y.2d 25, 335 N.Y.S.2d 851, 285 N.E.2d 241 (1972).

⁹⁵ See *Sorrentino v. United States*, 344 F. Supp. 1308 (E.D.N.Y. 1972). The court held:

One further point appears: the analysis of *Dole* and *Kelly* suggests that a view of contributory negligence which makes it an absolute bar to a plaintiff's recovery cannot survive.

Id. at 1310. Thus, while the strict rule of law announced in *Dole* and *Kelly* requires only that the relative degrees of negligence between joint defendants be apportioned, there is no apparent reason why this theory of apportionment cannot be extended to include a plaintiff's contributory negligence.

⁹⁶ See *Berenger v. Gottlieb*, 72 Misc. 2d 349, 338 N.Y.S.2d 319 (Civ. Ct. N.Y. 1972); *Dixon v. Knickerbocker Drivurself Inc.*, 72 Misc. 2d 1025, 341 N.Y.S.2d 150 (City Ct. of Albany County 1973).

⁹⁷ The lower courts appear confident that the Court of Appeals will uphold their expansion of the rule. In *Dixon v. Knickerbocker Drivurself Inc.*, 72 Misc. 2d 1025, 1026, 341 N.Y.S.2d 150, 151 (City Ct. of Albany County 1973), The court asserted: Comparative negligence is now the law in this state, although it remains for the Court of Appeals to decide what type of comparative negligence is to be applied."

⁹⁸ *Jones v. Hoffman*, 272 So. 2d 529 (Dist. Ct. App. Fla., 4th Dist., 1973). The court held:

We therefore decide that contributory negligence should not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, but any damages allowed shall be diminished in proportion (percentage) to the amount of the negligence attributable to the person bringing such action or on behalf of whom such action is maintained.

Id. at 533. It is not surprising that the language used here closely resembles that of

tified to the Florida Supreme Court for review, and thus the final disposition of the doctrine in this state, as in New York, has yet to be determined.

It is important to realize that the court method of reform has a number of shortcomings. For example, none of the judicial opinions, in either New York or Florida, mentions any of the procedural means through which a comparative negligence rule might be implemented.⁹⁹ In contrast, the legislature is likely to depart from legal formalism and establish pragmatic rules such as the special verdict procedure under which a jury actually arrives at a percentage distribution of fault. The legislative method of reform may also have the advantage of a statement of all the ramifications and consequences of the change being made, while the traditional judicial approach often leaves the full extent and significance of the change in doubt until another case presents the opportunity to determine an additional aspect of the problem.¹⁰⁰ Thus, the legislature can do more than merely announce a new rule of law; it can specifically establish the way in which the rule will operate and the effect of the rule on existing related concepts.¹⁰¹ Another advantage associated with legislative change is that it can be given a prospective effect. Judicial reform, on the other hand, customarily has an undesirable retroactive effect which subjects conduct to a legal rule that was not in existence at the time the cause of action arose.¹⁰² Finally, there is greater assurance of public acceptance when a new rule of law is adopted by the elected representatives of the people, rather than by the detached members of the judiciary.¹⁰³

Perhaps in recognition of these problems, seven states have recently chosen the legislative method of adoption.¹⁰⁴ Each of the

many comparative negligence statutes. A distinct disadvantage of judicial reform is that unless the courts are willing to make what is in effect a legislative decree, the change to comparative negligence will have to be made on a case-by-case basis. The resulting confusion and uncertainty is exemplified by the New York experience.

⁹⁹ The courts are, of course, well-suited to prescribe the necessary functions of the judge and jury under a comparative negligence system, but judicial opinions rarely utilize this empirical advantage. Judges are prone to ignore the details of actual courtroom practice when announcing broad doctrinal changes in the substantive law.

¹⁰⁰ Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 299 (1963).

¹⁰¹ In this context consideration should be given to the desirability of adopting an extensive comparative negligence rule which could encompass such problems as: (1) the operation of a special verdict for determining the comparative percentages of fault; (2) the effect of the rule on contribution among joint tortfeasors; and (3) the effect of the release of one tortfeasor on liability of others. See IDAHO CODE §§ 6-801 to -806 (Supp. 1973); UTAH CODE ANN. §§ 78-27-37 to -43 (Supp. 1973).

¹⁰² Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 400 (1963).

¹⁰³ Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 791 (1963).

¹⁰⁴ Colorado: COLO. REV. STAT. § 41-2-14 (1971); Idaho: IDAHO CODE §§ 6-801 to -806 (Supp. 1973); New Jersey: N.J. LAWS 1973, ch. 146, effective August 22,

laws was based on Alaska's proposed doctrine representing contributory negligence. The proposed Alaskan rule kept in mind the chance¹⁰⁷ would have in a negligence system. The harsh effects of the rule on the entire financial picture to the other. In a system where there are unnecessary awards of fault. Also, what is the proof? What about the kinds of questions to answer, but the implementation of a comparative negligence rule to be expected when enough that these are acceptable to resolution.

The roots of the processes of Alaska

1973; North Dakota: REV. STAT. § 18.470 (1973); and Wyoming: 1973).

¹⁰⁵ See note 48 *supra*. It is interesting to note the certitude with respect to P.2d 315 (Ore. 1971) statute was applicable at the time of enactment. Neither comparative negligence nor a vision that adequately covers causes of action which 8th Legis., 1st Sess. § 2.

¹⁰⁶ Fortunately, Alaska in contributory negligence the court criticized the rule that: "[O]nly the trial should govern cases such as should not be a defense."

¹⁰⁷ See W. Prosser, suggested that the principle of a comparative negligence rule intended to be mitigated) is guaranteed.

¹⁰⁸ A detailed analysis of the tangential problem, e.g., Ghiardi & Hogan, 18 DEFENSE L.J. 537, 465 (1953).

laws was based on the Wisconsin model and closely resembles Alaska's proposed statute.¹⁰⁵ But while the comparative negligence doctrine represents a distinct improvement over the old rule of contributory negligence, it is surely not a panacea. In considering the proposed Alaskan statute, a number of potential problems should be kept in mind. The doctrines of assumption of risk¹⁰⁶ and last clear chance¹⁰⁷ would have to be applied differently under a comparative negligence system. The doctrines evolved as means to ameliorate the harsh effects of the contributory negligence rule, but in their operation the entire financial burden is merely transferred from one party to the other. In a system of damage apportionment these exceptions are unnecessary and at variance with the theory of comparative fault. Also, what would happen to the rules pertaining to burden of proof? What about contribution between joint tortfeasors?¹⁰⁸ These are the kinds of questions which may have to be left for the courts to answer, but they certainly present no major barrier to the enactment of a comparative negligence rule. Some amount of difficulty is to be expected when dealing with so fundamental a change, and it is enough that these practical problems are both foreseeable and susceptible to resolution.

V. CONCLUSION

The roots of contributory negligence are deeply embedded in the processes of American jurisprudence. Whatever the reason, the

1973; North Dakota: N.D. CENTURY CODE ch. 9-10-07 (Supp. 1973); Oregon: ORE. REV. STAT. § 18.470 (1971); Utah: UTAH CODE ANN. §§ 78-27-37 to -43 (Supp. 1973); and Wyoming: WYO. STAT. § 1-7.2 (Supp. 1973).

¹⁰⁵ See note 48 *supra*.

It is interesting to note that in both Colorado and Oregon there was some incertitude with respect to the retroactive effect of their laws. In *Joseph v. Lowery*, 261 Ore. 545, 495 P.2d 273 (1972), and in *Heafer v. Denver-Boulder Bus Co.*, 489 P.2d 315 (Colo. 1971), it was held that the newly enacted comparative negligence statute was applicable only to causes of action arising subsequent to the effective date of enactment. Neither plaintiff could therefore collect for his damages under the comparative negligence rule. The current Alaskan bill does, however, contain a provision that adequately deals with this issue. It states: "This Act applies only to causes of action which arise subsequent to the effective date of this Act." SB 166, 8th Legis., 1st Sess. § 2 (1973).

¹⁰⁶ Fortunately, Alaska has already discarded this doctrine as a separate defense in contributory negligence cases. In *Leavitt v. Gillaspie*, 443 P.2d 61 (Alaska 1968) the court criticized the operation of the assumption of risk doctrine and concluded that: "[O]nly the traditional notions of negligence and contributory negligence should govern cases such as we have here and that the defense of assumption of risk should not be a defense and should not be used." *Id.* at 63.

¹⁰⁷ See W. PROSSER, *THE LAW OF TORTS* § 67 at 439 (4th ed. 1971). Prosser has suggested that the principle of last clear chance would no longer be necessary under a comparative negligence system. There would obviously be no reason to perpetuate a rule intended to protect the plaintiff's right of recovery, since recovery (though mitigated) is guaranteed under a damage apportionment approach.

¹⁰⁸ A detailed analysis of these issues would serve no useful purpose here. They are tangential problems and have been adequately discussed in other writings. See, e.g., Ghiardi & Hogan, *Comparative Negligence—The Wisconsin Rule and Procedure*, 18 DEFENSE L.J. 537 (1969); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953).

harsh inequities attributable to the doctrine have been tolerated for far too long, a particularly regrettable fact in that a fair and effective alternative rule is available. Comparative negligence offers a more rational approach to the treatment of mutual fault, and experience has shown that the administration of an apportionment doctrine is possible. For Alaska, legislative initiative would be preferable to judicial inertia and piecemeal solutions. The legislature has the opportunity, since a comparative negligence bill is currently before it, to provide a timely and comprehensive solution to the contributory negligence problem. While the importance of tradition in the law is recognized, the legislature can implement needed social changes and discard antiquated rules. Tradition without justice, tradition merely for the sake of tradition, has no place and should give way to a more rational and equitable system.

BRUCE L. DUSENBERRY

LANDLORD- AND RI RESI

Under the con
dwelling he rents i
need arises. If his
must nevertheless c
possession.² His o
and this is hardly a
shortage of moder

The modern t
archaic law that g
developed in 16th
tenant relationship
main principles of
formation, yet the
trial society are fa
terpart. This Com
Landlord and Ten
currently under co
pose of the Com
the rights of land

¹ AS 01.10.010 (1
sistent with the Consti
States or with any law
decision in this state."
the landlord-tenant re
applied by the courts.
Supp. 411, 413 (1957).

² See notes 8-19 i

³ See notes 17-19

⁴ The Alaska leg
housing shortage. As r
the state a serious sho
at low or moderate pr
AS 18.56.010(a) (Sup
(1962).

⁵ See H. LEBAR, J
torical development of

⁶ The original ver
cited as HB 226). Th
TEE SUBSTITUTE
and the amended Com
226 [hereinafter cited
session and will come
over bill.

COMPARATIVE NEGLIGENCE

As a result of action by the 1973 Legislature,¹ on April 1, 1974, the State of Washington will abandon the doctrine of contributory negligence and replace it with the increasingly popular rule of comparative negligence. Comparative negligence has been described as "a fault concept that apportions liability for damages in proportion to the contribution of each tortfeasor causing the injury or damages."²

This note will discuss briefly the policy considerations underlying a choice between comparative negligence and contributory negligence, and will attempt to predict the effects, both procedural and substantive, of the new Act on practice in Washington.

I. WASHINGTON'S NEW COMPARATIVE NEGLIGENCE ACT

The new Washington Act provides:

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.³

Section 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.⁴

Section 1 of the new Act replaces the rule of contributory negligence with the rule of comparative negligence; Section 2 abrogates a long standing community property rule. Some comparative negligence statutes permit only those plaintiffs who are themselves responsible for less than a specified percentage of the total negligence to recover; these

1. Ch. 138, [1973] Wash. Laws, 1st Ex. Sess. The Washington Comparative Negligence Act is codified in WASH. REV. CODE §§ 4.22.010-.910 (Supp. 1973).

2. C. R. HEFT & C. J. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 1.10, at 1 (1971) [hereinafter cited as HEFT & HEFT].

3. WASH. REV. CODE § 4.22.010.

4. *Id.*, § 4.22.020.

statutes enact "modified" comparative negligence. Section 1 of the Washington Act contains no such qualification, placing Washington among the states adopting "pure" comparative negligence. These two forms of comparative negligence have much in common, of course, and the experiences and judicial decisions of jurisdictions which have adopted pure as well as modified comparative negligence will exert persuasive force in construing the new Act.⁵

Although subject to conflicting interpretations,⁶ Sect. 1 2 of the new Act apparently abrogates the common law rule imputing the negligence of one marital spouse to the other so as to bar the latter's recovery in an action for damages caused by the negligence of a third party. Prior to the Act, the courts held that because the damage claim for personal injuries of one spouse is community property, the contributory negligence of the other spouse will bar recovery.⁷

II. HISTORY, ALTERNATIVE FORMS, AND EFFECT ON PROCEDURE OF COMPARATIVE NEGLIGENCE

Adoption of comparative negligence has been a response, by either the legislature or the courts, to the often inequitable results produced by the doctrine of contributory negligence. The judicially-created rule of contributory negligence,⁸ by which a plaintiff recovers all or

nothing, frequently frustrates recovery for the victims of tortious "splitting" approach contrasts sharply with the "all-or-nothing" approach which the fault of the plaintiff does not act as a total bar to recovery.

A. The Debate

Advocates of comparative negligence reduce court congestion by promoting simpler trials.¹⁰ Although the opponents of comparative negligence argue that the new rule reduces some recovery under comparative negligence on both sides and reduces the total amount of recovery. Those who oppose comparative negligence argue that the new rule results in inequitable results.¹² Furthermore, they argue that comparative negligence is a just and equitable rule which does not "profit" by their own wrongdoing. The rule is ameliorated by the

5. For jurisdictions which have adopted pure comparative negligence, see note 20 *infra*. For jurisdictions which have adopted modified comparative negligence, see notes 28-30 *infra*.

6. Sections 1 and 2, read together, suggest that the Legislature intended each spouse's recovery to be diminished in proportion to the percentage of negligence attributable to the negligently acting spouse; imputed negligence lessens but does not bar recovery. This is consonant with the mandate of Section 1 that "any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering." But when read alone, the absolute prohibition of Section 2 that "the negligence of one marital spouse shall not be imputed to the other spouse . . ." appears to prohibit considering the acting spouse's fault when comparing the negligence of the other; to do so would be "impute" one spouse's negligence to the other. The first interpretation reduces Section 2 to a mere expression of an obvious inference from Section 1; the latter interpretation seems to express better the probable legislative intent.

7. See *Ostheller v. Spokane & Inland Empire R.R.*, 107 Wash. 678, 182 P. 630 (1929).

8. The doctrine originated in *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809), wherein the plaintiff was denied recovery for injuries resulting from a horse riding accident on the ground that he was partially responsible for the accident.

9. See Schwartz, *Pure Comparative Negligence*, 117, 118 (1972) [hereinafter cited as Schwartz]. At the date of this publication, 27 states have enacted some form of comparative negligence: Alaska, ALASKA STAT. § 27-1730.1 (1961); Colorado, COLO. CODE ANN. § 105-603 (1933); Georgia, GA. CODE ANN. § 105-603 (1933); Maine, ME. REV. STAT. ANN. tit. 14, § 101 (1969); Minnesota, MINN. STAT. ANN. ch. 231, § 85 (1969); Mississippi, MISS. CODE ANN. § 3.1454 (1969); New Hampshire, N.H. REV. STAT. § 18:470 (1971); Rhode Island, R.I. GEN. STAT. § 15-18-1 (1969); South Dakota, S.D. COMPILED LAWS ANN. § 17-17-1 (1969); Wisconsin, WIS. STAT. ANN. § 89.11 (1969).

10. See Note, *Tort-Comparative Negligence*, 117, 118 (1972).

11. See Haugh, *Comparative Negligence*, 38, 42 (1969) [hereinafter cited as Haugh].

12. See Cotton, *Comparative Negligence*, 205 (1969); Burns, *Comparative Negligence*, 708 (1963).

13. The arguments in favor of comparative negligence are: (1) A negligent plaintiff should not be barred from recovery for his negligent act; (2) the equitable principle that both parties are at fault, the court should reduce the plaintiff's recovery; (3) comparative negligence provides a check on plaintiff's negligence; (4) the superceding legal cause; and (5) the plaintiff's carelessness. See Haugh, *supra* note 11, at 41.

14. *Id.* at 41.

Comparative Negligence

nothing, frequently frustrates the attainment of full and fair compensation for the victims of tortiously caused accidents. This "all or nothing" approach contrasts sharply with comparative negligence under which the fault of the plaintiff reduces his recoverable damages but does not act as a total bar to recovery.⁹

A. The Debate

Advocates of comparative negligence contend that its adoption reduces court congestion by promoting more settlements and shorter, simpler trials.¹⁰ Although the change may result in an increase in litigation, they argue that the greater certainty of a plaintiff's realizing some recovery under comparative negligence promotes settlement by both sides and reduces the plaintiff's insistence upon a jury trial.¹¹ Those who oppose comparative negligence predict exactly opposite results.¹² Furthermore, they view the doctrine of contributory negligence as a just and equitable check on those individuals who seek to "profit" by their own wrongdoing,¹³ and suggest that any harshness of the rule is ameliorated by the jury's natural sense of justice.¹⁴ Propo-

9. See Schwartz, *Pure Comparative Negligence in Action*, 34 *AM. TRIAL LAW. L.J.* 117, 118 (1972) [hereinafter cited as Schwartz]; HEFT & HEFT, *supra* note 2.

At the date of this publication, the following states number among those which have enacted some form of comparative negligence: Arkansas, *ARK. STAT. ANN.* tit. 27-1730.1 (1961); Colorado, *COLO. REV. STAT.* ch. 41-2-14 (Supp. 1971); Georgia, *GA. CODE ANN.* § 105-603 (1933); Hawaii, *HAWAII REV. STAT.* § 663-31 (1968); Maine, *ME. REV. STAT. ANN.* tit. 14, § 156 (1964); Massachusetts, *MASS. GEN. LAWS ANN.* ch. 231, § 85 (1969); Minnesota, *MINN. STAT. ANN.* ch. 604.01 (1969); Mississippi, *MISS. CODE ANN.* § 3.1454 (1910); Nebraska, *NEB. REV. STAT.* § 25-1151 (1913); New Hampshire, *N.H. REV. STAT. ANN.* § 507:7a (1969); Oregon, *ORE. REV. STAT.* § 18.470 (1971); Rhode Island, *R.I. GEN. LAWS ANN.* § 9-20-4 (1971); South Dakota, *S.D. COMPILED LAWS ANN.* § 20-9.2 (1967); Utah, *UTAH CODE ANN.* § 12-1036 (1969); Wisconsin, *WIS. STAT. ANN.* § 995.045 (1931).

10. See Note, *Tort-Comparative Negligence Statute*, 18 *VAND. L. REV.* 327, 329-30 (1964).

11. See Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 *ORE. L. REV.* 38, 42 (1969) [hereinafter cited as Haugh].

12. See Cotton, *Comparative Negligence: Not in the Public Interest*, 17 *LA. B.J.* 205 (1969); Burns, *Comparative Negligence: A Law Professor Dissents*, 51 *ILL. B.J.* 708 (1963).

13. The arguments in favor of retaining contributory negligence as a bar to actions are: (1) A negligent plaintiff gives implied consent to all the consequences of his negligent act; (2) the equitable doctrine of unclean hands demands that where both parties are at fault, the courts should leave them as they are; (3) contributory negligence provides a check on plaintiff-oriented injuries; (4) the plaintiff's negligence is the superceding, legal cause; and (5) by denying recovery, the doctrine restrains carelessness. See Haugh, *supra* note 11, at 39.

14. *Id.* at 41.

ments of comparative negligence have categorically contradicted these claims.¹⁵

Studies indicate that, in actuality, the change to comparative negligence has little practical effect.¹⁶ A survey of the short-lived experiment of Arkansas with a pure comparative negligence statute from 1955 to 1957 resulted in the following conclusions:¹⁷ (1) The introduction of comparative negligence brought about no drastic change in the number of cases burdening the courts; (2) it did not affect the preference for jury trials or the length of trials; (3) it increased potential litigation but promoted more pretrial settlements; (4) damages were harder to determine under comparative negligence; (5) plaintiffs won more, but not larger, verdicts under comparative negligence; and (6) cases had a higher compromise value for settlement under comparative negligence. A follow-up survey studying the experience of Arkansas under a modified form of comparative negligence from 1957 to 1967 affirmed the conclusions of the original survey.¹⁸ In addition, an observer of Wisconsin's experience with comparative negligence indicates that it has not raised insurance rates.¹⁹

15. They point out that: (1) Where the entire burden of the loss falls upon the less negligent party the policy is harsh and unjustifiable; (2) there are exceptions to the rule by which the party can recover despite his negligence; (3) to say the plaintiff's negligence is the sole cause attributes a meaning to legal cause that is inaccurate; (4) it is unlikely that a negligent plaintiff has in mind his loss of recovery when he commits the negligent act; and (5) rendering the defendant immune may encourage carelessness on his part. To rebut the argument that the jury is already employing a form of comparative negligence, one writer has stated that because juries may use a comparative negligence approach in situations where the plaintiff was contributorily negligent, the retention of the contributory negligence rule leads laymen to disrespect our system of accident law and to ignore jury instructions. See generally HEFT & HEFT, *supra* note 2; Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 468, 470-71 (1953) [hereinafter cited as Prosser]; Laugesen, *Colorado Comparative Negligence*, 48 DENVER L.J. 469, 470 (1972); Haugh, *supra* note 11, at 40; Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 162 (1958) [hereinafter cited as Maloney].

16. See Rosenberg, *Comparative Negligence in Arkansas, A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959) [hereinafter cited as Rosenberg]; Note, *Comparative Negligence—A Survey of the Arkansas Experience*, 22 ARK. L. REV. 692 (1969) [hereinafter cited as Survey]; Pfankuch, *Comparative Negligence vs. Contributory Negligence*, 1968 ILL. L.J. 725, 731 (1968) [hereinafter cited as Pfankuch].

17. See Rosenberg, *supra* note 16, at 108.

18. See Survey, *supra* note 16, at 713.

19. See Pfankuch, *supra* note 16, at 731.

B. *The Pure Form of Comparative Negligence*

Under "pure" comparative negligence is an exact rendering of the portion of damages for which the claimant's damages are diminished. A plaintiff may recover even if his negligence is greater than that of the defendant, but his recovery is reduced by the amount of his own negligence. In terms of fault, a plaintiff who is 90% guilty of ninety-nine percent of his losses.²⁰ The defendant's negligence is reduced by the amount of pure comparative negligence.

The most severe criticism of pure comparative negligence is that it permits a wrongdoer to recover damages for a portion of the greater fault.²¹ Some courts have rejected the philosophy of our fault-based system of tort law on the principle that all persons are held to a standard of conduct which, because of the possibility of omissions, is not always socially desirable.²² Others feel that a pure comparative negligence statute the jury would not apply in every case.

But, as Dean Prosser asserts, a pure comparative negligence statute is a justified apportionment; furthermore, the courts have held less than the nuisance value of the tortious conduct. Tortors agree that pure comparative negligence is a just and equitable rule.

20. Delaware, Mississippi and Rhode Island have adopted pure comparative negligence by legislative enactment. R.I. GEN. LAWS § 9-20-4 (Supp. 1973); the Florida Supreme Court replaced contributory negligence with pure comparative negligence. The court's decision was not clear and free from doubt. The law of England was enacted, it was a judicially adopted rule subject to legislative change.

21. See Flynn, *Comparative Negligence*, 11 U. FLA. L. REV. 135, 162 (1958) [hereinafter cited as Flynn].

22. See HEFT & HEFT, *supra* note 2.

23. *Id.*

24. HEFT & HEFT propose that if A is 90% negligent and his damages are \$25,000 and he is 90% negligent, he would recover \$2,500. If B was damaged in the same accident, he would recover \$1,000 less than A.

25. *Id.*

26. Prosser, *supra* note 15, at 468.

B. The Pure Form of Comparative Negligence

Under "pure" comparative negligence, apportionment of damages is an exact rendering of the fault system.²⁰ The tortfeasor pays only that portion of damages for which he is accountable; conversely, the claimant's damages are diminished in proportion to his negligence.²¹ A plaintiff may recover even if his negligence is greater than that of the defendant, but his recovery is diminished by the amount of his own negligence. In terms of apportionment, if a plaintiff is found guilty of ninety-nine percent of the fault he still recovers one percent of his losses.²² The defendant's only escape from liability under the rule of pure comparative negligence is a finding of no fault on his part.²³

The most severe criticism directed at pure comparative negligence is that it permits a wrongdoer to recover damages even if he is guilty of the greater fault.²⁴ Some writers feel that this result is contrary to the philosophy of our fault system, a system which is premised on the principle that all persons are responsible for their negligent acts and omissions. They find that such a result diminishes the impact of standards of conduct which, because they reflect the moral law, are socially desirable.²⁵ Others fear that under a pure comparative negligence statute the jury would feel compelled to give the plaintiff something in every case.

But, as Dean Prosser asserts, the court still has control over an unjustified apportionment; furthermore, a small recovery often would be less than the nuisance value of a suit.²⁶ Prosser and other commentators agree that pure comparative negligence is the superior rule of

20. Delaware, Mississippi and Rhode Island have adopted this form of comparative negligence by legislative enactment. See, e.g., MISS. CODE ANN. § 11-7-15 (Supp. 1972); R.I. GEN. LAWS § 9-20-4 (Supp. 1972). In *Hoffmand v. Jones*, 280 So. 2d 431 (Fla. 1973), the Florida Supreme Court replaced the rule of contributory negligence with that of pure comparative negligence. The court reasoned that since the doctrine of contributory negligence was not clear and free from doubt at the time Florida's statute adopting the common law of England was enacted, it was not made a part of the statute law of Florida but was a judicially adopted rule subject to judicial abrogation. *Id.* at 434.

21. See Flynn, *Comparative Negligence: The Debate*, 8 TRIAL 49 (1972) [hereinafter cited as Flynn].

22. See HEFT & HEFT, *supra* note 2, § 1.50.

23. *Id.*

24. HEFT & HEFT propose an example: If *A* has been damaged to the extent of \$25,000 and he is 90% negligent, this would permit a recovery of \$25,000 less 90%, or \$2,500. If *B* was damaged in the same accident to the extent of \$1,000 and was 10% at fault, he would recover \$1,000 less 10% or \$900.

25. *Id.*

26. Prosser, *supra* note 15, at 494.

apportionment and that nonpure forms of comparative negligence leave damages undivided in too many cases and often lead to appeals abounding in confusion.²⁷

C. Modified Comparative Negligence

Nevertheless, most states which have abandoned the doctrine of contributory negligence have adopted a modified, or "nonpure," form of comparative negligence. One variation of this "nonpure" rule allows recovery to plaintiffs whose negligence is "not greater than" that of the defendant.²⁸ The more common form, however, permits only those plaintiffs whose negligence is "not as great as" the defendant's to recover.²⁹ Two states vary this formula by permitting a plaintiff to recover only when his negligence is "slight" relative to the defendant's "gross" negligence.³⁰

III. IMPACT OF COMPARATIVE NEGLIGENCE IN PRACTICE

A. Retroactive Applicability

Comparative negligence will not apply to causes of action which arise before April 1, 1974. In those states in which the issue has been litigated, the courts have unanimously and unequivocally denied retroactive application to comparative negligence unless required by statute;³¹ the new Act does not require retroactive applicability on its

27. See Prosser, *supra* note 15, at 508; Keeton, *Comment on Maki v. Freck*, 21 VAND. L. REV. 906, 911 (1968); Schwartz, *supra* note 9.

28. Three states follow this form of comparative negligence: New Hampshire, N.H. REV. STAT. ANN. § 507:7a (1970); Vermont, VT. STAT. ANN. tit. 12, § 1036 (1937); and Wisconsin, WIS. STAT. § 895 (1971).

29. Eight states follow this rule, but with individual variations: Arkansas, ARK. STAT. ANN. § 27-1730.1 (1947); Colorado, COLO. REV. STAT. ANN. § 41-2-14 (Supp. 1971); Georgia, GA. CODE ANN. § 105-603 (1968); Hawaii, HAWAII REV. STAT. § 663-31 (Supp. 1972); Maine, ME. REV. STAT. ANN. tit. 14, § 156 (1965); Massachusetts, MASS. GEN. LAWS ANN. ch. 231, § 85 (Cum. Supp. 1972); Minnesota, MINN. STAT. ANN. § 604.01 (1945); and Oregon, ORE. REV. STAT. § 18.470 (1953).

30. Nebraska, NEB. REV. STAT. § 25.1151 (1964); and South Dakota, S.D. COMPILED LAWS ANN. § 20-9-2 (1967).

31. See *Fuller v. Illinois Central R.R.*, 100 Miss. 705, 56 So. 783 (1911); *Brewster v. Ludtke*, 211 Wis. 344, 247 N.W. 449 (1933); *Reddell v. Norton*, 225 Ark. 643, 285 S.W.2d 328 (1955). In other states the legislatures have expressly stated the statute either would apply retrospectively or prospectively.

face. While no cases to the effect of *Hallows* argued in a recent decision, the application of Wisconsin's comparative negligence by the plaintiff so long as his negligence and the defendant's was remedial in nature, is pending causes of action.³²

B. Application of the Pure Comparative Negligence Rule to Specific Factual Situations

The operation of a pure comparative negligence rule is demonstrated by reference to the following cases:

Case 1: Plaintiff is guilty and defendant sustains no damage. The jury finds plaintiff twenty-five percent at fault. Comparing his negligence with the defendant's, the plaintiff's recovery accordingly is 75 percent of the total, so he recovers \$7,500.

Case 2: Plaintiff is guilty and the defendant sustains damage. The jury finds plaintiff 25 percent at fault. Plaintiff's negligence damages of \$10,000 are reduced by 25 percent to \$7,500. Plaintiff would have no recovery if comparative negligence jurisdiction were applied.

Case 3: Plaintiff is more negligent than the defendant in a three party situation. Defendant number two (D-2) sustains no

32. *Holzem v. Mueller*, 54 Wis. 2d 100, 197 W.2d 100 (1972) (sentencing). *Hallows* further points out that the merits of which are not determined by the jury, most courts have ignored it.

33. These hypothetical situations are based on the facts of *Hallows*.

34. The case law supports this procedure of comparing the plaintiff's negligence to the defendant's. See *Pearson Appliance Store*, 155 Neb. 100, 210 Wis. 659, 246 N.W. 433 (1955).

35. See *Yazoo & M.V. R.R. v. O*

Comparative Negligence

face. While no cases to the contrary have been found, Chief Justice Hallows argued in a recent dissenting opinion that a statutory modification of Wisconsin's comparative negligence rule to allow recovery by the plaintiff so long as his negligence was "not greater than" the defendant's was remedial in character and should have been applied to pending causes of action.³²

B. Application of the Pure Comparative Negligence Statute to Specific Factual Situations

The operation of a pure comparative negligence statute can be demonstrated by reference to certain hypothetical situations.³³

Case 1: Plaintiff is guilty of lesser negligence in a two-party action and defendant sustains no damage. Plaintiff sustains \$10,000 damage. The jury finds plaintiff twenty-five percent at fault and defendant seventy-five percent at fault. Plaintiff's recovery is determined by comparing his negligence with the total negligence involved and reducing his recovery accordingly;³⁴ thus, plaintiff's negligence is twenty-five percent of the total, so he recovers seventy-five percent of his damages, or \$7,500.

Case 2: Plaintiff is guilty of greater negligence in a two-party action and the defendant sustains no damages. Plaintiff sustains \$10,000 damage. The jury finds plaintiff sixty percent at fault, defendant forty percent. Plaintiff's negligence is sixty percent of the total, so plaintiff's damages of \$10,000 are reduced by sixty percent and he recovers \$4,000.³⁵ Plaintiff would have had no recovery in a modified comparative negligence jurisdiction.

Case 3: Plaintiff is more negligent than one of two defendants in a three party situation. Defendant number one (D-1) and defendant number two (D-2) sustain no damage and plaintiff sustains \$10,000

32. *Holzem v. Mueller*, 54 Wis. 2d 388, 195 N.W.2d 635 (1972) (Hallows, C.J., dissenting). Hallows further points out that a defendant, "has no vested rights in a tort defense, the merits of which are not determined until trial and upon which he did not and could not very well rely in causing injury to the plaintiff." *Id.* at 641. While the argument has merit, most courts have ignored it, giving no reason for doing so.

33. These hypothetical situations are taken from Schwartz, *supra* note 9, at 122-25.

34. The case law supports this method of calculation rather than the now discredited procedure of comparing the plaintiff's negligence to that of the defendant. See *Murray v. Pearson Appliance Store*, 155 Neb. 860, 54 N.W.2d 250 (1954); *Cameron v. Union Auto. Ins. Co.*, 210 Wis. 659, 246 N.W. 420 (1933).

35. See *Yazoo & M.V. R.R. v. Carroll*, 103 Miss. 830, 60 So. 1013 (1912).

damage. Suppose plaintiff was forty percent negligent, *D-1* was ten percent negligent and *D-2* fifty percent negligent. Plaintiff's damages of \$10,000 are reduced by his share of the total negligence, forty percent, and he obtains a judgment against *D-1* and *D-2* for \$6,000. *D-1* and *D-2* will be jointly and severally liable to plaintiff; no right of contribution exists between joint tortfeasors in Washington.³⁶

Case 4: A two-party action in which both parties sustain damages. Automobiles owned and driven by *A* and *B* collide. Each sustains \$10,000 damage. *A* sues *B* and *B* files a counterclaim. *A* is found forty percent negligent and *B* is found sixty percent negligent. *A*'s negligence is forty percent of the total, so his damages of \$10,000 are reduced by forty percent and *A* is entitled to recover \$6,000 from *B*. Likewise, *B*'s damages of \$10,000 are reduced by sixty percent and *B* is entitled to recover \$4,000 from *A*. The question of setoff between *A* and *B* is discussed later.³⁷

Case 5: Vicarious liability. Assume that a servant negligently drives his master's truck within the scope of his employment, and it collides with a car being negligently driven by defendant. Servant is guilty of twenty-five percent of the negligence, and defendant is guilty of seventy-five percent of the negligence. The master may recover his damages from the defendant, less twenty-five percent. Similarly, defendant may recover his damages from the master, less seventy-five percent. If the master is assumed not to be negligent in entrusting the truck to the servant, the calculations simply are performed between the servant and defendant, and the master is then substituted for the servant to determine his recovery.³⁸ But if the master were negligent in entrusting the truck to the servant, perhaps knowing that the servant was drunk, the master's recovery would be reduced by his own personal negligence plus that of his servant imputed to him under the doctrine of respondeat superior.³⁹

C. Standard of Apportionment

A primary question arising under a comparative negligence statute

36. See discussion of contribution in text accompanying notes 14-17 *infra*.

37. See discussion of setoff in text accompanying notes 67-71 *infra*.

38. See Dobbs, *Act 191 Comparative Negligence*, 9 ARK. L. REV. 357, 379 (1955) [hereinafter cited as Dobbs].

39. *Id.*

is whether it is the relative negligence that should be the basis for apportionment. In some cases reduce damages in proportion among commentators is apportionment should be apportioned among parties.⁴¹ This is the position where comparative negligence is compared not to the total negligence, or the number of negligent parties, but upon each party's relative negligence causing the accident.⁴² Certain cases where the same percentage of negligence is found for each party is guilty of the same kind of negligence. The distinction between the extent of negligence in the accident and the extent to which the negligence is beyond the ken of the jury.

D. Special Verdicts

The special verdict has been used to determine comparative negligence concept.⁴⁴ Used to determine as findings of fact the percentage of negligence at fault, the law and apportionment.

40. Baird v. Harrington, 202 Mich. 101 (1924).

41. See Prosser, *supra* note 15, at note 38, at 361; and Bouchard, *Apportionment of Damages*, 54 Mass. L.Q. 125 (1972) [hereinafter cited as Bouchard].

42. Grana v. Summerford, 12 W. Va. 101 (1878).

43. Strupp v. Farmers Mutual A. & M. Ins. Co., 100 Ark. 101 (1915).

44. HERT & HERT, *supra* note 2, at 101.

45. See Maloney, *supra* note 15, at 101.

1. In operating his automobile, was the defendant Smith negligent?

2. If you answer Question 1 'Yes', was the defendant Smith negligent a cause of the collision? Yes.

3. In operating his automobile, was the plaintiff Jones negligent at the intersection? Yes.

4. If you answer Question 3 'Yes', was the plaintiff Jones negligent a cause of the collision? Yes.

5. If you answer all of the above questions 'Yes', what percentage of the total negligence is attributable to plaintiff Jones? 40 percent.

is whether it is the relative degree of causation or of fault which should be the basis for apportionment of damages. Although some cases reduce damages in proportion to causation,⁴⁰ the preferred position among commentators is that once sufficient causation is established, apportionment should be based on the comparative fault of the parties.⁴¹ This is the position of the Wisconsin court; it has held that negligence is compared not on the basis of the kind or character of causal negligence, or the number of respects in which the parties were negligent, but upon each party's contribution to the total negligence causing the accident.⁴² Certainly the jury is not required to attribute the same percentage of negligence to each party merely because each is guilty of the same kind of negligence.⁴³ In any event, a refined distinction between the extent to which the defendant's fault caused the accident and the extent to which he was negligent is likely to be beyond the ken of the jury.

D. Special Verdicts

The special verdict has been called the cornerstone of the comparative negligence concept.⁴⁴ Under a special verdict, the jury is required to determine as findings of fact the total amount of damages and the percentage of negligence attributable to each party; the judge then applies the law and apportions the damages.⁴⁵ This procedure is

40. *Baird v. Harrington*, 202 Miss. 112, 30 So. 2d 82 (1947).

41. See Prosser, *supra* note 15, at 481; Schwartz, *supra* note 9, at 125; Dobbs, *supra* note 38, at 361; and Bouchard, *Apportionment of Damages Under Comparative Negligence*, 54 MASS. L.Q. 125 (1972) [hereinafter cited as Bouchard].

42. *Grana v. Summerford*, 12 Wis. 2d 517, 107 N.W. 2d 463 (1961).

43. *Strupp v. Farmers Mutual Auto. Ins. Co.*, 14 Wis. 2d 158, 109 N.W.2d 660 (1961).

44. HEFT & HEFT, *supra* note 2, § 8.10.

45. See Maloney, *supra* note 15, at 171-72; Prosser poses a series of specific questions and answers which might appear in a typical case under a special verdict procedure:

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

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 the above Questions 1, 2, 3, and 4 'yes,' then answer this: What percentage of the total negligence was attributable to defendant Smith? 60 percent. To plaintiff Jones? 40 percent.

useful to assure that the jury does not apportion damages on some basis other than a comparison of fault.

Most commentators support the use of special verdicts, especially with the pure form of comparative negligence.⁴⁶ Although the Washington Act does not require special verdicts,⁴⁷ Washington courts have discretionary power to require a jury to return a special verdict.⁴⁸ In addition to the value of special verdicts as an aid to apportionment, a special verdict requires the jury to find the facts without regard to the actual outcome of the case.⁴⁹ It is claimed that this procedure provides a method for controlling the jury in order to prevent excess sympathy, prejudice, or bias from tainting the fact finding process.⁵⁰ Also, the special verdict makes it possible to localize error and save sound portions of a verdict, whereas a defect in part of a general verdict destroys the whole verdict.⁵¹

Although it is difficult in cases containing numerous complex issues to formulate satisfactory special verdicts either in the form of fact questions or fact findings,⁵² a general verdict does not insure that the jury understood or followed instructions.⁵³ Nevertheless, special verdicts have been opposed as making it difficult for juries to reach

agreement,⁵⁴ and as limiting the operation of justice.⁵⁵

E. Multiple Parties

Multiple wrongdoers are joined in one lawsuit when they cause, and the injured party sues all the wrongdoers.⁵⁶ In theory, the only way to handle a multiple party accident through a single lawsuit is to bring all parties into court in a single lawsuit. To allocate the damages based on the relative fault of the parties, plaintiffs will do well to avoid the danger of jury confusion in multiple party cases.⁵⁷

F. Effect on Conflict of Laws

There is no uniform rule for the choice of law conflicts between comparative negligence and those applying the pure negligence statute. Some courts have held that the statute is in effect where the forum court is.⁵⁸ The rationale is that comparative negligence, by granting a common law to persons consistent with the substantive rights of litigants,⁵⁹ is a traditional conflict of laws rule where the wrong occurred.

6. What is the amount of damages plaintiff Jones has sustained? \$10,000. Prosser, *supra* note 15, at 497-98.

46. Ghiardi and Hogan, *Comparative Negligence*, 18 DEFENSE L.J. 537 (1969); Kirchen, *Unfairness of "Mississippi Type" Comparative Negligence*, 2 FOR THE DEFENSE 66 (1970); HEFT & HEFT, *supra* note 2, § 8.10; Prosser, *supra* note 15, at 497; Maloney, *supra* note 15, at 171-72; Bouchard, *supra* note 41; Note, *Comparative Negligence, A Look at the South Dakota Approach*, 14 S.D. L. REV. 92 (1969).

Mississippi utilizes general verdicts rather than special verdicts in applying its pure comparative negligence statute. Such use of general verdicts in comparative negligence actions has been criticized on the ground that it is not possible to determine whether the jury does, in fact, diminish the recovery it awards in proportion to the negligence attributed to the person injured. See HEFT & HEFT, *supra* note 2, § 3.310.

47. See text accompanying note 3 *supra*.

48. (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 answers or may submit written forms of the several special findings which might properly be made under the pleadings and evidence

WASH. SUPER. CT. (CIV.) R. 49 (1972).

49. See HEFT & HEFT, *supra* note 2, § 8.10.

50. See Maloney, *supra* note 15, at 171-72.

51. See Driver, *The Special Verdict—Theory and Practice*, 26 WASH. L. REV. 21, 22 (1951) [hereinafter cited as Driver].

52. See Driver, *supra* note 51, at 24; HEFT & HEFT, *supra* note 2, § 1.70; Schwartz, *supra* note 9, at 134.

53. See HEFT & HEFT, *supra* note 2, § 1.70.

54. See Driver, *supra* note 51.

55. 5 J. MOORE, FEDERAL PRACTICE & PROCEDURE § 100.1 (1973).

56. See Maloney, *supra* note 15.

57. Multiple party cases are often difficult to handle because of the complexity of the fault and assessment of damages in the typical jury, especially with only one lawyer. They may approach a complexity in the allocation process. See Prosser, *supra* note 15, at 497.

58. See cases collected at 57 *supra*.

59. See Mississippi Power & Light Co. v. Shipowners & Merchants, 1934, classifying Mississippi's comparative negligence statute as a traditional conflict of laws rule.

60. See Chisum v. Phelps, 228 N.Y. 252, 169 N.E. 27 (1927).

61. See RESTATEMENT OF CONFLICTS OF LAWS § 389.

Comparative Negligence

agreement,⁵⁴ and as limiting the historic role of juries in the administration of justice.⁵⁵

E. Multiple Parties

Multiple wrongdoers are jointly and severally liable for the injuries they cause, and the injured party has the right to join them as defendants.⁵⁶ In theory, the only satisfactory method of dealing with a multiple party accident through comparative negligence is to bring all the parties into court in a single action, apportion the fault and then allocate the damages based on this apportionment. However, in practice plaintiffs will do well to avoid whenever possible the complexities and danger of jury confusion inherent in the joinder of multiple defendants.⁵⁷

F. Effect on Conflict of Laws

There is no uniform rule by which forum courts have resolved choice of law conflicts between jurisdictions embracing comparative negligence and those applying the common law rule of contributory negligence.⁵⁸ Some courts have held that if a comparative negligence statute is in effect where the tort occurred, it must be applied by the forum court.⁵⁹ The rationale of these decisions is that comparative negligence, by granting a right of recovery not recognized by the common law to persons contributorily negligent, directly affects substantive rights of litigants;⁶⁰ consequently, if such a court follows the traditional conflict of laws rule that the substantive law of the place where the wrong occurred governs the action,⁶¹ it will look to that law

54. See *Driver*, *supra* note 51, at 134.

55. 5 J. MOORE, *FEDERAL PRACTICE* § 49.05 (1960).

56. See *Maloney*, *supra* note 15, at 164-65.

57. Multiple party cases are often extremely complex factually. Apportionment of fault and assessment of damages involving three or more parties is a monumental task for the typical jury, especially with only limited time available. When special verdicts are used, they may approach a complexity and number which render the jury totally ineffective in the allocation process. See *Prosser*, *supra* note 15, at 503-04.

58. See cases collected at 57 AM. JUR. 2d, *Negligence* § 430 (1971).

59. See *Mississippi Power & Light Co. v. Whitescarver*, 63 F.2d 928, 929 (5th Cir. 1934), classifying Mississippi's comparative negligence statute as substantive; see also *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal. 2d 365, 159 P.2d 1, 8 (1945).

60. See *Chisum v. Phelps*, 228 Ark. 936, 311 S.W.2d 297 (1958); *Fitzpatrick v. International Ry.*, 252 N.Y. 127, 169 N.E. 112 (1929).

61. See *RESTATEMENT OF CONFLICTS* § 377 (1934).

in determining whether the doctrine of contributory negligence or comparative negligence will control.⁶² The Washington court follows the traditional place of wrong rule,⁶³ but since it has not yet characterized comparative negligence as a matter of substance or procedure, it is impossible to predict how the court will apply the law in such a case.

The Mississippi court has replaced the traditional, inflexible conflict of laws rule in tort cases with what is known as the "most significant relationship rule."⁶⁴ Using this doctrine, the court will apply its own comparative negligence law where the forum state has a more significant relationship to the occurrence and parties, even though the accident causing the injuries took place in another state adhering to the common law contributory negligence doctrine.⁶⁵ Conversely, under some modern conflicts rules, the court may decide to apply a comparative negligence statute of the place of the wrong, rather than the common law rule of the forum, on the ground that the foreign jurisdiction has a stronger interest in having its law applied than does the forum.⁶⁶

G. Setoff

Under Washington law, the court has discretion to allow a setoff of one judgment against another when warranted by considerations of equity.⁶⁷ Some commentators oppose the use of setoffs in conjunction with the pure form of comparative negligence,⁶⁸ and Rhode Island has responded to this criticism by incorporating in its pure comparative negligence statute a provision prohibiting setoffs.⁶⁹

62. See *Tri-State Transit Co. v. Monday*, 194 Miss. 714, 12 So. 2d 920, 922 (1943); *Mississippi Power & Light Co. v. Whitescarver*, *supra* note 59; *Chism v. Phelps*, *supra* note 60; *Fitzpatrick v. International Ry.*, *supra* note 60.

63. See *Maag v. Voykovich*, 46 Wn. 2d 302, 280 P.2d 680 (1955); *Stone Machinery Co. v. Kessler*, 1 Wn. App. 750, 460 P.2d 651 (1970).

64. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

65. See *Mitchell v. Craft*, 211 So. 2d 509, 516 (Miss. 1968).

66. See *Frummer v. Hilton Hotels Int'l*, 60 Misc. 2d 840, 304 N.Y.S.2d 335, 344 (N.Y. App. 1969).

67. See *Spokane Security Finance Co. v. Bevans*, 172 Wash. 418, 20 P.2d 31, 32 (1933).

68. See *Flynn*, *supra* note 21, at 52; *Schwartz*, *supra* note 9, at 126. Counterclaims, and, consequently, setoff problems, do not arise in connection with the "not as great as" and "slight-gross" forms of comparative negligence, as the plaintiff is permitted to recover only if his contributory negligence is less than that of the other party, thus precluding recovery by the other party. See 11 ARK. L. REV. 71, 74 (1956).

69. See R.I. GEN. LAWS § 9-20-4.1 (1956).

Whether setoff is permitted in the context of insurance claims found equally at fault and comparative negligence each with the other party's insurer. If judgments would cancel each other out to insurance companies, what is the effect of the pure comparative negligence rule?

Proponents of setoff, on the other hand, argue that the defendant's insurer can not be expected to pay more vigorously in the absence of a setoff. If the defendant's insurer would not ultimately be responsible for the plaintiff's judgment. The defendant's counterclaim on behalf of the defendant when the plaintiff's judgment is based on the defendant's policy and reached the plaintiff's insurer.

Encumbering the pure comparative negligence rule would result in insurance companies apportioned to their assets. If the defendant's insurer is expected from the comparative negligence statute to ignore part of the

IV. COMPARATIVE NEGLIGENCE ON COMMON LAW

Aside from these changes, the change to comparative negligence has resulted in the application of such concepts as last clear chance, degrees of negligence. In Virginia, the last clear chance and indemnification seem to

A. Last Clear Chance

Before the adoption of comparative negligence, the tools most frequently employed

70. See *Flynn*, *supra* note 21.

71. See *Dobbs*, *Comparative*

Whether setoff is permitted or not becomes important, of course, in the context of insurance claims. If both plaintiff and defendant were found equally at fault and sustained equal damages, under pure comparative negligence each would recover one-half of his damages from the other party's insurer. If setoffs are permitted, however, the two judgments would cancel each other out. This result, although pleasing to insurance companies, would negate much of the intended advantage of the pure comparative negligence rule.⁷⁰

Proponents of setoff, on the other hand, suggest that the defendant's insurer can not be expected to argue its client's counterclaim vigorously in the absence of setoff, because proof of its client's damages would not ultimately benefit the insurer by reducing or cancelling the plaintiff's judgment. The insurer's failure to establish a strong counterclaim on behalf of his client could be very damaging to a defendant when the plaintiff's recovery exceeded the limits of the defendant's policy and reached him personally.⁷¹

Encumbering the pure comparative negligence rule with setoff would result in insurance companies paying less than the total damages apportioned to their assureds; this vitiates the recovery of damages expected from the comparison of negligence and allows the liability insurer to ignore part of the risk it contracted to bear.

IV. COMPARATIVE NEGLIGENCE AND ITS EFFECT ON COMMON LAW CONCEPTS

Aside from these changes in the mechanics of negligence law, the change to comparative negligence also may arouse controversy over the application of such traditional common law doctrines and concepts as last clear chance, assumption of risk, *res ipsa loquitur* and degrees of negligence. In Washington, the application of contribution and indemnification seem well settled.

A. Last Clear Chance

Before the adoption of comparative negligence statutes, one of the tools most frequently employed to overcome the contributory negli-

70. See Flynn, *supra* note 21, at 52.

71. See Dobbs, *Comparative Negligence*, 9 *ARK. L. REV.* 357, 383 (1955).

not be justified on the usual ground that the defendant was the proximate cause of the accident. Because of the doctrine's logical inconsistency in this third class of cases and because its application in all three classes of cases has the effect of placing the *entire* loss on the defendant despite the plaintiff's negligence, most writers have urged the doctrine be discarded with the passage of comparative negligence statutes.⁷⁷

Nevertheless, not all states which have adopted comparative negligence statutes have done away with the doctrine. Last clear chance and comparative negligence exist side by side in Nebraska,⁷⁸ South Dakota,⁷⁹ and Georgia.⁸⁰ In Arkansas⁸¹ and Mississippi⁸² it is unclear whether the doctrine has been retained. The Wisconsin Supreme

less, the Washington court held the doctrine applicable to such a situation and the railway was held liable. *Locke* is cited in James, *supra* note 75, at 713.

The *Locke* decision was subsequently followed in *Norton v. City of Seattle*, 113 Wash. 408, 194 P. 373 (1920), another street car accident case wherein a deaf and dumb child darted out in front of the streetcar and although seen, was struck anyway when all the gripman did was to sound the gong without slowing down.

77. See, e.g., PROSSER, *supra* note 72, at 427; James, *supra* note 75; and MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1946). In Professor MacIntyre's words, "The whole last clear chance doctrine is only a disguised escape, by way of comparative fault, from contributory negligence as an absolute bar, and serves no useful purpose in jurisdictions which have enacted apportionment statutes." *Id.* at 1251.

78. See *Bezdek v. Patrick*, 170 Neb. 522, 103 N.W.2d 318 (1960).

79. See *Ulach v. Wyman*, 78 S.D. 504, 104 N.W.2d 817 (1960).

80. *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 88 S.E. 2d 6 (1955). The Georgia result, it should be noted, is dictated by the peculiarity of that state's statute which declares:

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. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.

GA. CODE ANN. § 105-603 (1968).

The first sentence of the quoted statute has been construed as a plaintiff's last clear chance doctrine. See *Southern Ry. v. Wilbanks*, 67 F.2d 424 (5th Cir. 1933); *United States v. Fleming*, 115 F.2d 314 (5th Cir. 1940). The second sentence is the basis for comparative negligence in Georgia. For an article criticizing the retention of last clear chance in Georgia, see Note, 1 GA. B.J. 500, 505 (1964), wherein the author states that the statute, by retaining the last clear chance doctrine, encroaches on and to that extent impairs the symmetry of the rule of comparative negligence.

81. See *Ed Hopson Produce Co. v. Munoz*, 230 Ark. 179, 321 S.W.2d 203 (1959) (dicta indicating that, had the factual situation been one in which the doctrine of "discovered peril" (the equivalent of last clear chance) could properly have been applied, the trial judge would have erred in refusing to instruct the jury on the doctrine). *But see* *Repetto v. Raymond*, 172 F. Supp. 786 (W.D. Ark. 1959) (dicta).

82. Several federal courts construing the Mississippi statute have concluded that the doctrine, while of diminished importance, is still alive in that state. See *Illinois Central R.R. v. Underwood*, 235 F.2d 868 (5th Cir. 1956), and *Brand v. Baker*, 324 F.2d 213 (5th Cir. 1963), in which the court assumed the doctrine applied but found it inapplicable to the factual situations before the court.

Comparative Negligence

ically dissimilar contexts.⁸⁹ Despite some apparent vacillation,⁹⁰ the Washington court has recognized the doctrine in most situations. Nevertheless, in the master-servant setting the doctrine has been explicitly abrogated⁹¹ and there are indications it will also be held to be unavailing in others.⁹² Where the doctrine does survive, the Washington court until recently had compounded the confusion by distinguishing assumption of risk from the closely analogous if not identical maxim of *volenti non fit injuria*, holding that the former applies to cases involving an express consensual acceptance of a risk known or unknown at the time of agreement, while the latter applies only to a unilateral assumption of a known risk.⁹³

With the adoption of a comparative negligence statute, assumption of risk logically should be abandoned; the plaintiff's voluntary exposure to an appreciated risk merely should increase his proportion of fault for computation purposes. Nevertheless, this reasoning has not been uniformly adopted by the courts. Mississippi,⁹⁴ Georgia,⁹⁵ South

89. Dean Prosser divides assumption of risk into three main categories: (1) where the plaintiff in advance has given his consent to relieve the defendant of a legal duty towards him; (2) where the plaintiff voluntarily enters into some relation with the defendant, with knowledge the defendant will not protect him against risk; and (3) where the plaintiff already is aware of the risk created by the defendant's negligence but nevertheless proceeds to encounter it. PROSSER, *supra* note 72, at 439.

90. It was thought at one time that the doctrine had been put to rest in Washington. In *Feignbaum v. Brink*, 66 Wn. 2d 125, 401 P.2d 642 (1965), the court held the doctrine of assumption of risk unavailable in a landlord-tenant situation where the lessor was under a duty to repair and maintain common areas. Language in the case indicated that the court might have been willing to abrogate the doctrine completely. A case decided soon after *Feignbaum*, however, makes clear that a broad reading of the decision would be incorrect and that the doctrine has survived. See *e.g.*, *Perry v. Seattle School Dist.*, 66 Wn. 2d 800, 405 P.2d 589 (1971).

91. *Siragusa v. Swedish Hosp.* 60 Wn. 2d 310, 373 P.2d 767 (1962). In *Siragusa* plaintiff nurse was injured at her place of employment when a door with a hook on it was unexpectedly opened by a patient and the hook struck her on the upper portion of her back. In reversing the judgment of dismissal in favor of the defendant hospital, the court held that if an employer negligently fails in his duty to furnish his employees with a reasonably safe place to work, the employee will not be denied recovery simply because he was aware or should have known of the dangerous condition. Rather, knowledge and voluntary exposure to the risk were held properly considered as factors in determining whether the employee was contributorily negligent.

92. See, *e.g.*, *Feignbaum v. Brink*, *supra* note 90.

93. See *Hogenson v. Service Armament Co.*, 77 Wn. 2d 209, 215 n.2, 461 P.2d 311 (1969). See also *Walsh v. West Coast Coal Mines*, 31 Wn. 2d 396, 197 P.2d 233 (1948); *Bailey v. Safeway Stores*, 55 Wn. 2d 730, 349 P.2d 1077 (1960). But see *Lyons v. Redding Construction Co.*, 83 Wn. 2d 86, 515 P.2d 821 (1973).

94. While Mississippi retains the doctrine in most cases, the Legislature has made the doctrine inapplicable in the master-servant relationship. See Miss. CODE ANN. § 1456 (1917). For a recent Mississippi decision to the effect that assumption of risk will still be applied absent such a relationship, see *United Roofing and Siding Co. v. Seefeld*, 222 So. 2d 406 (Miss. 1969).

95. In Georgia the assumption of risk by the plaintiff or plaintiff's deceased is an-

Comparative Negligence

their way to a Christmas party when it occurred. The jury found the driver eighty-five percent negligent and the plaintiff guest fifteen percent negligent. However, it also found the guest to have assumed the risk and thus barred from recovery. The Wisconsin court reversed and held a guest's assumption of risk no longer to be a separate defense; if a guest's exposure of himself to a particular hazard was unreasonable, such conduct was negligent and subject to the comparative negligence statute. Although *McConville* dealt with only the host-guest situations,⁹⁹ the subsequent case of *Dippel v. Sciano*¹⁰⁰ extended the rule to products liability. The court observed that assumption of risk by a user of consumer products, resulting from a failure to exercise reasonable care, could be considered negligence by the plaintiff to be compared to the defendant's negligence.

Unfortunately, in neither decision was the best reason for abrogating the doctrine well articulated—the fact that retention of assumption of risk, “in all probability . . . defeats the basic intention of the statute since it continues an absolute bar in the case of one important, and very common, type of negligent conduct on the part of the plaintiff.”¹⁰¹ Additionally, it could have been pointed out that in those states which have retained both the doctrine and a comparative negligence statute, a good deal of confusion has reigned, confusion which at least one federal judge has described as “the natural result of permitting the utilization of the assumption of risk doctrine to be extended to areas where it should have no applicability, adding, as it does, nothing to a straightforward analysis in terms of negligence and contributory negligence—nothing, that is, except confusion and anomalous results.”¹⁰²

The Washington Supreme Court has apparently accepted this rea-

99. The court noted also that present day customs and community attitudes toward the use of the automobile are out of line with the old notion that a guest rides as a mere supplicant, 113 N.W.2d at 16.

100. 37 Wis. 2d 443, 155 N.W. 2d 55 (1967). In *Dippel* the plaintiff and others were skidding a pool table along a tavern floor to get it into a playing position. One of the legs collapsed, crushing plaintiff's foot, and he sued both the tavern owner and the manufacturer.

While the strict liability discussion in *Dippel* is dicta, a later case, *Gies v. Nissen Corp.*, 57 Wis. 2d 371, 204 N.W. 2d 519 (1973), held products liability actions were subject to the comparative negligence rule. For the same holding, see *Hagenbuck v. Snap-On-Tools Corp.* 339 F. Supp. 676 (W.D. N.H. 1972).

101. See PROSSER, *supra* note 72, at 457.

102. See *Harris*, 328 F. Supp. at 364.

soning as well as of Wisconsin's interpretation of its statute in *McConville*, and has indicated in dicta that the doctrine will be abandoned once the new Act becomes effective.¹⁰³ Again, it should be emphasized that those elements which have constituted assumption of risk will still be considered by the jury, but in a weighing of fault rather than as an absolute bar to recovery.

C. *Res Ipsa Loquitur*

Under the doctrine of *res ipsa loquitur*, in certain circumstances the trier of fact is allowed, but not compelled, to infer that the defendant was negligent. Three conditions generally are required for the doctrine to apply: (1) The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence, (2) it must be caused by an agency or instrumentality within the "exclusive control" of the defendant and (3) it must not be caused by any voluntary act or contribution on the part of the plaintiff.¹⁰⁴

The Wisconsin court held in *Turk v. H. C. Prange Co.*¹⁰⁵ that passage of the comparative negligence statute negated the third requirement of the doctrine and that negligence by the plaintiff is considered in comparing the respective negligences rather than in applying *res ipsa loquitur*. A federal court in Mississippi,¹⁰⁶ on the other hand, took the position that *res ipsa loquitur* was not applicable in an action where the evidence indicated that the plaintiff's deceased had been contributorily negligent.

In Washington, where the primary effect of the doctrine is to protect the plaintiff from a nonsuit, the Wisconsin approach, retaining

only the first two elements. Probably, the reason for the third to permit a case to go to the jury is barred from recovery because of the passage of the new Act this year.

D. *Degrees of Negligence*

It is well-established in Washington that the negligence of a plaintiff does not bar his recovery by the defendant. While other jurisdictions in Washington the leading case is consistently followed. It is logical that comparative negligence conduct is subject to comparison under the doctrine to mitigate his own liability for negligence. To show that the plaintiff was contributorily negligent.

On the other hand, "willful and wanton" negligence has been defined as including a conscious awareness that injury will result. This is not the same as "gross" negligence. Negligence has been defined as fa

103. See *Lyons v. Redding Construction Co.*, 83 Wn. 2d 86, 95-96, 515 P.2d 821, 826 (1973).

104. W. PROSSER, LAW OF TORTS, § 39 (3d ed. 1964); 9 J. WIGMORE, EVIDENCE § 2509 (3d ed. 1940). The Washington court, while cognizant of the pitfalls of such a formulation, has accepted the stated requirements. See, e.g., *Horner v. Northern Pac. Beneficial Ass'n. Hosp., Inc.*, 62 Wn. 2d 351, 382 P.2d 518 (1963); *Miles v. St. Regis Paper Co.*, 77 Wn. 2d 828, 467 P.2d 307 (1970).

105. 18 Wis. 2d 547, 119 N.W.2d 365 (1963). In *Turk* a mother was injured when she fell while attempting to release her son whose galosh had become caught in a department store escalator. See also Ghiardi, *Res Ipsa Loquitur in Wisconsin*, 39 MARQ. L. REV. 361 (1956). For more recent Wisconsin cases following the *Turk* decision, see *Fehrman v. Smir*, 20 Wis. 2d 1, 121 N.W.2d 255 (1963) (medical malpractice); *Welch v. Neisius*, 35 Wis. 2d 682, 151 N.W.2d 735 (1967) (fertilizer bags fell on plaintiff).

106. *Fournier v. United States*, 220 F. Supp. 752 (S.D. Miss. 1963).

107. See *Zukowsky v. Brown* points out that in some instances absent exculpatory evidence presents a directed verdict. In other cases a presumption arises which the defendant must rebut. Finally, there can be cases where the defendant is contributorily negligent.

108. See, e.g., *Billingsly v. Arkansas* interpreting Arkansas law. Judge Black of the Arkansas "willful and wanton" negligence is thus subject to that state's comparative negligence. The purpose of a comparative negligence is a judicial characterization of negligence. See also the Arkansas state court decision, 875 (1966), quoted in *Billingsly*.

109. 42 Wn. 2d 676, 258 P.2d 110. Wanton misconduct on the ground that the act plus conscious awareness of the consequences of the act is characterized by intent to cause injury.

110. The *Addison* court defined contributory negligence. *Id.* at 684 n.110, 258 P.2d at 466.

111. See, e.g., *Hansen v. Paul*

Comparative Negligence

only the first two elements of the doctrine, is preferable.¹⁰⁷ Presumably, the reason for the third requirement was that little reason exists to permit a case to go to the jury on *res ipsa loquitur* if the plaintiff is barred from recovery because of his contributory negligence. With the passage of the new Act this rationale is no longer present.

D. Degrees of Negligence

It is well established in Washington that the contributory negligence of a plaintiff does not bar his recovery for "wilful or wanton" conduct by the defendant. While other jurisdictions take a contrary view,¹⁰⁸ in Washington the leading case of *Adkisson v. Seattle*¹⁰⁹ has been consistently followed. It is logical to assume, therefore, that under comparative negligence conduct which is wilful or wanton will not be subject to comparison under the Act. A defendant can scarcely seek to mitigate his own liability for striking the plaintiff by attempting to show that the plaintiff was clumsy.

On the other hand, "wilful or wanton" misconduct—which has been defined as including a mental state of intention or at least conscious awareness that injury would "likely" or "probably" result—is not the same as "gross" negligence.¹¹⁰ In Washington, gross negligence has been defined as failure to exercise "slight care."¹¹¹

107. See *Zukowsky v. Brown*, 79 Wn. 2d 586, 488 P.2d 269 (1971). The court points out that in some instances the effect is stronger. For example, in some cases, absent exculpatory evidence presented by the defendant, the plaintiff is entitled to a directed verdict. In other cases the inference of negligence is so strong that a legal presumption arises which the defendant must overcome by a preponderance of evidence. Finally, there can be cases where the presumption is conclusive.

108. See, e.g., *Billingsly v. Westrac Co.*, 365 F.2d 619 (8th Cir. 1966), interpreting Arkansas law. Judge Blackmun, writing for the court, stated that as used in Arkansas "wilful and wanton" are viewed simply as a brand of negligence and are thus subject to that state's comparative negligence law. Judge Blackmun noted in passing that "the purpose of a comparative negligence statute is thwarted whenever there is a judicial characterization of an act as something other than negligence." *Id.* at 623. See also the Arkansas state case of *Harkrider v. Cox*, 232 Ark. 165, 334 S.W.2d 875 (1966), quoted in *Billingsly*.

109. 42 Wn. 2d 676, 258 P.2d 461 (1953). The court distinguished wilful from wanton misconduct on the grounds that the former is characterized by an intent to do the act plus conscious awareness that it will probably cause injury while the latter is characterized by intent to do the act plus total indifference as to whether the act will cause injury.

110. The *Adkisson* court defined "wilfulness" and "wantonness" in these terms. *Id.* at 684 n.110, 258 P.2d at 466.

111. See, e.g., *Hansen v. Pauley*, 67 Wn. 2d 345, 407 P.2d 811 (1965).

The distinction between "wilful or wanton" misconduct and "gross" negligence, seemingly slight, becomes important chiefly for purposes of the Washington host-guest statute which allows a guest to recover for either "intentional" misconduct or "gross negligence."¹¹² Adoption of the new Act is likely to cause some confusion, because while "intentional" misconduct seems identical to "wilful and wanton" misconduct and thus not subject to comparison, "gross" negligence is still a form of negligence and thus should be subject to comparison.¹¹³ This distinction may require the trier of fact to specify whether the guest is allowed to recover because the host's conduct was "intentional" or because it was "grossly negligent." Only in the latter case should comparison with any negligence by the guest be made.

E. Contribution and Indemnification

Indemnification and contribution are two postjudgment methods by which a losing defendant can shift the burden of liability to another party. Indemnification shifts the entire liability imposed by a judgment onto the shoulders of the indemnifier;¹¹⁴ contribution shifts only

112. WASH. REV. CODE § 46.08.080 (1863) provides:

No person transported by the owner or operator of a motor vehicle as an invited guest or licensee, without payment for such transportation, shall have cause of action for damages against such owner or operator for injuries, death or loss, in the case of accident, unless the accident was intentional on the part of the owner or operator, or the result of said owner's or operator's gross negligence or intoxication, and unless the proof of the cause of action is corroborated by competent evidence or testimony independent of, or in addition to, the testimony of the parties to the action; Provided, That this section shall not relieve any owner or operator of a motor vehicle from liability while it is being demonstrated to a prospective purchaser.

113. See *Stevens v. Murphy*, 69 Wn. 2d 939, 947-48, 421 P.2d 668, 673 (1966), where the court stated: "Gross negligence . . . differs in *kind* from 'willful misconduct'; the former, by definition, is still negligence—a lack of care—although of a degree substantially greater than that which adheres in ordinary negligence." (emphasis added) *Stevens* involved an action by a child against his parent wherein the court held that in order to recover against the parent, the child must show wilful or wanton misconduct rather than simply gross negligence. There is no reason to believe, however, that the meaning of wilful and wanton will differ under the host-guest statute. See, e.g., *Nist v. Tudor*, 67 Wn. 2d 322, 407 P.2d 798 (1965).

114. In Washington, when the tortfeasors who have caused injury to a third person are not *in pari delicto*, the negligence of one being primary or active while the negligence of the other is passive, if the party guilty of the passive negligence is held liable he is entitled to indemnity from the wrongdoer guilty of the primary negligence. See, e.g., *Rufener v. Scott*, 46 Wn. 2d 240, 280 P.2d 240 (1955). If on the other hand the party guilty of active negligence is held liable, he is not entitled to indemnity from the tortfeasor guilty of only passive negligence. See, e.g., *Reefers Queen Co. v. Marine Construction*, 73 Wn. 2d 783, 440 P.2d 453 (1968).

a portion of the loss. An injured party's shoes after the negligent party has been apportioned have no effect on indemnification.

Contribution, in those jurisdictions, is a portion of the liability for a tort by only one of two or more joint tortfeasors to a pro rata contribution from each. For example, if three parties are liable and one is entitled to \$4,000 from each, a pro rata contribution has been made in three instances, that all the tortfeasors share the anomaly of having a comparative contribution which imposes on each a percentage less of his degree of fault, than the contribution of each share of the total percentage of negligence attributed to each.

Washington courts, however, apply the pro rata rule of contribution. Therefore, it will be possible for a negligent and damaged to the extent of his loss to proceed against D-1 who is fifty percent negligent and seek contribution from D-2 who is ninety percent negligent and an unjust outcome, even with comparative tortfeasors, by comparing the percentage of that defendant he has chosen.

115. See *Bielski v. Schulze*, 16

116. See, e.g., *City of Tacoma v. Peterson & Co.*, 99 Wn. 2d 100, 678 P.2d 100 (1974). Contribution has been criticized because it shifts the entire burden of a loss, for which one party is responsible to be shouldered onto another party, by levy of execution, the existence of which depends on or his collusion with the other wrongdoer.

117. See Note, *Comparative Negligence*, 596 (1973) and Campbell, *Ten Years of Comparative Negligence*, 289. As these articles point out, the current comparative negligence statute

Comparative Negligence

a portion of the loss. An indemnifier simply steps into the indemnified party's shoes after the negligence between the plaintiff and the indemnified party has been apportioned. Thus, the comparative statute should have no effect on indemnification.

Contribution, in those jurisdictions which permit it, shifts only a portion of the liability for a judgment. When judgment is had against only one of two or more joint tortfeasors, the party held liable is entitled to a pro rata contribution from each of the other liable parties (for example, if three parties are liable and one is forced to pay \$12,000, he is entitled to \$4,000 from each of the other two parties). This rule of pro rata contribution has been criticized for its premise, false in many instances, that all the tortfeasors were equally at fault. To prevent the anomaly of having a comparative negligence statute but a rule of contribution which imposes on each defendant a pro rata liability regardless of his degree of fault, the Wisconsin court has adopted a rule that the contribution of each should be apportioned according to the percentage of negligence attributed to each.¹¹⁵

Washington courts, however, have not accepted even the traditional pro rata rule of contribution.¹¹⁶ Unless the present rule is changed, therefore, it will be possible for a plaintiff who is five percent negligent and damaged to the extent of \$10,000 by *D-1* and *D-2* to proceed against *D-1* who is five percent negligent rather than *D-2* who is ninety percent negligent and recover \$9,500. *D-1* will be unable to seek contribution from *D-2*. The court might mitigate this obviously unjust outcome, even without permitting contribution among tortfeasors, by comparing the plaintiff's negligence only with the negligence of that defendant he has chosen to hold responsible.¹¹⁷

115. See *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

116. See, e.g., *City of Tacoma v. Bonnell*, 65 Wash. 505, 118 P. 642 (1911); *Seattle v. Peterson & Co.*, 99 Wash. 533, 170 P. 140 (1918). This rule against contribution has been criticized by PROSSER, *supra* note 72, at 307, as permitting "the entire burden of a loss, for which two defendants were equally, unintentionally responsible to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free."

117. See Note, *Comparative Negligence in Wyoming*, 8 LAND & WATER L. REV. 596 (1973) and Campbell, *Ten Years of Comparative Negligence*, 141 WIS. L. REV. 289. As these articles point out, the common law rule of joint and several liability, not comparative negligence statutes, produces such an unjust result.

V. CONCLUSION

Washington's new Act initially will raise a number of issues not encountered in a state which adheres to the old rule of contributory negligence. While empirical research indicates that litigation reaching the actual trial stage is not likely to increase dramatically, important questions arise about the Act's future effect on what previously had been considered well established doctrine or practice. Fortunately, Washington's Bar and Bench will be able to draw upon the practical experience and judicial decisions of sister states which already possess substantial experience with the comparative negligence concept. The law of these foreign jurisdictions can not provide pat answers to all of the issues, of course; indeed, when these states have addressed the issues at all, they have come to varying conclusions. This note has attempted only to identify and discuss some of the ramifications of the new Act, and to provide counsel with authority and arguments on both sides of issues which soon will be litigated in Washington.

Joel E. Smith

Alan D. Campbell

WASHINGTON LAW
organization of abstract and
land title service to the public

Our members subscribe
among other things, that:

*"Members shall issue a
only after a complete and
quate records and learn
so conduct their business
of paramount importance."*

Washington Law

BACK ISSUES OF THE

Washington Law Review

... are available

Past Symposia

Asian Law Symposium
Vol. 42, No. 2, March 1967

North Pacific Fisheries Symposium
Vol. 43, No. 1, October 1967

The

Vols. 1-45: Order back issues direct from
Lawrence, New Jersey 07606;

Vols. 46-date: Order back issues direct from
University of Washington, Seattle, Wash.

ically dissimilar contexts.⁸⁹ Despite some apparent vacillation,⁹⁰ the Washington court has recognized the doctrine in most situations. Nevertheless, in the master-servant setting the doctrine has been explicitly abrogated⁹¹ and there are indications it will also be held to be unavailing in others.⁹² Where the doctrine does survive, the Washington court until recently had compounded the confusion by distinguishing assumption of risk from the closely analogous if not identical maxim of *volenti non fit injuria*, holding that the former applies to cases involving an express consensual acceptance of a risk known or unknown at the time of agreement, while the latter applies only to a unilateral assumption of a known risk.⁹³

With the adoption of a comparative negligence statute, assumption of risk logically should be abandoned; the plaintiff's voluntary exposure to an appreciated risk merely should increase his proportion of fault for computation purposes. Nevertheless, this reasoning has not been uniformly adopted by the courts. Mississippi,⁹⁴ Georgia,⁹⁵ South

89. Dean Prosser divides assumption of risk into three main categories: (1) where the plaintiff in advance has given his consent to relieve the defendant of a legal duty towards him; (2) where the plaintiff voluntarily enters into some relation with the defendant, with knowledge the defendant will not protect him against risk; and (3) where the plaintiff already is aware of the risk created by the defendant's negligence but nevertheless proceeds to encounter it. PROSSER, *supra* note 72, at 439.

90. It was thought at one time that the doctrine had been put to rest in Washington. In *Feignbaum v. Brink*, 66 Wn. 2d 125, 401 P.2d 642 (1965), the court held the doctrine of assumption of risk unavailable in a landlord-tenant situation where the lessor was under a duty to repair and maintain common areas. Language in the case indicated that the court might have been willing to abrogate the doctrine completely. A case decided soon after *Feignbaum*, however, makes clear that a broad reading of the decision would be incorrect and that the doctrine has survived. See *e.g.*, *Perry v. Seattle School Dist.*, 66 Wn. 2d 800, 405 P.2d 589 (1971).

91. *Siragusa v. Swedish Hosp.*, 60 Wn. 2d 310, 373 P.2d 767 (1962). In *Siragusa* plaintiff nurse was injured at her place of employment when a door with a hook on it was unexpectedly opened by a patient and the hook struck her on the upper portion of her back. In reversing the judgment of dismissal in favor of the defendant hospital, the court held that if an employer negligently fails in his duty to furnish his employees with a reasonably safe place to work, the employee will not be denied recovery simply because he was aware or should have known of the dangerous condition. Rather, knowledge and voluntary exposure to the risk were held properly considered as factors in determining whether the employee was contributorily negligent.

92. See, *e.g.*, *Feignbaum v. Brink*, *supra* note 90.

93. See *Hogenson v. Service Armament Co.*, 77 Wn. 2d 209, 215 n.2, 461 P.2d 311 (1969). See also *Walsh v. West Coast Coal Mines*, 31 Wn. 2d 396, 197 P.2d 233 (1948); *Bailey v. Safeway Stores*, 55 Wn. 2d 730, 349 P.2d 1077 (1960). But see *Lyons v. Redding Construction Co.*, 83 Wn. 2d 86, 515 P.2d 821 (1973).

94. While Mississippi retains the doctrine in most cases, the Legislature has made the doctrine inapplicable in the master-servant relationship. See MISS. CODE ANN. § 1456 (1917). For a recent Mississippi decision to the effect that assumption of risk will still be applied absent such a relationship, see *United Roofing and Siding Co. v. Seefeld*, 222 So. 2d 406 (Miss. 1969).

95. In Georgia the assumption of risk by the plaintiff or plaintiff's deceased is an

adverse witnesses or the right to inspect documents unless the parolee has indicated previously that he will physically harm an informant if the informant's identity is disclosed. Third, pending the Board's review of the hearing record, the parolee should not be returned to prison but should be confined in the area where he normally resides. If the Board decides to revoke parole, the Board should meet with the parolee to discuss mitigating factors and disposition alternatives before making the final decision to reimprison the parolee.

GLENN R. NELSON*

Comparative Negligence Legislation: Continuing Controversy Over The Doctrine of Assumption Of the Risk in Oregon

The Oregon legislature has enacted a comparative negligence statute which, unlike similar statutes passed by other states,¹ explicitly abolishes assumption of the risk, along with contributory negligence, as a total bar to recovery:

Contributory negligence, including assumption of the risk, shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property if such negligence contributing to the injury 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 such negligence attributable to the person recovering.²

The statute's reference to assumption of the risk has created a major interpretive task for Oregon courts. If viewed as a doctrine conceptually

* Third-year student, School of Law, University of Oregon.

¹ The legislature of Wisconsin, from which Oregon borrowed its comparative negligence statute, made no mention of assumption of the risk in the language of its statute but left the initiative to the courts, which subsequently abolished assumption of the risk by judicial fiat in *McConville v. State Farm Mut. Auto Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14, 19 (1962). The Wisconsin court held that "[c]onsent seems not to be a satisfactory basis for retaining the doctrine of assumption of risk. The consequences of an automobile accident to a guest may be so disastrous that it would be contrary to public policy to hold that an individual who consents by implication to a dangerous situation will go uncompensated for his injuries."

² ORS 18.470 (1973).

distinct from the doctrine of contributory negligence, assumption of the risk is abrogated as a bar to plaintiff's recovery. If, on the other hand, assumption of the risk as used in the statute is viewed as essentially the same as contributory negligence, it is abrogated only to the extent that it comprises contributory negligence.

The doctrine of assumption of the risk has not been defined consistently by Oregon courts. This comment examines past judicial attempts to isolate a clear concept of the assumption of the risk doctrine. The consistency of judicial interpretation of the assumption of the risk doctrine is explored, and the statute's effect upon the doctrine is examined. Such analysis suggests that Oregon's comparative negligence statute operates upon only the contributory negligence sense of assumption of the risk, not only allowing a court to compare plaintiff's unreasonable conduct with defendant's negligence to arrive at an apportionment of recovery, but also allowing a plaintiff's consent to assumption of risks inherent in an activity to bar totally his recovery for resulting damages.

I

THE RESTATEMENT IMPLIED CONSENT CONCEPT

Intense debate concerning the existence and substance of assumption of the risk resulted in no uniform definition of the phrase in the *Restatement (Second) of Torts*.³ Instead, the *Restatement* notes four separate substantial bars to recovery which frequently have been found under the rubric of assumption of the risk.⁴ Two of the bars to recovery are based upon the plaintiff's implied consent to a risk.⁵

³ For a description of the division in scholarly opinion during the proceedings, see *Haleska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 378 n.3 (Tex. 1963); James, *Assumption of the Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 188 (1968).

⁴ RESTATEMENT (SECOND) OF TORTS, § 496A, comment c at 561-62 (1965):

"1. In its simplest form, assumption of risk means that the plaintiff has given his express consent to relieve the defendant of an obligation to exercise due care for his protection, and agrees to take his chances as to injury from a known or possible risk. . . .

"2. A second, and closely related meaning is that the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility and to take his own chances. . . .

"3. In a third type of situation the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it. . . . He may not be negligent in doing so, since his decision may be an entirely reasonable one, because the risk is relatively slight in comparison with the utility of his own conduct. . . .

"4. To be distinguished from these three situations is the fourth, in which the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence. . . ."

⁵ "[The] plaintiff has entered voluntarily into some relation with the defendant

The *Restatement* focuses the *Restatement* of the plaintiff. The hazards and therefore

The *Restatement* of plaintiff's manifestation of defendant's duty and adhering to the *Restatement* matter of law if circuit court the implication of

The implied consent cases in which the encounter a palpable plaintiffs who chose timorous may stay at entry into an deny compensation of the premise that who receive injury in

Arguably, Oregon implied consent as a consented to unreasonable. but only reduces the compared to the defendant part of assumption a dramatic policy choice

which he knows to involve agreeing to relieve the RESTATEMENT (SECOND

⁶ "No wrong is done Eldredge stated *volenti* so far as tort law (as do as he pleases with his tory Notes § 893 at 72-Draft No. 9).

⁷ See note 4 *supra*.

⁸ *Murphy v. Steeple* (1929).

⁹ Professor Eldredge law is that a defendant plaintiff's consent is not

¹⁰ ORS 18.470 (1973)

The *Restatement* formulation in terms of implied consent has its origins in the maxim *volenti non fit injuria*.⁶ Adoption of the maxim focuses the *Restatement* formulation entirely upon the manifestations of the plaintiff. The test becomes whether the plaintiff understood the hazards and therefore could be found to have accepted the risk voluntarily.

The *Restatement* defines assumption of the risk with reference to the plaintiff's manifestations alone and does not include a weighing of the defendant's duty and fault.⁷ The effect is that in a jurisdiction strictly adhering to the *Restatement* formulation a court may bar recovery as a matter of law if circumstances surrounding the hazard sufficiently warrant the implication of plaintiff's consent to the presence of the risk.

The implied consent concept has been a great aid to courts in resolving cases in which the essence of the activity requires the participants to encounter a palpable risk. Justice Cardozo offered a ready answer to plaintiffs who chose to engage in adventure with apparent risks: "the timorous may stay at home."⁸ If participants did not abstain from voluntary entry into an activity inherently involving a risk, the law would deny compensation for resulting injury. Such doctrine is the corollary of the premise that tort law will allow recovery to reasonable persons who receive injury in a non-consensual situation.⁹

Arguably, Oregon's comparative negligence provision¹⁰ removes implied consent as a total bar and allows recovery to those who have consented to unreasonable conduct so long as the other party was even more unreasonable. If implied consent no longer totally bars recovery but only reduces the plaintiff's damages to the extent of his negligence compared to the defendant's under a theory which makes implied consent part of assumption of the risk, the Oregon legislation will have made a dramatic policy choice favoring compensation for every victim.

which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances." *RESTATEMENT (SECOND) OF TORTS*, § 496A, comment c (2) at 561 (1965).

⁶ "No wrong is done to one who consents." *Id.*, comment b at 560-61. Professor Eldredge stated *volenti non fit injuria* is based upon the individualistic concept that so far as tort law (as distinct from criminal law) is concerned, a person is free to do as he pleases with his own body. *RESTATEMENT (SECOND) OF TORTS*, Explanatory Notes § 893 at 72-73 (Tent. Draft No. 9, 1963) [hereinafter cited as Tent. Draft No. 9].

⁷ See note 4 *supra*.

⁸ *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173, 174 (1929).

⁹ Professor Eldredge comments, "One of the fundamental principles of tort law is that a defendant who harmed the plaintiff's body or his property with the plaintiff's consent is not a tortfeasor at all." Tent. Draft No. 9, *supra* note 6, at 73.

¹⁰ ORS 18.470 (1973).

II

PRIOR OREGON FORMULATIONS OF ASSUMPTION OF THE RISK

A. Early Focus on Plaintiff's Conduct

Past Oregon decisions contain a variety of conceptual tools used by the court to recognize the plaintiff's implied consent. In finding that the plaintiff had accepted a hazard, the court typically focused upon the relationship between the plaintiff and the hazard. If the risk was "inherent and obvious" rather than "extraordinary,"¹¹ or if the plaintiff was "experienced" instead of "inexperienced,"¹² the court found adequate grounds for implying consent to confront the hazard and for relieving the defendant who failed to protect the plaintiff even though the defendant's conduct may have created the hazard.

The Supreme Court of Oregon recognized such a circumstance in *Hunt v. Portland Baseball Club*,¹³ when a spectator chose to sit in an unscreened section of a baseball stadium and subsequently was struck by a foul ball. The court disallowed recovery on grounds that plaintiff was intimately familiar with baseball, had witnessed others being struck by foul balls, had anticipated being struck himself, and therefore as a matter of law had consented to remain within the area of risk. This rationale for barring plaintiff's recovery is consistent with the *Restatement* formula of implied consent. However, the court further suggested that the case could have been decided on the issue of duty, although the court carefully avoided equating the defense of plaintiff's assumption of the risk with the duty issue. In *Hunt* the court discounted the duty issue to reach the more familiar bar of implied consent by stating, "[i]f the defendant should have provided screening for the plaintiff's protection, the plaintiff was fully aware of the lack of protection, and yet stayed in the ball park."¹⁴ The finding of implied consent made it unnecessary to decide the question of defendant's duty and fault.

Hunt adopted a standard from *C.J.S.* to be used in determining conditions under which assumption of the risk may be found. "[I]t is only when the risk exists in spite of the exercise of due care or when the risk results from negligence which is obvious that it is assumed by the person injured . . ."¹⁵ One may infer that the court viewed assumption of the risk as distinct from the duty issue. Under the rubric of assumption of the risk, the plaintiff may not recover either in the "no duty" situation or in a "duty" situation where the defendant's failure to discharge a duty

¹¹ See, e.g., *Vendrell v. School Dist. No. 26C*, 233 Or. 1, 376 P.2d 406 (1962).

¹² See, e.g., *Whipple v. Salvation Army*, 261 Or. 453, 495 P.2d 739 (1972).

¹³ 207 Or. 337, 296 P.2d 495 (1956).

¹⁴ *Id.* at 345, 296 P.2d at 498.

¹⁵ *Id.* at 347, 296 P.2d at 499, citing 65 C.J.S. *Negligence* § 174 (1950), now appearing as 65A C.J.S. *Negligence* § 174 (1966).

owed the plaintiff was actions, and not those risk issue.

B. Reappraisal

In *Hunt*, the court record disclosed no risk of injury. The court thus relying more heavily on the principle of contributing consideration of the plaintiff's preference in *Beals*.¹⁶ *Ritter* sought to distinguish the case from the mere isolated two senses of detriment of conceptual of assumption of the risk which was merely a re-negligence.¹⁷ Assumption of the risk to a plaintiff who consented to a hazard which the defendant had no duty to protect the plaintiff's assumption of the risk defendant's lack of duty court referred to the first sense of the primary sense act.

The significance of

¹⁶ See *RESTATEMENT (SECOND) OF TORTS* § 496, *Restatement* formulation, plaintiff's conduct; i.e., plaintiff's willingness to accept as distinct from negligence which asks what should a reasonable person do. 17 207 Or. at 355, 296 P.2d 495; 18 225 Or. 504, 358 P.2d 495; 19 *Id.* at 514, 520-21, 358 P.2d 495. *Ritter* took its doctrinal basis from the "primary" and "secondary" senses of the doctrine, advocating the abolition of the extreme individualism of the state that the "primary" sense of the defendant's lack of duty and the "secondary" sense is but a re-negligence. See 2 F. HARPER & JAMES W. FRANKLIN, *THE LAW OF NEGLIGENCE* (hereinafter cited as HARPER & FRANKLIN).

²⁰ See 2 HARPER & FRANKLIN, *supra* note 16, at § 10, illustrating a situation of contributory negligence." Apr. 16, 1971 on file in the Records of H.B. 1343.

owed the plaintiff was obvious to the plaintiff.¹⁶ Thus the plaintiff's actions, and not those of the defendant, control the assumption of the risk issue.

B. Reappraisal of the Focus on Plaintiff's Conduct

In *Hunt*, the court presented two grounds for barring recovery: the record disclosed no negligence, and plaintiff impliedly had assumed the risk of injury. The court indicated preference for the second ground, thus relying more heavily upon plaintiff's implied consent and subordinating consideration of defendant's duty and fault.¹⁷ The court repudiated this preference in a reappraisal of *Hunt* included in *Ritter v. Beals*.¹⁸ *Ritter* sought a definition of a "pure" assumption of the risk distinct from the mere duplication of contributory negligence. The court isolated two senses of assumption of the risk often intertwined to the detriment of conceptual clarity. The court held that a "primary" sense of assumption of the risk existed apart from the "secondary" sense which was merely a redundant reference to the plaintiff's contributory negligence.¹⁶ Assumption of the risk, in its primary sense, denies relief to a plaintiff who consciously, and perhaps reasonably, has encountered a hazard which the defendant had a right to create, and against which the defendant had no duty to protect the plaintiff. In its primary sense, the plaintiff's assumption of the risk is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk.²⁰ The court referred to the facts of *Hunt* as an archetypal situation in which the primary sense acted as a bar to recovery.

The significance of the court's synthesis in *Ritter* lies in its positive

¹⁶ See RESTATEMENT (SECOND) OF TORTS, comment e at 564 (1965). In the *Restatement* formulation, assumption of the risk entails a subjective test of the plaintiff's conduct; i.e., what the plaintiff in fact knows, understands, and is willing to accept as distinguished from the objective test of contributory negligence which asks what should have been obvious to the plaintiff.

¹⁷ 207 Or. at 355, 296 P.2d at 502.

¹⁸ 225 Or. 504, 358 P.2d 1080 (1961).

¹⁹ *Id.* at 514, 520-21, 358 P.2d at 1084-85, 1087-83. Justice Goodwin's opinion in *Ritter* took its doctrinal inspiration from Harper and James, who distinguished the "primary" and "secondary" senses of assumption of the risk as a prelude to advocating the abolition of all senses of the doctrine as merely "a heritage of the extreme individualism of the early industrial revolution." Harper and James state that the "primary" sense of assumption of the risk is "only the counterpart of the defendant's lack of duty to protect the plaintiff from a risk" and the "secondary" sense is but a redundant reference to the plaintiff's contributory negligence. See 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 21.8, at 1163-64 (1953) [hereinafter cited as HARPER & JAMES].

²⁰ See 2 HARPER & JAMES, *supra* note 19. Justice Denecke identified *Ritter* as illustrating a situation where assumption of the risk is "just another name for contributory negligence." Letter from Justice Denecke to Rep. Norma Paulus, Apr. 16, 1971 on file in the Archives Division of the Oregon State Library in the Records of H.B. 1343, 56th Or. Leg. Ass'y (1971).

assurance that the doctrine of assumption of the risk is distinct and independent from the doctrine of contributory negligence. When the legislature adopted the principle that "contributory negligence, including assumption of the risk, shall not bar recovery . . .,"²¹ either it did heed the separation between assumption of the risk and contributory negligence expounded in *Ritter*, or it intended to abrogate the bar of assumption of the risk in its primary sense as well as the sense included within contributory negligence. Therefore, the statute could have abrogated assumption of the risk only in its "secondary" sense as an inexact and superfluous reference to contributory negligence,²² or the statute could have abrogated assumption of the risk in its entirety, both in its "pure" primary sense defined in *Ritter* and in its secondary sense.²³

Determination of which interpretation of the statute is more appropriate depends in part upon detailed examination of the "primary sense" definition of assumption of the risk. *Ritter* relied more heavily upon the defendant's duty and fault, whereas *Hunt* had relied upon an implication of consent by the plaintiff as a matter of law. This revision signaled a change in analytical perspective amounting to the creation of a new definition of assumption of the risk at variance with the *Restatement* "implied consent" formula.²⁴ The court in *Ritter* stated that its focus

²¹ ORS 18.470 (1973).

²² This interpretation would prevent the inaccurate use of assumption of the risk to refer to situations in which the plaintiff acts unreasonably and is contributorily negligent yet also would allow the court to adhere to the *Restatement* implied consent formula.

²³ This interpretation would achieve the Harper and James objective of abolishing the phrase and concept of assumption of the risk under the rationale that assumption of the risk is purely duplicative of the other more widely understood concepts of scope of duty and contributory negligence.

As a third alternative, the court could limit *Ritter* to its facts and thus confine the Harper and James thesis to the context of an employer-employee case where assumption of the risk as a defense recently has been disfavored. This alternative is unlikely in view of Justice Goodwin's use of *Hunt*, a case which fell clearly outside the employer-employee context, as an illustration of the Harper and James thesis which he was expounding in *Ritter*.

²⁴ Tent. Draft No. 9, *supra* note 6, at 79. There Professor Prosser claimed such a categorization of assumption of the risk as either duty or contributory negligence "throws into the ashcan the language of thousands of cases." *But see* James, *Assumption of the Risk: Unhappy Reincarnation*, 78 *YALE L.J.* 185 (1968). James compares the position of the *Restatement of Torts*, which had no separate section concerning assumption of the risk, with that of the *Restatement (Second)*, which chose to give assumption of the risk a distinct existence. Professor Bohlen, the reporter for the original *Restatement*, argued that implied assumption of the risk deserved no recognition as a separate defense. Bohlen, as well as James, believed the key issue in "primary" assumption of the risk is whether the defendant had a legal right to expose the plaintiff to a risk. Both commentators point out that this is properly an issue of the scope of duty to be pleaded and proven by the plaintiff. Prosser, the prevailing theorist in *Restatement (Second)*, took the opposite position.

in barring recovery upon fault of the defendant. *Ritter* reappraisal of places a great burden upon the defendant necessary to determine predictability of tort upon the Harper and James alternatives of any duty for cases or to other fact

Ritter has raised the issue in Oregon because the duty issue.²⁵ A recent problem under the *Restatement* the statute simply re false and confusing "primary" sense of a duty issue at the time than to discard an implied contributory negligence

The long-standing risk has any conceptual vehemently by comment Eldridge at the time Prosser, whose theory that the duty issue de

²⁵ 225 Or. at 514, 358

²⁶ 225 Or. 504, 358 I § 21.5, at 1184. In their spectator liability and concealed spectator of the defendant. This conclusion rests upon commonly known, the Harper and James are the obvious to the attention true key to such a situation parties and their result recovery in the situation defendant has a right to the Harper and James risk, the court may find that the defendant had

²⁷ 225 Or. at 513, 35 § 21.1, at 116 (1956).

²⁸ See Comment, *Comparative Law*, 8 *WILL. L.J.* 37, 4 and *Procedural Problems*

²⁹ Comment, *supra* note

³⁰ See note 3 *supra* at

in barring recovery under assumption of the risk was upon the duty and fault of the defendant rather than the actions of the plaintiff.²⁵ The *Ritter* reappraisal of *Hunt* is deceptively simple,²⁶ but the duty analysis places a great burden of discretion upon the courts. The judicial discretion necessary to determine the duty issue unavoidably diminishes the predictability of tort law. *Ritter*, in its reappraisal of *Hunt*, relied heavily upon the Harper and James treatise²⁷ but failed to elaborate the variables of any duty formula which might be applied to spectator liability cases or to other fact situations.

Ritter has raised the argument that assumption of the risk vanished in Oregon because the doctrine has become only a semantic guise for the duty issue.²⁸ A recent comment²⁹ analyzed the assumption of the risk problem under the Oregon comparative negligence statute by arguing the statute simply removed the phrase "assumption of the risk" as a false and confusing reference to the duty issue. If indeed the "pure" or "primary" sense of assumption of the risk was a mere reference to the duty issue at the time of the legislation, the statute had no further effect than to discard an empty label, subsume assumption of the risk under contributory negligence, and apportion it.

The long-standing controversy concerning whether assumption of the risk has any conceptual identity separate from the duty issue was argued vehemently by commentators such as Professors Prosser, Malone, and Eldridge at the time the *Restatement of Torts (Second)* was drafted.³⁰ Prosser, whose theories eventually prevailed in the *Restatement*, argued that the duty issue does not and should not encompass all the considera-

²⁵ 225 Or. at 514, 358 P.2d at 1088.

²⁶ 225 Or. 504, 358 P.2d 1080 (1961). See 2 HARPER & JAMES, *supra* note 19, § 21.5, at 1184. In their treatise, Harper and James specifically analyze ballpark spectator liability and conclude that the owner owes no duty to warn the experienced spectator of the dangers of foul balls in the unscreened part of the bleachers. This conclusion rests upon the fact that such risks are "so customary, obvious, and commonly known, the defendant need give no warning of them." However, Harper and James are quick to add that by no means all the dangers which would be obvious to the attentive or experienced are thus assumed. They find that the true key to such a situation lies in the character of the relationship between the parties and their resulting duties. As a matter of law, the court should bar recovery in the situation wherein the plaintiff takes a risk voluntarily and the defendant has a right to force him with the dilemma of "take it or leave it." Under the Harper and James argument, even though a plaintiff may choose to accept a risk, the court may find when the plaintiff is young, inexperienced, or handicapped that the defendant had no legal right to confront the plaintiff with the risk.

²⁷ 225 Or. at 513, 358 P.2d at 1084, citing 2 HARPER & JAMES, *supra* note 19, § 21.1, at 116 (1956).

²⁸ See Comment, *Comparative Negligence in Oregon: A New Era in Tort Law*, 8 WILL. L.J. 37, 43 (1972); Note, *Torts—Assumption of Risk—Substantive and Procedural Problems in Oregon*, 46 OR. L. REV. 219 (1967).

²⁹ Comment, *supra* note 28.

³⁰ See note 3 *supra* and accompanying text.

tions inherent in the affirmative defense of assumption of the risk,³¹ relying upon the simple distinction that while the duty issue refers to the defendant's manifestations and reasonable expectations, assumption of the risk measures the subsequent conduct of the plaintiff.³²

Did the Oregon court indicate its intent in *Ritter* to align itself with the dissenters to the *Restatement* formulation?³³ The language of the decision forces the conclusion that the Oregon court decided assumption of the risk in its pure sense was merely a surrogate for the duty issue. However, the decisions following *Ritter* returned to the pre-*Ritter* analysis of the plaintiff's implied consent.

C. Applications of Assumption of the Risk

The court handed down *Vendrell v. School District No. 26C*³⁴ one year after *Ritter* identified assumption of the risk as an alter ego of the duty issue. The decision barred recovery for head injuries incurred by plaintiff during a school-sponsored football game. Although the court made passing mention of the duty issue, it based its holding on an implication of consent by plaintiff to the possibility of injury.³⁵ Citing the obviousness of the risk inherent in contact football and plaintiff's familiarity with the activity, the court implied consent to the risk from plaintiff's voluntary participation in the sport.

³¹ Tent. Draft No. 9, *supra* note 6, at 79: "Duty is sufficiently complex when it is confined to the conduct of the defendant. If it is to be extended to include a defense arising from the subsequent conduct of the plaintiff, it becomes such an overworked word that it falls of its own weight."

³² "Duty is a matter of what the defendant should reasonably expect, while assumption of the risk is a matter of what the plaintiff in fact knows and is willing to accept." *Id.*

³³ See James, *supra* note 24, at 194. But see Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 154-59 (1961). James is one of the foremost dissenters. He fears that Prosser's and Keeton's retention of assumption of the risk in the *Restatement* would bar the knowing but careful plaintiff from recovering for harm caused by the defendant's negligence. Thus, even when it is found that the defendant owed a duty to the plaintiff, which the defendant breached, assumption of the risk still might bar the plaintiff's recovery if the plaintiff had manifested acceptance of the risk created by the defendant's breach. James' worry seems overwrought. Consenting to a risk created by another's breach of duty is clearly contributory negligence on the plaintiff's part; under the comparative negligence statute contributory negligence would be compared to reduce the plaintiff's recovery but not necessarily bar recovery. Arguably, the spectre which James feels haunts the *Restatement* implied consent formula in fact does not exist under the comparative negligence statute.

³⁴ 233 Or. 1, 376 P.2d 406 (1962).

³⁵ *Id.* at 19, 376 P.2d at 414. But see Note, *supra* note 28, at 223-24, which argues that the court decided *Vendrell* as being a matter of duty by finding the relationship of the plaintiff to the defendant was one of free association with concomitant limited duties. Although this is undeniably a plausible thesis, the court's language in *Vendrell* did not discuss "limited duty" but rather spoke in terms of risks which were "obvious and inherent" to the plaintiff. This type of analysis lays a foundation for barring recovery under the *Restatement* implied consent formula.

Further doubt on the decisions. *Franks v. S* implied consent formula sport who clearly reco acceptance of the gan which the rules of the the court could have participant's duty, the the measure of the pa of *Square Dance Clu* years after *Ritter* had alter ego of the duty defense entirely in te and based the decisio sent was sufficient.

Tayer illustrates t consent as a bar to re upon an uneven floor what plaintiff expect tiff assumed the risk: by another dancer, sl floor.

The court used a "extraordinary" in A sitting on a swimmi rope to pass over th the defense of assu implied consent to th water skiing. The tr the "normal risk of reversed and reman evidence that the ri risk inherent in wat the "awareness" of t in the *Restatement* risk. Although *Ritt* only a matter of du ment focus.

³⁶ 251 Or. 98, 444 P

³⁷ 258 Or. 302, 482

³⁸ 263 Or. 612, 503

³⁹ "Since [the dece cause the rope to pas in that maneuver." 263

Further doubt on the duty analysis of *Ritter* is cast by other later decisions. *Franks v. Smith*,³⁶ based squarely upon the *Restatement's* implied consent formula, denied recovery to a participant in a dangerous sport who clearly recognizes the risks involved, emphasizing plaintiff's acceptance of the game's rules as an implied consent to injury from which the rules of the game cannot or will not protect him. Although the court could have discussed the rules as defining the extent of each participant's duty, the court instead referred to the rules as indicating the measure of the participant's consent. *Thayer v. Oregon Federation of Square Dance Clubs*³⁷ also failed to apply the *Ritter* definition. Ten years after *Ritter* had characterized assumption of the risk as a mere alter ego of the duty issue, the court responded to an assertion of the defense entirely in terms of the *Restatement* implied consent formula and based the decision upon whether plaintiff's manifestation of consent was sufficient.

Thayer illustrates the court's ability to avoid the harshness of implied consent as a bar to recovery. Plaintiff suffered injury when she tripped upon an uneven floor while dancing. The decision turned on analysis of what plaintiff expected when she had begun dancing. Although plaintiff assumed the risks inherent in square dancing, such as being kicked by another dancer, she did not assume the risk of a faulty and uneven floor.

The court used a similar characterization of risks as "inherent" or "extraordinary" in *McDonald v. Hanneson*.³⁸ Plaintiff's deceased was sitting on a swimming float when defendants caused a water ski tow rope to pass over the float and choke the deceased. Defendants raised the defense of assumption of the risk premised upon the deceased's implied consent to the hazards of a moving ski rope as a normal risk of water skiing. The trial court instructed that the deceased had assumed the "normal risk of injury incident to the sport." The appellate court reversed and remanded for a new trial on the ground that there was no evidence that the risk created by such a boat maneuver was a normal risk inherent in water skiing of which plaintiff was aware.³⁹ Evaluating the "awareness" of the plaintiff is indicative of the subjective test found in the *Restatement* implied consent formulation of assumption of the risk. Although *Ritter* had portrayed "pure" assumption of the risk as only a matter of duty, the court in *McDonald* returned to the *Restatement* focus.

³⁶ 251 Or. 98, 444 P.2d 954 (1963).

³⁷ 258 Or. 302, 482 P.2d 717 (1971).

³⁸ 263 Or. 612, 503 P.2d 674 (1972).

³⁹ "Since [the deceased] was completely unaware that [defendants] would cause the rope to pass over the float she could hardly assume the risk inherent in that maneuver." 263 Or. at 617, 503 P.2d at 676.

The approach to the assumption of the risk issue in *Thayer* and *McDonald* gives court and counsel great latitude because of the opportunity to characterize the alleged risks as either broad-ranging and inherent or quite particularized and extraordinary. The question as to whether conduct in engaging in an activity can be taken to imply that the risk is assumed is answered under the approach in *Thayer* and *McDonald* by the court's risk-characterization process. This approach dominates four recent assumption of the risk decisions⁴⁰ and is far afield from the announcement in *Ritter* that assumption of the risk is best decided through a duty analysis.

*Whipple v. Salvation Army*⁴¹ reaffirmed the conceptual importance to defendant of finding an implied consent by the plaintiff. It held that plaintiff's implied consent excused an otherwise existing duty of defendant.

Plaintiff correctly contends that because there is an inherent danger of injury in football, defendant did owe him a duty not to allow or encourage him to play unless the plaintiff realized the danger involved.⁴²

This statement is hard to reconcile with the *Ritter* characterization of assumption of the risk as merely synonymous with the duty issue.⁴³ By indicating that whenever there is implied consent there can be no duty, *Whipple* not only did not diminish the function and potency of implied consent, but rather indicated that the presence of implied consent becomes entirely determinative of the duty issue. This relationship between implied consent and duty is not one of mere equivalence.⁴⁴ The court in effect abandoned the theoretical underpinning of *Ritter* and returned to the *Restatement* formula under which the plaintiff's manifestations may relieve defendant of a duty otherwise owed. The plaintiff's manifestations, rather than the duties of the defendant, remained dispositive of whether assumption of the risk barred recovery.

Vendrell, McDonald, and Whipple each demonstrate the same reli-

⁴⁰ *Schroeder v. Blitz-Weinhard Co.*, 96 Or. Adv. Sh. 210, 504 P.2d 719 (1972); *McDonald v. Hanneson*, 263 Or. 612, 503 P.2d 674 (1972); *Whipple v. Salvation Army*, 261 Or. 453, 495 P.2d 739 (1972); *Thayer v. Oregon Fed'n of Square Dance Clubs*, 258 Or. 302, 482 P.2d 717 (1971).

⁴¹ 261 Or. 453, 495 P.2d 739 (1972).

⁴² *Id.* at 460-51, 495 P.2d at 743 (emphasis added).

⁴³ See Tent. Draft No. 9, *supra* note 6, § 496C, comment e at 77. Professor Malone found no legal logic in equating knowledge by the plaintiff with the absence of duty on the defendant's part.

⁴⁴ "The boundaries of the defendant's duty to act do not . . . coincide . . . with those of the plaintiff's assumption of the risk . . . Thus one who supplies a defective chattel for the use of another may be under a duty to make it safe, to warn the other of the defect, or otherwise to protect him, because it may be expected that he will not discover the defect. When the other does discover it and nevertheless proceeds quite voluntarily to make use of the chattel, he may assume the risk." Tent. Draft No. 9, *supra* note 6, comment e at 97.

ance by the court up consent, between "e between "inherent" a of the risk in terms of *Ritter*. undercuts the of the risk is merely : this summary of the draws to the game th injuries without whin orous may stay at hor tive to resuscitate the

This conceptual sy sent is implied only i and knowingly⁴⁷ agr apply an implicatio recovery by plaintiff: tude of the risk. Furtl realizes the risk and basic purpose of tort l consensual situation.⁴

D. A Sugi

Implied consent as a harsh and inequital gross abrogated the de In the absence of legi which insures against Many jurisdictions, in the doctrine through t an implication of cor extraordinary nature

Implied consent as inappropriately applic the risk is appropriat situations where the e the plaintiff depends

⁴⁵ *Vendrell v. School I*

⁴⁶ *Murphy v. Steeplec (1929)*.

⁴⁷ See RESTATEMENT (

⁴⁸ Tent. Draft No. 9, s

⁴⁹ Federal Employers deals with assumption of

⁵⁰ See *McDonald v. H Oregon Fed'n of Square I*

ance by the court upon the conceptual distinctions peculiar to implied consent, between "experienced" and "inexperienced" plaintiffs and between "inherent" and "extraordinary" risks. Analysis of assumption of the risk in terms of the plaintiff's implied consent in these cases after *Ritter* undercuts the court's announcement in *Ritter* that assumption of the risk is merely a matter of the defendant's duty. *Vendrell* offered this summary of the plaintiff's position vis-à-vis tort law: "[Football] draws to the game the manly; they accept its risks, blows, clashes, and injuries without whimper."⁴⁵ The echo of the Cardozo maxim "the timorous may stay at home"⁴⁶ is distinct. Clearly the court found it imperative to resuscitate the implied consent formula of assumption of the risk.

This conceptual system is adequate to insure that the plaintiff's consent is implied only in circumstances in which the plaintiff voluntarily and knowingly⁴⁷ agrees to the proximity of a hazard. Thus, properly applied an implication of consent should not work harshly against recovery by plaintiffs who could not recognize the nature and magnitude of the risk. Furthermore, barring recovery by a plaintiff who truly realizes the risk and intends to face that risk does no violence to the basic purpose of tort law—to compensate injuries resulting from a non-consensual situation.⁴⁸

D. A Suggested Application of Implied Consent

Implied consent as a bar to recovery has been subject to criticism as a harsh and inequitable barrier. Through F.E.L.A. legislation⁴⁹ Congress abrogated the defense in certain employer-employee relationships. In the absence of legislative action, courts have devised a judicial test which insures against the harsh application of the implied consent bar. Many jurisdictions, including Oregon, have lessened the harshness of the doctrine through the recognition of two characteristics which defeat an implication of consent: the inexperience of the plaintiff and the extraordinary nature of the risk.⁵⁰

Implied consent as a bar to recovery has been most harsh when inappropriately applied. The implied consent formula of assumption of the risk is appropriate only to the resolution of certain well defined situations where the essence or attraction of the activity entered into by the plaintiff depends in a substantial degree upon the likelihood of

⁴⁵ *Vendrell v. School Dist. No. 26C*, 233 Or. 1, 15, 376 P.2d 406, 413 (1962).

⁴⁶ *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173, 174 (1929).

⁴⁷ See RESTATEMENT (SECOND) OF TORTS § 496E (1965).

⁴⁸ Tent. Draft No. 9, *supra* note 6, Explanatory Notes § 893 at 73.

⁴⁹ Federal Employers Liability Act, 45 U.S.C. § 51 *et. seq.* (1970); section 54 deals with assumption of risks of employment.

⁵⁰ See *McDonald v. Hanneson*, 263 Or. 612, 503 P.2d 674 (1972); *Thayer v. Oregon Fed'n of Square Dance Clubs*, 258 Or. 302, 482 P.2d 717 (1971).

hazard. Purposeful encounter with hazard was the situation of *Murphy v. Steeplechase Amusement Co.*,⁵¹ a classic illustration of implied consent, or *volenti non fit injuria* as the doctrine then was denominated. Chief Judge Cardozo characterized the jerking of an amusement machine as the very hazard which was invited and foreseen. "There would have been no point to the whole thing, no adventure about it, if the risk had not been there."⁵² Regrettably, the Oregon court has applied the implied consent doctrine as a bar to recovery in cases where the hazard was merely incidental and not the "point, adventure, or meaning of the activity."⁵³

The patron of a ballpark who sits in the open bleachers is not properly a "volunteer" under the doctrine of *volenti non fit injuria* because he went to the ballpark to watch rather than dodge. Consideration of the implied consent doctrine was beside the point in *Thayer* because the square dancer was not properly a "volunteer" in the situation. The significance of her dancing did not depend on treading upon an uneven floor. If, on the other hand, she had been a sabre dancer whose performance derived significance from the avoidance of upright blades, the court properly should have barred the dancer's recovery under the implied consent formula.

The occasional misapplication of a doctrine, however, is not indicative of the doctrine's invalidity. The recognition that the court could have resolved several assumption of the risk cases through the duty issue does not advise the complete abrogation of the implied consent formula. The *Restatement* implied consent formula is uniquely appropriate to situations analogous to the facts of *Murphy* and *Vendrell* where a body clash, one of the integral features of the activity, resulted in injury to the participant. In the context of football, the participant's endurance of repeated body contact in a large measure comprises the significance society attributes to participation in the sport. If the individual will seek glory and society's recognition in such a manner, the function of tort law arguably is to defer to the individual's freedom to

⁵¹ 250 N.Y. 479, 166 N.E. 173 (1929).

⁵² 166 N.E. at 174.

⁵³ *Schroeder v. Blitz-Weinhard Co.*, 96 Or. Adv. Sh. 210, 504 P.2d 719 (1972), is a prime example of the court's misapplication of the implied consent formula of assumption of the risk. Plaintiff, a deliveryman, sued the premises owner for injuries when he was tipped off a hoist upon which he had caught a ride. The court held that the plaintiff was contributorily negligent in electing to ride a hoist meant only to handle materials. The court went on to hold, however, that the plaintiff "voluntarily assumed the obvious risk involved in the unorthodox maneuver." *Id.* at 215, 504 P.2d at 721. Under the *Restatement* contributory negligence alone is the bar to recovery based upon a plaintiff's unreasonable act toward himself. The court's misapplication of assumption of the risk to this fact situation ignores not only the legal learning of *Ritter* but the *Restatement* formulation as well.

encounter risk and purposeful and intentional application of implied

THE FUTURE T

Implied consent is harshly against the The interpretive pro within the statute's city of both doctrine pretation would res plied consent in deto a recovery.⁵⁴ The s tiff's manifestations rendered negligence the plaintiff's neglig others toward him.

In the alternative as merely a manifes Thus the jury wou defendant's neglige noted that such an i consent in view of t may consent to a ha

A recent commen tion of the implied court will resolve

⁵⁴ See F. Pozzi, C from the Oregon Stat Judiciary Committee where the plaintiff's r discussion in [The H lature meant to overru as Hunt) which have cannot recover becau engaged."

⁵⁵ "In a third type negligence of the defe He may not be negligi able one, because the own conduct." RESTAT

⁵⁶ Comment, *supra*

encounter risk and his self-responsibility for the resulting injury. The purposeful and intentional encountering of risk gives rise to the proper application of implied consent as a bar to recovery.

IV

THE FUTURE OF ASSUMPTION OF THE RISK IN OREGON: THREE POSITIONS FOR THE COURT

A. Total Abrogation

Implied consent as a bar to recovery in some cases has operated as harshly against the plaintiff as has the bar of contributory negligence. The interpretive problem caused by inclusion of assumption of the risk within the statute's purview is whether the statute abolished the capacity of both doctrines to operate as *absolute* bars to recovery. One interpretation would restrict the court from considering the plaintiff's implied consent in determining whether he should be barred totally from a recovery.⁵⁴ The statute may render the subjective test of the plaintiff's manifestations of implied consent irrelevant, much as the statute rendered negligence on the part of the plaintiff irrelevant, so long as the plaintiff's negligence toward himself was less than the negligence of others toward him.

In the alternative, the court may classify a plaintiff's implied consent as merely a manifestation by the plaintiff of negligence toward himself. Thus the jury would compare the plaintiff's implied consent with the defendant's negligence in reducing the plaintiff's recovery. It should be noted that such an interpretation would create a new hybrid of implied consent in view of the *Restatement's* position that a plaintiff impliedly may consent to a hazard without being negligent toward himself.⁵⁵

A recent comment on *Ritter* has suggested, assuming a total abrogation of the implied consent formula of assumption of the risk, that the court will resolve liability problems solely through a duty analysis.⁵⁶

⁵⁴ See F. Pozzi, *Comparative Negligence*, September, 1971 (a paper available from the Oregon State Bar, Portland, Oregon). Pozzi maintains that the House Judiciary Committee discussions indicate legislative intent to overrule past cases where the plaintiff's recovery was barred by assumption of the risk. "I think the discussion in [The House Judiciary Committee] leaves no doubt that the legislature meant to overrule *Vendrell* and other decisions of our Supreme Court (such as *Hunt*) which have held as a matter of law in various situations that a plaintiff cannot recover because he has assumed risks in the activity upon which he is engaged."

⁵⁵ "In a third type of situation the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it . . . He may not be negligent in doing so, since his decision may be an entirely reasonable one, because the risk is relatively slight in comparison with the utility of his own conduct." *RESTATEMENT (SECOND) OF TORTS*, § 496A, comment c at 89 (1965).

⁵⁶ Comment, *supra* note 28.

The duty formula, however, by balancing the utility of the activity against the foreseeability and magnitude of the injury, may fail to resolve adequately future implied consent cases similar to *Vendrell*. Football does not have an indispensable social utility. Non-contact sports serve the purpose of physical conditioning equally as well and naturally produce less drastic injuries. The school district reasonably should foresee that through its act of sponsoring the sport and encouraging participation, participants may suffer injuries of a serious magnitude. Thus, by a strict application of the duty formula, a duty may fall upon a defendant which sponsors an activity of low social utility yet with a high likelihood of serious injury to a number of victims.

If by total abrogation of assumption of the risk the comparative negligence statute has limited the court to a duty analysis, the court must move toward a much broader approach to risk-sharing and indemnification in the context of public school sports injuries. Other fact situations as well may yield contrary results when resolved by the court as matters of duty rather than as ones of implied consent by the plaintiff. Total abrogation of assumption of the risk promises to alter the boundaries between recovery and no recovery by overturning the previous complete barrier of implied consent.

*B. Non-Abrogation: Operation of the Statute
Upon Both Senses of Assumption of the Risk*

Under this position of non-abrogation assumption of the risk is retained, but the comparative negligence statute operates to require the comparison and apportionment of assumption of the risk. The court faces a great interpretive pitfall if under the statute it attempts to compare and apportion the "primary" sense of assumption of the risk in like manner as the plaintiff's contributory negligence. If the primary sense of assumption of the risk is equivalent to the duty issue, the court will be faced with the impossible conceptual task of apportioning duty. If, on the other hand, assumption of the risk is understood to refer to the *Restatement* implied consent formula, the court must engage in the equal folly of attempting to apportion and compare the effect of the plaintiff's implied consent.

Consent is either totally present or totally absent. The implied consent of the player in *Vendrell* to body clashes cannot be apportioned. His consent either entirely absolves the defendant or is entirely irrelevant. Courts may allow consenting persons to recover under revised tort principles, but no logic supports allowing a recovery of one-half or one-third or one-fourth the damages based upon an arbitrary fraction apportioned according to plaintiff's implied consent.

C.
Sta
Contributory

This position has espousing the Har secondary senses assumption of the ri while bringing the gence) under the of refers to the plain difficulty in compar apportionment of r

At the same tim sense of assumption commingling of co past decisions. Tha apportioned is pr decisions applying retire the notion o sense by recognizi correction in termi doctrines.

The operation of tion of the risk av language and autho last fifteen years. plaintiff's implied c as "inherent and upon the secondary the substance of t *Restatement* impli viable existence.

⁶⁷ Recently, in Bai 512 P.2d 1331, 1332 (James concept of the abandoning once aga instructions to the j constituted reversible is given when assump tion upon contributo instruction on the s: *Restatement* formulat OND) OF TORTS § 496

* Third-year s'ade

*C. Non-Abrogation: Operation of the
Statute Only Upon the "Secondary" or
Contributory Negligence Sense of Assumption of the Risk*

This position harks back to Justice Goodwin's opinion in *Ritter* espousing the Harper and James distinction between the primary and secondary senses of assumption of the risk. The court may retain assumption of the risk in the primary sense (essentially implied consent) while bringing the secondary sense (essentially contributory negligence) under the operation of the statute.⁶⁷ Because the secondary sense refers to the plaintiff's unreasonable conduct, the court will have no difficulty in comparing it with the defendant's negligence to arrive at an apportionment of recovery.

At the same time, the operation of the statute upon the secondary sense of assumption of the risk will dispel the confusion incurred by the commingling of contributory negligence and assumption of the risk in past decisions. That conduct of the plaintiff which can be compared and apportioned is properly denominated contributory negligence. In its decisions applying the comparative negligence statute, the court may retire the notion of plaintiff's assumption of the risk in the secondary sense by recognizing only the "plaintiff's compared negligence." This correction in terminology is essential to the conceptual clarity of both doctrines.

CONCLUSION

The operation of the statute upon only the secondary sense of assumption of the risk avoids the problem of throwing into the ashcan the language and authority of assumption of the risk cases decided over the last fifteen years. Moreover, the court may continue to speak of the plaintiff's implied consent based upon judicial characterization of risks as "inherent and obvious." Because the statute would operate only upon the secondary sense, the court is not required to determine whether the substance of the "primary" sense is solely duty or whether the *Restatement* implied consent formula demands an independent and viable existence.

RICHARD A. WYMAN*

⁶⁷ Recently, in *Bailey v. Stevens Auto Sales, Inc.*, 97 Or. Adv. Sh. 974, 977, 512 P.2d 1331, 1332 (1973), the Oregon court harkened back to the Harper and James concept of the primary and secondary senses of assumption of the risk, abandoning once again the *Restatement* position. The court held that separate instructions to the jury on assumption of the risk and contributory negligence constituted reversible error, saying: "if an instruction upon assumption of the risk is given when assumption of the risk is used in its secondary sense and an instruction upon contributory negligence is given as well, defendants secure a double instruction on the same issue." The improper instruction was essentially the *Restatement* formulation of implied assumption of the risk. *RESTATEMENT (SECOND) OF TORTS* § 496C (1965).

* Third-year student, School of Law, University of Oregon.

H B

176

③ ob ③

"An Act relating to a comparative negligence method of determining damages; effective date."

COMMITTEE REPORT

3/5/75

HOUSE

Mr. Speaker:

Date 4/7/75

The Committee on JUDICIARY has had HB 176

under consideration. A Majority of the members of the Committee

() recommends it DO PASS

() recommends it DO NOT PASS

() recommends it DO PASS WITH ATTACHED AMENDMENT(S)

(x) recommends it BE REPLACED WITH CS FOR HC 176 AND THAT

CS FOR HC 176 DO PASS

() "and" recommends it BE REFERRED TO THE _____

COMMITTEE

() reports it back WITHOUT RECOMMENDATION

() "other"

Members signing the Majority report:

<u>[Signature]</u>	_____	_____
<u>[Signature]</u>	_____	_____
<u>[Signature]</u>	_____	_____

Members NOT concurring in the Majority report:

<u>[Signature]</u>	recommends: <u>NO PASS</u>
_____	recommends:
_____	recommends:
_____	recommends:
_____	recommends:

[Signature] Chairman

Since 1949 Comp. negligence in Workmen's Comp AS 23.25
More states have comp. negligence now in one form or another
Admiralty law uses comp. negligence
50% system

Original sponsor: Cowper Presently court & juries look for way out so not to
bar plaintiff - Under contributory

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 176

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 NINTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to a comparative negligence method of
7 determining damages; and providing for an effective
8 date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

0 * Section 1. AS 09.65 is amended by adding a new section to read:

1 Sec. 09.65.130. CONTRIBUTORY NEGLIGENCE NO BAR TO ACTION; MODIFIED
2 COMPARATIVE NEGLIGENCE. (a) In any action to recover damages for death
3 or for injury to persons or property in which contributory negligence
4 may be asserted as a defense, contributory negligence shall not bar
5 recovery if the negligence of the person seeking recovery was not greater
6 than the negligence of the person or persons against whom recovery is
7 sought, but any damages allowed shall be diminished in proportion to the
8 amount of negligence attributable to the person seeking recovery.

9 (b) In an action to which (a) of this section applies the judge
0 may, and when requested by any party shall instruct the jury that

1 (1) the claimant may not recover if his contributory negli-
2 gence has contributed more to the injury than the negligence of the
3 defendant or the combined negligence of multiple defendants;

4 (2) if the jury determines the claimant is entitled to
5 recover, it shall return by general verdict the total amount of damages
6 the claimant would be entitled to recover except for his contributory
7 negligence;

8 (3) if the jury determines that a claimant is entitled to
9 recover, it shall return a special verdict indicating the percentage of

1 p. - 2 def - ~~any~~ - preference for plaintiff
 tort - civil wrong
 Tortfeasor - commit a civil wrong against another
 1. intentional - comparative doesn't apply
 2. negligence - this bill
 3. strict liability - product liability - no doubt apply

negligence attributable to each party.

(c) The percentage of negligence attributable to the claimant shall reduce the amount of his recovery by the proportionate amount of his negligence.

Sec. 09.65.140. MULTIPLE PARTIES. (a) Each defendant is jointly ^{all} and severally liable for the entire amount of the judgment awarded the claimant. - have on books now - stays the same

(b) Contribution among jointly liable defendants shall be as provided in AS 09.16. ^{Contribution among Joint Tortfeasors}

* Sec. 2. AS 09.16.020 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.

* Sec. 3. This Act applies to causes of action accruing after the effective date of this Act.

* Sec. 4. This Act takes effect immediately in accordance with AS 01.10.-070(c).

under existing law you divide by no. of defendants for liability
 Under comp. liability figured on % negligence

- ① Court solution
 50% chance court won't rule on that question
- ② Questions unanswered
 A. Solif How affects multiple parties
 B. ~~...~~
 I may will decide % of negligence
 Matter of fact - judge }
 " of law - judge } fuzzy in Calif law
- ③ Should court write law

62

House Judiciary Committee
March 20, 1965

The meeting was called to order at 1:25 p.m. by Chairman Gardiner. All members were present except Mr. Brown and Mr. Specking.

CS HB 177 Security deposits

The proposed CS was approved and moved out of committee to pass by Mr. Bradley. There being no objection, it was so ordered.

HB 176 Comparative Negligence

Fred Estaugh of the American Insurance Association testified that the AIA is against the pure form as proposed in HB 176. They prefer the 49% type similar to Hawaii's statute.

Alan Compton testified that the Board of Governors of the Alaska Bar Association has endorsed the concept of comparative negligence, but not a particular form.

Present law: if the plaintiff was negligent to any degree, recovery is prohibited

Pure form: even if the plaintiff is 90% negligent, he may recover the remaining 10%

50% form: if equal fault, each recovers from other

49% form: if equal fault, no recovery for either must be less than 50% negligent to recover (plaintiff's negligence does not exceed combined negligence of defendants)

Possible addition to bill: with multiple defendants, each pays their percentage of negligence of damages

Rep. Cowper, sponsor of HB 176, stated that he would be satisfied with the 49% form. He felt the pure form would totally discourage litigation, would encourage settling out of court, and would get the injured party his money when he needed it. He did not favor the addition of apportionment of the damages

House Judiciary Committee
April 7, 1975

The meeting was called to order at 1:22 p.m. by Chairman Gardiner. All members were present except Mr. Bradley.

Mr. Boetsch of Revenue testified that HB 211 was in effect a housekeeping bill that put all the remedies for different types of taxes into one section. The bill adds informal conference as a possible remedy but the option of a formal hearing remains. He stated that the Multi State Tax Commission can do audits on Alaska's behalf, acting as the state's agent. Mr. Parr raised the question of the Alaska citizen's right to privacy regarding his tax records and requested strict limitations on the Multi State Tax Commission. A 1972 Attorney General's opinion in the supplement (23.20.190) deals with the right to privacy. Mr. Messenger in the AG's office was requested to review the opinion and report to the committee.

Mr. Boetsch further stated that HB 211 would make the penalty for all delinquent taxes at 8%. The federal IRS is going to 9% in June. Other penalties listed in the bill are comparable to the IRS.

Regarding section 230 and the lack of control the state would have on information after it leaves Alaska, Mr. Boetsch stated that the clause "for the purpose of enforcing a tax" had been added to the bill to limit access. He stated that other states have similar procedures regarding confidentiality and that if they did not, Alaska would not have made reciprocal agreements with them. Mr. Brown stated that he would like to see a standard put in the bill to control the actions of the Commissioner of Revenue regarding confidential information.

HB 176 Comparative Negligence

Mr. Gardiner stated that the basic policy decision the committee must make concerns what form of the bill they wish -- pure, 50%, 49%. The committee considered the possibility of putting the material on joint tort feasons into a seperate bill but it was decided that since this relates so directly to multiple defendents in a comparative negligence case, that it should be included in this bill. It was agreed that degrees of fault would be considered, thus allocating percentages of negligence to the defendents. The committee agreed to reject pure negligence was potentially just as discriminatory as contributory negligence now is and opted for the 50% form. Mr. Brown moved CS HB 176 out of committee. There being no objection, it was so ordered.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

Sec. 09.65.130. CONTRIBUTORY NEGLIGENCE NO BAR TO ACTION: MODIFIED COMPARATIVE NEGLIGENCE. ^(a) ~~127~~ 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.

(b) This section applies to all causes of action accruing after the effective date of this Act.

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

(1) 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.

(2) 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.

(3) 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.

(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. 09.65.150. MULTIPLE PARTIES. (a) 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.

(b) 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

1 claimant only for that portion of the judgment which represents the
2 percentage of negligence attributable to him.

3 Sec. 09.65.160. SETTLEMENTS; EFFECT ON REMAINING PARTIES. (a)

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

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

19 Sec. 09.65.170. SETOFFS. If the application of the rules contained
20 in secs. 150 and 160 of this chapter results in two claimants being liable
21 to each other in damages, the claimant who is liable for the greater
22 amount is entitled to a credit toward his liability in the amount of
23 damages owed him by the other claimant.

24 * Sec. 2. This Act takes effect immediately in accordance with AS 01.10.070 c

25 * Sec 3. AS 09.16 is amended.
26
27
28
29

Hawaii
Regular Session
1969 New Laws 1. 2 543
(Page 542 - In Blank)

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 ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

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

4 Part-----Comparative Negligence

5 "Section 663 - Contributory negligence no bar; compara-
6 tive negligence; findings of fact and special verdicts.

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

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

19 "(1) The amount of the damages which would

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

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

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

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

17 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

RECEIVED

FEB 26 1970

ROBERTSON, MONAGLE
EASTAUGH & ANNIS

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(d)

TEXT OF LAW ATTACHED

ACTIONS

507: 7-a

CHAPTER 507

ACTIONS

[New Sections]

- 507: 7-a Comparative Negligence.
- 507: 7-b Release or Covenant Not to Sue; Joint Tortfeasors.
- 507: 7-c Inadmissible Evidence; Post Verdict Procedure.
- 507: 8 Contributory Negligence as Defense [Repealed.]
- 507: 8-b Strict Liability and Implied Warranties Limited.
- 507: 14 Minors Contracts; Motor Vehicles [Repealed.]

507: 1 Partners.

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

507: 2 Cotenants.

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 Amendments—1971. Omitted provisions 384: 12. RSA 507: 7. 1971, 227: 5, eff. relating to arrest. Aug. 17, 1971.

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. thereof the provision concerning the 1970, 35: 1, eff. May 4, 1970. burden of proof as to comparative negligence. Amendments—1970. Added at the end

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 defendant's 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.*

AN ACT relating to justices of the peace in townships; and providing for the election of justices of the peace in townships.

The People of the State of Nevada, do enact as follows:

SECTION 1. NRS 4.020 and 4.021 are hereby amended to read: 4.020 1. [There shall be elected by the people of the state having a population of more than 100 persons at the last preceding national United States Department of Commerce census a justice of the peace shall be elected by the people of the state at the general state election in November of each year.

2. There shall be one justice of the peace in each township of the state having a population of more than 100 persons at the last preceding national United States Department of Commerce census. The justice of the peace shall be elected by the people of the state at the general state election to be held in each township at the election held every 4 years.

3. There shall be one justice of the peace in each township of the state, for which there shall be no township at a general state election thereafter, the following number of justices of the peace shall be elected by the people of the state at the general state election of the Bureau of the Census:

(a) *If the population is less than 100 persons, one justice of the peace.*

(b) *If the population is 100 persons or more, two justices of the peace.*

2. The term of office of a justice of the peace shall begin on the 1st Monday in January of each year.

[4.] 3. Justices of the peace shall be elected by the boards of county commissioners.

[5.] 4. The clerk of the board of county commissioners shall, 10 days after the election of a justice of the peace, certify under oath to the board of county commissioners the appointment and qualifications of such justice of the peace. The clerk shall file in the office of the county clerk a copy of the official character of such officer.

SEC. 2. The board of county commissioners shall, if there is a township of such population, appoint an additional justice of the peace in each township on or before January 1, 1975.

SEC. 3. Section 2 of this act shall be effective July 1, 1973. Section 1 of this act shall be effective July 1, 1975.

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 Division 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

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

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 ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

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

4 Part-----Comparative Negligence

5 "Section 663 - Contributory negligence no bar; compara-
6 tive negligence; findings of fact and special verdicts.

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

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

19 "(1) The amount of the damages which would

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

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

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

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

17 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

RECEIVED

FEB 20 1970

ROBERTSON, MONTAGLE
EASTAUGH & ANNIS

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(a)

TEXT OF LAW ATTACHED

MODEL STATUTE COMPARATIVE NEGLIGENCE

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

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

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

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

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

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

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

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

29 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.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

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 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 matter of fact. *Haws & 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

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 circumstance 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. 623
Maine	14 M.R.S.A. § 166
Massachusetts	M.G.L.A. c. 231, § 85
Minnesota	M.S.A. § 604.01
Mississippi	Code 1912 § 1464
Nebraska	R.R.S. § 25-1161
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. § 1030
Washington	Laws 1973, c. 138(X)
Wisconsin	W.S.A. § 895.046

Law Review Commentaries

Automobile insurance rate changes under comparative negligence. Jerry D. Todd, 36 Texas Bar J. 1163 (1973).

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

Comparative negligence. Frank T. Abraham and Don H. 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, 5 Texas L.Rev. 825 (1973).

Proposed modified comparative negligence statute. Frank T. Abraham, 35 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 in accordance with article 8.15 of the Texas Constitution.

Sam - Pure; Pro. Rata Dist of
Tom - 49%
Bob - Pure
Me -

40 plaintiff 30 def
30 def

Fred Estough

HB 176

American Insurance Co.
Casualty + Surety carriers

Past bills based Mississippi statute
Pure negligence

4 types

- Nov. 1, 1973
1. Pure Miss R.I. Wash
 2. 50% threshold 7 states equal negligence
 3. 49% not as great as defendant 11 states
 4. slight theory plaintiff must have less negligence than defendant

they favor 3 or 4 type
favor Hawaii type

Compton

① present system
plaintiff & defendant - negligent - if plaintiff negligent then no settlement

② Pure system
90% negligent - can collect 10% from defendant only
10% guilty

③ 50% Wisconsin if equal no ~~recovery~~ ^{recovery}
if plaintiff 49% contributory then get 51% recovery of award

④ 49% system if equal then get 50% of damages
then depends on extent of damages