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## THE EFFECT OF PENNSYLVANIA'S COMPARATIVE NEGLIGENCE STATUTE ON TRADITIONAL TORT CONCEPTS AND DOCTRINES

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### I. INTRODUCTION: "FURNISHING THE SCALES TO WEIGH WRONGDOING"

It is an incontestable principle that where the injury complained of is the product of mutual or concurring negligence, no action for damages will lie. The parties being mutually at fault, there can be no apportionment of the damages. The law has no scales to determine in such cases whose wrong-doing weighed most in the compound that occasioned the mischief.<sup>1</sup>

AS IF TO RESPOND, however belatedly, to this quotation by former Justice Woodward of the Supreme Court of Pennsylvania, the scales to determine wrongdoing were furnished by the Pennsylvania Legislature some 121 years later when that body, during its 160th session, enacted a statute establishing the doctrine of comparative negligence in actions for injuries due to negligence.<sup>2</sup> With the implementation of the Act, Pennsylvania has joined the ever increasing majority of jurisdictions which have adopted some system of comparing negligence or fault in tort claim actions.<sup>3</sup>

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1. *Railroad v. Norton*, 24 Pa. 465, 469 (1855).

2. For purposes of this symposium, references to and quotations from the Pennsylvania Comparative Negligence Act will be made without citation. For the text of the Act, see Spina, *Introduction, Symposium: Comparative Negligence in Pennsylvania*, 24 VILL. L. REV. 419, 419 (1979).

3. The frequency with which jurisdictions are adopting comparative negligence or comparative fault makes any attempt at a complete listing difficult. At the time of printing, the authors were aware of 33 jurisdictions in which, in one form or another, a general comparative negligence or comparative fault system of apportioning damages is in force. *Kaatz v. State*, 540 P.2d 1037 (Alas. 1975) (judicially adopted); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (judicially adopted); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (judicially adopted); *Placek v. City of Sterling Heights*, — Mich. —, 375 N.W.2d 511 (1979) (judicially adopted); ARK. STAT. ANN. §§ 27-1763 to -1765 (Supp. 1977); COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1976); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1978); GA. CODE ANN. § 105-603 (1968); HAW. REV. STAT. § 663-31 (Supp. 1975); IDAHO CODE §§ 6-801 to -806 (Supp. 1978); KAN. STAT. ANN. §§ 60-258a to -258b (1976); ME. REV. STAT. tit. 14 § 156 (Supp. 1978-1979); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1979); MINN. STAT. ANN. § 604.01 (West Supp. 1979); MISS. CODE ANN. § 11-7-15 (1972); MONT. REV. CODES

The effect of the Act can scarcely be overestimated. Indeed, this symposium merely suggests the Act's wide-ranging impact, the parameters of which, like its predecessor, traditional contributory negligence, will be defined only after years of litigation, and probably redefined as social policy or underlying policy considerations change. The Act expressly changes long established doctrines of recovery and revamps the method of recovery where a plaintiff's negligence contributes causally to the occurrence of the accident which brought about his injuries.<sup>4</sup> It also modifies the method of recovery against and among joint tortfeasors.<sup>5</sup>

ANN. § 58-607.1 (Supp. 1977); Act of Apr. 5, 1978, Legis. Bill No. 665, § 6, 1978 Neb. Laws 565 (to be codified at NEB. REV. STAT. § 25-1151); NEV. REV. STAT. § 41.141 (1977); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1977); N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3 (West Supp. 1978-1979); N.Y. CIV. PRAC. LAW §§ 1411-1413 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); OKLA. STAT. ANN. tit. 23, § 11 (West Supp. 1978-1979); OR. REV. STAT. §§ 18.470-.510 (1977); 42 PA. CONS. STAT. § 7102 (1978); R.I. GEN. LAWS §§ 9-20-4 to -4.1 (Supp. 1978); S.D. COMPILED LAWS ANN. § 20-9-2 (1967); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978-1979); UTAH CODE ANN. §§ 78-27-37 to -43 (1977); VT. STAT. ANN. tit. 12, § 1036 (1973); WASH. REV. CODE ANN. §§ 4.22.010-.910 (Supp. 1977); WIS. STAT. ANN. § 895.045 (West Supp. 1978-1979); WYO. STAT. ANN. § 1-1-109 (1977).

The federal government has long had a comparative negligence rule under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-55 (1970), and the Merchant Marine Act of 1920 (Jones Act), 46 U.S.C. § 688 (1970), which incorporates the provisions of the Federal Employers' Liability Act in actions for personal injury or death of seamen. *Id.*

4. It should be noted that the Act does not abrogate the formally recognized common law contributory negligence defense, but merely modifies it. Under the newly adopted comparative negligence concept, a plaintiff's contributory negligence bars his recovery only when his contributory negligence is greater than that "of the defendant or defendants against whom recovery is sought." Where a plaintiff's contributory negligence is "not greater than" the causal negligence of the defendant or defendants against whom recovery is sought, he is allowed to recover, but his total damages are diminished in proportion to his contributory negligence.

The basic operation of the Act can be demonstrated by the following example: Plaintiff is involved in an automobile accident with defendant. The jury finds that plaintiff's total damages were \$10,000 and assesses plaintiff's contributory negligence at 20% and defendant's causal negligence at 80%. Plaintiff would be allowed to recover, but his total damages of \$10,000 would be reduced in proportion to his contributory negligence, 20%, resulting in a net verdict in his favor of \$8,000. If, conversely, plaintiff's contributory negligence were assessed at 80% and defendant's causal negligence at 20%, the plaintiff would be totally barred from recovery. The implementation of the doctrine in a situation with one plaintiff and one defendant is relatively simple. Additional plaintiffs or defendants in the action, however, vastly compound this rather simple functioning of the statute. Dealing with the application of the Act in multiple party actions would require a single article or more. The authors, therefore, leave to others the task of dealing with this complicated application. For a discussion by one of the authors, see Timby, *Comparative Negligence*, 48 PA. B.A.Q. 219 (1977).

5. There seems to be little doubt that the Act modifies the common law concept of joint and several liability in cases to which it applies. Under the traditional common law doctrine of joint and several liability, if two or more tortfeasors are found jointly liable to the injured party, each is responsible for the full extent of the damages inflicted. W. PROSSER, *LAW OF TORTS* § 47, at 296 (4th ed. 1971). This was the law in Pennsylvania before the Act. *Menarde v. Pennsylvania Transp. Co.*, 376 Pa. 497, 103 A.2d 681 (1954); *Gorman v. Charlson*, 287 Pa. 410, 135 A. 250 (1926). The second section of the new Act, however, appears to abolish this common law doctrine by limiting each defendant's liability to "that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed." Under this provision, a tortfeasor is liable only for his proportionate share of the damages, not the entire amount. One commentator has already remarked that this identical statutory language in New Hampshire,

The impact of the Act is not to be measured solely by its express provisions. Indeed, what the Act does not say will generate far greater ramifications in tort law. The Act compels a reevaluation of both traditional tort concepts and procedural applications in order to adjust Pennsylvania tort law to accommodate the new statutory apportionment doctrine.

The introduction of comparative negligence in Pennsylvania raises a multitude of issues which the authors will leave to others, including the task of interpreting and assessing the impact of the statute on multiple defendant situations,<sup>6</sup> multiple plaintiff situations,<sup>7</sup>

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N.H. REV. STAT. ANN. § 507:7-a (Supp. 1977), and Vermont, VT. STAT. ANN. tit. 12, § 1036 (1973), can be construed to completely abolish joint and several liability in comparative negligence cases. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 3.5(C), at 80-81, § 16.7, at 264 (1974).

The Act also changes the meaning ascribed to the phrase "pro rata" as used in the Pennsylvania Uniform Contribution Among Tortfeasors Act, 42 PA. CONS. STAT. §§ 8321-8327 (1978). The phrase was previously construed as an intentment to codify the common law equal responsibility of joint tortfeasors. *Brown v. Dickey*, 397 Pa. 454, 155 A.2d 836 (1959); *Mong v. Hershberger*, 200 Pa. Super. Ct. 68, 186 A.2d 427 (1962). Under the Act, "pro rata" will mean proportionate, rather than equal. Proportionate, for purposes of comparative negligence cases, is defined in § (b) of the Act as "the ratio of the amount of . . . [the individual tortfeasor's] causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed." See generally Timby, *supra* note 4, at 232.

6. This is a complex and confusing area of application. Most notable among the many issues are the following:

(1) Who is to be considered a "defendant" for purposes of apportioning liability and damages under the Act? What happens in a situation where one or more of the tortfeasors are not parties to the action or are shielded from liability? Section (a) of the Act provides that the plaintiff's negligence will be compared to the negligence of the defendant or defendants "against whom recovery is sought." The identical language in the Wisconsin statute, WIS. STAT. ANN. § 895.045 (West Supp. 1978-1979), has been interpreted by the Supreme Court of Wisconsin to include absent tortfeasors, settled parties, and persons otherwise barred from liability to the plaintiff. *Pierringer v. Hoyer*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963); *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934). Florida has taken an opposite approach by holding that it is improper to apportion negligence to joint tortfeasors or to "phantom" tortfeasors who are not before the court. *Model v. Rabinowitz*, 313 So.2d 59 (Fla. Dist. Ct. App. 1975); *Souto v. Seagal*, 302 So.2d 465 (Fla. Dist. Ct. App. 1974).

(2) Is the plaintiff's contributory negligence to be compared to the aggregate negligence of the defendants or to the individual negligence of each defendant? The manner of comparison can have vastly different results. Georgia, Minnesota, and Wisconsin have adopted a rule against combining the negligence of defendants by construing their respective statutes to bar recovery by a plaintiff from a joint defendant if the plaintiff would have been barred by his contributory negligence from recovering in an action against that defendant alone. See *Mishoe v. Davis*, 64 Ga. App. 700, 14 S.E.2d 187 (1941); *Kowalske v. Armour & Co.*, 300 Minn. 301, 220 N.W.2d 268 (1974); *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934). At least one jurisdiction has refused to follow the rule against combining negligence. See *Walton v. Tull*, 234 Ark. 82, 356 S.W.2d 20 (1962). An analysis of this issue necessarily involves consideration of the statutory language implemented.

(3) The Act expressly provides for new rules of contribution among joint tortfeasors. See note 5 *supra*. On the other hand, the Act is silent as to indemnity. One must thus ask what application, if any, the Act will have to the common law principles of indemnity. At least one jurisdiction has abrogated the doctrine in the face of its comparative negligence statute. *Gies v. Nissen Corp.*, 57 Wis. 2d 371, 204 N.W.2d 519 (1973); *Pachowitz v. Milwaukee & Suburban Transp. Corp.*, 56 Wis. 2d 383, 202 N.W.2d 268 (1972).

For a discussion of these issues, see Timby, *supra* note 4, at 229-34.

7. Although the Act uses both the singular and plural form when referring to defendants, it

derivative actions,<sup>8</sup> counterclaims and set-offs,<sup>9</sup> and the multitude of procedural considerations.<sup>10</sup> The major purpose of this article is to explore the impact of the statute on traditional tort actions and claims arising out of intentional tortious conduct, wanton and reckless misconduct, and strict tort liability. This article will also examine the Act's effect on the traditional tort doctrines of assumption of the risk and "discovered peril."

Before dealing with these specific issues, it is necessary to briefly examine the origins of the Pennsylvania comparative negligence concept and some of the general principles by which it should be construed and applied.

## II. BASIC CONSIDERATIONS OF INTERPRETATION AND APPLICATION

### A. Origins

Although some commentators<sup>11</sup> have traced the origin of contributory negligence in Pennsylvania to the case of *Railroad Co. v. Aspell*,<sup>12</sup> the authors' research has revealed that the principle was

only uses the singular form "plaintiff." It is unclear how the Act will be applied in a multiple plaintiff situation where one or both of the plaintiffs are contributorily negligent.

8. This issue is related to considerations of the Act's application in a multiple plaintiff situation. More particularly, the question becomes whether the contributory negligence of an injured plaintiff should diminish the innocent plaintiff's derivative recovery. The Washington comparative negligence statute. WASH. REV. CODE ANN. §§ 4.22.010-.910 (Supp. 1977), precludes imputed negligence between husband and wife so as to bar recovery in an action by the innocent spouse. *Id.* § 4.22.020. The Supreme Court of Wisconsin has developed formulae for application to derivative claims where one or both of the claimants are contributorily negligent. See *Victorson v. Milwaukee & Suburban Transp. Co.*, 70 Wis. 2d 336, 234 N.W.2d 332 (1975); *White v. Lunder*, 66 Wis. 2d 563, 225 N.W.2d 442 (1975).

9. These issues are necessarily tied to considerations of the Act's interpretation and application in multiple defendant and multiple plaintiff situations. See generally *Timby*, *supra* note 4, at 235-37.

10. For example, can the court, in a comparative negligence situation, declare contributory negligence as a matter of law? Should special verdicts be employed in comparative negligence cases? How should the jury be charged and to what extent should they be informed of the effect of their verdict, particularly if special verdicts are employed? For a discussion of these issues, see *id.* at 237-39.

11. See, e.g., M. MEYER, 2 LAW OF VEHICLE NEGLIGENCE IN PENNSYLVANIA § 18.00, at 3 (1970); Philbrick, *Loss Apportionment in Negligence Cases, Part II: Some Proposals for Reform in Pennsylvania*, 99 U. PA. L. REV. 766, 773 (1951).

12. 23 Pa. 147 (1854). The Supreme Court of Pennsylvania stated:

It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened, except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained.

*Id.* at 149-50.

enunciated in Pennsylvania as early as 1840, in *Simpson v. Hand*.<sup>13</sup> Whatever its origins, it appears that contributory negligence was introduced into Pennsylvania jurisprudence on the assumption that it was so well established in the law that no further discussion was required.<sup>14</sup> The concept of contributory negligence which was eventually adopted in Pennsylvania was the principle announced in the English case of *Butterfield v. Forrester*.<sup>15</sup> As more recently applied, the doctrine has operated to prevent a plaintiff from recovery "if his own negligence, however slight, contributes to the happening of the accident in a proximate way."<sup>16</sup>

Although the Pennsylvania courts have appeared to temper the harsh doctrine of contributory negligence by creating the related doctrines of willful, wanton, or reckless misconduct<sup>17</sup> and discovered peril,<sup>18</sup> and by upholding the jury's right to render a compromise verdict,<sup>19</sup> the courts have continually refused to implement a system of comparative negligence or comparative fault to ameliorate the effects of the doctrine.<sup>20</sup> The courts have at times adhered so rigidly

13. 6 Whart. 311 (Pa. 1840). In *Simpson*, a negligence case involving the collision of ships, the court enunciated the following rule: "It is an undoubted rule, that, for a loss from mutual negligence, neither party can recover in a court of common law . . ." *Id.* at 321, citing *Hill v. Warren*, 2 Stark. 377, 171 Eng. Rep. 678 (K.B. 1818). This principle was applied in a more traditional tort context in *Wynn v. Allard*, 5 Watts & Serg. 524 (Pa. 1843). In *Wynn*, the court stated that "[t]he principle that there is no recourse by action for an injury which is the consequence of negligence on both sides, was laid down by this court in . . . [*Simpson*]." *Id.* at 524-25.

14. See notes 12 & 13 *supra*.

15. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). This case has been acknowledged as the earliest contributory negligence case. W. PROSSER, *supra* note 5, § 65, at 416 n.1. Prosser also notes that the first American case employing contributory negligence appears to have been the Massachusetts case of *Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824). W. PROSSER, *supra* note 5, § 65, at 416 n.1.

16. *McCay v. Philadelphia Elec. Co.*, 447 Pa. 490, 495, 291 A.2d 759, 762 (1972).

17. See notes 56-77 and accompanying text *infra*.

18. See notes 182-86 and accompanying text *infra*.

19. *Karcosky v. Laria*, 382 Pa. 227, 114 A.2d 150 (1955). In *Karcosky*, Justice Bell stated:

The doctrine of comparative negligence, or degrees of negligence, is not recognized by the Courts of Pennsylvania, but as a practical matter they are frequently taken into consideration by a jury. The net result, as every trial judge knows, is that in a large majority of negligence cases where the evidence of negligence is not clear, or where the question of contributory negligence is not free from doubt, the jury brings in a compromise verdict. . . . Under such circumstances, a jury usually does what this jury did, namely, render a compromise verdict which is much smaller in amount than they would have awarded (a) if defendant's negligence was clear, and (b) if they were convinced that plaintiffs were free from contributory negligence.

Where the evidence of negligence or contributory negligence, or both, is conflicting or not free from doubt, a trial judge has the power to uphold the time-honored right of a jury to render a compromise verdict, and to sustain a verdict which is substantial . . .

*Id.* at 234-35, 114 A.2d at 154.

20. See *Stiles v. Geesey*, 71 Pa. 439 (1872). In *Stiles*, the supreme court stated:

The question presented to the court or the jury is never one of comparative negligence, as between the parties; nor does very great negligence on the part of a defendant,

to the contributory negligence doctrine that judgments have been reversed because the word "material" was used to qualify the degree of the plaintiff's contributory negligence.<sup>21</sup> The judicial reluctance to apply comparative fault in tort actions was in fact reaffirmed within one year from the date of enactment of the Act.<sup>22</sup>

It is difficult to ascribe any motivation to the unwillingness of the judiciary to adopt a system of comparative negligence.<sup>23</sup> No great significance should be attached to the judicial restraint, however, since all jurisdictions which had adopted comparative negligence before 1973 had done so by legislative enactment.<sup>24</sup> Whatever the reasons for their inaction, the Pennsylvania courts had deferred to the legislature for adoption of a comparative fault system and the legislature has recently furnished the vehicle for implementation of apportioning fault in tort cases.

so operate to strike a balance of negligence as to give a judgment to a plaintiff whose own negligence contributes in any degree to the injury . . . .

*Id.* at 442, quoting *Wilds v. Hudson River R.R.*, 24 N.Y. 430, 432 (1862).

In *Weir v. Haverford Elec. Light Co.*, 221 Pa. 611, 70 A. 874 (1908), the Supreme Court of Pennsylvania reiterated that "[t]he doctrine of comparative negligence has not been recognized in our state. Any negligence on the part of a plaintiff that contributes to, and is the proximate cause of, his injury defeats his action. There can be no balancing or matching of degrees of negligence." *Id.* at 617, 70 A. at 876. The *Weir* rule has been more recently applied in *Kasanovich v. George*, 348 Pa. 199, 34 A.2d 523 (1943), and in *Cebulskie v. Lehigh Valley R.R.*, 441 Pa. 230, 272 A.2d 171 (1971).

21. See *Mattimore v. City of Erie*, 144 Pa. 14, 22 A. 817 (1891); *Oil City Fuel Supply Co. v. Bound*, 122 Pa. 449, 15 A. 865 (1888); *Monongahela City v. Fischer*, 111 Pa. 9, 2 A. 87 (1886).

22. See *McCown v. International Harvester Co.*, 463 Pa. 13, 342 A.2d 381 (1975). In *McCown*, the court was asked to adopt a system whereby the plaintiff's contributory negligence would be a factor in determining the plaintiff's recovery against the defendant in a strict tort liability action under RESTATEMENT (SECOND) OF TORTS § 402A (1965). 463 Pa. at 15, 342 A.2d at 382. Speaking for the court, former Chief Justice Jones stated:

Acceptance of the appellant's first alternative would create a system of comparative assessment of damages for 402A actions. Neither the General Assembly by statute nor this Court by case law has established such a scheme of comparative negligence in other areas of tort law. Without considering the relative merits of comparative negligence, we think it unwise to embrace the theory in the context of an appeal involving Section 402A.

*Id.* at 16, 342 A.2d at 382 (footnote omitted). The *McCown* court's reluctance to consider the merits of comparative negligence may have been prompted by more than its reluctance to adopt comparative negligence in Pennsylvania. As Chief Justice Jones explained in a footnote, "[t]o initially apply a theory of comparative negligence to an area of the law in which liability is not premised on negligence seems particularly inappropriate." *Id.* at n.3.

23. For what research reveals to be the sole case in which a Pennsylvania appellate court has grounded its decision on deference to the legislature, see *McCown v. International Harvester Co.*, 463 Pa. 13, 16, 342 A.2d 381, 382 (1975). For a discussion of *McCown*, see note 22 *supra*.

In the final analysis, Pennsylvania state courts may have rigidly applied contributory negligence simply because it was well established by doctrinal precedents and, in most instances, they were compelled to do so by virtue of *stare decisis*.

24. Florida was the first jurisdiction to judicially adopt comparative negligence. See *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). Since 1973, only three other jurisdictions, Alaska, California, and Michigan, have judicially adopted a comparative fault system. See *Kaatz v. State*, 540 P.2d 1037 (Alas. 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P. 2d 1226, 119 Cal. Rptr. 858 (1975); *Placek v. City of Sterling Heights*, \_\_\_ Mich. \_\_\_, 375 N.W.2d 511 (1979).

This summary of the background of contributory and comparative negligence in Pennsylvania has been provided only to emphasize that the legislature has defined the nature of comparative fault to be applied and has explicitly delineated the extent of that doctrine. Due respect should therefore be accorded to the legislature's handiwork.

As previously stated, numerous adjustments are needed to conform Pennsylvania's tort law to the apportionment system adopted by the legislature. The fact that Pennsylvania courts will now apportion damages in tort actions does not support the proposition that the courts will do so in all situations, regardless of the extent of fault. Rather, the apportionment system adopted by the legislature retains the basic fault concept that one should not be allowed to recover against others who are less culpable.<sup>25</sup>

### B. *The Wisconsin Model*

The proliferation of legislation and judicial action in the field of comparative negligence has resulted in almost as many different approaches as there are jurisdictions which have adopted the concept. Although many jurisdictions have followed others in developing its own comparative negligence doctrines, every jurisdiction seems to have retained a certain individual element which makes its doctrine somewhat unique.<sup>26</sup> The Pennsylvania statute is no different. Although borrowing principally from the basic approach of Wisconsin,<sup>27</sup> the Pennsylvania legislature nonetheless has fashioned a truly unique comparative negligence statute.

Despite the manifold fine differences among the various jurisdictions which have adopted comparative negligence laws, all of the unique applications have emanated from one of three elemental approaches. In understanding what Pennsylvania comparative negligence is, it is thus important to know what it is not.

25. This system should be contrasted with "pure" comparative negligence, in which the plaintiff is allowed to recover regardless of the extent of his fault. His recovery, however, will be diminished accordingly. For a discussion of "pure" comparative negligence, see text accompanying notes 28-31 *infra*.

26. Although each jurisdiction may be attempting to fashion a concept uniquely palatable to its ideas of equity and fairness, the few cases of duplication certainly indicate that no one jurisdiction has developed a system or statute so well-worded or applied that it has been accepted with any unanimity. The lesson to be learned may be that although newly emerging comparative negligence states are not sure of what they want, they obviously are sure of what they do not want.

27. See WIS. STAT. ANN. § 895.045 (West Supp. 1978-1979). For a discussion of the legislative history of the Act with relation to the Wisconsin model, see notes 41-45 and accompanying text *infra*.



“Pure” comparative negligence always permits a plaintiff to recover regardless of the percentage of his negligence so long as his negligence was not the sole cause of the accident causing his injuries.<sup>28</sup> His recovery is reduced, however, by diminishing his total damages in proportion to the amount of negligence attributable to him.<sup>29</sup> This system of comparative negligence has been adopted for general application in at least seven jurisdictions<sup>30</sup> and appears in many limited statutes applicable to damage caused by railroads or to injuries sustained by employees in certain employment situations.<sup>31</sup>

Unlike the “pure” system, the “50%” comparative negligence system allows a plaintiff to recover only when his contributory negligence is equal to or less than that of the defendant or defendants.<sup>32</sup> This approach retains more of the traditional contributory negligence rationale by prohibiting a plaintiff from recovering from one who is less negligent than himself.<sup>33</sup> The “50%” comparative negligence approach has two basic variations. The original and majority version is exemplified by those statutes which provide that a plaintiff is not barred from recovery when his negligence is “less than” or “not as great as” the negligence of the defendant or defendants.<sup>34</sup> The second version usually provides, as in the Pennsylvania Act, that a plaintiff’s contributory negligence will not bar recovery if it is “not greater than” the defendant’s or defendants’ negligence.<sup>35</sup> The significant

28. V. SCHWARTZ, *supra* note 5, § 3.2, at 46.

29. *Id.*

30. Pure comparative negligence exists in Alaska, California, Florida, Mississippi, New York, Rhode Island, and Washington. *Kaatz v. State*, 540 P.2d 1037 (Alas. 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *MISS. CODE ANN. § 11-7-15* (1972); *N.Y. CIV. PRAC. LAW §§ 1411-1413* (McKinney 1976); *R.I. GEN. LAWS §§ 9-20-4 to -4.1* (Supp. 1978); *WASH. REV. CODE ANN. §§ 4.22.010-.22.910* (Supp. 1977).

31. For a listing of comparative negligence statutes of limited application, see V. SCHWARTZ, *supra* note 5, at 387 app.

32. See *id.* § 2.1, at 33.

33. *Id.*

34. This system is currently in force in Arkansas, Colorado, Hawaii, Idaho, Kansas, Maine, Massachusetts, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, Utah, and Wyoming. *ARK. STAT. ANN. §§ 27-1763 to -1765* (Supp. 1977); *COLO. REV. STAT. § 13-21-111* (1973 & Supp. 1976); *HAW. REV. STAT. § 663-31* (Supp. 1975); *IDAHO CODE §§ 6-801 to -806* (Supp. 1978); *KAN. STAT. ANN. §§ 60-258a to -258b* (1976); *ME. REV. STAT. tit. 14, § 156* (Supp. 1978-1979); *MASS. GEN. LAWS ANN. ch. 231, § 85* (West Supp. 1979); *MINN. STAT. ANN. § 604.01* (West Supp. 1979); *N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3* (West Supp. 1978-1979); *N.D. CENT. CODE § 9-10-07* (1975); *OKLA. STAT. ANN. tit. 23, § 11* (West Supp. 1978-1979); *OR. REV. STAT. §§ 18.470-.510* (1977); *UTAH CODE ANN. §§ 78-27-37 to -43* (1977); *WYO. STAT. ANN. § 1-1-109* (1977).

35. See V. SCHWARTZ, *supra* note 5, § 2.1, at 33. This formula has been adopted in Connecticut, Montana, Nevada, New Hampshire, Texas, Vermont, and Wisconsin. *CONN. GEN. STAT. ANN. § 52-572h* (West Supp. 1978); *MONT. REV. CODES ANN. § 58-607.1* (Supp. 1977); *NEV. REV. STAT. § 41.141* (1977); *N.H. REV. STAT. ANN. § 507:7-a* (Supp. 1977); *TEX. REV. CIV. STAT. ANN. art. 2212a* (Vernon Supp. 1978); *Vt. STAT. ANN. tit. 12, § 1036* (1973); *Wis.*

difference between these two approaches occurs in a situation where a jury assesses the plaintiff's and defendant's negligence as equal. Under those circumstances, the plaintiff would not recover under the former version, but would recover under the latter. These two 50% systems are the most widely adopted method of apportioning liability.

The final type of comparative negligence statute is the "slight-gross" system of comparing negligence. Under this formulation, the plaintiff is allowed to recover when his negligence is slight and the defendant's negligence is gross by comparison.<sup>36</sup> Similar to the "50%" systems, a plaintiff's damages, in the event of recovery, are mitigated in proportion to his contributory negligence.<sup>37</sup> This approach has very limited acceptance, having been adopted in only two jurisdictions.<sup>38</sup>

As between plaintiffs and defendants, the Pennsylvania Act is clearly one of the "50%" comparative negligence systems, allowing recovery only if the claimant's negligence is equal to or less than 50%. When determining the amount of recovery between or among defendants, however, the contribution provisions of the statute operate more in the nature of a "pure" comparative negligence system, allowing recovery regardless of the relative proportions of negligence.<sup>39</sup> This blend of comparative negligence systems is not unique to Pennsylvania.<sup>40</sup> The Pennsylvania courts thus have the opportunity to draw from the experience of other jurisdictions when implementing the procedures mandated by the Act.

Wisconsin has been identified as the forerunner among those states which have adopted general comparative negligence statutes.<sup>41</sup> It has had a "50%" comparative negligence statute since 1931<sup>42</sup> and there have been many judicial decisions implementing and construing

STAT. ANN. § 895.045 (West 1978-1979) (amending WIS. STAT. ANN. § 895.045 (West 1966) ("not as great as")).

36. See V. SCHWARTZ, *supra* note 5, § 2.1, at 33.

37. *Id.*

38. This formula has been adopted in Nebraska and South Dakota. Act of Apr. 5, 1978, Legis. Bill No. 665, § 6, 1978 Neb. Laws 565 (to be codified at NEB. REV. STAT. § 25-1151), S.D. COMPILED LAWS ANN. § 20-9-2 (1967).

39. Section (b) provides that "[a]ny defendant who is . . . compelled to pay more than his percentage share may seek contribution." This right of recovery is operative regardless of the percentage of causal negligence of the defendant seeking a contribution recovery.

40. See, e.g., Packard v. Whitten, 274 A.2d 169 (Me. 1971); Bielski v. Schulze, 60 Wis. 2d 1, 114 N.W.2d 105 (1962).

41. See V. SCHWARTZ, *supra* note 5, § 2.1, at 33, § 3.5, at 74-75.

42. WIS. STAT. ANN. § 895.045 (West 1966) (amended 1971). The original Wisconsin statute was amended in 1971, changing the phrase "not as great as" to "not greater than." Act of June 22, 1971, ch. 47, 1971 Wis. Laws 50. As it presently reads, the statute allows a plaintiff who is found equally negligent with a defendant to recover. WIS. STAT. ANN. § 895.045 (West Supp. 1978-1979).

the language of the statute and the purposes of its enactment.<sup>43</sup> As the "50%" form of comparative negligence has become the most prevalent, the experience of these other states has created a large base of precedent for newly developing "50%" jurisdictions.

The rather limited legislative history of Pennsylvania's comparative negligence statute indicates that Pennsylvania has also decided to use Wisconsin as its model. Senator Henry G. Hager, one of the principal sponsors of the legislation, stated during a Senate floor debate on an amendment offered to his bill that the "bill comes almost exclusively from the Wisconsin statute . . . . It has worked very well in Wisconsin and it is my understanding and my hope that in Pennsylvania it will work the same way."<sup>44</sup> Although Senator Hager's remarks are a forceful indication that Pennsylvania's comparative negligence doctrine should develop as comparative negligence has developed in Wisconsin, the legislative intent is unclear. Notwithstanding Senator Hager's statement, the statute does not appear to have come "almost exclusively from the Wisconsin statute."<sup>45</sup> It is nonetheless submitted that Senator Hager's remarks are significant in establishing that the sponsors of the law had the Wisconsin enactment in mind when they formulated Pennsylvania's version. Similarities in language and purpose should therefore be given effect and, in such circumstances, the Pennsylvania approach should be modeled on that implemented in Wisconsin.

### C. Applying Authority From Other Jurisdictions

We have already mentioned the multitude of different approaches utilized by the various jurisdictions in implementing an apportionment system.<sup>46</sup> This should serve as a caveat to one who

43. See, e.g., cases cited note 6 *supra*.

44. 1 PA. LEG. J. 1707 (Senate 1976) (remarks of Sen. Hager). The remarks of Senator Hager were made during discussion of Senator Hill's proposed amendment to Pennsylvania Senate Bill 1237, which was designed to deny recovery to a plaintiff whose contributory negligence was equal to the causal negligence of the defendant or defendants and to provide for a special verdict procedure. For a discussion of the Hill Amendment, see text accompanying notes 196-201 *infra*.

45. Although portions of the first section of the Pennsylvania Act are similar to the Wisconsin statute, other portions differ considerably. The entire second section of the Pennsylvania Act has no counterpart in the Wisconsin enactment. Compare 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1978) with WIS. STAT. ANN. § 895.045 (West Supp. 1978-1979). The Pennsylvania Act appears to implement by legislation what Wisconsin has employed judicially. See note 40 and accompanying text *supra*. The first sentence of § (b) of the Act is identical to one of the sentences in the New Hampshire and Vermont statutes. See N.H. REV. STAT. ANN. § 507:7-a (Supp. 1977); VT. STAT. ANN. tit. 12, § 1036 (1973). A similar sentence also appears in the Kansas statute. See KAN. STAT. ANN. § 60-258a(d) (1976). The second paragraph of § (b) is similar to a provision in the New Jersey statute. See N.J. STAT. ANN. § 2A:15-5.3 (West Supp. 1978-1979).

46. See notes 28-38 and accompanying text *supra*.

searches for authority from other jurisdictions which may be applicable to Pennsylvania's experience with comparative negligence. The diversity of approaches, statutes, and judicial applications will provide an advocate with a myriad of precedents from which to draw support. Jurists and advocates alike should therefore be certain that the authority cited is reasonably applicable to the Pennsylvania comparative negligence situation.

The authors suggest four basic considerations which should be applied in determining the validity of authority: (1) the type of comparative negligence system adopted;<sup>47</sup> (2) the manner in which the comparative negligence or fault system was adopted;<sup>48</sup> (3) the similarity or difference in language in the comparative negligence statute;<sup>49</sup> and (4) the status and application of tort concepts within the jurisdiction prior to adoption of comparative negligence or comparative fault.<sup>50</sup> Using these considerations as a guide and starting point, it should be possible to isolate those precedents in other jurisdictions which are appropriate to identify the decisions which comport with the intent and spirit of the Pennsylvania comparative negligence statute.

### III. APPLICATION OF THE ACT TO RECOGNIZED TORT ACTIONS AND CLAIMS

When a comparative negligence statute is first enacted, questions arise as to whether the statute applies to claims on a liability theory other than common law negligence.<sup>51</sup> It would appear that the Act

47. It should be reiterated that Pennsylvania's comparative negligence system is not a "pure" system, except to the extent of contribution among joint tortfeasors. See notes 28-31 & 39 and accompanying text *supra*. The Pennsylvania system retains fault to the extent that the plaintiff is barred from recovering when his negligence exceeds that of the defendant or defendants. It is suggested that authority from "pure" jurisdictions be carefully applied in Pennsylvania.

48. The crucial distinction is whether the system was adopted by legislative enactment or by the judiciary. When the concept is adopted judicially, the comparative system is to be applied to all tort actions, claims, and doctrines which are conducive to apportionment. It is submitted that a jurisdiction is in a completely different analytical situation when the legislature has circumscribed the parameters of the doctrine's effect.

49. For a discussion of the similarity of Pennsylvania's statute to statutes in other jurisdictions, see note 45 *supra*. Cases construing similar language in these identified jurisdictions will be persuasive in Pennsylvania.

50. Some tort doctrines are labelled differently in different jurisdictions. Additionally, other tort doctrines, though carrying the same name, may have two distinct meanings in two separate jurisdictions. For an example of this situation, see notes 161-79 and accompanying text *infra*. To insure an accurate evaluation, the origin and application of the underlying tort doctrines must therefore be compared.

51. See, e.g., *Munoz v. Olin*, 76 Cal. App. 3d 85, 142 Cal. Rptr. 667 (1977) (comparative negligence not applicable in cases of intentional wrongdoing); *Busch v. Busch Constr., Inc.*, \_\_\_ Minn. \_\_\_, 262 N.W.2d 377 (1977) (comparative negligence applicable to product liability action based upon strict liability in tort).

by its express terms has foreclosed any argument in this area since section (a) provides that the Act will apply only to "actions brought to recover damages for negligence resulting in death or injury to person or property." In spite of similar limitations in the statutes of other jurisdictions, courts have construed their comparative negligence statutes to apply to other than common law negligence actions and claims.<sup>52</sup> Regardless of the restrictive language in the Act, it should also be noted that the Supreme Court of Pennsylvania retains the prerogative to judicially modify the common law to bring other tort actions and claims into conformity with the comparative principles which will be applied in common law negligence actions.

We now turn to an examination of the anticipated impact of the Comparative Negligence Act upon three other bases of liability in tort: intentional torts; willful, wanton, or reckless misconduct; and strict liability.

#### A. *Intentional Torts*

In Pennsylvania, as in all other jurisdictions, contributory negligence is not a defense to an action for an intentional tort.<sup>53</sup> It is submitted that this rule should be maintained and the Act should not be extended to include intentional torts. When a party actually intends to inflict harm upon the plaintiff, the plaintiff's inattentiveness should be irrelevant. Moreover, any conduct on the part of the plaintiff, though denominated contributory negligence, which is of such a consequence as to be compared with the intentional action of the defendant, is more likely to be in the nature of one of the common law defenses to intentional torts, such as consent, self-defense, or defense of others.

The few jurisdictions which have dealt specifically with this issue under a comparative negligence doctrine have been unanimous in ruling that comparative negligence has no application where the defendant's conduct consists of intentional or deliberate wrongdoing.<sup>54</sup> The same rule should be followed in Pennsylvania.

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52. See, e.g., *Busch v. Busch Constr., Inc.*, \_\_\_ Minn. \_\_\_, 262 N.W.2d 377 (1977) (comparative negligence applied to strict liability theory); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (same).

53. *Kasanovich v. George*, 348 Pa. 199, 202, 34 A.2d 523, 525 (1943); *Bauchspies v. Obert*, 51 Pa. Super. Ct. 441, 445 (1912). Dean Prosser has in fact noted that the defense of contributory negligence has never been extended to intentional torts. W. PROSSER, *supra* note 5, § 65, at 426.

54. See *Munoz v. Olin*, 76 Cal. App. 3d 85, 142 Cal. Rptr. 667 (1977); *Stephan v. Lynch*, \_\_\_ Vt. \_\_\_, 388 A.2d 376 (1978); *Schulze v. Cleever*, 10 Wis. 2d 540, 103 N.W.2d 560 (1960).

### B. *Willful, Wanton, or Reckless Misconduct*

More difficulty is encountered with the application of the concept of willful, wanton, or reckless misconduct than with the application of intentional wrongdoing in a comparative negligence system. Rather extensive analyses by the Pennsylvania appellate courts have seemingly placed this concept between that which is generally recognized as common law negligence and that form of deliberate conduct which is generally labelled an intentional tort.<sup>55</sup> The concept of some form of culpability between intent and negligence has been defined and applied in Pennsylvania under a variety of terms, including "willful," "wanton," and "reckless."<sup>56</sup> Moreover, the Pennsylvania courts have strained to further define this gradation into three levels of culpability which are apparently distinguishable from one another.<sup>57</sup> Whatever the rubric applied, all three forms of this gradation operate to negate a plaintiff's contributory negligence and thus permit recovery.<sup>58</sup>

The notion of culpability which is greater than negligence and less than intentional conduct appears to have been introduced into Pennsylvania jurisprudence in the case of *Gillespie v. McGowan*.<sup>59</sup> The rule was expanded and eventually applied to allow recovery in a series of situations where the plaintiff, because of some legal handicap, such as contributory negligence, would not otherwise be allowed to recover. The most notable of these situations is illustrated by cases in which the plaintiff was a trespasser or an uninvited party on a railroad or subway right of way,<sup>60</sup> an infant trespasser on a train

55. See *Kasanovich v. George*, 348 Pa. 199, 34 A.2d 523 (1943). The *Kasanovich* court stated:

It must be understood, of course, that wanton misconduct is something different from negligence however gross—different not merely in degree but in kind, and evincing a different state of mind on the part of the tortfeasor. Negligence consists of inattention or inadvertence, whereas wantonness exists where the danger to the plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong.

*Id.* at 203, 34 A.2d at 525.

56. See note 65 *infra*.

57. See note 66 *infra*.

58. See, e.g., *Fugagli v. Camasi*, 426 Pa. 1, 229 A.2d 735 (1967) (wanton misconduct); *Misorski v. Pennsylvania R.R.*, 348 Pa. 204, 34 A.2d 526 (1943) (reckless or wanton misconduct).

59. 100 Pa. 144 (1882). The *Gillespie* court stated that "[i]t is settled by abundant authority that to enable a trespasser to recover for an injury he must do more than show negligence. It must appear there was a wanton or intentional injury inflicted on him by the owner." *Id.* at 150.

60. See, e.g., *Evans v. Philadelphia Transp. Co.*, 418 Pa. 567, 212 A.2d 440 (1965); *Zawacki v. Pennsylvania R.R.*, 374 Pa. 89, 97 A.2d 63 (1953); *Frederick v. Philadelphia Rapid Transit Co.*, 337 Pa. 136, 10 A.2d 576 (1940); *Peden v. Baltimore & O. R.R.*, 324 Pa. 444, 188 A. 586 (1936); *Cover v. Hershey Transit Co.*, 290 Pa. 551, 139 A. 266 (1927).

or wagon,<sup>61</sup> a railroad passenger who had released the railroad from liability for negligence,<sup>62</sup> or a person who was simply contributorily negligent.<sup>63</sup> Whatever the application, the intent in each case seemed to be to allow recovery to the plaintiff because the conduct of the defendant was so culpable as to compel recovery regardless of the plaintiff's legal impediment.<sup>64</sup>

In its early application in Pennsylvania, the concept of culpability between that of negligence and intentional conduct passed under several names, many of which were used simultaneously and interchangeably.<sup>65</sup> Eventually, however, the new gradation of culpability was further divided into the concepts of "willful," "wanton," and "reckless."<sup>66</sup> As the meaning of these concepts evolved, "willful" misconduct came to be defined as something in the nature of an intentional tort.<sup>67</sup> "Wanton" misconduct, on the other hand, was applied in a situation where a defendant, having reason to know of the plaintiff's peril, ignored the peril and proceeded in the face of it.<sup>68</sup> Finally, "reckless" misconduct seems to have been applied only

61. *Petrowski v. Philadelphia & R. Ry.*, 263 Pa. 531, 107 A. 381 (1919); *McGinnis v. Peoples Bros.*, 249 Pa. 335, 94 A. 925 (1915).

62. *Turek v. Pennsylvania R.R.*, 369 Pa. 341, 85 A.2d 845 (1952); *Bowman v. Pennsylvania R.R.*, 299 Pa. 558, 149 A. 877 (1930).

63. *Millili v. Alan Wood Steel Co.*, 418 Pa. 154, 209 A.2d 817 (1965); *Kasanovich v. George*, 348 Pa. 199, 34 A.2d 523 (1943).

64. See *Kasanovich v. George*, 348 Pa. 199, 34 A.2d 523 (1943). In *Kasanovich*, the court reasoned that contributory negligence should not bar recovery where the defendant had exhibited "at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong." *Id.* at 203, 34 A.2d at 525.

65. Compare *Petrowski v. Philadelphia & R. Ry.*, 263 Pa. 531, 107 A. 381 (1919) ("intentional," "willful," and "wanton" used simultaneously and interchangeably to describe the doctrine) with *Bowman v. Pennsylvania R.R.*, 299 Pa. 558, 149 A. 877 (1930) ("willful" and "wanton" combined together in considering whether there was sufficient evidence in the lower court of "willful, wanton, or gross negligence").

66. See *Evans v. Philadelphia Transp. Co.*, 418 Pa. 567, 212 A.2d 440 (1965). The *Evans* court reasoned:

Correctly speaking, wilful misconduct means that the actor desired to bring about the result that followed, or at least that he was aware that it was substantially certain to ensue. This, of course, would necessarily entail actual prior knowledge of the trespasser's peril. Wanton misconduct, on the other hand, "means that 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 . . . ."

*Id.* at 573-74, 212 A.2d at 443, quoting W. PROSSER, *LAW OF TORTS* § 33, at 151 (2d ed. 1955). See also *Saaybe v. Penn Cent. Transp. Co.*, 438 F. Supp. 65, 69 n.6 (E.D. Pa. 1977) (all three concepts defined).

67. See *Bowman v. Pennsylvania R.R.*, 299 Pa. 558, 149 A. 877 (1930). The *Bowman* court stated that "[t]o be wilful the harm must have been intentionally inflicted, and to be wanton must have been committed with a reckless regard [sic] of the rights of others." *Id.* at 567, 149 A. at 880.

68. See *Evans v. Philadelphia Transp. Co.*, 418 Pa. 567, 212 A.2d 440 (1965). For a discussion of *Evans*, see note 66 *supra*; note 70 *infra*.

in those cases in which the Pennsylvania appellate courts have dealt with the "discovered peril" doctrine.<sup>69</sup>

Upon an examination of the cases which have attempted to distinguish "willful" and "wanton" misconduct, one readily observes the courts' attempts to liberalize the application of "wanton" misconduct so as to allow a contributorily negligent plaintiff to recover. Indeed, the Supreme Court of Pennsylvania, although mentioning the word "reckless," appears to have been measuring the evidence of "wanton" misconduct by the reasonable care standard of common law negligence.<sup>70</sup>

Another interesting observation in this area of tort law is the similarity of the application of "willful" and "wanton" misconduct to that of the "discovered peril" doctrine.<sup>71</sup> The sharp line of distinction<sup>72</sup> between these concepts has essentially been inconsequential since the application of either doctrine operates to negate the plain-

69. See text accompanying note 71 *infra*. For a discussion of the discovered peril doctrine, see notes 182-95 and accompanying text *infra*.

70. See *Evans v. Philadelphia Transp. Co.*, 418 Pa. 567, 212 A.2d 440 (1965). Regarding the standard of knowledge needed to apply the doctrine, the supreme court stated:

These cases, as well as the Restatement of Torts, clearly indicate that if the actor . . . at least has knowledge of sufficient facts to cause a *reasonable man* to realize the existing peril for a sufficient period of time beforehand to give him a *reasonable opportunity* to take means to avoid the accident, then he is guilty of wanton misconduct if he recklessly disregards the existing danger.

*Id.* at 574, 212 A.2d at 444 (emphasis added). Although invoking the notion of "reckless disregard" in the definition of duty, the *Evans* court implied that if the defendant had negligently failed to realize the peril of the plaintiff and, further, was negligent in failing to avoid the accident, he would have acted "wantonly." See *id.*

In *Frederick v. Philadelphia Rapid Transit Co.*, 337 Pa. 136, 10 A.2d 576 (1940), the court stated that "it is wanton negligence, within the meaning of the law, to fail to use ordinary and reasonable care to avoid injury to a trespasser after his presence has been ascertained." *Id.* at 140, 10 A.2d at 576 (emphasis in original) (citations omitted).

See also *Petrowski v. Philadelphia & R. Ry.*, 263 Pa. 531, 107 A. 381 (1919). The *Petrowski* court stated: "Finally, where one, knowing that a child of tender years is trespassing upon a vehicle under his care, negligently acts in such a manner as to injure the trespasser, the conduct of the transgressor is viewed in law as 'intentional,' or willful, and 'wanton' . . ." *Id.* at 536, 107 A. at 382 (emphasis added). For a review of authority in this area and a rather candid analysis, see *Evans v. Philadelphia Transp. Co.*, 418 Pa. at 581-96, 212 A.2d at 447-55 (Mussmanno, J., dissenting).

71. For a discussion of the discovered peril doctrine, see notes 182-95 and accompanying text *infra*.

72. The difficulty of defining the distinctions among common law negligence, "wanton" misconduct, and the "discovered peril doctrine" is amply demonstrated by the case of *Millili v. Alan Wood Steel Co.*, 418 Pa. 154, 209 A.2d 817 (1965). Moreover, Dean Prosser has observed:

This "conscious last clear chance," sometimes distinguished as the "doctrine of discovered peril," occasionally has been explained on the basis that negligence after the danger is known to the defendant necessarily involves a greater degree of fault, and amounts to "willful" or "wanton" misconduct, to which the ordinary negligence of the plaintiff is no defense.

W. PROSSER, *supra* note 5, § 66, at 429 (footnote omitted).



tiff's contributory negligence.<sup>73</sup> The major difference between the approaches is that in the application of "wanton" misconduct, the focus is on culpability, whereas the application of the "discovered peril" doctrine focuses on causation.<sup>74</sup> Whatever the focus, both doctrines allow a plaintiff to recover, regardless of his contributory negligence, where it would otherwise be unjust to deny recovery.

Although the application of the concepts of "willful," "wanton," and "reckless" misconduct served a valid purpose in tempering the harsh effects of contributory negligence when a defendant's conduct was extremely culpable in comparison to the plaintiff's negligence, the concepts have little, if any, purpose in a comparative negligence system. The doctrines were simply attempts to apply a comparative fault system in a traditional common law contributory negligence jurisdiction.<sup>75</sup> Although Pennsylvania courts have endeavored to distinguish these concepts from ordinary negligence,<sup>76</sup> the attempts must be recognized as merely a means of circumventing the contributory negligence rule in situations where its application would produce a manifestly unjust result.<sup>77</sup>

Approaching the issue from another perspective, one might ask the purpose to be served by retaining the wantonness or recklessness concept in a comparative negligence situation. Since the purpose of comparative negligence is to eliminate the "all-or-nothing" approach to tort recovery,<sup>78</sup> there appears to be little justification for retaining

73. See cases cited note 58 *supra*. See also W. PROSSER, *supra* note 5, § 65, at 426, § 66, at 427.

74. See generally W. PROSSER, *supra* note 5, § 66, at 429-30.

75. According to Dean Prosser, cases in which courts have held that ordinary negligence on the part of a plaintiff will not bar recovery where the defendant's conduct was "willful," "wanton," or "reckless," form "in reality a rule of comparative fault . . . and the court is refusing to set up the lesser fault against the greater." *Id.* § 66, at 426. See also V. SCHWARTZ, *supra* note 5, § 5.1, at 99-100; F. HARPER & F. JAMES, 2 THE LAW OF TORTS § 22.6, at 1215 (1956).

76. See notes 55 & 67 *supra*.

77. This motivation is probably best evident in the case of *Kasanovich v. George*, 348 Pa. 199, 34 A.2d 523 (1943), where the Supreme Court of Pennsylvania, after having carefully framed the concept of "wanton misconduct" in the area of culpability between intentional torts and ordinary negligence, endeavored to rationalize that its action was not in contravention of the rejection in Pennsylvania of comparative negligence. *Id.* at 203, 34 A.2d at 525. The court stated:

Negligence consists of inattention or inadvertence, whereas wantonness exists where the danger to the plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong. Having in mind this characterization of wanton misconduct, it will be readily seen that the principle that contributory negligence is not a defense to an action for a tort involving such misconduct is not in conflict with the rejection in Pennsylvania of the doctrines of "comparative negligence" and "last clear chance" hereinbefore referred to.

*Id.*

78. See 1 PA. LEG. J. 1705 (Senate 1976) (remarks of Sen. Kelley).

the "all-or-nothing" approach in particular contexts. Although the conduct of the defendants has been described as "wanton" or "reckless," it is submitted that it is simply a high degree or percentage of ordinary negligence.<sup>79</sup> There apparently is no harm when such conduct is compared to that of the plaintiff's contributory negligence. If the conduct of the defendant is in fact so culpable as to constitute something more than negligence, it should reduce the plaintiff's contributory negligence by comparison and have little effect on the plaintiff's recovery. A countervailing consideration is that retention of a separate gradation of culpability may encourage claimants to denominate the defendant's conduct as "willful," "wanton," or "reckless" in order to circumvent application of the comparative negligence doctrine.

The majority of jurisdictions which have considered the impact of comparative negligence on "wanton misconduct" or "gross" negligence<sup>80</sup> have applied comparative negligence even where defendant's conduct was "grossly" negligent, "reckless," or "wanton."<sup>81</sup> Only one, now repealed, comparative negligence statute has made specific mention of "willful and wanton conduct."<sup>82</sup> Three jurisdictions, however, have specifically included "gross negligence" in their comparative negligence statutes.<sup>83</sup> The remaining statutes do not expressly address the issue.

The absence of specific mention of "gross" negligence or "wanton misconduct" has not foreclosed the application of comparative negligence principles to these doctrines. Most notable among those cases extending comparative negligence is the Supreme Court of Wisconsin's decision in *Bielski v. Schulze*.<sup>84</sup> In *Bielski*, the court deter-

79. The authors wonder by what standard recklessness is to be measured if not by the standard of reasonable care. One must then ask whether there is a standard of reckless care. If so, one must further question whether the jury is to consider what a reckless person would do under the circumstances.

80. These terms are used interchangeably in some jurisdictions. See *Bielski v. Schulze*, 16 Wis. 2d 1, 15-16, 114 N.W.2d 105, 112 (1962). Compare *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir. 1977) (Oregon definition of "gross negligence") with *Evans v. Philadelphia Transp. Co.*, 418 Pa. 567, 574, 212 A.2d 440, 443 (1965) (definition of "wanton misconduct").

81. See notes 85-98 and accompanying text *infra*.

82. Act of Mar. 12, 1973, No. 303, §§ 1-3, 1973 Ark. Acts 928 (repealed 1975). The statute provided: "The word 'fault' as used in this Act includes negligence, willful and wanton misconduct, supplying of a defective product in an unreasonably dangerous condition, or any other act or admission or conduct actionable in tort." *Id.* The above section was later amended and now provides: "The word 'fault' as used in this Act . . . includes any act, omission, conduct, risk assumed, breach of warranty or breach of any legal duty which is a proximate cause of any damages sustained by any party." ARK. STAT. ANN. § 27-1763 (Supp. 1977).

83. See IDAHO CODE § 6-801 (Supp. 1978); NEV. REV. STAT. § 41.141 (1977); UTAH CODE ANN. § 78-27-37 (1977).

84. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

mined that gross negligence, which encompasses willful and wanton misconduct, generally constitutes a higher degree of negligence.<sup>85</sup> The court concluded that the doctrine of gross negligence should be abolished since it was a vehicle of social policy which no longer fulfilled a purpose under comparative negligence.<sup>86</sup> A federal court applying the Arkansas comparative negligence statute reached a similar result in *Billingsley v. Westrac Co.*<sup>87</sup> Concerned that the Arkansas statute<sup>88</sup> would be inapplicable whenever the defendant's conduct was characterized as something other than negligence, the *Billingsley* court construed the statute as applying to actions based upon a defendant's willful and wanton misconduct.<sup>89</sup> This decision was apparently endorsed by the Arkansas legislature when it subsequently amended the Arkansas comparative negligence statute to define "fault," rather than "negligence," as including "willful and wanton conduct."<sup>90</sup>

Moreover, Florida's comparative negligence system has also been construed to apply to that area of culpability which falls between or-

85. *Id.* at 14-15, 114 N.W.2d at 112.

86. *Id.* at 14-19, 114 N.W.2d at 111-14. The court stated:

One of the main reasons for the growth of the doctrine of gross negligence was to ameliorate the hardships of the common-law doctrine of contributory negligence which barred recovery from a tort-feasor to one negligently causing, however slightly, his own injury. However, gross negligence, being defined as different in kind and not in degree, could not be compared to ordinary negligence and, hence, contributory negligence was no bar to recovery. Various guest statutes couched in terms of wilfully, wantonly, and recklessly, although not adopted in Wisconsin, also influenced the growth of the doctrine of gross negligence to reach the socially desirable result. The hardship of the common-law doctrine of barring recovery in cases involving ordinary negligence was recognized by the passage of . . . [the Wisconsin comparative negligence law] in 1931, and the old principle that a tort-feasor should not profit from his wrongdoing was modified by that section to apply only when the contributory negligence was equal to or greater than the defendant's negligence. This section was a limited recognition of the principle that the negligence or tort-feasors causing an injury ought to be evaluated on a relative fault basis. This recognition is based on the truism that when one tort-feasor is prevented from profiting from his own wrong, you necessarily allow the other tort-feasor, who is not compelled to pay, to profit from his wrong.

The doctrine of gross negligence as a vehicle of social policy no longer fulfills a purpose in comparative negligence. Much of what constituted gross negligence will be found to constitute a high percentage of ordinary negligence causing the harm. Obviously, we are stressing the basic goal of the law of negligence, the equitable distribution of the loss in relation to the respective contribution of the faults causing it.

*Id.* at 16-17, 114 N.W.2d at 112-13 (footnotes omitted).

87. 365 F.2d 619 (8th Cir. 1966).

88. ARK. STAT. ANN. §§ 27-1730.1-1730.2 (1962) (current version at ARK. STAT. ANN. §§ 27-1763 to -1765 (Supp. 1977)). The statute construed by the *Billingsley* court applied to "all actions hereafter accruing for negligence." ARK. STAT. ANN. § 27-1730.2 (repealed 1973) (emphasis added).

89. 365 F.2d at 623.

90. Act of Mar. 12, 1973, No. 303, §§ 1-3, 1973 Ark. Acts 928 (1973) (repealed 1975). See note 89 *supra*. The current definition of "fault" is even more liberal. See note 82 *supra*.

dinary negligence and an intentional tort.<sup>91</sup> In addition, although the impact of California's comparative negligence system in this area has not yet been directly addressed, the Supreme Court of California, in judicially adopting the comparative negligence concept, noted "that a comprehensive system of comparative negligence should allow for the apportionment of damages in all cases involving misconduct which falls short of being intentional."<sup>92</sup>

The only state appellate court which has retained the common law rule in the face of a comparative negligence statute is the Superior Court of New Jersey, in *Draney v. Bachman*.<sup>93</sup> The court in *Draney* viewed willful, wanton, and reckless conduct as having been "elevated to the status of a separate tort"<sup>94</sup> which was not amenable to apportionment.<sup>95</sup> Although the court distinguished "wanton misconduct" from negligence, it "recognized that there was no simple formula that could describe with exactness the difference between negligence and willful, and wanton misconduct."<sup>96</sup> Using a similar analysis, the Ninth Circuit has also refused to offset a defendant's gross negligence with a plaintiff's contributory negligence despite Oregon's comparative negligence statute.<sup>97</sup>

Joining one of the noted commentators in this field,<sup>98</sup> the authors suggest the elimination of the concept of willful, wanton, and reckless misconduct with the adoption of comparative negligence in Pennsylvania.

### C. Strict Tort Liability

Strict tort liability is well established in Pennsylvania jurisprudence and has been applied to situations involving liability for ab-

91. See *Tampa Elec. Co. v. Stone & Webster Eng'r. Corp.*, 367 F. Supp. 27 (M.D. Fla. 1973) (applying Florida law). The court stated that where the plaintiff claims that the defendants were grossly negligent, "the equitable cause is to allow plaintiff's negligence to diminish its recovery of compensatory damages. If the defendants' negligence is truly 'gross', the plaintiff's negligence will appear that much smaller in comparison." *Id.* at 38.

92. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 826, 532 P.2d 1226, 1241, 119 Cal. Rptr. 858, 873 (1975) (citation omitted).

93. 138 N.J. Super. 503, 351 A.2d 409 (Law Div. 1976).

94. *Id.* at 513, 351 A.2d at 414.

95. *Id.* at 513-14, 351 A.2d at 414-15.

96. *Id.* at 513, 351 A.2d at 414. The authors suggest that the Superior Court of New Jersey has found a distinction without a difference.

97. *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 465 (9th Cir. 1977), *construing* OR. REV. STAT. §§ 18.470-510 (1977).

98. V. SCHWARTZ, *supra* note 5, § 5.3, at 108.

normally dangerous activities,<sup>99</sup> products liability,<sup>100</sup> and liability for material misrepresentations in connection with the sale of a product.<sup>101</sup> Although evidence of the ordinary negligence of a plaintiff may be a relevant consideration in some strict tort liability situations,<sup>102</sup> Pennsylvania appellate courts have repeatedly rejected the notion that a plaintiff's contributory negligence can be a defense in a strict tort liability case.<sup>103</sup> One must therefore consider whether

99. *Lobozzo v. Adam Eidemiller, Inc.*, 437 Pa. 360, 263 A.2d 432 (1970); *Federoff v. Harrison Constr. Co.*, 362 Pa. 181, 66 A.2d 817 (1949). See also *Mulchanock v. Whitehall Cement Mfg. Co.*, 253 Pa. 262, 98 A. 554 (1916) (objects hurled upon plaintiff's property during blasting operations actionable in trespass).

100. *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966) (adopting RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

101. *Klages v. General Ordnance Equip. Corp.*, 240 Pa. Super. Ct. 356, 367 A.2d 304 (1976) (adopting RESTATEMENT (SECOND) OF TORTS § 402B (1965)).

102. See *McCown v. International Harvester Co.*, 463 Pa. 13, 19-20, 342 A.2d 381, 384 (1975) (Pomeroy, J., concurring). Justice Pomeroy stated:

This is not to say, however, that evidence of ordinary negligence on the part of a plaintiff is never relevant in a Section 402A action; such evidence may bear directly upon the determination of whether the plaintiff has proved all the elements necessary to make out a cause of action. Thus, negligence in the use of a product may tend to show that the plaintiff caused a defect and therefore that the product was not defective when sold . . . . Again, if the negligent use of a product amounts to abnormal use, it may be inferred that the product was not defective at all, for a product is not defective if it is safe for normal handling and use . . . . Similarly, negligence in the use of a product may have a bearing on the question whether a defect in a product was the legal cause of the plaintiff's injury . . . .

What has been said is not intended as an exhaustive listing of the purposes for which evidence of the plaintiff's negligence may be relevant in Section 402A cases. It is intended merely to indicate that, although such negligence is not per se a bar to recovery, it may nevertheless have that effect in a proper case where it negates an essential element of the cause of action.

*Id.* (citations omitted).

See also Seidelson, *The 402A Defendant and the Negligent Actor*, 15 DUQ. L. REV. 371 (1977). This commentator reasoned:

If a court decides, as I think it should, that contributory negligence is a defense not available to the 402A defendant, the court must be continually sensitive to the necessity for distinguishing between that offered evidence which indicates only contributory negligence (and is therefore inadmissible), and that evidence which, though implying fault, may be admissible as tending to indicate either a legitimate liability-defeating fact, such as a non-contemplatable misuse of a product which although defective is not unreasonably dangerous, or a matter affecting creditability.

*Id.* at 383.

103. See *McCown v. International Harvester Co.*, 463 Pa. 13, 342 A.2d 381 (1975) (contributory negligence does not bar actions brought under RESTATEMENT (SECOND) OF TORTS § 402A (1965)); *Klages v. General Ordnance Equip. Corp.* 240 Pa. Super. Ct. 356, 367 A.2d 304 (1976) (§ 402B). Section 402A provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and

Pennsylvania's comparative negligence statute will have any application to cases arising under strict tort liability. With the advent of a new social consciousness in the field of products liability, and the corresponding liberalization of the standards of recovery in products liability situations,<sup>104</sup> this determination becomes particularly significant in actions arising under section 402A of the Restatement (Second) of Torts.<sup>105</sup> Our examination of the Act's impact on strict tort liability, thus, focuses on the products liability field.

The Pennsylvania Comparative Negligence Act has been expressly limited in section (a) to "actions brought to recover damages for negligence." On its face, the Act, therefore excludes strict liability. Any argument that the legislature was actually intending to include strict tort liability in the definition of "negligence" contradicts prior Pennsylvania judicial authority. First, strict tort liability, as applied in Pennsylvania, has always been considered liability without fault or proof of negligence on the part of the defendant.<sup>106</sup> Additionally, contributory negligence has been abolished as a defense to a strict tort liability action in Pennsylvania.<sup>107</sup> Moreover, the Supreme

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402B provides:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

*Id.* § 402B.

See also *McCown v. International Harvester Co.*, 463 Pa. at 17 n.5, 342 A.2d at 382 n.5, citing *Federoff v. Harrison Constr. Co.*, 362 Pa. 181, 66 A.2d 817 (1949). In *Federoff*, the court adopted a provision of the Restatement concerning ultrahazardous activity which eliminated the defense of contributory negligence. 362 Pa. at 183, 66 A.2d at 817, citing RESTATEMENT OF TORTS § 519 (1938).

104. See *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). In *Berkebile*, the Supreme Court of Pennsylvania held that a manufacturer could be held liable under RESTATEMENT (SECOND) OF TORTS § 402A (1965), without any showing of negligence. 462 Pa. at 94-95, 337 A.2d at 899. In *Azzarello*, the supreme court held that the use of the term "unreasonably dangerous" in a jury instruction in a § 402A case was reversible error. 480 Pa. at 559-60, 391 A.2d at 1027. For the text of § 402A, see note 84 *supra*.

105. RESTATEMENT (SECOND) OF TORTS § 402A (1965). For the text of § 402A, see note 103 *supra*.

106. See *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). In *Berkebile*, former Chief Justice Jones stated:

The crucial difference between strict [*sic*] liability and negligence is that the existence of due care, whether on the part of seller or consumer, is irrelevant. The seller is responsible for injury caused by his defective product even if he "has exercised all possible care in the preparation and sale of his product."

*Id.* at 94, 337 A.2d at 899, quoting RESTATEMENT (SECOND) OF TORTS § 402A (1965).

107. See *McCown v. International Harvester Co.*, 463 Pa. 13, 342 A.2d 381 (1975). See also cases cited note 104 *supra*.

Court of Pennsylvania has carefully avoided any imputation of negligence concepts or principles in actions arising under section 402A.<sup>108</sup>

Despite identical restrictions limiting the application of comparative negligence statutes to actions for "negligence," some courts of other jurisdictions have construed their respective statutes to apply to products liability actions arising under section 402A. In *Dippel v. Sciano*,<sup>109</sup> the Supreme Court of Wisconsin in dicta stated that strict tort liability actions under section 402A were subject to Wisconsin's comparative negligence law.<sup>110</sup> The court found no difficulty in combining negligence principles with strict liability, concluding that proof of the necessary elements in a strict liability action in Wisconsin would constitute a finding of negligence per se.<sup>111</sup> Conduct comprising traditional common law contributory negligence has therefore been retained as a defense<sup>112</sup> and as a factor in apportioning damages in a products liability action in Wisconsin.<sup>113</sup> Minnesota subsequently followed Wisconsin's lead, by applying its comparative negligence statute to cases arising under section 402A,<sup>114</sup> and the Supreme Court of New Hampshire has ruled that the principles of comparative negligence, rather than the terms of the state's legislative enactment, are applicable in strict liability cases.<sup>115</sup> In addition, federal courts construing the comparative negligence statutes of New Hampshire,<sup>116</sup> Idaho,<sup>117</sup> and the Virgin Islands<sup>118</sup> have also extended

108. See note 104 *supra*.

109. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

110. *Id.* at 461-62, 155 N.W.2d at 64, *construing* WIS. STAT. ANN. § 895.045 (West 1966) (amended 1971).

111. 37 Wis. 2d at 461-62, 155 N.W.2d at 64.

112. *Id.* at 460, 155 N.W.2d at 63. Voluntary assumption of the risk, which had previously been a complete bar to recovery in strict liability tort cases, has been merged into contributory negligence in Wisconsin. See *Powers v. Hunt-Wesson Foods, Inc.*, 64 Wis. 2d 532, 536-37, 219 N.W.2d 393, 395 (1974).

113. *Powers v. Hunt-Wesson Foods, Inc.*, 64 Wis. 2d 532, 536-37, 219 N.W.2d 393, 395 (1974).

114. *Busch v. Busch Constr., Inc.*, \_\_\_ Minn. \_\_\_, 262 N.W.2d 377 (1977). In *Marier v. Memorial Rescue Serv., Inc.*, 296 Minn. 242, 207 N.W.2d 706 (1973), the Supreme Court of Minnesota held that it would adopt the Supreme Court of Wisconsin's interpretations of the Wisconsin comparative negligence statute, WIS. STAT. ANN. § 895.045 (West Supp. 1978-1979), in interpreting its own comparative negligence law since Minnesota's statute, MINN. STAT. ANN. § 604.01 (West Supp. 1979), was based on the Wisconsin model. 296 Minn. at 244-46, 207 N.W.2d at 708-09.

115. *Thibault v. Sears, Roebuck & Co.*, \_\_\_ N.H. \_\_\_, 395 A.2d 843 (1978).

116. N.H. REV. STAT. ANN. § 507:7-a (Supp. 1977), *construed in* *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972). It should be noted that contributory negligence was a defense to a strict products liability action in New Hampshire prior to the enactment of the comparative negligence statute. *Stephan v. Sears, Roebuck & Co.*, 110 N.H. 248, 266 A.2d 855 (1970).

117. *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976), *construing* IDAHO CODE § 6-801 to -806 (Supp. 1978), The *Sun Valley* court remarked:

the respective enactments to products liability cases. Conversely, Colorado,<sup>119</sup> Oklahoma,<sup>120</sup> and a federal court applying Nebraska law<sup>121</sup> have refused to extend comparative negligence statutes limited to "negligence" actions to products liability actions.

These diverse approaches leave little consistent precedent and authority for the courts of Pennsylvania to follow.

Given the careful manner in which Pennsylvania courts have distinguished strict liability from negligence, however,<sup>122</sup> the authors

The rationale of Idaho's comparative negligence statute extends to a comparison of all legal causes of the plaintiff's injuries and results in a sensible and fair method of loss allocation. No case has come before the Supreme Court of Idaho raising this issue. However, it is the view of this Court that the Idaho Supreme Court would, if presented with this issue in a products liability case, apply comparative causation. The result also follows from the wording of Idaho Code § 6-801 wherein gross negligence is compared with negligence. Likewise, courts in Idaho, as well as this court, have been comparing negligence per se with ordinary negligence under Idaho Code § 6-801. Strict liability, like negligence per se, is equally capable of causal comparison.

411 F. Supp. at 603 (footnotes omitted), citing *Dipple v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

118. *Murray v. Beloit Power Sys., Inc.*, 450 F. Supp. 1145 (D.V.I. 1978), *construing* V.I. CODE ANN. tit. 5, § 1451 (Supp. 1977). In *Murray*, the court adopted and applied the position and policy considerations of the Supreme Court of Wisconsin to the Virgin Islands' statute. 450 F. Supp. at 1147. The district court commented that "both plaintiff's want of ordinary due care in his use of the product and plaintiff's unreasonable exposure to a known and appreciated risk of injury should work to diminish plaintiff's recovery in a § 402A type action in proportion to the amount of causative culpable conduct attributable to plaintiff." *Id.* (footnote omitted).

119. *Kinard v. Coats Co.*, 37 Colo. App. 555, 553 P.2d 835 (1976) (cert. denied), *construing* COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1976). The court remarked:

Although some other jurisdictions have chosen to apply comparative negligence to products liability cases, . . . in our view the better-reasoned position is that comparative negligence has no application to products liability actions under § 402A.

Products liability under § 402A does not rest upon negligence principles, but rather is premised on the concept of enterprise liability for casting a defective product into the stream of commerce . . . Thus, the focus is upon the nature of the product, and the consumer's reasonable expectations with regard to that product, rather than on the conduct either of the manufacturer or of the person injured because of the product . . .

What defendant proposes here is that we inject negligence concepts into an area of liability which rests on totally different policy considerations.

37 Colo. App. at 557, 553 P.2d at 837 (citations omitted).

120. *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974), *construing* OKLA. STAT. ANN. tit. 23, § 11 (West Supp. 1978-1979). The court found that Oklahoma's comparative negligence statute had no application to products liability cases because the statute had been limited to "negligence" actions. 521 P.2d at 1367. The court reasoned that products liability cases were not based on negligence and were not to be treated as a negligence theory of recovery. *Id.* The court, however, retained voluntary assumption of the risk of a known defect as a complete bar to recovery in products liability cases. *Id.* at 1366.

121. *Melia v. Ford Motor Co.*, 534 F.2d 795, *construing* NEB. REV. STAT. § 25-1151 (1964) (amended 1978). The court noted that application of Nebraska's comparative negligence statute would be extremely confusing and inappropriate in a strict liability case. 534 F.2d at 802. The *Melia* court reasoned that proof of negligence was not required under strict liability, but findings of plaintiff and defendant negligence were required to trigger the Nebraska comparative negligence statute. *Id.* In 1978, the Nebraska comparative negligence statute was modified to encompass strict liability. Act of Apr. 5, 1978, Legis. Bill No. 665, § 6, 1978 Neb. Laws 565 (to be codified at NEB. REV. STAT. § 25-1151).

122. See *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975).



maintain that the Act will not be directly applied to strict liability actions in Pennsylvania.

There is, nonetheless, the remaining consideration of whether the doctrine of strict liability should be judicially modified to bring it into conformity with the new apportionment system. It should be remembered that strict tort liability in Pennsylvania is a judicially created doctrine.<sup>123</sup> Consequently, the Supreme Court of Pennsylvania retains the prerogative to change or modify the doctrine as it deems appropriate.<sup>124</sup> A decision to do so will depend upon several important considerations concerning the philosophy of products liability and the countervailing notion of apportioning fault.

It should be noted that many of these policy considerations have been evaluated by the appellate courts of Alaska,<sup>125</sup> California,<sup>126</sup> and Florida,<sup>127</sup> which have judicially implemented the comparative negligence, or more appropriately, the comparative fault, concept into the tort law of their respective jurisdictions. Weighing the underlying social policy considerations involved in a decision to extend comparative fault to strict liability situations, these courts have unanimously concluded that comparative negligence has a place in products liability actions.<sup>128</sup>

123. See notes 100-04 and accompanying text *supra*.

124. The Supreme Court of Pennsylvania "has not been reluctant to simplify, clarify, and improve the law in light of modern conditions." *Gilbert v. Corvette's, Inc.*, 457 Pa. 602, 612 n.27, 327 A.2d 94, 100 n.27 (1974) (citations omitted). Concerning the application of *res ipsa loquitur*, the court further stated: "This is true even when we are dealing with legal principles of long standing." *Id.* (citations omitted). The supreme court has in fact exercised its prerogative to modify the application of strict products liability in Pennsylvania. See, e.g., *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975).

125. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alas. 1976). See note 128 *infra*.

126. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). See note 128 *infra*.

127. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976). See note 128 *infra*.

128. For example, in *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), the Supreme Court of California remarked:

In . . . [*Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975)], we announced a system of pure comparative negligence "the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties." . . . Those same underlying considerations of policy which moved us judicially in *Li* to rescue blameworthy plaintiffs from a 100-year-old sanction against *all* recovery persuade us now to extend similar principles to the strict products liability area. Legal responsibility is thereby shared. We think that apportioning tort liability is sound, logical and capable of wider application than to negligence cases alone. To hold otherwise, in our view, would be to perpetuate a system which, as we noted in *Li*, Dean Prosser describes as placing " . . . upon one party the entire burden of loss for which two are, by hypothesis, responsible." . . . We reiterate that our reason for extending a full system of comparative fault to strict products liability is because it is fair to do so. The law consistently seeks to elevate justice and equity above

Two arguments have been advanced against application of comparative fault in products liability cases. One is that the public policy reasons for strict liability in products liability cases are incompatible with comparative negligence.<sup>129</sup> The second is that it is theoretically difficult to compare the strict liability of the defendant with the contributory negligence of the plaintiff.<sup>130</sup> Both arguments have been rejected by the courts.<sup>131</sup>

For example, the Supreme Court of Alaska has concluded that the public policy reasons for strict products liability are not incompatible with comparative negligence.<sup>132</sup> According to the court, the "basic public policy reasoning for strict liability [is] that manufacturers should bear the costs of injury resulting from their marketing of de-

the exact contours of mathematical equation. We are convinced that in merging the two principles what may be lost in symmetry is more than gained in fundamental fairness. *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390 (emphasis in original), quoting *Li v. Yellow Cab Co.*, 13 Cal. 3d at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875; W. PROSSER, *supra* note 5, § 67, at 433.

In *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alas. 1976), the Supreme Court of Alaska stated:

We find it unnecessary to conceptualize the theory of the action which strict liability creates in order for us to apply comparative negligence principles to strict products liability cases which result in personal injuries. Whether the action is characterized as negligence, warranty, or in tort, the plaintiff must prove essentially the same elements to recover. Further, most of the cases of strict liability for defective products have recognized a defense based on the conduct of the plaintiff, for courts have been unwilling to disregard the plaintiff's conduct to interpret strict liability to mean absolute liability even though they may have differed as to the defense itself. The seller has not been converted into an insurer of his product with respect to all harm generated by its use.

... We feel that pure comparative negligence can provide a predicate of fairness to products liability cases in which the plaintiff and defendant contribute to the injury. The defendant is strictly liable due to the existence of a defective condition in the product. On the other hand, the plaintiff's liability attaches as a result of his conduct in using the product. It is appropriate, therefore, that the parties' contribution to the injury be apportioned. The defendant is strictly liable for the harm caused from his defective product, except that the award of damages shall be reduced in proportion to the plaintiff's contribution to his injury.

*Id.* at 45-46 (footnotes omitted).

In *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976), the Supreme Court of Florida similarly concluded that "[c]ontributory or comparative negligence is a defense in a strict liability action if based upon grounds other than the failure of the user to discover the defect in the product or the failure of the user to guard against the possibility of its existence." *Id.* at 92.

*Cf.* *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1122 (9th Cir. 1977) (policy considerations in applying comparative negligence to a strict products liability case arising under admiralty cases discussed).

129. See *Kinard v. Coats Co., Inc.*, 37 Colo. App. 555, 553 P.2d 835 (1976) (cert. denied). In *Kinard*, the court stressed that, due to the placing of products on the market, products liability was based upon enterprise liability rather than upon fault. *Id.* at 557, 553 P.2d at 837.

130. See *Beasley & Tunstall, Jury Instructions Concerning Multiple Defendants and Strict Liability After the Pennsylvania Comparative Negligence Act, Symposium: Comparative Negligence in Pennsylvania*, 24 VILL. L. REV. 518, 535-36 (1979).

131. See text accompanying notes 132-35 *infra*; note 137 and accompanying text *infra*.

132. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 46 (Alas. 1976).

fective products rather than the injured party who is essentially powerless to protect himself.”<sup>133</sup> The Alaska court explained that under comparative negligence, the defendant manufacturer would still be strictly liable for the harm caused by a defective product, but not for the harm caused by the consumer’s own conduct.<sup>134</sup> The Supreme Court of California, following a similar reasoning, has also concluded that comparative negligence does not conflict with the public policy underlying strict product liability and, indeed, has suggested that application of comparative negligence to strict liability produces a far more equitable result.<sup>135</sup>

The theoretical difficulty of balancing a seller’s strict liability against the user’s negligence has been recognized by one commentator as a problem which is more apparent than real.<sup>136</sup> The Supreme Court of Alaska has similarly noted that the experience of certain courts in comparing negligence and strict liability frequently does not support the argument that such a system would be too difficult for the courts and juries to administer.<sup>137</sup>

The reader must be cautioned that these decisions by the supreme courts of Alaska, California, and Florida involve jurisdictions which have judicially adopted “pure” comparative negligence.<sup>138</sup> The results are therefore not directly applicable in Pennsylvania, which has a statutory “50%” system of comparative negligence. The analyses of the policy considerations provided by these courts, however, are applicable and persuasive in connection with the issue of whether the Supreme Court of Pennsylvania should modify the concept of strict

133. *Id.* at 44.

134. *Id.* at 46.

135. *Daly v. General Motors Corp.*, 20 Cal. 3d 744, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). See note 128 *supra*.

136. See V. SCHWARTZ, *supra* note 5, § 12.7, at 208-09. Professor Schwartz states:

It is true that the jury might have some difficulty in making the calculation required under comparative negligence when defendant’s responsibility is based on strict liability. Nevertheless, this obstacle is more conceptual than practical. The jury should always be capable, when the plaintiff has been objectively at fault, of taking into account how much bearing that fault had on the amount of damage suffered and of adjusting and reducing the award accordingly. Triers of fact *are* apparently able to do this, and the benefits from the approach suggest that it be applied in all comparative negligence jurisdictions.

*Id.* (emphasis in original).

137. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alas. 1976). The *Butaud* court observed:

Comparative negligence systems have long been employed in other jurisdictions, and experience has not borne out the argument that the system is difficult for courts and juries to administer. Noteworthy in this regard are admiralty cases in which the rule of comparative negligence has been applied without serious problems to cases arising under the doctrine of unseaworthiness, which is a form of strict liability.

*Id.* at 45 (footnote omitted) (citation omitted).

138. See notes 27-29 and accompanying text *supra*.

liability to allow for consideration of a plaintiff's contributory negligence in the use of the product in order to achieve a more equitable result.<sup>139</sup>

A related concern is the application, if any, of comparative negligence to an action involving multiple defendants where one is held strictly liable to the plaintiff and another is held liable under negligence principles.<sup>140</sup> One must also determine the extent to which comparative negligence will operate to diminish a plaintiff's recovery and the manner in which comparative negligence will govern the responsibility of the defendants *inter se*. The authors submit that the most equitable result is achieved in both of these situations when the comparative fault and culpability of all the parties are apportioned.<sup>141</sup> Anything less than total apportionment results in the retention of the harsh "all-or-nothing" form of tort compensation which the new era of "comparative negligence consciousness" is intended to eliminate.

#### IV. THE IMPACT ON OTHER TORT DOCTRINES

##### A. *Assumption of the Risk*

Under Pennsylvania common law, a person who voluntarily exposes himself to a known or obvious danger is deemed to assume the attendant risk and cannot recover for personal injuries sustained as a result of exposure to that risk.<sup>142</sup> Although the defense of contributory negligence has been eliminated in strict products liability

139. See V. SCHWARTZ, *supra* note 5, § 12.7, at 209. Professor Schwartz cautions:

The conceptual difficulty in strict liability cases does preclude a return of contributory negligence as a complete defense under the modified comparative negligence statutes. An attempt to apply the modification in this way would seriously undermine policies of risk distribution that underlie strict liability. In light of the fact that courts are in fact utilizing comparative negligence principles from their respective states' comparative negligence statutes rather than applying the letter of that legislation itself, it would seem that they have the power to apply whatever comparative negligence system is appropriate to strict liability. If courts follow this suggested approach, comparative negligence will enhance and facilitate the development of strict liability theory, rather than cause additional problems.

*Id.*

140. For examples of factual situations involving strictly liable and negligent defendants, see, e.g., *Chamberlain v. Carborundum Co.*, 485 F.2d 31 (3d Cir. 1973); *Safeway Stores, Inc. v. Nest-Cart*, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

141. See Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723 (1974); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); Comment, *The Pennsylvania Comparative Negligence Act: The Fifty-One Percent Solution*, 50 TEMP. L.Q. 352, 362-63 (1977).

142. *Pritchard v. Leggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966) (applying Pennsylvania law); *Kopp v. R.S. Noonan, Inc.*, 385 Pa. 460, 123 A.2d 429 (1956); *Hall v. Ziegler*, 361 Pa. 228, 64 A.2d 767 (1949).

cases,<sup>143</sup> the assumption of the risk defense has been retained as a complete bar to recovery in such cases.<sup>144</sup> With the advent of a comparative negligence statute in Pennsylvania, the question now becomes whether the assumption of the risk defense will be merged into the concept of comparative negligence or whether it will survive as a separate defense which bars recovery.

Any analysis of this issue requires a careful interpretation of the confusing treatment of this issue. As noted by Dean Prosser, much of this confusion has occurred "because 'assumption of risk' has been used by the courts in several different senses, which have been lumped together under the one name, usually without realizing that any differences exist, and certainly with no effort to make them clear."<sup>145</sup> Since either defense was a complete bar to the plaintiff's action, it is not surprising that the two defenses were not clearly distinguished. The distinction between these defenses actually had significance only after the Supreme Court of Pennsylvania, in actions arising under section 402A, abolished the contributory negligence defense<sup>146</sup> and retained the assumption of the risk defense.<sup>147</sup> Since that time, the Pennsylvania courts have struggled with the confusing and sometimes inconsistent authorities in this area<sup>148</sup> and have elaborated a clear distinction between the two defenses.<sup>149</sup>

143. *McCown v. International Harvester Co.*, 463 Pa. 13, 342 A.2d 381 (1975). In *McCown*, the court adopted RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965), which provides: "Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence." *Id.* 463 Pa. at 15-16, 342 A.2d at 382.

144. *Ferraro v. Ford Motor Co.*, 423 Pa. 324, 223 A.2d 746 (1966).

145. W. PROSSER, *supra* note 5, § 68, at 439 (footnote omitted).

146. *McCown v. International Harvester Co.*, 463 Pa. 13, 342 A.2d 381 (1975).

147. *Ferraro v. Ford Motor Co.*, 423 Pa. 324, 223 A.2d 746 (1966).

148. Much of the confusion has resulted from the different approaches employed in various jurisdictions. For example, many jurisdictions have adopted the analysis set forth in W. PROSSER, *supra* note 5, § 68, at 440, where assumption of the risk is divided into three categories: 1) where plaintiff, in advance, gives consent to relieve defendant of a legal duty and to take a chance of injury from a known risk; 2) where plaintiff acts reasonably and voluntarily encounters a risk with knowledge that defendant will not protect him; and 3) where plaintiff acts unreasonably by voluntarily exposing himself to a risk created by defendant's negligence. *Id.* The focus in this analysis is on the reasonableness of the plaintiff's conduct.

A second analysis is that suggested by Harper and James in their treatise on the law of torts. F. HARPER & F. JAMES, *supra* note 75, § 21.1 at 1162. Express assumption of the risk is separated and treated independently while implied assumption of the risk is divided into primary and secondary applications. *Id.* This analysis has also been followed in several jurisdictions. See *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959); *Ritter v. Beals*, 225 Or. 504, 521, 358 P.2d 1080, 1085 (1961). The approach was also nominally applied in *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977).

149. See text accompanying notes 150-59 *infra*.

The federal courts which have applied Pennsylvania law have probably articulated the most lucid distinction between contributory negligence and assumption of the risk.<sup>150</sup> Most noteworthy is the decision of the United States Court of Appeals for the Third Circuit in *Pritchard v. Liggett & Meyers Tobacco Co.*,<sup>151</sup> where the court divided the Pennsylvania assumption of risk cases into two categories based upon the application of the defense by the courts.<sup>152</sup> The *Pritchard* court defined assumption of the risk in its primary and strict sense as a "voluntary exposure to an obvious known danger which negates liability."<sup>153</sup> Assumption of the risk in its secondary sense was defined by the Third Circuit as "ordinarily synonymous with contributory negligence and involv[ing] a failure to exercise reasonable care for one's own safety."<sup>154</sup> Although this method of analysis was not original<sup>155</sup> and has been applied in other jurisdictions,<sup>156</sup> the Third Circuit in *Pritchard* carefully applied the distinction to Pennsylvania law.

An examination of the cases in Pennsylvania in light of *Pritchard* reveals that assumption of the risk in its secondary sense has to a great extent been merged into the definition of contributory negligence.<sup>157</sup> Conversely, the holding of the Supreme Court of Pennsylvania in *Ferraro v. Ford Motor Co.*,<sup>158</sup> and the decisions of other courts which have adopted the *Ferraro* holding, demonstrate that assumption of the risk in its primary and strict sense exists as a separate and distinct defense from that of the defense of contributory negligence.<sup>159</sup>

This distinction is a result of the differing policies supporting the defenses and their relationship to the strict liability cause of action. Contributory negligence in its true sense should not bar recovery in a strict liability case since the risk of loss is better imposed upon the

150. See *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1966); *Stephenson v. College Misericordia*, 376 F. Supp. 1324, 1327 (M.D. Pa. 1974).

151. 350 F.2d 479 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1966).

152. 350 F.2d at 484.

153. *Id.*

154. *Id.*

155. See F. HARPER & F. JAMES, *supra* note 75, § 21.1 at 1162.

156. See cases cited note 148 *supra*.

157. See *Stephenson v. College Misericordia*, 376 F. Supp. 1324, 1327 (M.D. Pa. 1974). See *Joyce v. Quinn*, 204 Pa. Super. Ct. 580, 587-88, 205 A.2d 611, 614-15 (1964).

158. 423 Pa. 324, 223 A.2d 746 (1966).

159. See *Henrich v. Cutler Hammer Co.*, 460 F.2d 1235 (3d Cir. 1972); *Elder v. Crawley Book Mach. Co.*, 441 F.2d 771 (3d Cir. 1971); *McCown v. International Harvester Co.*, 463 Pa. 13, 342 A.2d 381 (1975).

manufacturer or seller. The defense of assumption of the risk, however, is based on a policy of refusing to allow persons who consciously expose themselves to danger to recover.<sup>160</sup> In view of these varying policy considerations, it is submitted that Pennsylvania's Comparative Negligence Act should not operate to confuse the lines of distinction.

The experience of other jurisdictions is not necessarily helpful because of the diverse approaches in analyzing assumption of the risk.<sup>161</sup> It should initially be noted that several states have merged assumption of the risk into contributory negligence in their respective comparative negligence statutes.<sup>162</sup> Although many others have merged the doctrines judicially,<sup>163</sup> most of these jurisdictions have done so while carefully qualifying or restricting the merger, thereby allowing conduct which has been termed assumption of the risk to operate as a complete bar in certain situations.<sup>164</sup> For example, Wis-

160. See *McCown v. International Harvester Co.*, 463 Pa. 13, 18-19, 342 A.2d 381, 383-84 (1975) (Pomeroy, J., concurring). In a concurring opinion, Justice Pomeroy reasoned:

The strict liability of Section 402A is founded in part upon the belief that as between the sellers of products and those who use them, the former are the better able to bear the losses caused by defects in the products involved . . . . This greater loss-bearing capacity is unrelated to negligence in the manufacture or marketing of products. Indeed, retail and wholesale sellers of chattels are themselves often in no position to discover or avoid defects in their inventories, even by the exercise of a high degree of care. Thus, defendants in Section 402A actions are subjected to liability without regard to fault. It is a proper corollary to this principle that the lesser loss-bearing capacity of product users exists independently of their negligence or lack of it. It follows that such negligence should not ordinarily or necessarily operate to preclude recovery in a strict liability case. On the other hand, where assumption of risk is involved, the "loss-bearing" policy underlying Section 402A is outweighed by a countervailing policy, one which refuses recovery to persons who consciously expose themselves to known dangers. This policy is deemed stronger than the one, reflected in the normal law of contributory negligence, which denies recovery to individuals whose conduct is merely lacking in due care under the circumstances.

*Id.* (citations omitted).

161. See note 148 *supra*.

162. See ARK. STAT. ANN. §§ 27-1763 to -1765 (Supp. 1977); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1978); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1979); N.Y. CIV. PRAC. LAW §§ 1411-1413 (McKinney 1976); OKLA. STAT. ANN. tit. 23, § 11 (West Supp. 1978-1979); OR. REV. STAT. §§ 18.470-510 (1977); UTAH CODE ANN §§ 78-27-37 to -43 (1977). The 1971 version of the Oregon statute provided that "[c]ontributory negligence, including assumption of the risk, shall not bar a recovery." Act of June 30, 1971, ch. 668, 1971 Or. Laws 1516 (amended 1975). The Oregon Court of Appeals construed "assumption of the risk" in the statute to mean assumption of the risk in the secondary sense, *i.e.*, as merely a designation for a type of contributory negligence. See *Becker v. Beaverton School Dist. No. 48*, 25 Or. App. 879, 882-85, 551 P.2d 498, 500-01 (1976). See F. HARPER & F. JAMES, *supra* note 75, § 21.1, at 1163. Assumption of the risk in its primary sense, *see id.*, thus remained a valid defense under the Oregon statute. 25 Or. App. at 882, 551 P.2d at 501. The statutory ambiguity is clarified in the current version which deletes the phrase "including assumption of the risk." See OR. REV. STAT. § 18.470 (1977).

163. See notes 165-74 and accompanying text *infra*.

164. For the sole jurisdiction which has expressly abrogated comparative negligence as a defense, *see* note 162 *supra*.

consin, which was one of the earlier jurisdictions to merge assumption of the risk into contributory negligence,<sup>165</sup> retained the defense in certain situations which are denominated as "express assumption of risk."<sup>166</sup> Florida has also merged the two doctrines except for what has been termed "express assumption of the risk,"<sup>167</sup> which appears to fall within the definition of Pennsylvania's primary assumption of the risk.<sup>168</sup> Other jurisdictions which have to some extent merged assumption of the risk into contributory negligence are California,<sup>169</sup> Minnesota,<sup>170</sup> Maine,<sup>171</sup> and Mississippi.<sup>172</sup> The Virgin Islands<sup>173</sup> and Washington appear to be the only jurisdictions which have abolished assumption of the risk as a separate defense as a result of their comparative negligence systems.<sup>174</sup>

Four states, although not fully explaining their rationale, have retained assumption of the risk as a separate, complete defense despite the enactment of comparative negligence statutes.<sup>175</sup> Although Rhode Island has completely rejected the notion of merging the two doctrines,<sup>176</sup> the authors submit that the result in Rhode Island is

165. See *Gibson v. Drees Bros.*, 19 Wis. 2d 252, 120 N.W.2d 63 (1963); *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis.2d 374, 113 N.W.2d 14 (1962).

166. *Polsky v. Levine*, 73 Wis. 2d 547, 243 N.W.2d 503 (1976) (by implication).

167. *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977) (express assumption of the risk retained as a complete bar).

168. See text accompanying notes 151-54 & 157-59 *supra*.

169. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Paula v. Gagnon*, 81 Cal. App. 3d 680, 146 Cal. Rptr. 702 (1978); *Gonzalez v. Garcia*, 75 Cal. App. 3d 874, 142 Cal. Rptr. 503 (1977).

170. *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971).

171. *Wilson v. Gordon*, 354 A.2d 398 (Me. 1976).

172. *Braswell v. Economy Supply Co.*, 281 So. 2d 669 (Miss. 1973). The Supreme Court of Mississippi stated that it did "not abolish the doctrine of assumption of risk, but where assumption of risk overlaps and coincides with contributory negligence the rules of the defense of contributory negligence shall apply." *Id.* at 677.

173. *Murray v. Beloit Power Sys., Inc.*, 450 F. Supp. 1145 (D.V.I. 1978). The *Murray* court remarked that "under the Virgin Islands comparative negligence statute the affirmative defenses of contributory negligence and assumption of the risk should be considered together as a single defense, that is, the degree which the plaintiff's own culpable conduct contributed to his accident and injuries." 450 F. Supp. at 1146, *construing* V.I. CODE ANN. tit. 5, § 1451 (Supp. 1977).

174. *Lyons v. Redding Const. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973) (dicta). The authors suggest that the abolishment was, in fact, a merger with contributory negligence.

175. *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); *Mason v. Western Power & Gas Co.*, 183 Neb. 392, 160 N.W.2d 204 (1968); *Bartlett v. Gregg*, 77 S.D. 406, 92 N.W.2d 654 (1958).

176. *Kennedy v. Providence Hockey Club, Inc.*, \_\_\_\_ R.I. \_\_\_\_, 376 A.2d 329 (1977). The court stated:

In our understanding, then, contributory negligence and assumption of the risk do not overlap; the key difference is, of course, the exercise of one's free will in encountering the risk. Negligence analysis, couched in reasonable man hypotheses, has no place in the assumption of the risk framework. When one acts knowingly, it is immaterial whether he acts reasonably. The postulate, then, that assumption of the risk is merely a variant of contributory fault, is not, to our minds, persuasive. Accordingly, it is our determination



similar to that reached in those jurisdictions which have qualifiedly merged the two doctrines in certain situations.<sup>177</sup>

In reviewing the action of the courts construing the comparative negligence doctrines, one must avoid merely compiling a list of cases in which contributory negligence and assumption of the risk have been "merged" without considering the context in which the terms were being applied when the particular court decided to merge the defenses. It is also important to note the degree to which a court has reserved its judgment on certain portions of the assumption of the risk defense and to what extent it has expressly retained the viability of the concept. The authors suggest that careful analysis reveals that a majority of the jurisdictions have retained, by one name or another, that form of voluntary assumption of the risk which has been denominated by the *Pritchard* court as assumption of the risk in a primary and strict sense.<sup>178</sup> As has been suggested, the Pennsylvania courts have already merged contributory negligence with assumption of the risk in those situations where assumption of the risk was merely an application of traditional contributory negligence.<sup>179</sup>

As properly applied in Pennsylvania, voluntary assumption of the risk in its primary and strict sense has few, if any, of the attributes of negligence. The standard of conduct being considered exceeds inattentiveness and is in the nature of consent. It approaches and sometimes involves the same kind of deliberate conduct which is considered in evaluating the liability of defendants in intentional tort actions. This conclusion is supported not only by the history of the development of assumption of the risk,<sup>180</sup> but also by considerations of the nature of the conduct being evaluated.<sup>181</sup> In summary, it is submitted that the merger in Pennsylvania of assumption of the risk

that . . . [Rhode Island's comparative negligence statute] does not affect the validity of assumption of the risk as a complete bar to recovery.

*Id.* at \_\_\_\_\_, 376 A.2d at 333 (citation omitted), *construing* R.I. GEN. LAWS §§ 9-20-4 to -4.1 (Supp. 1978).

177. Compare cases cited notes 165-74 *supra* with note 176 *supra*.

178. See text accompanying notes 151-53 *supra*.

179. See cases cited note 157 *supra*.

180. See V. SCHWARTZ, *supra* note 5, § 9.5, at 173. Professor Schwartz reasoned that assumption of the risk developed theoretically because the defense was "based not so much on plaintiff's fault as on his agreement by his conduct to take the risk of the very consequences that befell him. Viewed from that perspective, it is a cousin of the consent defense to intentional torts." *Id.* (emphasis in original) (footnotes omitted).

181. See W. PROSSER, *supra* note 5, § 68, at 441. Dean Prosser remarked "that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of conduct of the reasonable man." *Id.*

in its secondary sense and contributory negligence fully responds to the policy considerations involved in applying Pennsylvania's comparative negligence statute. To the extent that assumption of the risk survives at common law in its primary and strict sense, the Act should have no effect.

### B. *Discovered Peril Doctrine*

One of the early doctrines developed to moderate the harsh effect of contributory negligence in certain situations was the concept of "last clear chance."<sup>182</sup> This doctrine had its origin in the 1842 English case of *Davies v. Mann*,<sup>183</sup> in which the plaintiff left his animal on the highway and the defendant negligently drove into it.<sup>184</sup> The court held that the plaintiff might recover regardless of his contributory negligence if the defendant had had, by exercising proper care, the last clear opportunity to avoid the accident and yet failed to do so.<sup>185</sup> This notion was eventually introduced into American jurisprudence under the name of "last clear chance" or "last clear opportunity."<sup>186</sup>

Although it has been said that Pennsylvania has not adopted the "last clear chance" doctrine,<sup>187</sup> the related doctrine of "discovered peril" has been considered and applied by the Pennsylvania courts.<sup>188</sup> Moreover, despite the fact that the Supreme Court of Pennsylvania has never embraced the doctrine of "last clear chance," the concept has been recognized by that court as a factor in determining proximate causation.<sup>189</sup> Furthermore, the "willful, wanton, or reckless" conduct concept in Pennsylvania is similar to the underlying rule of "last clear chance" or "discovered peril."<sup>190</sup> In spite of this limited application, the question remains as to whether "discovered

182. *See id.* § 66, at 427.

183. 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. D. 1842).

184. *Id.* at 546-47, 152 Eng. Rep. at 588.

185. *Id.* at 548-49, 152 Eng. Rep. at 589.

186. For a general discussion of the "last clear chance" doctrine, *see* W. PROSSER, *supra* note 5, § 66, at 427-33.

187. *Kasanovich v. George*, 348 Pa. 199, 34 A.2d 523 (1943). The *Kasanovich* court stated: Nor has Pennsylvania adopted the doctrine of the "last clear chance" that, notwithstanding negligence on the part of the injured person, the tortfeasor will be held liable if, by the exercise of reasonable care, he could have discovered the peril to which the other had exposed himself, and then, by due care, could have avoided the accident.

*Id.* at 202, 34 A.2d at 525.

188. *Lehman v. McCleary*, 229 Pa. Super. Ct. 508, 329 A.2d 862 (1974); *Curt v. Ziman*, 140 Pa. Super. Ct. 25, 12 A.2d 802 (1940); *Hess v. Kemmerer*, 65 Pa. Super. Ct. 247 (1916).

189. *See Coleman v. Dahl*, 371 Pa. 639, 92 A.2d 678 (1952).

190. *See* notes 71-74 and accompanying text *supra*.

peril" should survive the application of comparative negligence in Pennsylvania. The authors submit that it should not.

The experience of those comparative negligence jurisdictions which have recognized the "last clear chance" doctrine might help to resolve this issue if there were any consistent trend in the treatment of the doctrine. Unfortunately, there is a wide split of authority. Some states have retained the "last clear chance" doctrine regardless of the adoption of comparative negligence in their jurisdictions.<sup>191</sup> On the other hand, several jurisdictions have eliminated this common law doctrine in light of their state's comparative negligence statute.<sup>192</sup> The remaining jurisdictions with both "last clear chance" and comparative negligence statutes are either undecided or have not yet considered the issue.

Regardless of this split of authority, the authors submit that "last clear chance" or "discovered peril" serves no equitable purpose in a comparative negligence jurisdiction. The Pennsylvania "discovered peril" doctrine should be recognized as a device created to allow a negligent plaintiff to overcome the doctrine of contributory negligence in a situation where the defendant's culpable conduct was gross in comparison to that of the plaintiff's. In this regard, the reasons for advocating extinction of the "discovered peril" doctrine are the same as those for abrogation of the concept of "willful, wanton, or reckless" conduct.<sup>193</sup> Although these concepts have served well in balancing the equities in a contributory negligence situation, they are no longer appropriate where culpability is to be allocated and the plaintiff's negligence serves only to diminish, rather than bar, recovery.

Although two leading commentators on comparative negligence have acknowledged the wide split of authority on this issue, both have criticized the retention of "last clear chance" under a comparative negligence system.<sup>194</sup> Moreover, the commentators on the new comparative negligence statute in Pennsylvania have been unanimous in advocating a merger of the considerations applicable in the "discovered peril" doctrine into contributory negligence in Pennsylvania.<sup>195</sup> The authors join with the foregoing in calling for merger of

191. *Lovett v. Sandersville R.R.*, 72 Ga. App. 692, 34 S.E.2d 644 (1945); *Bezdek v. Patrick*, 170 Neb. 522, 103 N.W.2d 318 (1960); *Vlach v. Wyman*, 78 S.D. 504, 104 N.W.2d 817 (1960).

192. *Burns v. Ottati*, 513 P.2d 469 (Colo. Ct. App. 1973); *Cushman v. Perkins*, 245 A.2d 846 (Me. 1968).

193. See notes 75-79 and accompanying text *supra*.

194. See C.R. HEFT & C.J. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* § 1.220, at 41 (1978); V. SCHWARTZ, *supra* note 5, § 7.2, at 133. See also Annot., 59 A.L.R.2d 1258 (1958).

195. Sherman, *An Analysis of Pennsylvania's Comparative Negligence Statute*, 38 U. PITT. L. REV. 51, 76-77 (1976); Comment, *supra* note 141, at 367-68; 81 DICK. L. REV. 677, 679 (1977).

"discovered peril" into contributory negligence under Pennsylvania's comparative negligence application, thereby allowing the jury to apportion liability in damages as they see fit.

## V. SOME PROCEDURAL CONSIDERATIONS

### A. *Special Verdict Procedures*

#### 1. *The Hill Amendment*

On the Act's third consideration in the Pennsylvania Senate, Senator Louis Hill proposed an amendment to the Senate Bill which provided for a special verdict procedure to be implemented in comparative negligence cases.<sup>196</sup> Essentially, the amendment provided that the court or jury would make either specific findings of fact or "answer specific questions indicating: (1) The amount of damages which the party bringing the action would be entitled to recover had that person not been at fault. (2) The degree of negligence of each party expressed as a percentage."<sup>197</sup> The court would then be required to reduce the amount of the verdict in proportion to the amount of negligence attributable to the party recovering.<sup>198</sup> If the negligence of the plaintiff were equal to or greater than the negligence of the defendant, judgment would be entered for the defendant.<sup>199</sup>

At least eleven of the comparative negligence statutes enacted to date have incorporated a special verdict procedure similar to the one proposed in the Hill amendment.<sup>200</sup> The procedures have received increasing attention in practically all of the states which have adopted comparative negligence, particularly those which have adopted "50%" systems. Nonetheless, the Pennsylvania Senate defeated Senator Hill's amendment, and the original Senate Bill eventually passed both the Senate and the House without a single change.<sup>201</sup>

196. Proposed Amendment to S.B. 1237, 160th Gen. Assembly, 1976 Sess., 1 PA. LEG. J. 1703 (Senate 1976).

197. *Id.*

198. *Id.*

199. *Id.*

200. COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1976); HAW. REV. STAT. § 663-31 (Supp. 1975); IDAHO CODE § 6-802 (Supp. 1978); KAN. STAT. ANN. § 60-258a(b) (Supp. 1978); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1979); MINN. STAT. ANN. § 604.01 (West Supp. 1979); NEV. REV. STAT. § 41.141 (1977); N.J. STAT. ANN. § 2A:15-5.2 (West Supp. 1978-1979); N.D. CENT. CODE § 9-10-07 (1975); UTAH CODE ANN. § 78-27-38 (1977); WYO. STAT. ANN. § 1-1-109 (1977).

201. 1 PA. LEG. J. 1707-08 (Senate 1976). See Act of July 9, 1976, P.L. 855, No. 152, 1976 Pa. Laws 855.

The defeat of Senator Hill's amendment would seem to indicate that the legislature was not interested in implementing special verdict procedures as part of the Pennsylvania comparative negligence system. The authors, however, are not convinced. The comments made during the Senate debate on Senator Hill's amendments demonstrate no discernible majority disapproval of special verdict procedures in comparative negligence cases.<sup>202</sup> Much of the debate regarding the amendments concerned Senator Hill's corollary amending provision which would have changed the wording of the first section of the Act to allow recovery only when a person's contributory negligence was "not as great as" instead of "not greater than" the negligence of the defendant, as provided in the original version.<sup>203</sup> In addition, two Senators who eventually voted against the amendments spoke in favor of the special verdict procedures in comparative negligence cases.<sup>204</sup> Finally, it must be remembered that the Act was being considered for passage in the waning days before a legislative recess. Any amendment proposed at such a time would receive limited interest since lengthy debate or thorough consideration might have jeopardized the passage of any legislation on the matter.<sup>205</sup>

202. 1 PA. LEG. J. 1703-07 (Senate 1976).

203. *See id.* at 1706-07. For example, Senator Jubelirer stated:

[I]f there is nothing in the bill which takes away the right to file a counterclaim, if the gentleman from Philadelphia, Senator Hill, is concerned about if the plaintiff is fifty per cent negligent and if the defendant is fifty per cent negligent, would it not be, for all practicality, good strategy on the part of the defendant to file a counterclaim and, thus, if the jury found each of them fifty per cent negligent, would that not be a wipe out.

The doctrine of comparative negligence . . . certainly is a doctrine whose time has come. If a plaintiff were to recover fifty per cent of what is asked for, then that is really the change in the law which we are seeking. We are seeking to compensate the plaintiff for only that to which he is entitled, and if that be fifty per cent or forty per cent, or what-have-you, I think that the juries would come to the proper decision.

*Id.* at 1706 (remarks of Sen. Jubelirer). Senator Hager, the bill's sponsor, remarked:

[R]ather than worry about whether a person can recover if he is equally to blame, what we should be considering is, how much should a person contribute to pay for the damages of a person that he has caused and if he has caused your accident fifty per cent, why should he not respond in fifty per cent of the damages . . . .

. . . I ask all Members . . . to beat the amendments and support the bill.

*Id.* at 1707 (remarks of Sen. Hager).

204. Senator Kelley stated: "It is absolutely necessary, without the amendments of the gentleman, that this bill, becoming law, that the courts would have to make the findings of fact which he has set forth in his amendments, and that the jury would have to find the percentages." *Id.* at 1705 (remarks of Sen. Kelley). Senator Hager also spoke in favor of the procedure. *See* text accompanying note 206 *infra*.

205. This was perhaps recognized by the Senators themselves during debate on the amendments. Senator Hill, in proposing the amendments, stated: "I ask that the Senate adopt these amendments. They are not an attempt to delay this bill. They are not an attempt to have the bill go over in its order." 1 PA. LEG. J. 1704 (Senate 1978) (remarks of Sen. Hill). At least one legislator, Senator Duffield, disagreed, stating that "the gentleman mentioned the personal aspect that he did not intend to sabotage the bill by introducing these amendments. I think this would sabotage the bill." *Id.* at 1704 (remarks of Sen. Duffield).

Although Senator Hill's special verdict proposal was widely criticized, the intent of the Hill amendment was not necessarily rejected. Senator Hager, principal sponsor of the original Senate bill, remarked:

In Wisconsin, in proper cases, there is a request by the judge for special verdicts from a jury, so that the language which the gentleman from Philadelphia, Senator Hill, has put in as the second portion of his amendment *already is called for in the law and if the judge wishes to do it in a proper case it can be done*. I think there is a possibility of it leading to confusion in some simple cases and it is not necessary across the board. For that reason, I oppose that portion of the amendments.<sup>206</sup>

Senator Hager therefore appeared to have recognized the need for special verdict procedures in the "proper case." Consequently, his remarks demonstrate that the defeat of the amendment did not mean that special verdict procedures should never be employed. On the contrary, in the "proper case," they should be employed.

Even though the Pennsylvania Rules of Civil Procedure currently provide for special interrogatories in cases involving additional defendants,<sup>207</sup> it is doubtful whether this rule adequately deals with the special problematic considerations in comparative negligence situations. Additionally, the procedures under the rule would have no application to two party actions. It is therefore submitted that the special verdict must be adopted in multiple defendant situations. Furthermore, the interests of consistency and unbiased fact-finding seem to dictate the need for specific fact-finding in all comparative negligence cases.

## 2. *The Wisconsin Special Verdict*

Although Wisconsin's comparative negligence statute does not include a specific special verdict provision, Wisconsin does have a general statute on special verdicts<sup>208</sup> which is presently lacking in Pennsylvania. The Supreme Court of Wisconsin has indicated that this special verdict statute should always be used in jury tried comparative negligence cases.<sup>209</sup> According to the Wisconsin procedure, the court prepares written questions for the jury relating to material issues of fact and providing for a direct answer.<sup>210</sup> The court retains

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206. *Id.* at 1707 (remarks of Sen. Hager) (emphasis added).

207. PA. R. CIV. P. 2257.

208. WIS. STAT. ANN. § 270.27 (West 1957).

209. See V. SCHWARTZ, *supra* note 5, § 17.4, at 284.

210. WIS. STAT. ANN. § 270.27 (West 1957).

the discretion to submit the questions in terms of ultimate facts or in the form of separate questions as to the component issues of the ultimate fact.<sup>211</sup> The trial court also has the prerogative to direct the jury to find upon particular questions of fact if they render a general verdict.<sup>212</sup>

Perhaps it was these Wisconsin procedures Senator Hager had in mind when he remarked that the special verdict is "already called for in the law and if a judge wishes to do it in a proper case it can be done."<sup>213</sup> Considering Senator Hager's recognition of the confusion which may result in simple comparative negligence cases, it is reasonable to conclude that Senator Hager supports a discretionary special verdict procedure such as that used in Wisconsin and six other jurisdictions,<sup>214</sup> and merely objected to Senator Hill's proposed procedures because they were mandatory.<sup>215</sup>

The authors are convinced that Pennsylvania needs a special verdict procedure requiring some form of specific fact-finding on the part of the jury. The reasons for special verdict procedures seem logical and straightforward. First, the procedure has a tendency to ascertain fact, not tainted by prejudice, bias, or a desire to see one particular party win. Second, a special verdict permits a court to isolate an issue not dealt with properly by the jury, thus allowing for something less than a total reversal in all cases of error. These arguments in favor of the special verdict procedure have been vigorously advanced by three recognized commentators in the comparative negligence field.<sup>216</sup> Two of these commentators, Wisconsin lawyers Carroll R. Heft and C. James Heft, have labelled the special verdict "the very cornerstone of the comparative negligence concept."<sup>217</sup> Numerous scholarly reviews and articles also support the use of special verdict procedures in comparative negligence cases.<sup>218</sup>

211. *Id.*

212. *Id.*

213. See text accompanying note 206 *supra*.

214. See IDAHO CODE § 6-802 (Supp. 1978); MINN. STAT. ANN. § 604.01 (West Supp. 1979); NEV. REV. STAT. § 41.141 (1977); N.D. CENT. CODE § 9-10-07 (1975); UTAH CODE ANN. § 78-27-38 (1977); WYO. STAT. ANN. § 1-1-109 (1977).

215. Special verdict procedures are mandatory in five jurisdictions which have comparative negligence statutes. See COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1976); HAW. REV. STAT. § 663-31 (Supp. 1975); KAN. STAT. ANN. § 60-258a(b) (1976); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1979); N.J. STAT. ANN. § 2A:15-5.2 (West Supp. 1978-1979). Two other jurisdictions require the use of a general verdict. See N.H. REV. STAT. ANN. § 507:7-a (Supp. 1977); VT. STAT. ANN. tit. 12, § 1036 (1973).

216. C.R. HEFT & C.J. HEFT, *supra* note 194, § 8.10, at 1-2; V. SCHWARTZ, *supra* note 5, § 17.4, at 282-91.

217. C.R. HEFT & C.J. HEFT, *supra* note 194, § 8.10, at 1.

218. See, e.g., Cadena, *Comparative Negligence and the Special Verdict*, 5 ST. MARY'S L.J. 688 (1974); Thode, *Comparative Negligence, Contribution Among Tort-Feasors, and the Effect*

### 3. *The Practical Approach*

Since the Comparative Negligence Act does not contain special verdict procedures, such as are required by the New Hampshire and Vermont statutes,<sup>219</sup> it seems reasonable to conclude that the task of developing these procedures now rests with the judiciary. As provided in the Pennsylvania constitution, the Supreme Court of Pennsylvania retains "the power to prescribe general rules governing practice, procedure and the conduct of all courts."<sup>220</sup> It is perhaps with this understanding that the General Assembly saw no need to include mandatory special verdict procedures in the Act.

It is therefore necessary to determine the type of special verdict procedure that should be adopted in Pennsylvania. The authors suggest that the Wisconsin procedure seems the most appropriate because Pennsylvania's comparative negligence system was in fact modeled after the one adopted and used in Wisconsin.<sup>221</sup> Moreover, Wisconsin's forty-five years of experience with the special verdict in comparative negligence cases would be of immeasurable aid to the Pennsylvania courts in their efforts to facilitate the implementation of the Pennsylvania comparative negligence doctrine.

#### B. *Informing The Jury*

Closely tied to the verdict procedures in comparative negligence matters is the issue of whether or not the jury should be informed of the results of their specific answers. This issue is obviously moot if the Supreme Court of Pennsylvania retains the general verdict procedures in such cases, because a general verdict necessitates that the jury thoroughly understand the operation of the law before rendering its net verdict in favor of one or more parties. Assuming that the supreme court does adopt special verdict procedures for use in comparative negligence cases, one must then ask whether the jury should be informed of the net effect of their answers.

Some states have provided the answer in their comparative negligence statutes. For example, the comparative negligence enactments of Connecticut<sup>222</sup> and Maine<sup>223</sup> require that the jury be informed of

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*of a Release—A Triple Play by the Utah Legislature*, 1973 UTAH L. REV. 406, 412-17; Comment, *Comparative Negligence in Washington*, 9 GONZ. L. REV. 737, 749 (1973).

219. See note 215 *supra*.

220. PA. CONST. art. 5, § 10(c).

221. See text accompanying note 44 *supra*.

222. CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1978).

223. ME. REV. STAT. tit. 14, § 156 (Supp. 1978-1979).



the result of its answers. Since the statutes of New Hampshire<sup>224</sup> and Vermont<sup>225</sup> expressly provide for a general verdict, it is necessary that the jury in these states also be informed of the operation of the law. North Dakota's statute provides for informing the jury only upon request of one of the parties.<sup>226</sup> The remaining general comparative negligence statutes, like Pennsylvania's, are silent as to jury information.

In the absence of such a statutory provision, there is a division of authority regarding whether a jury should be informed of the effect of its answers. Two of the most outspoken critics of informing the jury are the comparative negligence commentators, Heft and Heft, who advance the argument that:

The jury does not know the legal effect and result of its answers to the interrogatories in the special verdict to allow the jury to make a fair and impartial decision on the negligence of each party.

By using the procedure of a special verdict under comparative negligence, a jury finds the facts without regard to the ultimate outcome of the case. The court then takes the facts as found by the jury and awards judgment. This procedure is intended to ascertain the truth untainted by prejudice or a desire to see one of the parties win or lose.<sup>227</sup>

Wisconsin has long held it reversible error to inform the jury of the consequences of its findings.<sup>228</sup> The rationale of the Supreme Court of Wisconsin is that the jury should make findings of fact and not decide who will win or lose the lawsuit.<sup>229</sup> Other commentators support informing the jury on the ground that it borders on deceit not to have the jury understand the effect of its answers.<sup>230</sup>

Much of the resolution of this matter in Pennsylvania depends upon the kind of special verdict procedure eventually adopted by our supreme court. If the Wisconsin system of allowing the jury to determine only the total damages and percentages of causal negligence is implemented, it seems appropriate that the Pennsylvania courts follow the Wisconsin rule prohibiting the jury from knowing the net result of its specific answers. Moreover, the authors have difficulty understanding the opposing argument that it is necessary for the jury

224. N.H. REV. STAT. ANN. § 507:7-a (Supp. 1977).

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

226. N.D. CENT. CODE § 9-10-07 (1975).

227. C.R. HEFT & C.J. HEFT, *supra* note 194, § 8.10, at 1.

228. *See* Erb v. Mutual Serv. Cas. Co., 20 Wis. 2d 530, 123 N.W.2d 493 (1963).

229. *See id.* at 536, 123 N.W.2d at 496.

230. *See* Thode, *supra* note 217, at 145.

to understand the impact of its findings. Arguably, in a jurisdiction which has adopted the "not as great as" or "less than" approach to recovery, this rationale could be supported since the jury may not realize that it is completely denying recovery when it apportions negligence equally between the parties. In situations where, as in Pennsylvania, a 50-50 assessment of negligence still permits recovery, there appears to be, however, no valid reason to inform the jury and take an unnecessary chance of importing bias into the apportionment system. It seems inappropriate to provide elaborate procedures for eliciting specific facts from the jury, only to gamble on injecting bias and prejudice into the procedure by providing the jury information it needs to make one party win the lawsuit. If jury members are finders of fact, let them determine only the facts and let the court render the verdict.

## VI. CONCLUSION

As previously stated, the effect of the Act cannot be underestimated. The Act itself has drastically altered the doctrine of contributory negligence, and it is submitted that other judicially created doctrines which mitigated the harshness of contributory negligence will be eliminated or severely curtailed. Although the rulings of other courts may be helpful in interpreting the Act, it is ultimately the task of the Pennsylvania courts to implement and shape the concept of comparative negligence in Pennsylvania.