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A Practitioner's Guide to Comparative Negligence in Ohio

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Amended Senate Bill 165, to be codified as section 2315.19 of the Ohio Revised Code, establishes comparative negligence in Ohio.[1] The statute, which became effective on June 20, 1980, also leaves many unanswered questions. Is the statute to be retroactively applied to those negligence actions that arose before June 20, 1980 but are tried after that date? How does the statute affect last clear chance, assumption of risk, willful or wanton misconduct, the right of common law or contractual indemnity, negligence per se, derivative or imputed liabilities, joint and several liability, set-off, or the apportionment of fault to absent parties? Although one can not definitively say how the courts will resolve these questions, this Article will examine some of these questions to alert the Ohio practitioner to the issues that he or she will face in consequence of the statute.

I. MECHANICS OF THE STATUTE

Although the Ohio Comparative Negligence Act raises innumerable conceptual questions concerning the continued viability in Ohio of many of the traditional doctrines of the law of negligence, its basic operation is relatively straightforward. Whenever the defense of contributory negligence is raised, the court and, in a jury trial, the jury, now must make four basic calculations to determine the issues of recovery and damages.

First, the trier of fact must find the total amount of damages sustained by the complainant and the percentages of negligence, in relation to one hundred percent, that directly and proximately caused those damages.[2]

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1. Ohio Comparative Negligence Act, Amended S. 165, 113th Gen. Assembly (1980), *reprinted in* OHIO LEGIS. SERV. LAWS OF OHIO 5-59 (Baldwin 1980) [to be codified at OHIO REV. CODE ANN. § 2315.19]. The Act provides:

> (A)(1) In negligence actions, the contributory negligence of a person does not bar the person or his legal representative from recovering damages that have directly and proximately resulted from the negligence of one or more other persons, if the contributory negligence of the person bringing the action was no greater than the combined negligence of all other persons from whom recovery is sought. However, any damages recoverable by the person bringing the action shall be diminished by an amount that is proportionately equal to his percentage of negligence, which percentage is determined pursuant to division (B) of this Section. This Section does not apply to actions described in Section 4113.03 of the Revised Code.
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> (2) If recovery for damages determined to be directly and proximately caused by the

The finding of percentages should reflect the total fault attributable to the complainant and to all other persons from whom recovery is sought.[3]

Second, based upon these findings, the court must decide whether the complainant has a right to recover damages.[4] To make this determination, the court must compare the percentage of negligence attributable to the complainant with the combined percentage of negligence attributable to all of the parties from whom the complainant seeks a recovery.[5] Only if the complainant's negligence is no greater than the total negligence of the defendant or defendants will the complainant be allowed to recover.[6] Otherwise, the court must enter judgment against the complainant.[7]

Third, if the court finds that the complainant is entitled to recover (i.e., the court finds that the complainant's negligence is not greater than the total negligence of the parties from whom recovery is sought), then, to determine recoverable damages, the court must reduce the complainant's total damages by an amount that is proportionately equal to his percentage of negligence.[8]

Fourth, if there are multiple defendants, the court must allocate the portion of recoverable damages for which each defendant is liable.[9] This allocation is achieved by multiplying the total recoverable damages by a

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negligence of more than one person is allowed under division (A)(1) of this Section, each person against whom recovery is allowed is liable to the person bringing the action for a portion of the total damages allowed under that division. The portion of damages for which each person is liable is calculated by multiplying the total damages allowed by a fraction in which the numerator is the person's percentage of negligence, which percentage is determined pursuant to division (B) of this Section, and the denominator is the total of the percentages of negligence, which percentages are determined pursuant to division (B) of this Section to be attributable to all persons from whom recovery is allowed. Any percentage of negligence attributable to the person bringing the action shall not be included in the total of percentages of negligence that is the denominator in the fraction.

(B) In any negligence action in which contributory negligence is asserted as a defense, the court in a nonjury trial shall make findings of fact, and the jury in a jury trial shall return a general verdict accompanied by answers to interrogatories, that shall specify:

(1) The total amount of damages that would have been recoverable by the complainant but for his negligence;

(2) The percentage of negligence that directly and proximately caused the injury, in relation to one hundred percent, that is attributable to each party to the action.

(C) After the court makes its findings of fact or after the jury returns its general verdict accompanied by answers to interrogatories, the court shall diminish the total amount of damages recoverable by an amount that is proportionately equal to the percentage of negligence of the person bringing the action, which percentage is determined pursuant to division (B) of this Section. If the percentage of the negligence of the person bringing the action is greater than the total of the percentages of the negligence of all other persons from whom recovery is sought, which percentages are determined pursuant to division (B) of this Section, the court shall enter a judgment for the persons against whom recovery is sought.

2. Amended S. 165, 113th Gen. Assembly (1980), *reprinted in* OHIO LEGIS. SERV. LAWS OF OHIO 5-59 (Baldwin 1980) [to be codified at OHIO REV. CODE ANN. § 2315.19(B)(1),(2)].

3. *Id.*

4. *Id.* [to be codified at OHIO REV. CODE ANN. § 2315.19(C)].

5. *Id.*

6. *Id.* [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(1)].

7. *Id.* [to be codified at OHIO REV. CODE ANN. § 2315.19(C)].

8. *Id.*

9. *Id.* [to be codified at OHIO REV. CODE ANN. § 2315.19(B)(2)].

fraction in which the numerator is the individual defendant's percentage of negligence and the denominator is one hundred percent minus the percentage of negligence attributable to the complainant.[10]

A few examples may make the above rules easier to comprehend.

The statute works most simply when there is only a single defendant. In that instance, if the plaintiff is sixty percent negligent while the defendant is only forty percent negligent, the plaintiff's recovery would be barred because his negligence is greater than that of the defendant. Conversely, if both the plaintiff and the defendant are fifty percent negligent, the plaintiff would recover because his negligence does not exceed that of the defendant. The plaintiff's recovery, however, is limited to fifty percent of the total damages sustained by him. Similarly, if a ten percent negligent plaintiff brings suit against a ninety percent negligent defendant, the plaintiff recovers ninety percent of his total damages.

Operation of the statute is more complex when the litigation involves multiple defendants. Suppose that in a negligence action against two defendants, the trier of fact determines that the plaintiff, who suffered $20,000 of total damages, is the direct and proximate cause of fifty percent of the total negligence while defendant(1) and defendant(2) are each twenty-five percent negligent. Since the plaintiff's negligence (fifty percent) is not greater than the combined negligence of defendant(1) and defendant(2) (twenty-five percent and twenty-five percent, or a combined total of fifty percent), the plaintiff will recover. Recovery, however, is lessened by an amount equal to the plaintiff's proportionate share of the total negligence, resulting in $10,000 of recoverable damages,[11] which is to be allocated among the defendants.[12]

Recoverable damages are allocated among the defendants according to the following formula:

$$\text{defendant (x)'s liability} = \left[\begin{array}{l}\text{amount of}\\ \text{recoverable}\\ \text{damages}\end{array}\right] \left[\frac{\text{percentage of negligence of defendant (x)}}{\text{combined negligence of all defendants}}\right]$$ [13]

Applying this formula to the multiple defendant example, defendant(1)'s liability equals

$$(\$10{,}000)\frac{25\%}{50\%} = (\$10{,}000)\ (.50) = \$5{,}000.$$

10. *Id.* [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(2)].

11. As used in this Article, "recoverable damages" are the total damages sustained by the plaintiff reduced by an amount equal to the proportionate share of damages attributable to the plaintiff's negligence.

12. In this example, recoverable damages of $10,000 are determined by reducing the $20,000 total damages sustained by the plaintiff by fifty percent, which is the percentage of negligence attributable to the plaintiff.

13. *See* Amended S. 165, 113th Gen. Assembly (1980), *reprinted in* OHIO LEGIS. SERV. LAWS OF OHIO 5-59 (Baldwin 1980) [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(2)].

Since defendant(2) also is twenty-five percent negligent, his share of liability for the recoverable damages also will be $5,000.

A more complicated analysis is necessary when additional defendants become parties to a negligence action. For example, the plaintiff, who again has sustained $20,000 of total damages, is found by the trier of fact to be thirty percent negligent while defendant(1) is fifteen percent negligent, defendant(2) is twenty percent negligent, and defendant(3) is thirty-five percent negligent. The plaintiff's damages initially must be reduced by an amount equal to his proportionate share of the total negligence, leaving $14,000 of recoverable damages attributable to the defendants.[14] Applying the formula, given above, for allocation of recoverable damages to the multiple defendants,[15] whose combined negligence equals seventy percent, each defendant's liability will be calculated in the following fashion:

$$\text{defendant(1)'s liability} = (\$14{,}000)\frac{15\%}{70\%} = \$3{,}000$$

$$\text{defendant(2)'s liability} = (\$14{,}000)\frac{20\%}{70\%} = \$4{,}000$$

$$\text{defendant(3)'s liability} = (\$14{,}000)\frac{35\%}{70\%} = \$7{,}000.$$[16]

As can be seen from these examples, although the complexity of application of the statute increases as the number of defendants increases, application essentially remains a series of mathematical computations.

II. RETROACTIVITY

If a negligence action arises before June 20, 1980 but comes to trial sometime after that date, will the complainant's contributory negligence preclude his recovery or merely serve to lessen it? Put another way, does the Ohio Comparative Negligence Act apply prospectively or retroactively?[17]

Although the legislatures of many of the states that have adopted comparative negligence have eliminated the retroactivity issue by expressly stating that their comparative negligence statutes are to have only a prospective effect,[18] an even greater number of state legislatures

14. Twenty thousand dollars total damages minus [($20,000 total damages)(30% plaintiff's negligence)] results in $14,000 recoverable damages.

15. *See* text accompaning note 13 *supra*.

16. According to the formula given earlier, *see* text accompanying note 13 *supra*, the $14,000 amount represents the amount of recoverable damages. The numerator in each fraction represents the individual defendant's percentage of negligence while the denominator in the fraction represents the combined negligence of all of the defendants.

17. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 8 (1974); H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT § 16 (1978); Annotation, *Retrospective Application of State Statute Substituting Rule of Comparative Negligence for that of Contributory Negligence*, 37 A.L.R.3d 1438 (1971); Note, *Comparative Negligence: Some New Problems for the Maine Courts*, 18 U. MAINE L. REV. 65, 71-73 (1966); Comment, *Judicial Adoption of Comparative Negligence in Ohio*, 44 U. CIN. L. REV. 811, 816-17 (1975).

18. *See* COL. REV. STAT. ANN. § 41-2-14(4) (1963); HAWAII REV. STAT. § 663-31 (1976); KAN.

have refused to address the issue;[19] Ohio unfortunately belongs to the latter group.

Virtually all the courts that have been forced to resolve the retroactivity of a statute that is silent on the issue have analyzed the question in terms of whether the legislature intended the statute to be prospective or retrospective.[20] The majority of jurisdictions, illustrated by a line of Wisconsin Supreme Court cases beginning with *Brewster v. Ludtke*[21] and culminating with *Holzem v. Mueller*[22] and *Lupie v. Hartzheim*,[23] have relied upon the well-settled principles that a statute is to apply only prospectively unless there is a clear legislative intent to the contrary[24] and that absent a legislative statement, a presumption of prospectivity arises,[25] and have held that their comparative negligence statutes have no retroactive effect.[26] These holdings have been justified on the ground that "while a court's pronouncements may apply to past conduct, a legislature's function is to declare law for the future."[27]

Despite the weight of authority favoring the majority position, there nevertheless is contrary authority giving retroactive effect to a comparative negligence statute.[28]

The Minnesota comparative negligence statute applies to any action

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STAT. ANN. § 60-258(b) (1976); MASS. ANN. LAWS ch. 231, § 85 (Law. Co-op 1974); N. H. REV. STAT. ANN. § 507:7-a (Supp. 1979); N. J. STAT. ANN. § 2A:15-5.1 (West Supp. 1980); N.Y. CIV. PRAC. LAW § 1413 (McKinney 1976); OKLA. STAT. ANN. tit. 23, § 13 (West 1979); VT. STAT. ANN. tit. 12, § 1036 (1973).

19. *See* ARK. STAT. ANN. §§ 27-1763 to 27-1765 (1979); CONN. GEN. STAT. § 52-572h (1977); GA. CODE ANN. § 94-703 (1972); IDAHO CODE §§ 6-801 to 6-806 (1979); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MONT. REV. CODE ANN. § 27-1-702 (1979); NEB. REV. STAT. § 25-1151 (1979); NEV. REV. STAT. § 41.141 (1979); N.D. CENT. CODE § 9-10-07 (1975); OR. REV. STAT. § 18.470 (1979); S.D. COMP. LAWS ANN. § 20-9-2 (1967); UTAH CODE ANN. §§ 78-27-37 to 78-27-43 (1977); WASH. REV. CODE ANN. §§ 4.22.010-.020 (Supp. 1980).

20. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 8.4 (1974).

21. 211 Wis. 344, 247 N.W. 449 (1933).

22. 54 Wis. 2d 388, 195 N.W.2d 635 (1972).

23. 54 Wis. 2d 415, 195 N.W.2d 461 (1972).

24. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 8.4 (1974).

25. *Id. See* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 789 (1936).

26. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 8.1 (1974). *See, e.g.*, Fuller v. Illinois Cent. Ry. Co., 100 Miss. 705, 56 So. 783 (1911); Joseph v. Lowery, 261 Or. 545, 495 P.2d 273 (1972); Lupie v. Hartzheim, 54 Wis. 2d 415, 195 N.W.2d 461 (1972); Holzem v. Mueller, 54 Wis. 2d 388, 195 N.W.2d 635 (1972); Brewster v. Ludtke, 211 Wis. 344, 247 N.W. 449 (1933). It should be noted, however, that this position applies only when a court is interpreting a statute that adopts comparative negligence; in those jurisdictions in which comparative negligence has been *judicially* adopted, the courts have tended to give retroactive effect to the new doctrine. *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Thorton v. Elliott, 288 So. 2d 254 (Fla. 1974); Williams v. Seaboard Atlantic Ry. Co., 283 So. 2d 33 (Fla.), *cert. denied*, 415 U.S. 935 (1973); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Placek v. Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Rivers v. Ford Motor Co., 90 Mich. App. 94, 280 N.W.2d 875 (1979). *See also* H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT §§ 16:4-16:8 (1978 & Supp. 1980).

27. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 8.4 (1974).

28. *See* Peterson v. Minneapolis, 285 Minn. 282, 173 N.W.2d 353 (1969); Godfrey v. State, 84 Wash. 2d 959, 530 P.2d 630 (1975). *See also* Raymond v. Jenard, 390 A.2d 358 (R.I. 1979).

"which is commenced after July 1, 1969."[29] In *Peterson v. Minneapolis*,[30] in which the plaintiff was injured on April 24, 1967 but did not commence his action until July 2, 1969, the Minnesota Supreme Court reversed the trial court and held that the state legislature intended that the statute apply retroactively to cases in which the cause of action accrued before the effective date of the statute but were not commenced until after that date.[31] Similar to the Minnesota statute, the Rhode Island comparative negligence provision, enacted on July 16, 1971, applies to "all actions hereafter brought."[32] In *Raymond v. Jenard*,[33] the plaintiff was injured before the effective date of the statute but did not file his law suit until after the effective date.[34] The Rhode Island Supreme Court held that the statute applied retroactively on the ground that the action was "brought" after the effective date of the statute.[35]

In *Godfrey v. State*,[36] the Supreme Court of Washington construed a comparative negligence statute that, unlike the apparent relative clarity of the Minnesota and Rhode Island statutes, provides only that it "takes effect as of 12:01 a.m. on April 1, 1974."[37] Although the plaintiff in *Godfrey* was injured before this date, the court gave complete retroactive effect to the statute.[38] Like the Minnesota court in *Peterson*,[39] the Washington Supreme Court brushed aside arguments that retroactivity was precluded because the defendant had a vested right in the common law defense of contributory negligence[40] or because retroactive application of the statute would deny equal protection guarantees of the fourteenth amendment.[41] Rather, the court proceeded to find a legislative intent to apply the statute retroactively in the title of the statute, "An Act Relating to Civil Procedure,"[42] and in the purpose of the statute to abrogate the harsh consequences of the common law doctrine of contributory negligence.[43] On the former basis for finding legislative intent, the court ruled that a merely procedural enactment is to be retroactively applied;[44] on the latter basis, the court stated that "[i]t would be incongruous indeed

29. MINN. STAT. ANN. § 604.01 (West Supp. 1979).

30. 285 Minn. 282, 173 N.W.2d 353 (1969).

31. *Id.* at 287, 173 N.W.2d at 356. *See also* Keefer v. Al Johnson Constr. Co., 292 Minn. 91, 193 N.W.2d 305 (1971) (reaffirming *Peterson*).

32. R.I. GEN. LAWS § 9-20-4 (Supp. 1980).

33. 390 A.2d 358 (R.I. 1978).

34. *Id.* at 358.

35. *Id.* at 359.

36. 84 Wash. 2d 959, 530 P.2d 630 (1975).

37. WASH. REV. CODE § 4.22.900 (1976). Since the Washington statute gave only an "effective date" rather than a date after which it would apply to actions subsequently commenced, it more closely resembles the Ohio statute than do the acts of Minnesota or Rhode Island.

38. Godfrey v. State, 84 Wash. 2d 959, 968, 530 P.2d 630, 635 (1975).

39. Peterson v. Minneapolis, 285 Minn. 282, 290, 173 N.W.2d 353, 358 (1969).

40. Godfrey v. State, 84 Wash. 2d 959, 962, 530 P.2d 630, 631 (1975).

41. *Id.* at 962-63, 530 P.2d at 632.

42. 1973 WASH. LAWS ch. 138.

43. Godfrey v. State, 84 Wash. 2d 959, 966-67, 530 P.2d 630, 633-34 (1975).

44. *Id.* at 633, 530 P.2d at 966.

to frustrate this obvious legislative change in policy by adopting a position that would permit the rejected bar to recovery [of common law contributory negligence] to continue in operation for years to come."[45]

Despite a certain equitable appeal, the *Godfrey*, *Peterson*, and *Raymond* position is clearly a minority view and it is doubtful that the Ohio courts will follow their lead; indeed, one commentator has termed the *Godfrey* rationale a "thin basis" for finding legislative intent to apply comparative negligence retroactively.[46] Although, like the majority of jurisdictions, these courts have at least given lip-service to the "legislative intent" test of retroactivity,[47] it appears that the majority "presumption of prospectivity"[48] and the concomitant conclusion that comparative negligence statutes silent on the question of retroactivity will not be given retroactive effect is too firmly established to be lightly set aside.[49]

Although it is doubtful that Ohio will follow the minority example, it also does not appear that, at least initially, it will employ the traditional "legislative intent" test of the majority to determine whether the comparative negligence statute will have retroactive effect. Rather, in the initial stages of analysis, the Ohio courts must focus upon whether the statute is substantive or procedural. Under article II of the Ohio Constitution the general assembly has no power to enact a retroactive law.[50] Nevertheless, the Ohio courts have construed this prohibition to apply only to laws that are substantive rather than procedural in their effect.[51] As a result, the ability to apply the Ohio Comparative Negligence Act retroactively hinges upon the hazy distinction between substance and procedure.

In *State* ex rel. *Holdridge v. Industrial Commission*,[52] the Ohio Supreme Court attempted to shed light on the substance-procedure dichotomy:

> It is doubtful if a perfect definition of "substantive law" or "procedural or remedial law" could be devised. However, the authorities agree that, in general terms, substantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress.[53]

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45. *Id.* at 967, 530 P.2d at 634.

46. H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT § 16:3 (1978).

47. *Id.* *See* text accompanying notes 20-27 *supra*. *See also* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 8.4 (1974).

48. *See* text accompanying notes 20-27 *supra*. *See also* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 8.4 (1974).

49. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 8.4 (1974). *See also* Winfree v. Northern Pac. Ry. Co., 227 U.S. 296 (1913).

50. OHIO CONST. art. II, § 28.

51. Denicola v. Providence Hosp., 57 Ohio St. 2d 115, 387 N.E.2d 231 (1979); State *ex rel.* Slaughter v. Industrial Comm'n, 132 Ohio St. 537, 9 N.E.2d 505 (1937); Smith v. New York Cent. Rd. Co., 122 Ohio St. 45, 170 N.E. 637 (1930).

52. 11 Ohio St. 2d 175, 228 N.E.2d 621 (1967).

53. *Id.* at 178, 228 N.E.2d at 623. Similarly, in Sibbach v. Wilson & Co., 312 U. S. 1, 14 (1941), the United States Supreme Court defined "procedure" as "the judicial process for enforcing rights and

Using the *Holdridge* definition, it is unclear whether the Ohio statute creates certain rights or whether it merely affects those remedies that are available if substantive rights are abridged. If substantive, retroactivity clearly is precluded by the Ohio Constitution.[54] In *Smith v. New York Central Road Company*,[55] however, the court held that a statute of limitations is procedural and thus can be applied retroactively.[56] Based on the *Smith* rationale, an argument can be forwarded that the doctrine of comparative negligence is very much like a statute of limitations: both relate to available remedies rather than to vested rights.[57]

If the Ohio courts accept the analogy between comparative negligence and statutes of limitations, thus holding that the Ohio statute is merely a procedural or remedial rule that may be applied retroactively, the courts will be squarely faced with the crux of the retroactivity analysis that has been used by the majority of other jurisdictions that have considered the question—whether the Ohio legislature intended the statute to have a retroactive effect.[58] Since the Ohio statute is silent on this point, reference must be made to the Ohio Revised Code's rules of statutory construction, which embody the presumption of prospectivity upon which most other courts have relied to hold that a comparative negligence statute is to have only a prospective effect.[59] Section 1.48 of the Code provides that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective."[60] Although this section appears to be a clear statement of legislative intent and thus should preclude retroactive application of the Ohio Comparative Negligence Act, the Ohio courts have not read the provision strictly and have permitted remedial statutes to be retroactive even though they contain no express statement to that effect.[61] Indeed, in *Denicola v. Providence Hospital*,[62] the Ohio Supreme Court indicated that a procedural or remedial statute should be applied to all cases tried after

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duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."

54. *See* text accompanying note 50 *supra*.

55. 122 Ohio St. 45, 170 N.E. 637 (1930).

56. *Id.* at 49, 170 N.E. at 638. See Denicola v. Providence Hosp., 57 Ohio St. 2d 115, 387 N.E.2d 231 (1979); Kilbreath v. Rudy, 16 Ohio St. 2d 70, 242 N.E.2d 658 (1968); State *ex rel.* Holdridge v. Industrial Comm'n, 11 Ohio St. 2d 175, 228 N.E.2d 621 (1967).

57. *See generally*, V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 8.4 (1974).

58. *See* text accompanying notes 20-27 *supra*.

59. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 8.1 (1974). *See, e.g.*, Fuller v. Illinois Cent. Ry. Co., 100 Miss. 705, 56 So. 783 (1911).

60. OHIO REV. CODE ANN. § 1.48 (Page 1978). *See* Clifford Jacobs Motors, Inc. v. Chrysler Corp., 357 F. Supp. 564 (S.D. Ohio 1973) (determining that OHIO REV. CODE ANN. §§ 1333.73-.74 apply only prospectively); Columbus v. Vest, 42 Ohio App. 2d 83, 330 N.E.2d 726 (Franklin County 1974) (determining that OHIO REV. CODE ANN. §§ 2945.71-.73 apply only prospectively).

61. *E.g.*, Kilbreath v. Rudy, 16 Ohio St. 2d 70, 242 N.E.2d 658 (1968); state *ex rel.* Holdridge v. Industrial Comm'n, 11 Ohio St. 2d 175, 228 N.E.2d (1967); Beckman v. State, 122 Ohio St. 443, 5 N.E.2d 482 (1930); Smith v. New York Cent. Rd. Co., 122 Ohio St. 45, 170 N.E. 637 (1930); Cassero v. Cassero, 50 Ohio App. 2d 368, 363 N.E.2d 753 (Cuyahoga County 1976).

62. 57 Ohio St. 2d 115, 387 N.E.2d 231 (1979).

the effective date of the statute, even though the cause of action arose before that date.[63]

Although the *Denicola* decision may provide a way around the prospectivity presumption of the Code, most courts have refused to adopt this type of rationale when considering comparative negligence, holding instead that a prospective course must be followed.[64] Ohio will likely follow this lead. It is interesting to note that since 1908 Ohio, by statute, has applied comparative negligence principles to railroad employees seeking damages from their employers.[65] In *Hill v. Pere Marquette Railroad Company*[66] the court held this statute to have only a prospective operation.[67] The *Hill* rationale, which is in accord with the decisions from most other jurisdictions, is the likely Ohio view and would forbid retroactive operation of the Comparative Negligence Act.

In sum, if an Ohio court considering the retroactivity of the Ohio Comparative Negligence Act finds that it is procedural or remedial rather than substantive, and thus may be retroactive, the court must determine whether the general assembly intended the statute to be retroactive. The statute's silence on this point, coupled with Ohio precedent, the view of the majority of other jurisdictions, and the Code's presumption of prospectivity, indicates that the Act should be given only prospective effect.[68]

III. Willful, Wanton and Reckless Misconduct

Is the Ohio Comparative Negligence Act applicable to cases of willful, wanton, or reckless misconduct by a defendant? As with so many other questions, the statute is painfully silent on the point.

Dean Prosser defines this type of behavior as conduct by which

> the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences, amounting almost to willingess that they shall follow; and it has been said that this is indispensable.[69]

The comparative negligence statute provides that it is applicable only

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63. *Id.* at 118, 387 N.E.2d at 233.

64. *See* text accompanying notes 20-27 *supra*. *See also* V. Schwartz, Comparative Negligence § 8 (1974).

65. Ohio Rev. Code Ann. § 4973.09 (Page 1977).

66. 20 Ohio C.C. (n.s.) 236, 31 Ohio C.C. Dec. 282 (1912), *aff'd without opinion*, 88 Ohio St. 599 (1913).

67. *Id.* at 239, 31 Ohio C.C. Dec. at 285.

68. *Compare* Hockman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960), *and* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 789 (1936), *with* Comment, *Judicial Adoption of Comparative Negligence in Ohio*, 44 U. Cin. L. Rev. 811, 816-17 (1975).

69. W. Prosser, Handbook of the Law of Torts § 34 (4th ed. 1971).

to "negligence" actions.[70] Is an action alleging willful or wanton misconduct or recklessness a negligence action for the purposes of the statute? Much of the answer to this question hinges upon how the courts define this type of misconduct.

Initially, it is apparent that "willful" misconduct may connote behavior more onerous than "wanton or reckless" misconduct.[71] Some courts have drawn the distinction, equating "willfulness" with "knowing or intentional" conduct.[72] If willful conduct is given this meaning, it is clear that it falls outside of the realm of comparative negligence; there is virtual unanimity that neither contributory nor comparative negligence will bar or reduce recovery in a suit for an intentional tort.[73]

Most jurisdictions, however, appear to have lumped willful behavior in with wanton and reckless misconduct, creating a somewhat amorphous level of culpability that is more dire than garden-variety negligence but does not rise to the level of an intentional tort.[74] When this type of conceptual framework is employed, whether comparative negligence applies generally depends upon the distinction between recklessness and negligence and whether contributory negligence is a defense to recklessness.[75]

In *Payne v. Vance*,[76] the Ohio Supreme Court, referring to the distinction between negligence and willful, wanton, and reckless behavior, stated:

> A defendant might be guilty of the grossest negligence and his acts might be fraught with the direst consequences without having those elements of intent and purpose necessary to constitute willful tort. A willful tort . . . can only be predicated upon knowledge of danger, with reckless disregard of the consequence after discovering the danger. It is of course not necessary that the defendant should have knowledge of the peril of any particular person, or

70. Amended S. 165, 113th Gen. Assembly (1980), *reprinted in* OHIO LEGIS. SERV. LAWS OF OHIO 5-59 (Baldwin 1980) [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(1)]. *See* note 1 *supra*.

71. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 34 (4th ed. 1971); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 5.3 (1974). In Falls v. Mortensen, 207 Ore. 130, 142-43, 295 P.2d 182, 187-88 (1956), the Oregon Supreme Court appeared to reach the frustrated conclusion that "willfulness" is hopelessly ambiguous.

72. *See* Farmers Ins. Exch. v. Village of Hewitt, 274 Minn. 246, 258, 143 N.W.2d 230, 238 (1966); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 5.3 (1974).

73. *E.g.*, Munoz v. Olin, 76 Cal. App. 3d 85, 142 Cal. Rptr. 667 (1977); Carman v. Heber, 601 P.2d 646 (Colo. App. 1979); Finnigan v. Sandoval, 600 P.2d 123 (Colo. App. 1979); Moore v. Atchison, Topeka & Santa Fe Ry. Co., 26 Okla. 682, 110 P. 1059 (1910); McCrary v. Taylor, 579 S.W.2d 347 (Tex. Civ. App. 1979); Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W.2d 312 (1963); Schulze v. Kleeber, 10 Wis. 2d 540, 103 N.W.2d 560 (1960). *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 66 (4th ed. 1971); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 5.2 (1974); H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT § 7:1 (1978). *But see* Comer v. Gregory, 365 So. 2d 1212 (Miss. 1978); Sindle v. New York City Transit Auth., 33 N.Y.2d 293, 352 N.Y.S.2d 183, 307 N.E.2d 245 (1973); Comment, *Comparative Fault and Intentional Torts*, 12 LOY. L.A. L. REV. 179 (1978).

74. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 5.3 (1974). *See also* Donnelly v. Southern Pac. Co., 18 Cal. 2d 863, 118 P.2d 465 (1941); RESTATEMENT (SECOND) OF TORTS § 500 (1965).

75. *See generally* V. SCHWARTZ, COMPARATIVE NEGLIGENCE §§ 5.1, 5.3 (1974).

76. 103 Ohio St. 59, 133 N.E. 85 (1921).

that he should have intended to do injury to some particular person, but, on the other hand, any general knowledge of information that other persons are placed in a position of peril by his reckless and heedless conduct would amount to a legal willful tort. This doctrine is based upon the well-known principle that a person is presumed to intend the natural and logical consequences of his acts. An illustration of this statement would be that of a person who would ride a wild and highly excited horse into a crowded street on a public festival day.[77]

The *Payne* decision not only indicates that Ohio does not classify willful misconduct as an intentional tort but rather groups it with recklessness or wanton behavior,[78] it also clearly illustrates the distinct status that recklessness holds in relation to ordinary negligence.[79] At least prior to the adoption of comparative negligence in Ohio, contributory negligence by the plaintiff was not a defense to an action alleging willful or wanton misconduct.[80] In *Kellerman v. Durig Co.*,[81] the Ohio Supreme Court stated that "where willful or wanton misconduct exist[s], plaintiff's negligence is not available as a defense."[82] This principle is in accord with the vast weight of authority from other jurisdictions.[83] Following this rationale, it thus appears that since contributory negligence did not preclude a plaintiff's claim for willful, wanton, or reckless misconduct prior to the comparative negligence statute, it should not now serve to lessen the plaintiff's recovery. Exactly this result has been reached by a number of courts. In *Danculovich v. Brown*,[84] the Wyoming Supreme Court held that its comparative negligence statute does not apply when the

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77. *Id.* at 69, 133 N.E. at 88. *See* Roszman v. Sammett, 26 Ohio St. 2d 94, 269 N.E.2d 420 (1971).

78. In defining willful misconduct, the *Payne* court equates it with recklessness and states that no specific intent or knowledge is necessary. 103 Ohio St. at 69, 133 N.E. at 88. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965) (defining recklessness). Although in Reserve Trucking Co. v. Fairchild, 128 Ohio St. 519, 531, 191 N.E. 745, 750 (1934) and Tighe v. Diamond, 149 Ohio St. 520, 526, 80 N.E.2d 122, 126 (1948) the court indicated that willfulness held a distinct status in relation to wanton or reckless behavior, as distinguished by their respective degrees of intent or purpose, the distinction was never clear by any means, *see* Payne v. Vance, 103 Ohio St. 59, 69, 133 N.E. 85, 88 (1921), and does not appear to have been followed with any consistency, *see* Kellerman v. Durig Co., 176 Ohio St. 320, 323, 199 N.E.2d 562, 565 (1964); Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 573-74, 200 N.E. 843, 846 (1936).

79. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965).

80. Kellerman v. Durig Co., 176 Ohio St. 320, 199 N.E.2d 562 (1964); Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 200 N.E. 843 (1936).

81. 176 Ohio St. 320, 199 N.E.2d 562 (1964).

82. *Id.* at 323, 199 N.E.2d at 565.

83. Wallin v. Fuller, 476 F.2d 1204 (5th Cir. 1973) (applying Alabama law); Price v. Lowman, 373 F.2d 390 (4th Cir. 1967) (applying South Carolina law); Scholz v. United States, 271 F. Supp. 111 (D.C. Conn. 1967) (applying Connecticut law); Turkett v. Wedgeworth, 289 Ala. 106, 266 So. 2d 265 (1972); Evans v. Pickett, 102 Ariz. 393, 430 P.2d 412 (1967); Hewko v. G.I. Trucking Co., 242 Cal. App. 2d 738, 51 Cal. Rptr. 775 (1966); National Car Rental Sys., Inc. v. Holland, 269 So. 2d 407 (Fla. App. 1972), *cert. denied*, 273 So.2d 768 (Fla. 1973); Bogle v. Conway, 198 Kan. 166, 422 P.2d 971 (1967); Terwilliger v. Terwilliger, 52 Misc. 2d 404, 276 N.Y.S.2d 8 (Sup. Ct. Tomplans Co. 1966); Vaughn v. Baxter, 488 P.2d 1234 (Okla. 1971); Elliott v. Rogers Constr., Inc., 257 Or. 421, 479 P.2d 753 (1971); RESTATEMENT (SECOND) OF TORTS §§ 481, 482, 500 (1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65 (4th ed. 1971); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 5.1 (1974); H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT § 7:2 (1978).

84. 593 P.2d 187 (Wyo. 1979).

defendant has acted willfully or wantonly.[85] A similar result was reached by the Supreme Court of Nevada in *Davies v. Butter*,[86] in which the court held that although a defendant's gross negligence would be compared to a plaintiff's contributory negligence, no similar comparison should occur when the defendant is liable for wanton or willful misbehavior.[87] In *Ryan v. Foster & Marshall, Inc.*,[88] the Ninth Circuit Court of Appeals, applying Oregon law, went even a step further, holding that a plaintiff's contributory negligence is not to be offset against a defendant's gross negligence.[89] Since gross negligence is less culpable than wanton, willful, or reckless misconduct,[90] the *Ryan* holding also clearly precludes application of principles of comparative fault when the defendant has acted in a wanton, willful, or reckless fashion.

Although *Danculovich*, *Davies*, and *Ryan* are consistent with the common law principle that contributory negligence is no defense to willful, wanton, or reckless misconduct,[91] other courts have looked to the purposes of the common law concept and, having concluded that they are no longer viable under the doctrine of comparative fault, have proceeded to reduce a contributorily negligent plaintiff's recovery even though the defendant's conduct rose to the level of willfulness or recklessness.[92]

The bases for the common law rule that contributory negligence is no defense to willful, wanton, or reckless behavior appear to be threefold: first, the defendant's culpability in this context is of a wholly different kind than that of a contributorily negligent plaintiff;[93] second, and closely related to the first, since the defendant's culpability rises nearly to the level of an intentional tort, he should not be allowed to benefit from the defense;[94] and third, courts traditionally have been more than willing to find ways to avoid the harsh consequences of the total bar of contributory negligence.[95]

Once a jurisdiction has adopted the doctrine of comparative fault, the third basis for the common law rule is eliminated.[96] Moreover, the first

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85. *Id.* at 194.

86. 602 P.2d 605 (Nev. 1979).

87. *Id.* at 610. In Draney v. Bachman, 138 N.J. Super. 503, 351 A.2d 409 (1976), the New Jersey Superior Court indicated that, like *Davies*, although gross negligence would be compared with a plaintiff's contributory negligence, willful, wanton or reckless misconduct would not. 138 N.J. Super. at 514, 351 A.2d at 415. *See also* Burd v. Vercruyssen, 142 N.J. Super. 344, 361 A.2d 571 (1976).

88. 556 F.2d 460 (9th Cir. 1977).

89. *Id.* at 465.

90. *See* Davies v. Butter, 602 P.2d 605 (Nev. 1979); Burd v. Vercruyssen, 142 N.J. Super. 344, 361 A.2d 571 (1976); Draney v. Bachman, 138 N.J. Super. 503, 351 A.2d 409 (1976).

91. *See* RESTATEMENT (SECOND) OF TORTS §§ 481, 482, 500 (1965).

92. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 5.3 (1974); H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT § 7:2 (1978).

93. Falls v. Mortensen, 207 Or. 130, 139, 295 P.2d 182, 187 (1956).

94. *Id. See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 5.3 (1974).

95. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65 (4th ed. 1971).

96. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 5.3 (1974).

basis, differing kinds of fault, becomes more an issue whether different levels of culpability can be compared rather than whether they should preclude each other. In *Li v. Yellow Cab Co.*,[97] in which the California Supreme Court judicially adopted comparative negligence, the court addressed this latter issue by stating that "a comprehensive system of comparative negligence should allow for apportionment of damages in all cases involving misconduct which falls short of intentional."[98] The cases holding that principles of comparative fault apply in actions based upon strict or products liability also indicate that differing levels of culpability can be the subject of comparision.[99]

The Wisconsin Supreme Court in *Bielski v. Schulze*[100] squarely addressed the question whether recklessness is subject to comparative fault and, contrary to *Dranculovich*, *Davies*, and *Ryan*, held that it is. In *Bielski*, the court ruled that the common law principle has no purpose under comparative negligence and that apportionment of damages should occur unless the defendant has committed an intentional tort.[101] A similar result has been reached by the courts in *Billingsley v. Westrac Company*[102] and *Rone v. Miller.*[103]

In interpreting the Ohio statute, the courts will be faced with the choice of following *Dranculovich*, thus denying application of the statute when the defendant has acted in a willful, wanton, or reckless manner, or *Bielski*, thus holding that the defendant's willfulness or recklessness is to be compared with the plaintiff's contributory negligence. Consistency with Ohio precedent developed prior to comparative negligence would require taking the former course and holding that comparative negligence does not apply to willful, wanton, or reckless misconduct. This result seems particulary compelling since comparative negligence is merely a substitute for the absolute bar of contributory negligence, rather than a complete rewriting of substantive law. Moreover, to hold otherwise would allow a defendant who has acted in a willful or reckless fashion to benefit from a plaintiff's negligence, a result never reached under former law and one that seemingly has been ignored by the *Bielski*, *Billingsley*, and *Rone* courts. Although the other bases for the common law principle that contributory negligence is no defense to recklessness may have been eliminated or

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97. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

98. *Id.* at 826, 532 P.2d at 1241, 119 Cal. Rptr. at 873.

99. *E.g.*, Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D.C.N.H. 1972); Sturm, Roger & Co. v. Day, 594 P.2d 38 (Alaska 1979); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Lippes v. Atlantic Bank, 69 A.D. 2d 127, 419 N.Y.S.2d 505 (1979); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

100. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

101. *Id.* at 17, 114 N.W.2d at 113.

102. 365 F.2d 619 (8th Cir. 1966) (applying Arkansas law).

103. 257 Ark. 791, 520 S.W.2d 268 (1975).

modified by the advent of comparative negligence,[104] this basis appears to remain intact.

If the Ohio courts decide to follow the *Bielski* line of decisions and apportion damages when the defendant is guilty of willful, wanton, or reckless misbehavior, the question arises whether punitive as well as compensatory damages should be apportioned. There is some Ohio authority that wanton misconduct supports an award of punitive damages.[105]

Like so many issues that arise under comparative fault, other jurisdictions are split on this issue. Some courts apportion punitive damages,[106] while others do not,[107] holding that the policy of punishing wanton acts must be preserved and viewing the concepts of apportionment and punishment as exclusive and incompatible.[108]

The Ohio Comparative Negligence Act speaks of apportioning only those damages caused by the negligent conduct of another person—in other words, compensatory damages. Punitive damages are not caused by the tortfeasor; rather, they are awarded to punish and deter extraordinary conduct motivated by actual malice.[109] Considering that apportionment frustrates the purpose of punitive damages, Ohio courts, if they ever face this issue, should probably not apportion punitive damages.

IV. PARTIES UNDER DISABILITY

In deciding whether a party has exercised due care, the courts generally apply an objective standard and do not take into account the infinite varieties of temperament, intellect, and education that may affect human behavior.[110] There are situations, however, in which the courts will consider the individual circumstances of a party in determining whether he has satisfied his duty of due care, particularly if the party is a child or an adult with a diminished mental capacity.

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104. *See* text accompanying notes 93-99 *supra*.

105. Davis v. Tunison, 168 Ohio St. 471, 155 N.E.2d 904 (1959). It should be noted that this issue may arise regardless whether the Ohio courts decide to apportion responsibility between a plaintiff's negligence and a defendant's willfulness or recklessness. RESTATEMENT (SECOND) OF TORTS § 921 (1979) provides:

> Compensatory damages are not diminished by the fact that the injured person provoked the tortfeasor; but the provocation is considered in determining the allowance and amount of punitive damages.

Although section 921 applies to intentional torts, "provocation" may be equated with contributory negligence and thus become a consideration in determining whether a contributorily negligent plaintiff is entitled to punitive damages and, if so, whether the award should be reduced to reflect the plaintiff's fault.

106. *E.g.*, Pedernales Elec. Corp., Inc. v. Schultz, 583 S.W.2d 882, 885 (Tex. Civ. App. 1979).

107. *E.g.*, Tampa Elec. Co. v. Stone & Webster Eng'r Corp., 367 F. Supp. 27 (D.C. Fla. 1973).

108. *Id.* at 38.

109. Saberton v. Greenwald, 146 Ohio St. 414, 66 N.E.2d 224 (1946).

110. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32 (4th ed. 1971).

A. *Children*

Rather than hold children to the objective standard of reasonable care that is generally required of adults, the courts have tested a child's negligence according to how a reasonable child of similar age, intelligence, and experience would act under the circumstances.[111] Some jurisdictions, including Ohio, have afforded additional protection to children by erecting a series of presumptions that children under the age of seven are conclusively presumed to be incapable of negligence or contributory negligence[112] while children under the age of fourteen are rebuttably presumed to be incapable of negligence.[113]

These principles are not altered by the Ohio Comparative Negligence Act. As a result, plaintiffs under the age of seven will continue to have any contributory negligence on their part ignored and will be entitled to a full recovery for their injuries despite the statute, while plaintiffs under the age of fourteen will be treated in a similar fashion unless the presumption of incapability of negligence is rebutted, in which case the child-plaintiff's contributory negligence will serve to reduce his recovery by a proportionate amount.[114] Recovery for child-plaintiffs over the age of fourteen and found negligent under the "similar age, intelligence, and experience" standard[115] should be determined in a like manner.

B. *Diminished Mental Capacity*

Although at odds with a true fault system, the traditional rule of the law of torts is that diminished mental capacity or even insanity will not relieve a negligent defendant from liability.[116] When the contributory negligence of a plaintiff with a dimished mental capacity is at issue, however, the law has taken a different tack. In most jurisdictions, a plaintiff's negligence is wholly ignored if the plaintiff is totally insane.[117] Ohio, along with a minority of other jurisdictions, has taken this principle one step further, holding that diminished capacity not rising to the level of

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111. *Id.* Under the RESTATEMENT (SECOND) OF TORTS § 283A (1965), however, if a child engages "in an activity which is normally undertaken only by adults, and for which adult qualifications are required," the child will be held to an adult standard of care. *See* Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961).

112. Holbrock v. Hamilton Distributing Co., 11 Ohio St. 2d 185, 228 N.E.2d 628 (1967).

113. *See* Kuhns v. Brugger, 390 Pa. 331, 135 A.2d 395 (1957); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 14.1 (1974).

114. Although this appears to be the plain operation of the Ohio statute, note should be made of the Wisconsin doctrine that a child-plaintiff's contributory negligence must be tested twice; first to determine whether the child was in fact contributorily negligent and second in comparing the child's fault with that of the defendant. *See* Blahnik v. Dix, 22 Wis. 2d 67, 125 N.W.2d 364 (1963). *See also* Gremban v. Burke, 33 Wis. 2d 1, 146 N.W.2d 453 (1966); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.1 (1974).

115. *See* text accompanying note 111 *supra*.

116. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 135 (4th ed. 1971).

117. Annotation, *Contributory Negligence of Mentally Incompetent or Mentally or Emotionally Disturbed Persons*, 91 A.L.R.2d 392, 399 (1963).

total insanity must nevertheless be considered in determining whether the plaintiff was contributorily negligent.[118] Although the Ohio position has been criticized because of its unwieldiness and the easy escape from liability that it may offer for an accident-prone plaintiff,[119] it does not appear to have been affected by enactment of the comparative negligence statute. Rather, if upon considering the plaintiff's diminished capacity the trier of fact finds the plaintiff incapable of contributory negligence under the circumstances, the plaintiff is entitled to a full recovery. Conversely, if a plaintiff is found contributorily negligent regardless of his diminished capacity, the statute will operate to lessen his recovery.[120]

V. NEGLIGENCE PER SE

It is a fundamental principle of the law of torts that liability for negligence must be premised upon breach of an applicable standard of conduct.[121] This legal duty generally is the one required by the common law—namely, the ordinary care of a reasonable person.[122] Nevertheless, legal duty also may be established by legislation prescribing that certain acts shall or shall not be done to protect the person or property of others from a risk of harm.[123] As a general proposition, violation of such a statute amounts to breach of the standard of care—in other words, negligence per se.[124] In *Eisenhuth v. Moneyhon*,[125] the Ohio Supreme Court set forth the parameters of this doctrine as it applies in Ohio:

> The standard of conduct as to due care to be exercised by one for the protection of others may be specifically established by legislative enactment; by judicial decision; or, in the absence of legislative enactment or judicial decision, by a consideration of the facts and circumstances of a particular case. Where a legislative enactment imposes upon any person a specific duty for the protection of others, and his neglect to perform that duty proximately results in injury to such another, he is negligent per se or as a matter of law. Where there exists a legislative enactment commanding or prohibiting for the safety of others the doing of a specific act and there is a violation of such enactment solely by one whose duty it is to obey it, such violation constitutes

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118. Feldman v. Howard, 5 Ohio App. 2d 65, 68, 214 N.E.2d 235, 237 (Franklin County 1966), *rev'd on other grounds*, 10 Ohio St. 2d 189, 226 N.E.2d 564 (1967). *See* Snider v. Callahan, 250 F. Supp. 1022 (W.D. Mo. 1966).

119. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 14.3 (1974). Professor Schwartz acknowledges, however, that the flexibility of the Ohio rule is more appropriate to a true fault system.

120. Of course, if the plaintiff's contributory negligence exceeds the negligence of the parties against whom recovery is sought, all recovery is precluded. *See* note 1 *supra*.

121. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971). *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965). *See also* Mudrich v. Standard Oil Co., 87 Ohio App. 8, 86 N.E.2d 324 (1949), *aff'd*, 153 Ohio St. 31, 90 N.E.2d 859 (1950).

122. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36 at 190 n.31 (4th ed. 1971). *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965).

123. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36 (4th ed. 1971); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 6.1 (1974); RESTATEMENT (SECOND) OF TORTS §§ 285, 286 (1965).

124. *See* authority cited in note 123 *supra*.

125. 161 Ohio St. 367, 119 N.E.2d 440 (1954).

negligence per se; but where there exists a legislative enactment expressing for the safety of others, in general or abstract terms, a rule of conduct, negligence per se has no application and liability must be determined by the application of the test of due care as exercised by a reasonably prudent person under the circumstances of the case.[126]

As can be seen from the rule of law laid down by *Eisenhuth*, negligence per se does not adhere to every violation of statute; rather, a breach of legal duty as a matter of law will be found only when the statute at issue proscribes or prescribes specific conduct for the protection of others.[127] Examples of negligence per se include furnishing a firearm to a minor,[128] failing to furnish a handrail for a stairway in a public place,[129] and failing to maintain the brakes of a motor vehicle in good working order.[130]

Contributory negligence generally is a defense to negligence per se.[131] Consequently, whenever prior to adoption of the Ohio Comparative Negligence Act the plaintiff's contributory negligence would have barred his action for negligence per se, the principles of comparative negligence should now apply to reduce recovery in an amount proportionate to the plaintiff's fault.[132] Although at first glance there appears to be a problem in allocating the proportions of negligence to the parties when the defendant's negligence is founded upon negligence per se rather than upon breach of the ordinary care expected of a reasonable person, the difficulty is in fact illusory. Negligence per se does not mean that the defendant's fault is greater than, lesser than, or even equal to the negligence of the plaintiff; rather, it means only that the defendant has been negligent, without any reflection upon the degree to which that negligence proximately caused the plaintiff's injury.[133] Apportionment of damages is a wholly unrelated question; once it is determined that the plaintiff has been contributorily negligent and the defendant has been negligent per se, the relevant inquiry is to what extent the defendant's statutory violation, and conversely, the plaintiff's contributory fault, caused the harm. Under the Ohio statute, if the defendant's breach of a statutorily prescribed

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126. *Id.* at 367, 119 N.E.2d at 440.

127. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36 (4th ed. 1971).

128. Taylor v. Webster, 12 Ohio St. 2d 53, 231 N.E.2d 870 (1967) [violation of OHIO REV. CODE ANN. § 4301.22(B) (Page 1973)].

129. Torok v. Stambaugh Thompson Co., 36 Ohio Law Abs. 193, 43 N.E.2d 653 (Mahoning County Ct. App. 1938) [violation of OHIO REV. CODE ANN. § 4107.14 (Page 1973)].

130. Spalding v. Waxler, 2 Ohio St. 2d 1, 205 N.E.2d 890 (1965) [violation of OHIO REV. CODE ANN. § 4513.20 (Page 1973)].

131. Patton v. Pennsylvania Rd. Co., 136 Ohio St. 159, 24 N.E.2d 597 (1939); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 6.2 (1974); Annotation, *Contributory Negligence as a Defense to a Cause of Action Based upon Violation of Statute*, 10 A.L.R.2d 853 (1950).

132. Peterson v. Haule, 304 Minn. 160, 230 N.W.2d 51 (1975); Immchuck v. Fullerton, 299 Minn. 91, 216 N.W.2d 683 (1974); Johnson v. Chemical Supply Co., 38 Wis. 2d 194, 156 N.W.2d 455 (1968); Presser v. Siesel Constr. Co., 19 Wis. 2d 54, 119 N.W.2d 405 (1963); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 6.2 (1974); H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT § 10:2 (1978).

133. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 6.2 (1974).

standard of care is found to be an equal or greater cause of the injury than the plaintiff's negligence, then the plaintiff is entitled to recover his total damages less an amount equal to that portion of the fault attributable to the plaintiff. Conversely, if the fault attributed to the plaintiff is greater than the fault attributed to the defendant's violation of statute, the plaintiff can have no recovery.[134]

There are, however, certain exceptions to the general rule that a plaintiff's contributory fault is a defense to negligence per se. The first is when, in conjunction with the statute that the defendant has violated, the legislature has expressly stated that contributory negligence is no defense.[135] In such an instance, any fault on the part of the plaintiff will be ignored and, even under comparative negligence, the plaintiff is entitled to full recovery.[136]

The second exception is somewhat more elusive. Although the case law is vague and much of it is inconsistent,[137] as a general proposition contributory negligence is no defense to negligence per se when the plaintiff belongs to a class of persons that the statute violated by the defendant was intended to protect because of their inability to protect themselves.[138] The effect of comparative negligence upon this exception has resulted in a split of authority among the jurisdictions. In *Hartwell Handle Company v. Jack*,[139] the Supreme Court of Mississippi held that a child-plaintiff's contributory negligence would not serve to reduce his recovery under comparative fault principles since the statute violated by the defendant, a child labor law, was designed "to protect the child . . . from the consequences of imprudence, negligence, or lack of care or caution, which on account of the immaturity of youth and the lack of experience, discretion, and judgment is characteristic of children within the prohibited age."[140] The court went on to state that to allow a comparison of fault "would defeat the very purpose of the statute."[141] In

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134. The example assumes that all potentially liable parties are before the court. For a discussion of absent tortfeasors and the Ohio Comparative Negligence Act, *see* text accompanying notes 205-29 *infra*.

135. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 6.2 (1974); H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT §10:1 (1978).

136. Bond v. Missouri Pac. R.R. Co., 233 Ark. 32, 342 S.W.2d 473 (1961). *See* authority cited in note 135 *supra*.

137. *Compare* Wertz v. Lincoln Liberty Life Ins. Co., 152 Neb. 451, 41 N.W.2d 740 (1950), *with* Koenig v. Patrick Constr. Corp., 298 N.Y. 313, 83 N.E.2d 133 (1948).

138. Tamiami Gun Shop v. Klein, 109 So. 2d 189, *cert. discharged*, 116 So. 2d 421 (Fla. 1959); Bennett Drug Stories v. Mosely, 67 Ga. App. 347, 20 S.E.2d 208 (1942); Hartwell Handle Co. v. Jack, 149 Miss. 465, 115 So. 586 (1928); Koeing v. Patrick Constr. Corp. 298 N.Y. 313, 83 N.E.2d 133 (1948); Skarpness v. Port of Seattle, 52 Wash. 2d 490, 326 P.2d 747 (1958); H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT § 10:3 (1978); Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 Minn. L. Rev. 105, 118-21 (1948). *See* RESTATEMENT (SECOND) OF TORTS § 483 comment c (1965).

139. 149 Miss. 465, 115 So. 586 (1928).

140. *Id.* at 477, 115 So. at 588.

141. *Id.*, 115 So. at 588.

Presser v. Siesel Construction Company,[142] however, the Wisconsin Supreme Court held that a plaintiff's contributory fault and a defendant's negligence per se would be compared even though the statute violated by the defendant was intended to protect the class of persons to which the plaintiff belonged.[143] The court rejected the exception to the rule that contributory negligence is a defense to negligence per se, stating that the issue "as a matter of public policy has been committed to the doctrine of comparative negligence."[144] Although the *Presser* position is more compatible with a true fault system and may be preferable in some situations because of the difficulty inherent in attempting to determine whether a plaintiff falls within a protected class,[145] the better approach seems to be that of the Mississippi courts, since protective legislation otherwise would be emasculated.[146] If this view is adopted, a plaintiff's fault will be ignored under comparative negligence and, as with the first exception, the plaintiff receives a full recovery.

A closely related issue is the effect of partial comparative negligence upon a plaintiff's contributory negligence per se. Although it has been suggested that violation of a statute by the plaintiff should, as a matter of law, be construed as fault greater than that of the defendant,[147] thus barring any recovery by the plaintiff, this approach has not been adopted. Rather, the courts consistently have held that the issue of the relative fault of the parties should be submitted to the jury.[148]

VI. Last Clear Chance

The most commonly applied modification of the strict rule of contributory negligence is the doctrine of last chance.[149] Last clear chance is defined by the Restatement in the following manner:

> A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm, (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and (b) the defendant is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm.[150]

There generally are two recognized types of last clear chance. The first

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142. 19 Wis. 2d 54, 119 N.W.2d 405 (1963).

143. *Id.* at 64-65, 119 N.W.2d at 411.

144. *Id.* at 66, 119 N.W.2d at 411.

145. *See* V. Schwartz, Comparative Negligence § 6.2 (1974).

146. *See* H. Woods, The Negligence Case: Comparative Fault § 10:4 (1978).

147. *See* the defendant's argument in Johns v. Secress, 106 Ga. App. 96, 126 S.E.2d 296 (1962). The court, however, rejected this contention. *Id.* at 98, 126 S.E.2d at 298.

148. *E.g.*, Johns v. Secress, 106 Ga. App. 96, 126 S.E.2d 2;6 (1962); Johnson v. Chemical Supply Co., 38 Wis. 2d 194, 156 N.W.2d 455 (1968); V. Schwartz, Comparative Negligence § 6.3 (1974).

149. W. Prosser, Handbook of the Law of Torts § 66 (4th ed. 1971).

150. Restatement (Second) of Torts § 479 (1965).

is "conscious last clear chance" when the plaintiff negligently places himself in a dangerous position and the defendant discovers the danger in time to avoid it but fails to do so. The second is "unconscious last clear chance" when the defendant does not discover the danger but is under a duty to discover it.[151]

During its experience with contributory negligence, Ohio followed the former "conscious" variety of last clear chance, with the Ohio Supreme Court defining use of the theory as follows:

> Where a plaintiff, by his own fault, caused himself to be placed in a perilous situation, he may recover under the rule of the "last clear chance," notwithstanding his negligence, if the defendant did not, after becoming aware of the plaintiff's perilous situations, exercise ordinary care to avoid injuring him . . . .
>
> For the doctrine of "last clear chance" to be applicable it must be proved that the defendant became aware that plaintiff was in a position of peril at a time and distance when, in the exercise of ordinary care, he could have avoided injuring plaintiff.[152]

Several rationales have been used to somewhat unsatisfactorily explain the rule. The most common is that when the defendant has the last chance to act, his act and not the plaintiff's prior negligence is the "proximate cause" of the accident.[153] Another rationale suggests that the later negligence of the defendant involves a higher degree of fault.[154] Finally, many commentators and courts submit that the real explanation for last clear chance is to limit the harsh effect of the contributory negligence denial of plaintiff's recovery.[155]

The rationale for the existence of last clear chance has been critical to states' decisions whether the doctrine will continue under comparative fault. In those states that have considered the question, the results are mixed. In Georgia, Nebraska, and South Dakota the doctrine survives.[156] These jurisdictions generally have analyzed clear chance in terms of proximate cause, concluding that last clear chance survives under comparative negligence since the defendant's last negligent act was the sole legal cause of the injury. As an example, the Supreme Court of South Dakota explained:

151. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 66 (4th ed. 1971); H. WOODS, COMPARATIVE FAULT § 8:1 (1978). Note that in the case of an inattentive plaintiff the defendant must usually be conscious of the plaintiff's situation in order that the plaintiff be able to recover. *See* RESTATEMENT (SECOND) OF TORTS § 480 (1965).

152. Peters v. B & F Transfer Co., 7 Ohio St. 2d 143 (1966).

153. *See, e.g.*, Bragg v. Central New England R. Co., 228 N.Y. 54, 126 N.E. 253 (1920).

154. *See, e.g.*, Rawitzer v. St. Paul City R. Co., 93 Minn. 84, 100 N.W. 664 (1904).

155. *See, e.g.*, *Petition of* Kinsman Transit Co., 338 F.2d 708 (2nd Cir. 1964); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 66 (4th ed. 1971).

156. Southland Butane Gas Co. v. Blackwell, 211 Ga. 665, 85 S.E.2d 542 (1955); Whitehouse v. Thompson, 150 Neb. 370, 34 N.W.2d 385 (1948); Ulach v. Wyman, 78 S.D. 504, 104 N.W.2d 817 (1960). It should be noted that Georgia has a system of partial comparative negligence while Nebraska and South Dakota have adopted the slight-gross variation of this doctrine. V. SCHWARTZ, COMPARATIVE NEGLIGENCE §§ 3.4(B), 3.5(B) (1974).

This court views the doctrine of last clear chance as a rule of proximate cause . . . that is the subsequent negligence of the defendant in failing to exercise ordinary care to avoid injuring the plaintiff becomes the immediate or proximate and efficient cause of the accident, which intervenes between the accident and the more remote negligence of the plaintiff. . . . Considered as a rule of proximate cause the common law doctrine of last clear chance is not incompatible or in conflict with our statutory rule of comparative negligence. . . . Accordingly, if the doctrine applies, plaintiff's contributory negligence, regardless of degree, would not bar recovery.[157]

The overwhelming number of commentators, however, have suggested that last clear chance is out of harmony with comparative negligence—a system that requires each party to bear the cost of his own fault.[158] Likewise, most jurisdictions considering the issue have abolished last clear chance after adopting comparative fault. Connecticut and Oregon have abolished the doctrine by statute.[159] Maine, Florida, California, Alaska, Colorado, Texas, Wyoming, and New York[160] have abolished it judicially. Florida, California, and Alaska, which have pure comparative negligence, have asserted unequivocally that last clear chance has no place in a comparative fault system.[161] The Alaska Supreme Court explains this position as follows:

[I]t is recognized by nearly all who have reflected upon the subject that the last clear chance doctrine is, in the final analysis, merely a means of ameliorating the harshness of the contributory negligence rule. Without the contributory negligence rule there would be no need for the palliative doctrine of last clear chance. To give continued life to that principle would defeat the very purpose of the comparative negligence rule—the apportionment of damages according to the degree of mutual fault. There is, therefore, no longer any reason for resort to the doctrine of last clear chance in the courts of Alaska.[162]

States adopting only partial comparative fault systems have also rejected last clear chance as a vestigial and unnecessary part of the former contributory negligence system. The Supreme Judicial Court of Maine fully discussed the issue in *Cushman v. Perkins*:[163]

The justifications for the last clear chance doctrine most frequently given are that because the plaintiff's negligence has ceased or is remote or because

157. Ulach v. Wyman, 78 S.D. 504, 507, 104 N.W.2d 817, 819 (1960).

158. V. Schwartz, Comparative Negligence § 7.2 (1974).

159. Conn. Pub. Acts 73-622 § 1(c) (1973); Or. Rev. Stat. § 18.470 (1979).

160. H. Woods, Comparative Fault § 8:3 (1978 & Supp. 1980). *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Burns v. Ollati, 513 P.2d 469 (Colo. App. 1973); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Cushman v. Perkins, 245 A.2d 846 (Me. 1968); Dominguez v. Manhattan & Bronx Surface Transit Operating Auth., 46 N.Y.2d 528, 388 N.E.2d 1221, 415 N.Y.S.2d 634 (1979); French v. Grigsby, 567 S.W.2d 604 (Tex. Civ. App. 1978); Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979).

161. Kaatz v. State, 540 P.2d 1037, 1040 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 829, 532 P. 2d 1226, 1243, 119 Cal. Rptr. 858, 874 (1975); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973).

162. Kaatz v. State, 540 P. 2d 1037, 1040 (Alaska 1975).

163. 245 A.2d 846 (Me. 1968).

> the defendant had the last opportunity to avoid the harm, the negligence of the defendant must be the sole proximate cause . . . [But] [i]n such a case the negligence of the plaintiff undoubtedly has been a cause, and a substantial and important one, of his own damage. . . . While the extent of such a plaintiff's negligence and the efficiency of its causation may be less than a defendant's, it would appear to us that the negligence of a plaintiff who gets himself into a situation of peril cannot reasonably be excluded as a proximate cause of an injury the very danger of which he should have anticipated.[164]
>
> We conclude that the last clear chance rule is but a modification of the doctrine of contributory negligence. In our view when our contributory negligence rule as an absolute bar disappeared (in cases where the plaintiff's negligence is less than the defendant's) through legislative action, the last clear chance rule disappeared with it and no longer exists as an absolute rule.[165]

It appears from a survey of other states' responses to last clear chance under comparative negligence that those states which analyze the doctrine in terms of proximate cause retain it and those states which view the doctrine as one to ameliorate the harshness of contributory negligence abolish it.

Since the Ohio comparative negligence statute is silent regarding the destiny of last clear chance, the basic rationale used to support the doctrine in Ohio is likely, as in other jurisdiction, to be partially determinative of its fate.

The precise reasoning that Ohio uses to underpin its use of this rule, however, is unclear. Some courts essentially have treated the doctrine as a modification of contributory negligence. For example, in *West Receiver v. Gillette*[166] the court accentuated the modification of contributory negligence with only casual mention of the proximate cause analysis:

> It seems to be now generally agreed that this doctrine of "last chance" is a humane modification of the strict and rigid rule which denies to a plaintiff under all circumstances any recovery for the negligence of a defendant, where the plaintiff has himself, contributed to the injury by his own negligence. The application of this rigid rule was in many cases found to work injustice, for it would surely be unjust to hold that one should be denied the protection of the law because of acts of carelessness on his part, which were followed by subsequent acts of negligence on the part of another which latter acts were the proximate cause of injury.[167]

At other times, the Ohio courts have emphasized treating the rule of last clear chance in terms of proximate and remote causes. In *Drown v. Northern Ohio Traction Co.*[168] the court analyzed last clear chance as follows:

> Now, it must`be apparent upon even a slight analysis of this rule that it

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164. *Id.* at 847-49.
165. *Id.* at 850.
166. 95 Ohio St. 305, 116 N.E. 521 (1917).
167. *Id* at 311, 116 N.E. at 522.
168. 76 Ohio St. 234, 81 N.E. 326 (1907).

> can be applied only in cases where the negligence of the defendant is proximate and that of the plaintiff remote; for if the plaintiff and the defendant both be negligent and the negligence of both be concurrent and directly contributing to produce the accident, then the case is one of contributory negligence pure and simple. But if the plaintiff's negligence merely put him in the place of danger and stopped there, not actively continuing until the moment of the accident and the defendant either knew of his danger, or by the exercise of such diligence as the law imposes on him would have known it, then if the plaintiff's negligence did not concurrently combine with the defendant's negligence to produce the injury, the defendant's negligence is the proximate cause of the injury and that of the plaintiff is a remote cause. That is all there is of the so called doctrine of "the last clear chance."[169]

If the Ohio last clear chance doctrine is analyzed as resulting from a somewhat dubious proximate and remote cause theory, then it should survive because the question is one of causation and not contributory negligence. If, on the other hand, the Ohio doctrine is considered a judicial attempt to alleviate the harshness of contributory negligence, then it may no longer be necessary and may be viewed as supplanted by comparative fault principles.

It should be noted, however, that contributory negligence still exists in Ohio as an absolute bar to recovery when the plaintiff is more than fifty percent negligent. To that extent, it is still possible that last clear chance could mitigate the harshness of this remnant of contributory negligence.[170] If last clear chance is retained in order to mitigate the harshness for a plaintiff who is more than fifty percent at fault in a partial comparative fault system, the jurisdiction must live with the anomaly that a forty-five percent negligent plaintiff will get fifty-five percent of his damages while a fifty-five percent negligent plaintiff will get one hundred percent of his damages when the defendant had a last clear chance. This jurisdiction, then, also must endure the reverse harshness to the defendant who, under the last clear chance doctrine, becomes fully liable when two are at fault. In the final analysis, it must be remembered that the goal of a comparative negligence system is to require each party to bear liability in proportion to his fault,[171] a goal inconsistent with the all-or-nothing result of last clear chance.

VII. Assumption of Risk

The advent of the doctrine of comparative negligence likely has created more confusion and inconsistency in the area of the defense of

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169. *Id.* at 248, 81 N.E. at 329.

170. The Supreme Court of Maine, although abolishing last clear chance under its partial comparative fault system, recognized that the doctrine might still apply under a diluted comparative negligence system of slight-gross negligence where contributory negligence had more virility. Cushman v. Perkins, 245 A.2d 846, 850 (Me. 1968). See also, V. Schwartz, Comparative Negligence § 7.2 (1974).

171. W. Prosser, Handbook of the Law of Torts § 67 (4th ed. 1971).

assumption of risk than in any other area of the law of negligence. Although the Ohio Comparative Negligence Act compares negligence and contributory negligence, as with so many other questions it is silent on whether negligence can be compared with assumption of risk. Does assumption of risk continue to bar a plaintiff's recovery or has it merged with contributory negligence, thus becoming subject to comparison and an allocation of fault?

A. *The Parameters of Assumption of Risk*

While contributory negligence traditionally has been defined in objective terms as the care that a reasonable person would exercise for his or her own safety,[172] objectivity takes a back seat when the issue is whether a plaintiff assumed a risk. Rather, assumption of risk contemplates that the plaintiff voluntarily and consciously encounters a subjectively known risk of harm arising from the defendant's negligent conduct.[173] The risk assumed must always be an unreasonable risk; assumption of risk serves no purpose if the risk assumed is a reasonable one. The defense arises from a two-step process: first, the plaintiff subjectively perceives the potential danger of the defendant's negligence; and second, the plaintiff makes a conscious choice to risk the danger.

Although the defense has been broken down into innumerable categories, analysis of the impact of comparative negligence upon assumption of risk can be satisfactorily accomplished by the three traditional categories: (1) express assumption of risk; (2) implied reasonable assumption of risk; and (3) implied unreasonable assumption of risk.[174]

Express assumption of risk is the easiest to define. It constitutes an explicit statement by the plaintiff, in a contract or otherwise, that the plaintiff agrees to assume the risk of injury from the defendant's negligence.[175] When no express statement has been made by the plaintiff but he nevertheless fully appreciates the danger potentially presented by negligence on the part of the defendant and consciously chooses to confront that danger, the plaintiff impliedly assumes the risk.[176] If the choice made by the plaintiff is one that would have been made by a reasonable person, the plaintiff's conduct is within the scope of implied

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172. *Id.* at § 65. *See* RESTATEMENT (SECOND) OF TORTS § 496A (1965).

173. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68 (4th ed. 1971); Comment, *Assumption of Risk in a Comparative Negligence System—Doctrinal, Practical, and Policy Issues*: Kennedy v. Providence Hockey Club, Inc.; Blackburn v. Dorta, 39 OHIO ST. L.J. 364, 366 (1978). *See* RESTATEMENT (SECOND) OF TORTS §§ 496B, 496C (1965).

174. Comment, *Assumption of Risk in a Comparative Negligence System—Doctrinal, Practical, and Policy Issues*: Kennedy v. Providence Hockey Club, Inc.; Blackburn v. Dorta, 39 OHIO ST. L.J. 364, 367 (1978).

175. RESTATEMENT (SECOND) OF TORTS § 496B (1965).

176. RESTATEMENT (SECOND) OF TORTS § 496C (1965). *See* Comment, *Assumption of Risk in a Comparative Negligence System—Doctrinal, Practical, and Policy Issues*: Kennedy v. Providence Hockey Club, Inc.; Blackburn v. Dorta, 39 OHIO ST. L.J. 364, 367 (1978).

reasonable assumption of risk;[177] conversely, if the plaintiff's choice is objectively unreasonable, the plaintiff impliedly and unreasonably assumes the risk of the defendant's negligence.[178] This latter type of the defense—implied unreasonable assumption of risk—contemplates both the subjective, conscious, voluntary, and knowing choice elements of assumption of risk and the objective, reasonable person elements of contributory negligence.[179] As a result, it can be characterized as either and, when it is present, a defendant generally can assert both defenses.[180] Because of this doctrinal overlap, it causes the most difficult problems when a comparative negligence system is adopted.

B. *Express Assumption of Risk and Comparative Negligence*

Express assumption of risk has its roots in contract and waiver; it is said to relieve the defendant of any duty that he otherwise would owe to the plaintiff[181] and thus has little, if anything, to do with contributory or comparative negligence. Although an express agreement to assume a risk of negligence may be held unenforceable because of a lack of bargaining parity,[182] it seems clear that when the parties are in a relatively equal bargaining position, an express assumption of risk should be a valid and total defense unaffected by the doctrine of comparative negligence. Indeed, the other jurisdictions that have considered the issue have reached just this result.[183]

C. *Implied Assumption of Risk and Comparative Negligence*

In the absence of comparative negligence, distinguishing between implied assumption of risk and contributory negligence is of little practical importance since both defenses operate as a total bar to recovery.[184] Once comparative negligence has been adopted, however, the distinction becomes critical.[185] If a plaintiff is contributorily negligent, his damages are apportioned; if he has assumed the risk, however, his recovery will hinge upon how the jurisdiction interprets assumption of risk.

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177. Comment, *Assumption of Risk in a Comparative Negligence System—Doctrinal, Practical, and Policy Issues*: Kennedy v. Providence Hockey Club, Inc.; Blackburn v. Dorta, 39 OHIO ST. L.J. 364, 367 (1978).

178. *Id.*

179. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68 (4th ed. 1971).

180. *Id.*

181. Comment, *Assumption of Risk in a Comparative Negligence System—Doctrinal, Practical, and Policy Issues*: Kennedy v. Providence Hockey Club, Inc.; Blackburn v. Dorta, 39 OHIO ST. L.J. 364, 368 (1978).

182. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68 (4th ed. 1971); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.2 (1974).

183. *E.g.*, Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971); Becker v. Beaverton School Div. No. 48, 551 P.2d 498 (Or. App. 1976); Lyons v. Redding Constr. Co., 83 Wash. 2d 86, 515 P.2d 821 (1973); Gilson v. Drees Bros., 19 Wis. 2d 252, 120 N.W.2d 63 (1963). *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.2 (1974).

184. *See* Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54 (1943); Packard v. Quesnel, 112 Vt. 175, 22 A.2d 164 (1941).

185. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.1 (1974).

One commentator has suggested three approaches that a jurisdiction may take with respect to implied assumption of risk and comparative negligence:

> (1) that assumption of risk is unaffected by the adoption of comparative negligence, and that it therefore remains a complete bar to recovery, (2) that assumption of risk, though retaining an existence independent from contributory negligence, is no longer a bar to recovery but is instead to be entered into the calculus for determining the relative contributions of the plaintiff and defendant to the injury suffered, or (3) that assumption of risk is abolished as a defense separate from contributory negligence.[186]

Given the distinction between implied reasonable assumption of risk and implied unreasonable assumption of risk, with the latter encompassing not only the subjective aspects of the former but also the negligence elements of contributory fault, the approach taken by a jurisdiction may be different for each type.[187]

The Ohio courts generally have failed to recognize the distinction between contributory negligence and implied assumption of risk and often confuse them, speaking of the former when the latter is involved, or of assumption of risk when the particular risk assumed is not apparent.[188] Courts also talk of assumption of risk or contributory negligence when, in fact, neither is applicable because the defendant owes no duty of reasonable care to the plaintiff[189] or the defendant has performed his duty and thus is not negligent.[190] The confusion is compounded by the assumption of risk instruction recommended by Ohio Jury Instruction 255.11,[191] which says, in effect, that a plaintiff has assumed a known risk when he is aware of the danger, or the danger is so obvious that he must be taken to know it, and he has had a definite opportunity to avoid it by use of ordinary care.[192]

Under comparative negligence, the distinctions are of the utmost importance. Although a party may be found both to be contributorily negligent and to have assumed the risk, the two defenses are neither necessarily inclusive or exclusive.[193] Each defense is supported by a different policy; that behind contributory negligence is to deter

186. Comment, *Assumption of Risk in a Comparative Negligence System—Doctrinal, Practical, and Policy Issues*: Kennedy v. Providence Hockey Club, Inc.; Blackburn v. Dorta, 39 OHIO ST. L.J. 364, 369-70 (1978).

187. *Id.* at 370.

188. *See* Bishop v. Penn Cent. Transp. Co., 39 Ohio App. 2d 185, 188-89, 316 N.E.2d 907, 910 (1974); Haarmeyer v. Roth, 113 Ohio App. 74, 177 N.E.2d 507 (1960).

189. *See, e.g.*, Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E.2d 453 (1951).

190. *See* Cincinnati Base Ball Club Co. v. Eno, 112 Ohio St. 175, 147 N.E. 86 (1925); Ivory v. Cincinnati Base Ball Club Co., 62 Ohio App. 514, 24 N.E.2d 837 (1939).

191. 2 OHIO JURY INSTRUCTIONS (Ohio Judicial Conf.) § 255.11 (1970).

192. *Id.* RESTATEMENT (SECOND) OF TORTS § 402A; adopted in Ohio in Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 322, 364 N.E.2d 267, 271 (1977), further treats assumption of risk and foreseeable misuse of a product as forms of contributory negligence.

193. DeAmiches v. Popczun, 35 Ohio St. 2d 180, 186, 299 N.E.2d 265, 268 (1973).

blameworthy conduct and to prevent a party from profiting by his own fault, while the underlying basis for assumption of risk is to give a party the freedom of choice. A man who is injured rushing into a burning building to obtain his hat may find an action in negligence barred by both assumption of risk and contributory negligence. A paraplegic who is injured by ingesting an unreasonably dangerous drug to prevent infection in his disabled limbs, but who takes the drug fully conscious of the risks in order to avoid having his limbs amputated, may not be contributorily negligent because his behavior is reasonable under the circumstances, but may be found to have voluntarily assumed the risk of harm.

The other jurisdictions that have considered the impact of comparative negligence upon implied reasonable assumption of risk have split on the issue, resulting in a gamut of decisions that cover each of the three alternatives suggested earlier.[194] In *Kennedy v. Providence Hockey Club, Inc.*[195] and *Bartlett v. Gregg*,[196] the Supreme Courts of Rhode Island and South Dakota respectively held that reasonable assumption of risk is unaffected by the adoption of comparative negligence and that it remains a total defense to a negligence action.[197] This position seems impossible to support, however, in light of the resulting anomaly that a plaintiff who acts reasonably but assumes an unreasonable risk will totally be denied recovery while a plaintiff who has acted unreasonably and thus with greater culpability by being contributorily negligent will be permitted a recovery, albeit a diminished one.[198] Because of this anomaly, a number of jurisdictions have held that, under comparative fault, reasonable assumption of risk will no longer be a total bar to recovery but rather has merged with contributory negligence and thus will serve to diminish a plaintiff's recovery.[199] Although this result avoids the obvious inconsistencies of the *Kennedy* and *Bartlett* rationale, it nevertheless remains subject to the traditional criticism leveled against reasonable assumption of risk that one should not be penalized for acting in a reasonable manner. The merger position also creates an anomaly of its own; a plaintiff who acts reasonably will be treated the same as an unreasonable plaintiff, while a defendant who acts reasonably and thus without fault is absolved of all liability.

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194. *See* text accompanying note 163 *supra*.

195. 376 A.2d 329 (R.I.1977).

196. 77 S.D. 406, 92 N.W.2d 654 (1958).

197. Kennedy v. Providence Hockey Club, Inc., 376 A.2d 329, 333 (R.I. 1977); Bartlett v. Gregg, 77 S.D. 406, 413, 92 N.W. 2d 654, 658 (1958). *See also* Rone v. Miller, 257 Ark. 791, 520 S.W.2d 268 (1975).

198. Comment, *Assumption of Risk in a Comparative Negligence System—Doctrinal, Practical, and Policy Issues*: Kennedy v. Providence Hockey Club, Inc.; Blackburn v. Dorta, 39 OHIO ST. L.J. 364, 375 (1978).

199. *See* Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971); Wentz v. Deseth, 221 N.W.2d 101 (N.D. 1974); Farley v. M.M. Cattle Co., 529 S.W.2d 751 (Tex. 1975); Brittain v. Booth, 601 P.2d 532 (Wyo. 1979).

Because of the problems inherent in treating reasonable assumption of risk as either unaffected or merged with comparative negligence, perhaps the best approach is to follow the Florida Supreme Court's lead in *Blackburn v. Dorta*[200] and hold that the defense of reasonable assumption of risk is abolished and will serve neither to preclude a plaintiff nor to lessen his recovery.[201] Since a plaintiff who has reasonably assumed a risk has, by definition, acted without fault and in the manner that would be expected of an ordinary member of society, penalizing the plaintiff by diminishing his recovery appears at odds with the purposes of a true fault system. In other words, if fault is defined in terms of unreasonable behavior, no fault should result in no loss.

Although, for obvious reasons, the alternatives with respect to implied unreasonable assumption of the risk are lessened to two, the impact of comparative negligence upon this defense presents a somewhat more difficult choice. To hold that it remains a total defense, as many courts have done,[202] finds support in the fact that a plaintiff who has unreasonably assumed a known unreasonable risk not only has the culpability of one who acts negligently, but this culpability has been heightened by the plaintiff's subjective awareness that he was acting in an unreasonable fashion. This "dual culpability" has led many courts to look with little sympathy upon one who unreasonably assumes an unreasonable risk.[203]

Nevertheless, even though a plaintiff has knowingly acted negligently, the defendant may also have acted unreasonably; and it is the combined negligence of *both* parties that has caused the injury forming the basis of the litigation. As a result, consistency with a true fault system would appear to require that a plaintiff's unreasonable assumption of risk be compared with the defendant's negligence. The majority of courts that have considered this question have reached just this result.[204] To hold otherwise merely serves to continue the viability of the "all or nothing" approach of the common law, an approach that, at least with respect to

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200. 348 So. 2d 287 (Fla. 1977).

201. *Id.* at 293. *See* Lyons v. Redding Constr. Co., 83 Wash. 2d 86, 515 P.2d 821 (1973); Colson v. Rule, 15 Wis. 2d 387, 113 N.W.2d 21 (1962).

202. *See* Rone v. Miller, 257 Ark. 791, 520 S.W.2d 268 (1975); Spradlin v. Klump, 244 Ark. 841, 427 S.W.2d 542 (1968); Yankey v. Battle, 122 Ga. App. 275, 176 S.E.2d 714 (1970); Wade v. Roberts, 118 Ga. App. 284, 163 S.E.2d 343 (1968); Roberts v. King, 102 Ga. App. 518, 116 S.E.2d 885 (1960); Saxton v. Rose, 201 Miss. 814, 29 So.2d 646 (1947); Fritchley v. Love-Courson Drilling Co., 177 Neb. 455, 129 N.W.2d 515 (1964); Kennedy v. Providence Hockey Club, Inc., 376 A.2d 329 (R.I. 1977).

203. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE §§ 9.3-9.5 (1974).

204. Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977); Wilson v. Gordon, 354 A.2d 398 (Me. 1976); Dilorio v. Tipaldi, 4 Mass. App. 640, 357 N.E.2d 319 (1976); Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971); Braswell v. Economy Supply Co., 281 So.2d 669 (Miss. 1973); Kopischke v. First Continental Corp., 610 P.2d 668 (Mont. 1980); Wentz v. Deseth, 221 N.W.2d 101 (N.D. 1974); Becker v. Beaverton Sch. Dist. No. 48, 25 Or. App. 879, 551 P.2d 498 (1976); Farley v. M.M. Cattle Co., 529 S.W.2d 751 (Tex. 1975); Lyons v. Redding Constr. Co., 83 Wash. 2d 86, 515 P.2d 821 (1973); Gilson v. Drees, 19 Wis. 2d 252, 120 N.W.2d 63 (1963); Colson v. Rule, 15 Wis. 2d 387, 113 N.W.2d 21 (1962); Brittain v. Booth, 601 P.2d 532 (Wyo. 1979).

unreasonable conduct, has expressly been rejected by the legislature in its adoption of comparative fault.

VIII. ABSENT TORTFEASORS

A pair of intertwined issues arises when, because of failure of service of process or for some other reason, all of the appropriate party-defendants are not before the court. First, must the court consider the negligence of absent tortfeasors in determining whether the plaintiff can recover? Second, assuming that the plaintiff can recover, must the negligence of absent tortfeasors be taken into account when apportioning fault among those liable to the plaintiff?

The first question is the easiest to answer. The Ohio Comparative Negligence Act provides that a plaintiff may recover only if his contributory negligence is "no greater than the combined negligence of all other *persons from whom recovery is sought*".[205] Assume that the plaintiff, a passenger in an auto driven by her husband, is seriously injured in an accident between her husband's vehicle and one driven by the defendant. Since the doctrine of interspousal immunity continues to remain viable in Ohio,[206] the plaintiff cannot sue her husband. In her action against the defendant, if the jury finds her to be ten percent negligent while the defendant is twenty percent negligent, she will be allowed to recover since her fault does not exceed that of the defendant. If the findings are reversed, however, with twenty percent of the fault allocated to the plaintiff and ten percent to the defendant, her action will be totally barred. The plain language of the statute indicates that only the negligence attributable to those persons against whom a judgment is in fact sought should be considered in determining whether a plaintiff has a right to recovery.

The second issue, whether the apportionment of fault should include both parties and nonparties, is considerably more complex. Assume that the plaintiff is negligently injured by three persons (for convenience, referred to as tortfeasor(1), tortfeasor(2), and tortfeasor(3), respectively), but can obtain jurisdiction only over tortfeasor(1). The jury finds the plaintiff's damages to be $10,000 and determines that the plaintiff is ten percent contributorily negligent while tortfeasor(1) is responsible for thirty percent of the fault. The remaining sixty percent of the total negligence consequently is attributable to absent tortfeasors(2) and (3). In determining the portion of damages for which each person is liable, the Ohio Comparative Negligence Act instructs the court to multiply the amount of recoverable damages by a fraction in which the numerator is the person's percentage of negligence and the denominator is the total of the

205. Amended S. 165, 113th Gen. Assembly (1980), *reprinted in* OHIO LEGIS. SERV. LAWS OF OHIO 5-59 (Baldwin 1980) [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(1)].

206. *See* Varholla v. Varholla, 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978); Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965). *See also* Recent Development Note, *The Need for Legislative Action to Abolish Interspousal Immunity*: Varholla v. Varholla, 40 OHIO ST. L.J. 771 (1979).

percentages of negligence attributable to all persons from whom recovery is allowed.[207] If, in the example, the court uses only the negligence of tortfeasor(1) in calculating the denominator of the fraction, tortfeasor(1) will be liable for all of the plaintiff's recoverable damages, $9,000.[208] On the other hand, if the court computes the denominator by using the total of the fault attributable to tortfeasors (1), (2), and (3), ninety percent, tortfeasor(1) will be liable for only one-third of the plaintiff's recoverable damages, or $3,000.[209]

Since a court cannot enter judgment or allow recovery against nonparties, there is an argument that the combined percentage of fault of tortfeasors(2) and (3), who have not been joined nor been given a full and fair opportunity to litigate the claims against them, should not be included in apportioning fault. If successful, however, this argument would allow a plaintiff to frustrate the policy of the comparative negligence statute by choosing his defendants. In a situation in which a plaintiff is injured by two tortfeasors, one of whom is insured while the other is judgment-proof, the plaintiff can proceed against only the insured tortfeasor and recover all of his damages, save those attributable to his own fault. The result is that an insured defendant will be liable for more than his proportional share of the damages, a result contrary to the language and spirit of the statute.

Other jurisdictions have split on this question, with South Dakota taking the lead in holding that the negligence of absent tortfeasors will not be considered in apportioning liability among party-defendants.[210] In *Walker v. Kroger Grocery & Baking Company*[211] and *American Motorcycle Association v. Superior Court*, the Supreme Courts of Wisconsin and California, respectively, reached the opposite conclusion, holding that apportionment should be based upon the combined negligence of all tortfeasors who contributed to the plaintiff's injuries, regardless of whether they are joined as party-defendants.[213] Both courts, however, conditioned their holdings on the parallel rule, viable in each jurisdiction,[214] that negligent tortfeasors are jointly and severally liable.[215]

207. Amended S. 165, 113th Gen Assembly (1980), *reprinted in* OHIO LEGIS. SERV. LAWS OF OHIO 5-59 (Baldwin 1980) [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(2)]. See text accompanying note 13 *supra*.

208. *See* text accompanying note 13 *supra*.

209. *Id.*

210. Beck v. Wessel, 237 N.W.2d 905 (S.D. 1976). *See* Kapchuck v. Orlan, 332 So. 2d 671 (Fla. Dist. Ct. App. 1976); Conner v. Mertz, 274 Or. 657, 548 P.2d 975 (1976).

211. 214 Wis. 519, 252 N.W. 721 (1934).

212. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182, (1978).

213. Walker V. Kroger Grocery & Baking Co., 214 Wis. 519, 535, 252 N.W. 721, 727 (1934); American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 589 n.2, 578 P.2d 899, 906 n.2, 146 Cal. Rptr. 182, 189 n.2, (1978). The strength of this rule in Wisconsin is questionable, however. *See* Ross v. Koberstein, 220 Wis. 73, 264 N.W. 642 (1936) (even though apportionment was not based upon the fault of all tortfeasors, there was not prejudicial error).

214. For a discussion of the impact of the Ohio Comparative Negligence Act upon the doctrine of joint and several liability in Ohio, *see* text accompanying notes 230-39 *infra*.

215. Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 536, 252 N.W. 721, 728 (1934);

The outcome in Ohio likely depends upon the interpretation given to the language "all persons from whom recovery is allowed."[216] This language, which defines those persons whose negligence shall be taken into account in apportioning liability, conceivably is subject to three constructions, two of which would permit a court to consider the fault of all tortfeasors, not just those who have been made parties.

Although the statute can be construed as allowing apportionment only among those tortfeasors actually joined by the plaintiff as party-defendants to the litigation, such a construction does not appear consistent with the portion of the statute that defines whether a complainant can recover at all.[217] In determining whether a plaintiff can recover, the Act dictates that the fault of the plaintiff be compared with the combined fault of those "persons from whom recovery is sought."[218] As indicated earlier, this provision clearly is limited to only those tortfeasors actually joined.[219] The portion of the statute relating to apportionment of liability, "persons from whom recovery is *allowed*,"[220] indicates a broader scope than "persons from whom recovery is *sought*."

A court could partly implement this broader construction, and thus hold that apportionment requires consideration of the fault of all tortfeasors, by holding that "allowed" contemplates not only those persons joined as party-defendants but also those persons joined as third-party defendants pursuant to Ohio Rule of Civil Procedure 14[221] or as persons necessary for complete and adequate relief pursuant to rule 19.[222] Although this construction of the statute would still allow apportionment among only those persons actually joined in the action, this broader interpretation of who is joined would at times allow apportionment to be based upon the negligence of all tortfeasors rather than only those named by the plaintiff as party-defendants.

Perhaps the most satisfactory interpretation of "persons from whom recovery is allowed"[223] is that which has been adopted in Kansas, whose comparative negligence statute contains identical language.[224] In order to allow apportionment of liability to be based upon the fault of all tortfeasors, the court in *Greenwood v. McDonough Power Equipment,*

American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 590, 578 P.2d 899, 906-07, 146 Cal. Rptr. 182, 189-90, (1978).

216. Amended S. 165, 113th Gen. Assembly (1980), *reprinted in* OHIO LEGIS. SERV. LAWS OF OHIO 5-59 (Baldwin 1980) [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(2)].

217. *Id.* [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(1)].

218. *Id.*

219. *See* text accompanying notes 171-72 *supra*.

220. Amended S. 165, 113th Gen. Assembly (1980), *reprinted in* OHIO LEGIS. SERV. LAWS OF OHIO 5-59 (Baldwin 1980) [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(2)] (emphasis added).

221. OHIO R. CIV. P. 14 (Page 1971).

222. OHIO R. CIV. P. 19 (Page 1971).

223. *See* Amended S. 165, 113th Gen. Assembly (1980), *reprinted in* OHIO LEGIS. SERV. LAWS OF OHIO 5-59 (Baldwin 1980) [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(2)].

224. KAN. STAT. ANN. § 60-258(a) (1963).

Inc.[225] rejected an interpretation of "allowed" as meaning only those persons actually joined and held that "allowed," for purposes of apportionment, includes not only those tortfeasors against whom the plaintiff actually seeks relief but also all those tortfeasors whose negligence causally relates to the plaintiff's injuries and against whom recovery would be allowed by law.[226]

In sum, an Ohio court may give one of three interpretations to "persons from whom recovery is allowed," each of which will cause a different result in the number of tortfeasors whose fault may be considered in apportioning liability among defendents. First, if the statute is construed to mean only those persons actually joined by the complainant, the fault of absent tortfeasors cannot be taken into account in apportioning liability.[227] Second, if the language is held to mean both tortfeasors actually joined by the plaintiff *and* tortfeasors joined as third-party defendants or necessary parties, apportionment in some instances would be based upon the fault of all tortfeasors.[228] Third, if the Kansas approach is followed and the provision is interpreted to mean all tortfeasors against whom recovery would be allowed by law (*i.e.* all persons guilty of causal negligence even though not joined), apportionment would always reflect the fault of all tortfeasors, whether joined or not.[229] Since one of the basic purposes of the statute is to apportion liability according to individual fault and since this result is best achieved only by considering the negligence of all tortfeasors, whether or not they are technical parties, the third interpretation appears to be the preferable approach.

IX. JOINT AND SEVERAL LIABILITY

Prior to the enactment of the Ohio Comparative Negligence Act, it was clear that the principle of joint and several liability of tortfeasors was generally accepted and applied.[230] The statute, however, which provides that "each person against whom recovery is allowed is liable to the person bringing the action for a portion of the total damages . . . ,"[231] may have abolished joint and several liability, at least when a plaintiff has been contributorily negligent. Liability "for a portion" is not joint and several liability for the entirety.[232]

225. 437 F. Supp. 707 (D.C. Kan. 1977).

226. *Id.* at 712.

227. *See* text accompanying notes 183-86 *supra.*

228. *See* text accompanying notes 187-88 *supra.*

229. *See* text accompanying notes 189-92 *supra.*

230. *See* OHIO REV. CODE ANN. § 2307.31-.32 (Page Supp. 1979) (contribution among joint tortfeasors). *See also* 52 OHIO JUR. 2d *Torts* § 19 (1962).

231. Amended S. 165, 113th Gen. Assembly (1980), *reprinted in* OHIO LEGIS. SERV. LAWS OF OHIO 5-59 (Baldwin 1980) [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(2)].

232. *See* Howard v. Spafford, 132 Vt. 434, 321 A.2d 74 (1974).

Other jurisdictions have dealt with this issue in a number of ways. The comparative negligence statute of Nevada has explicitly abolished joint liability.[233] On the other hand, the statutes of a number of states retain the doctrine.[234] Other comparative negligence states have kept joint liability through court decisions.[235] In Vermont, whose statute resembles the Ohio Act,[236] and Kansas, whose statute is identical to the Ohio Act,[237] however, the courts have held that, under comparative negligence, joint and several liability is abolished.[238]

Given this array of positions from other jurisdictions, the issue in Ohio appears to be wide open. Nevertheless, since the General Assembly recently enacted a statute allowing contribution among joint tortfeasors,[239] which would become ineffective in negligence actions if joint and several liability is abolished, and since the Comparative Negligence Act does not expressly abolish joint and several liability, there appears to be good reason to believe that the doctrine will remain viable under comparative negligence. Moreover, to hold that the statute abolishes joint and several liability would result in the anomaly that defendants may be jointly and severally liable when the plaintiff is not at fault, but not jointly and severally liable when the plaintiff is contributorily negligent. Additionally, different standards could apply in the same case. For example, joint and several liability would not exist for a contributorily negligent driver, but could still obtain for the benefit of his passengers. These results may make the statute constitutionally defective.

Whichever position one takes, there is no escaping the question of the continued viability of joint and several liability in negligence actions, since the statutory language is obviously susceptible of a construction abolishing the doctrine. At the most, one can confidently predict a heated judicial challenge to either point of view.

X. VICARIOUS LIABILITY

Most courts that have considered the question have held that the vicarious liability of an employer for the negligence of an employee acting

233. NEV. REV. STAT. § 41.141(3)a(b) (1979).

234. *See* MINN. STAT. ANN. § 604.01 (West Supp. 1980); N.D. CENT. CODE § 9-10-07 (1975), OR. REV. STAT. § 18.485 (1979); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980); UTAH CODE ANN. § 78-27-40(2) (1953).

235. Gazaway v. Nicholson, 109 Ga. App. 510, 136 S.E.2d 425 (1964): Saucier v. Walker, 203 So. 2d 299 (Miss. 1967); Caldwell v. Piggly-Wiggly Madison Co., 32 Wis. 2d 447, 145 N.W.2d 745 (1966). *See* Wheeling Pipe Line, Inc. v. Edrington, 259 Ark. 600, 534 S.W.2d 225 (1976); American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182, (1978); Dunham v. Kampman, 547 P.2d 263 (Colo. 1975); Mihoy v. Proulx, 113 N.H. 698, 313 A.2d 723 (1973); Rice v. Hyster Co., 273 Or. 191, 540 P.2d 989 (1975); Fitzgerald v. Badger State Mut. Cas. Co., 67 Wis. 2d 321, 227 N.W.2d 444 (1975).

236. VT. STAT. ANN. tit. 12, § 1036 (1973).

237. KAN. STAT. ANN. § 60-258(a)(d) (1975).

238. Miles v. West, 224 Kan. 284, 580 P.2d 876 (1978); Brown v. Keil, 224 Kan. 195, 580 P.2d 867 (1978); Howard v. Spafford, 132 Vt. 434, 321 A.2d 74 (1974).

239. *See* OHIO REV. CODE ANN. § 2307.31-.32 (Page Supp. 1979).

within the scope of his employment is not affected by the adoption of comparative negligence.[240] Since the purpose of respondeat superior, to shift responsibility to one who is financially responsible and has benefited from the enterprise causing the negligence,[241] does not appear to be at odds with the purposes of a comparative system, the doctrine should not be altered by comparative fault and should continue to operate as before. For example, an employee negligently injures a child while driving his employer's delivery vehicle and the child, alleging negligent operation of the vehicle, sues the employer. If the jury finds the employee eighty percent at fault while attributing twenty percent of the negligence to the child, and finds that the employee was acting with the scope of his employment, then the employer is liable for eighty percent of the child's damages. Assume, however, that the child sues alleging both negligent operation of the vehicle by the employee and negligent entrustment of the vehicle by the employer to the employee. If the child prevails on both theories of recovery, the jury will have to make an apportionment of liability between the employer and the employee. If the jury finds the employee sixty percent responsible and the employer twenty percent responsible, then the employer will be both twenty percent personally liable and, assuming that the employee was acting within the scope of his employment, sixty percent vicariously liable.

XI. SET-OFF

In an action for negligence the defendant may counterclaim against the plaintiff in the same suit. When this occurs under a fifty percent comparative fault system such as Ohio's, it is entirely possible that both the plaintiff and defendant can recover damages from each other. If the court finds that the fault is divided equally between a single plaintiff and a single counterclaiming defendant, then both parties will theoretically recover under Ohio's statute since neither party's fault is greater than that of his adversary.[242] The recovery of the party who was entitled to the lesser amount, however, would subsequently be set-off against the amount this party owed to the other.[243] A set-off thereby reduces the amount of final judgment owed to the party gaining the greatest recovery but eliminates the need for him to pay the remaining judgment to his opponent.

Assume, for illustration, that a fifty percent negligent plaintiff suffers

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240. *See* Dearing v. Ferrell, 165 F. Supp. 508 (W.D. Ark. 1958); Pennebaker v. Parker, 232 Miss. 725, 100 So. 2d 363 (1958); Sears, Roebuck & Co. v. Creekmore, 199 Miss. 48, 23 So. 2d 250 (1945); Loper v. Yazoo & Mississippi Valley R.R. Co., 166 Miss. 79, 145 So. 743 (1933); Hall v. McDonald, 229 Wis. 472, 282 N.W. 561 (1938).

241. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.1 (1974).

242. Note that if a single plaintiff and single defendant were found to be anything other than each 50% negligent no set-off would be possible since recovery would be denied to the party whose fault was greater than the fault of the other. *See* Amended S. 165 113th Gen. Assembly (1980), *reprinted in* OHIO LEGIS. SERV. LAWS OF OHIO 5-59 (Baldwin 1980) [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(1)].

243. H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT § 17:2 (1978).

$10,000 damages while a fifty percent negligent counterclaiming defendant suffers $20,000 in damages. The plaintiff consequently owes $10,000 to the defendant and the defendant, in turn, owes $5,000 to the plaintiff. Under the set-off doctrine, the plaintiff can off-set the award against him by the $5,000 due him from the defendant and thus pay to the defendant only the remaining $5,000 due.[244]

Although the Ohio statute is silent regarding set-off, the text does not preclude such a practice and Ohio generally recognizes that one judgment may be set off against another as long as it does not infringe upon another's rights.[245] In addition, nine states with a similar fifty percent comparative fault statute do utilize the set-off procedure.[246] It is therefore probable that Ohio will likewise use set-off in two-party comparative negligence actions, when appropriate.

Similarly, though a more complex computation will be involved, set-off should be available in Ohio in actions involving multiple parties provided the party claiming damage has fault not greater than the combined negligence of his adversaries.[247] For example,[248] assume in a three-vehicle collision driver A with $80,000 damage brings an action against drivers B and C for his damages. B with $100,000 damages and C with $60,000 damages then counter-claim against A and crossclaim against each other. Fault is apportioned thirty percent to A, forty percent to B and thirty percent to C. Before set-off, A would recover seventy percent of his damages or $56,000 ($32,000 from B and $24,000 from C). B would recover sixty percent of his damages or $60,000 ($30,000 from A and $30,000 from B). C would recover $42,000 ($18,000 from A and $24,000 from B). What happens to the above recoveries after set-off? A ultimately recovers $8,000 consisting of $2,000 from B (the $32,000 that B owes A minus the $30,000 that A owes B) and of $6,000 from C (the $24,000 that C owes A minus the $18,000 that A owes C). B ultimately recovers $6,000 from C (consisting of the $30,000 that C owes B minus the $24,000 B owes C). C finally recovers nothing.[249]

Although this appears to be an equitable as well as efficient procedure

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244. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 19.2 (1974 & Supp. 1978).

245. Diehl v. Friester, 37 Ohio St. 473, 476-77 (1882). In this case the court noted that the practice of setting off one judgment against another between the same parties is well-established and to be used when it infringes on no other rights and protects the just rights of the parties. Judgments need not be set off if they prejudice other rights. *Id.*

246. New Hampshire, Connecticut, Nevada, New Jersey, Texas, Vermont, Wisconsin, Montana and Pennsylvania. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 19.2 (1974 & Supp. 1978).

247. *See* Amended S. 165, 113th Gen. Assembly (1980), *reprinted in* OHIO LEGIS. SERV. LAWS OF OHIO 5-59 (Baldwin 1980) [to be codified at OHIO REV. CODE ANN. § 2315.19(A)(1)].

248. This is presuming no joint and several liability complications.

249. This illustration is from H. Woods, THE NEGLIGENCE CASE: COMPARATIVE FAULT § 17:4 (1978).

Party	*Damages*	*% Fault*	*Amount Recovered*	*Amount Received*
A	$ 80,000	30%	*$56,000* (-)	$8,000 from B&C
B	$100,000	40%	$60,000	$6,000 from C
C	$ 60,000	30%	$42,000	-0-

to determine individual parties' proportionate contributions, it becomes windfall to the partys' liability insurers when they receive the benefit of the set-off. This result, permitting insurers to pay less than full compensation for damage caused by their insurees, has stimulated the enactment of antiset-off provisions in the comparative fault statutes of both Rhode Island and Oregon.[250] For similar reasons the Supreme Court of Florida held in *Stuyvesant Ins. Co. v. Bournazian*[251] that "the concept of set-off . . . applies only between uninsured parties to a negligence action, or to insured parties to the extent that insurance does not cover their mutual liabilities."[252] This pronouncement resulted from an automobile accident litigation in which the plaintiff husband and wife recovered a $10,000 judgment and the defendant husband and wife were awarded $20,000 as a result of their counter-claim. If the personal injury verdict for the plaintiffs were to be set-off against the award for the defendants, the result, a net judgment of $10,000 for the defendants, would be a windfall to the defendants' insurer, who would pay nothing. The court rejected this consequence as a defective view of insurance liability, declaring that "[t]he effect of set-off as an antecedent to payment by each insurer is to abrogate the parties' respective insurance contracts."[253]

Since the Ohio statute merely permits rather than mandates set-offs and since set-off is essentially an efficient procedure to be used only when it does not trespass upon equity[254] it is possible that the Ohio courts would restrict its use to noninsured litigants or to insured parties to the extent that insurance does not cover liability. While the use of set-offs when it mutually cancels damages awarded to seriously injured parties and grants a windfall to insurers may impair the general goal of fairness that is anticipated in a comparative fault system and also may not comport with the general tort policy of encouraging compensation for victims, the elimination of set-offs for casualty insurance companies nevertheless has some obvious earmarks of invidious discrimination.[255]

In sum, the Ohio statute and precedent permit the use of set-off in single and multi-party actions in which there are counter-claims and in which the parties claiming recovery have fault not greater than the total fault of their opponents. The courts will need to examine the equities carefully, however, when determining whether parties should be subject to set-off when their insurers will be the ones to benefit.

XII. Indemnity

If the Act abolishes joint and several liability and the law of

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250. Or. Rev. Stat. § 18.490 (1979 Supp.); R.I. Gen. Laws § 9.20-4.1 (1956). *See* H. Woods, The Negligence Case: Comparative Fault § 17:5 (1978).

251. 342 So. 2d 471 (Fla. 1977).

252. *Id.* at 474.

253. *Id.* at 473-74.

254. *See* note 245 *supra*.

255. V. Schwartz, Comparative Negligence § 19.3 (1974).

contribution among joint tortfeasors, then the law of indemnity becomes particularly important. In the successful indemnity action, the plaintiff-indemnitee recovers from the defendant-indemnitor the entire loss he has sustained and such a result has little to do with comparative fault.

Under common law, an implied contract of indemnity exists in the following situations:

> (1) [W]here the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged.
> (2) Where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged.
> (3) Where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged.
> (4) Where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged.
> (5) Where there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved.[256]

A owns a restaurant. In the sidewalk in front of the restaurant there is a trap door through which *B* delivers food products to the restaurant. While delivering the products, *B* negligently leaves the trap door open, causing a pedestrian-plaintiff to sustain serious injuries. Plaintiff sues *A* and *B*. The jury allocates fault as follows:

Plaintiff	10%
A	20%
B	70%

Plaintiff sustains damages of $10,000. In light of the jury's apportionment of fault, the court allows recovery of $9,000. Restaurant owner *A* pays plaintiff $2,000 and seeks the amount from deliveryman *B*. *B* denies any liability to *A*.

Upon these facts *A* will recover $2,000 from *B*. While there may be no right of contribution, *B* does have a duty to indemnify *A* for any damages suffered as a result of the incident. When a person is injured through the violation of a duty owed in common by two persons and sues and recovers from the one of the two who did not participate in the act or omission that caused the injury, the nonparticipating person is only secondarily liable. Upon payment of the judgment and expenses, he is entitled to indemnity from the one whose act or omission was primary and gave rise to the action.[257]

In situations in which the indemnitee is not personally at fault—such as when imputed or vicarious liability exists—there is no reason for the law

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256. Tolbert v. Gerber Indus., Inc., ____ Minn. ____, ____, 255 N.W.2d 362, 366 (1977), *quoting* Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 372, 104 N.W.2d 843, 848 (1960).

257. Maryland Cas. Co. v. Frederick Co., 142 Ohio St. 605, 612-13, N.E.2d 795, 798-99 (1944).

of indemnity to be changed, and the indemnitee should recover the entire loss from the indemnitor.

In cases in which the parties disputing indemnification are both at fault, some courts are applying comparative negligence standards, preferring to apportion fault rather than secure the harsh all or nothing result of indemnification. For example, in *Pachowitz v. Milwaukee & Suburban Transport Corp.*,[258] the Supreme Court of Wisconsin held that the all or nothing approach of common law indemnity should be modified in appropriate cases to permit a right of partial indemnity among multiple tortfeasors when damages are apportioned on a comparative fault basis.[259] In this case, a woman sued a bus company after being let off a bus on a defective curb. The bus company sought indemnification from the city for maintaining the curb, but the court found it a proper case for apportioning fault.[260] In *Southern Railway Co. v. Brunswick Pulp & Paper Co.*,[261] the court applied comparative negligence principles to a contractual indemnity agreement between two negligent parties in which one promised to indemnify the other for all damages resulting from his negligence.[262] The court interpreted the agreement to entitle the indemnitee to recover only that percentage of his damages not attributable to his own negligence.[263] In effect, the court applied not the rule of indemnity, but a form of contribution based on degrees of relative fault.

Conclusion

This Article has been an attempt to discuss potential problems areas, not to argue that comparative negligence is a troublesome concept or necessarily a difficult one for lawyers and judges to apply. After all, juries have been doing nicely with it for some time, without help from the bench or bar.

Two suggestions are offered in conclusion. First, it would be well to keep in mind that the purpose of the Ohio Comparative Negligence Act is to ameliorate and modify the hitherto absolute defense of contributory negligence in negligence actions, not to revamp or amend substantially the tort law of the state. Keeping the statute in the context in which it was enacted will do much to eliminate confusion and potential adventurism by the more activist courts.

Second, to visualize how much difference the statute will make in practice, review cases you have actually tried, not those you can imagine.

258. 56 Wis. 2d 383, 202 N.W.2d 268 (1972).

259. *Id.* at 386-87, 202 N.W.2d at 270.

260. *Id.* at 389-90, 202 N.W.2d at 272. *See also* Gies v. Nissen Corp., 57 Wis. 2d 371, 386, 204 N.W.2d 519, 527 (1973); City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 657, 207 N.W.2d 866, 871-72 (1973).

261. 376 F. Supp. 96 (S.D. Ga. 1974).

262. *Id.* at 103.

263. *Id.*

You will probably find that, with a few exceptions, little difference in outcome would result from an application of the statute. Were this not the case, we already would have heard the outcry from the thirty-plus jurisdictions that now have some form of comparative negligence at work in their courts.

The major difference for the practitioner probably will be the greater number and variety of settlements that will result. No longer is evidence of contributory negligence a signal to end negotiations and button up for trial; it is just the beginning of the dialogue.