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Comparative Negligence - North Dakota

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COMPARATIVE NEGLIGENCE—NORTH DAKOTA

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I. INTRODUCTION

There are trial practitioners who would tell you that comparative negligence law in North Dakota is nothing new. That as a practical matter, juries have been comparing negligence for years. They rationalize that juries find for a given party and then mitigate the recovery by a comparison of the parties' respective negligence. Be that as it may, it was not until the 1973 Legislature adopted North Dakota Century Code § 9-10-07, effective July 1, 1973, that it could be said that North Dakota has a comparative negligence law:

> § 9-10-07. Comparative Negligence.—Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each; provided, however, that each shall remain jointly and severally liable for the whole award. Upon the request of any party, this section shall be read by the court to the jury and the attorneys representing the parties may comment to the jury regarding this section.

As § 9-10-07 now exists, it is not unlike most other new statutes which bring about substantial change.[1] It may well have some pro-

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* Tenneson, Serkland, Lundberg & Erickson, Ltd., Fargo, N. D., J.D., 1958, University of North Dakota.

1. As North Dakota practitioners consider the application of the law, we might note some resource materials. Besides the general encyclopedias, Wisconsin's comparative negligence statute which has been in effect for many years and cases arising thereunder are

visions which need to be amplified, amended or construed. Therefore, it may take some time, some trials, appeals, amendments—and maybe some inequities enroute—before we have what most would consider a workable comparative negligence statute.

Through the years we have become accustomed to thinking that contributory negligence and other affirmative defenses such as assumption of risk are a complete bar to a plaintiff's claim. Now, these affirmative defenses are reflected in percentages of negligence which determine if in fact the moving party is entitled to recover and, if so, what amount.

It is significant to note that the language of our law reflects that if plaintiff's negligence was *not as great as* the negligence of the defendant then there shall be recovery. Therefore, in a case involving one plaintiff and one defendant, the plaintiff will recover if he is less than 50 percent negligent.

There are two basic forms of comparative negligence. The one North Dakota has adopted is very close to the one which is commonly referred to as the modified form of comparative negligence. Under the modified form the plaintiff will not recover anything unless his liability is less than a certain percentage of liability. The other form is what is referred to as the pure comparative negligence and is only present in the state of Mississippi.[2] The pure form provides that, although the plaintiff may be more than fifty percent negligent, this does not bar him from recovering that percent of damages not attributed to his negligence. In other words, if plaintiff's damages are ascertained at $10,000 and he is eighty percent negligent, he still recovers twenty percent, or $2,000; if he is ninety-nine percent negligent, he still recovers one percent, or $100.

II. COMPARISON WITH OTHER STATES

This article is intended merely to be a discussion of various aspects of the new comparative negligence law as it relates to other laws and the anticipated application of the law in North Dakota

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found in Volume 40K WIS. STAT. ANN. Attorneys and fellow practitioners Carroll and James Heft have a one-volume manual on comparative negligence, entitled COMPARATIVE NEGLIGENCE MANUAL (1971) which we will refer to later in the article. The thoughts expressed herein are derived from various readings, seminars, lectures and trial experience, the total of which makes it difficult to properly give credit by way of footnotes or sources, but we have tried to give credit as best we can.

2. MISS. CODE ANN. § 11-7-15 (1972):

> *Contributory negligence no bar to recovery of damages—jury may diminish damages.* In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

drawn from experiences under similar statutes. We will raise questions which will need to be resolved either by judicial interpretation or statutory change.

Comparative negligence is a significant change in North Dakota law. The proponents of comparative negligence assert that there is reason for dissatisfaction with the present system of handling tort cases. They point to the manner in which litigation is delayed and claim that the practicing bar and insurance carriers have not adequately taken care of the accident victim; thus, a change in tort reparations is called for through comparative negligence. Some also claim that too many benefits run to the defendant and too few to the injured plaintiff.

Comparative negligence is generally opposed by insurance carriers and defense lawyers. On the other hand, it is generally favored by plaintiffs' attorneys. In addition legal writers and scholars are almost unanimous in a desire to remove the bar of contributory negligence.[3]

At the legislative session that brought us our comparative negligence statute, there was support for the pure form of comparative negligence and the question may be raised as to why we did not adopt a pure form. The answer could well be that someday we will, but to go from a system in which something more than slight contributory negligence was a complete bar to a situation where someone who is 95 percent negligent can recover 5 percent of his loss would be too much of a transition. It is more logical that the transition be gradual.

Wisconsin has solved its tort litigation for more than forty years through the application of comparative negligence. Through these years, the law has changed, and it continues to change as the electorate imposes society's needs and wants upon its legislative body. As we will cover in more detail later, it is interesting to note that when Minnesota adopted its comparative negligence law in 1969,[4] Wisconsin was operating under the same test adopted by Minnesota, and now by North Dakota, that being the "not as great as" test. In 1969, New Hampshire passed a comparative negligence law which permitted recovery provided plaintiff's negligence "was not greater

3. A fine example of a scholar favoring removal of contributory negligence as a bar is Prosser in W. PROSSER, LAW OF TORTS 433 (4th ed. 1971).

> In that the hardship of the doctrine of contributory negligence upon the plaintiff is readily apparent, it places upon one party the entire burden of a loss for which two are by hypothesis, responsible. The negligence of the defendant has placed no less a part in causing the damage; the plaintiff's deviation from the community standard may even be more extreme; the injured man is in all probability for the very reason of his injury the less able to bear the financial burden of the law; and the answer of the law to all this is that the defendant goes scott free of all liability and the plaintiff bears it all.

4. MINN. STATS. ANN. § 604.01 (1974 Supp.).

than" defendant's negligence.[5] In 1971, Wisconsin amended its law to conform with the New Hampshire test.[6]

The significant difference in our law and the Wisconsin-New Hampshire type statute is that in the latter if the jury determines the negligence of plaintiff and defendant to be evenly balanced, fifty percent each, then there is recovery of fifty percent; whereas under the Minnesota-North Dakota form, plaintiff would not recover with a fifty-fifty finding—North Dakota's standard being "not as great as." There have been those on the Wisconsin Supreme Court who expressed the thought that Wisconsin should now amend its law to a pure form.[7]

Heft, in his treatise, concludes, and it seems well taken, that if you are to consider fault doctrines at all, it seems as though pure comparative negligence is wrong.[8] The pure form goes too far and is too liberal; it is not in line with the adversary system as it tends to compensate tortfeasors who are essentially guilty of causing the occurrence. It would seem that the pure form is quite similar to a no-fault type statute and maybe we are in a transition process, enroute to the no-fault system.[9] However, as we understand most no-fault plans, they are very limited in application, so comparative negligence would remain the rule in the cases not specifically covered by the no-fault legislation.

In 1955 Arkansas adopted a system which was intended to permit a plaintiff to recover though his negligence was greater than the defendant's. However, due to confusing results the statute was repealed two years later by enactments which allowed recovery only when the plaintiff's negligence was less than the defendant's.[10]

Our neighbors, Nebraska and South Dakota, permit the plaintiff to recover if his negligence is slight in comparison to the defendant's gross negligence, but state that the contributory negligence of the plaintiff shall be considered by the jury in mitigation of the plaintiff's damages.[11] The questions of negligence and contributory negligence are for the jury.[12] It is quite obvious that this is a general

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5. N.H. REV. STAT. ANN. § 507:7(a) (Supp. 1973).
6. WIS. STAT. ANN. § 895.045 (1966).
7. Lawver v. City of Park Falls, ——Wisc.——, 151 N.W.2d 68 (1967). Justice Hallows not only wrote the basic opinion but also wrote a concurring opinion in which he stated:

> In justice, there is no reason why a plaintiff who is 52 percent negligent should not recover 58 percent of the amount of his damage. There is nothing magic about being equally at fault so that one should lose all and the other win all. Each tort-feasor should be responsible for his torts to the extent of his culpability, whether that be less than or more than 50 percent of the total; and conversely, each tort-feasor should be able to recover the amount of his damages caused by himself and another diminished in proportion to the amount of negligence attributable to him.

8. C. HEFT & J. HEFT, COMPARATIVE NEGLIGENCE MANUAL (1971).
9. In House Bill 1214, The North Dakota Legislaturue adopted a "No Fault Plan".
10. C. HEFT & J. HEFT, *supra* note 8, at § 390.
11. NEB. REV. STAT. § 25.1151 (1964); S.D. COMPILED LAWS ANN. § 20-9-2 (1967).
12. *Id.*

verdict system, and that the jury is, in those states, permitted to determine the end result or award without any percentage finding. This would seem to make it difficult for any possible court supervision of that verdict. It is submitted that the South Dakota-Nebraska statute is not ideal, since what might be slight or gross negligence in the minds of one jury is not necessarily slight or gross negligence in the minds of another. It seems more logical that percentages or ordinary negligence would be a better method when you are weighing the relative negligence of the parties.

Prior to 1974, twenty-one states, Puerto Rico and the Virgin Islands had adopted comparative negligence.[13] If numbers and experience mean anything, it would seem that the Minnesota, Wisconsin and North Dakota forms—"not as great as," or "not greater than" —are the more popular and better methods because they provide a truer comparison of negligence while leaving the adversary system intact.

III. FEATURES OF THE NORTH DAKOTA LAW

A. *Application of the Statute*

In light of what we have discussed and considering other applicable laws, what does North Dakota have in its new comparative negligence statute? In such a review we must note some of the things the Legislature did or did not do at the time of adopting the comparative negligence doctrine:

1. It restated our degrees of negligence as slight, ordinary and gross.[14]

2. It did not repeal the guest statute.[15]

3. It did not specifically provide that the law should be applied retroactively, but rather the law received the standard effective application date of July 1, 1973.

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13. ARK. STAT. ANN. 27-1730.1-1730.2 (1947); COLO. REV. STAT. § 13-21-111 (1973); CONN. GEN. STAT. REV. § 52-557d (1958); GA. CODE ANN. § 105-603 (1968) (modified-plaintiff may recover even though plaintiff may in some way have contributed to his injury); HAWAII REV. STAT. § 663-31 (Supp. 1974); IDAHO CODE § 6-801-6 (1947); ME. REV. STAT. ANN. tits. 14, § 156 (1965); MASS. GEN. LAWS Ch. 231, § 85 (Supp. 1975); MINN. STAT. ANN. § 604.01 (1975); MISS. CODE ANN. § 85-3-19 (1972); NEB. REV. STAT. § 25-1151 (1964); NEV. REV. STAT. Ch. 787 (1973); N.H. REV. STAT. ANN. § 507.7 (Supp. 1973); N.J. REV. STAT. Title 2A, c-15, § 5.1 (Supp. 1975); N.D. CENT. CODE § 9-10-07 (1971); OKLA. 23 § 11 (1975); ORE. REV. STAT. § 18.470 (1973); P.R. LAWS ANN. tit. 31, § 5141 (1974); R.I. GEN. LAWS ANN. § 9-20-4 (1956); S.D. COMPILED LAWS ANN. 20-9-2 (1967); Tex. Vernons Tex. Stat., house bill, 88 63rd Legislature; VT. STAT. ANN. 12-1036 (1972); V.I. CODE ANN. 5-1451; Wash. First Exec. Session, c. 138, effective 4/1/74; WISC. STAT. ANN. § 895.045 (1966).

14. N.D. CENT. CODE § 1-01-16 (1975) "*Degrees of negligence.*—There are three degrees of negligence mentioned in this code, namely, slight, ordinary, and gross. Each of the last two include any lesser degree or degrees."

15. N.D. CENT. CODE § 39-15-03 (1972), which was held to be unconstitutional. Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974), *noted in* 50 N.D.L. REV. 139 (1973).

At first blush, and noting our discussion of South Dakota and Nebraska statutes which involve a comparison between slight and gross negligence, we might think that such was being considered in North Dakota; however, our statute has no such language.

It would be useful, as we discuss and attempt to apply comparative negligence, if we would set up a hypothetical case to use as a means of showing actual application of the doctrine. This hypothetical case will be referred to throughout this article. Let us assume the following facts:

> *A* is the driver of an automobile owned by *B*, who is a passenger in the right front seat. The car is involved in an intersection accident with a car owned and driven by *C*. It is a clear day, road conditions are good and unobstructed, and the road upon which *C* is driving is the favored roadway, not only by a yield sign, but by *C* having the directional right of way. However, *C* was driving at a rate of speed which bordered on the limit and the normal lookout questions were present. All parties were injured. *A* and *B* commenced a suit against *C* who in turn counter-claimed against *A* and *B* for his injuries and damages.

From experience, one might surmise, that this is the type of case where, under the contributory negligence rule, *C* is, more often than not, found to be contributorily negligent and barred from recovery. *A* may well be found by the jury to be negligent as a matter of law or quickly dismissed by the jury. *B* would normally recover unless, by circumstances, *A*'s negligence is imputed to *B* as owner, or barred by an affirmative defense.

It should be noted that comparative negligence in no way changes the substantive law, but rather changes the determination of those substantive rights or duties into percentages of negligence to determine the right to recovery. It will be noted later that comparative negligence, while not changing the substantive law, can make quite a difference in the way pleadings are structured.

B. *Effective Date*

The effective date of our statute, July 1, 1973, raises a question as to the practical application of the law. North Dakota Century Code section 1-02-10 provides:

> No part of this code is retroactive unless it is expressly declared to be so.

As noted, our present law is silent and, therefore, it appears that comparative negligence will be applied only to causes of action occurring and accruing after July 1, 1973. It would seem from the practical application of the law by the courts that this is going

to create some problems and concerns. To illustrate, let us take our hypothetical fact situation, but with one accident occurring before July 1, 1973, and one after July 1, 1973. The cases are tried back-to-back before the same jury. Let us assume that C is found to be negligent in failure to keep a proper lookout, but not as to his rate of speed. Let us say that he is twenty percent and that this is more than slight,[16] and, therefore, he is barred from recovery by the law of contributory negligence.

In the second suit, where the accident occurred after July 1, C is not only found to be negligent as a result of a failure to keep a lookout, but also as to his speed, and his negligence accumulates to a total of forty-five percent. He then goes home with fifty-five percent of the total damages. It seems to this writer that it would be of little consolation to C, in case one, that the law changed the week after he had his accident; and, therefore, he is completely barred. Granted, laws must have an effective date and change at some time or another, but it would appear that the Legislature thought that society, at that given point in time, had concluded that people should be compensated if their negligence was not as great as the other party's. The reasons for concluding that contributory negligence should no longer be a bar to recovery were to take away or alleviate the harshness of that doctrine. In addition, it would seem that it would be confusing to the jury to reconcile why one day they are not compensating and the next day they are compensating under the same set of facts.

There are good arguments for not applying the law retroactively. To do so would mean that cases which occurred prior to July 1, 1973, may have a significant value following July 1, 1973, because after that date contributory negligence would no longer be a complete bar to recovery. This was evident in Minnesota following its application of comparative negligence in that a great number of subrogation claims were dug out of the cellars and reevaluated as if the statute of limitations had not run on them. These cases received a value if there was ten or fifteen percent negligence (assuming that the figure may be considered as contributory negligence). It boils down to the mere fact that they could recover that portion of their interest in the subrogation matter up to the percentage which they themselves were not negligent. If we are to conclude that comparative negligence was enacted because contributory negligence was too harsh a doctrine, then it should not be incongruous with society's desires that we do consider compen-

16. In Willert v. Nielsen, 146 N.W.2d 31 (N.D. 1966) the North Dakota Supreme Court held it prejudicial error to instruct that plaintiff's contributory negligence, "even in the slightest degree", would bar recovery.

sating on a comparative negligence basis those persons whose matters had not already been litigated and in which the statute of limitations had not run. In those cases, a general philosophy is that it is better to spread the losses over the great masses than to have an individual suffer the loss acknowledging that in most cases the losses are paid through insurance carriers and then spread over the multitude of policyholders.

As noted above, Minnesota did provide that its law would be applied to all cases tried after July 1, 1969, and as one might suspect it quickly was tested on constitutional grounds.[17] The Minnesota Supreme Court concluded that the Legislature had intended to give, and had the constitutional right to give, the statute retrospective application.

C. *Guest Statute*

Since the 1973 Legislature restated and readopted the degrees of negligence and did not remove the guest statute, it seems apparent that the legislature still wanted to favor a host driver.[18] Still, when considered logically, it was inconsistent to enact a comparative negligence law and retain the guest statute, which requires proof of gross negligence. The jury would be asked to compare two dissimilar degrees of negligence in its deliberations. The theory of comparative negligence is that the respective negligence of all parties involved is compared in order to determine whether the plaintiff shall recover.

Guest statutes are not favored in the tort system; many have been repealed and not one has been enacted in the past 25 years. Guest statutes have as their only justification the ruling out of collusive lawsuits.

North Dakota has ruled its guest statute unconstitutional.[19] While the decision comes following the passage of our comparative negligence law, the supreme court used that as only one of the reasons why it should be struck down. However, it is timely that the guest statute was set aside at the onset of practice under comparative negligence in order to permit a more smooth and logical operation of the statute's purpose.

We believe that the setting aside of the guest statute is a relief to many persons dealing with the statute. In the waning days of the guest statute, many practitioners approached one-car guest

17. Peterson v. City of Minneapolis, ——Minn.——, 173 N.W.2d 353 (1969). In this case there was involved an action for personal injury occurring on April 24, 1967, more than two years before the statute's enactment. The court acknowledged that there are cases contrary, but concluded the better rule would be a retrospective application.

18. *See* Case Comment, 50 N.D.L. REV. 139 (1973) for discussion of guest statute in North Dakota.

19. Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974).

negligence on the premise that juries have little difficulty finding gross negligence in order to compensate; that the doctrine or statute had become watered down and in many cases, some will contend, it was to the point where juries found ordinary negligence rather than gross negligence, therefore, concluding that maybe we no longer had gross negligence in a strict sense of the term. They would argue that gross negligence is something that you can philosophize about, but as to a practical application on a case by case basis, it is not strictly a meritorious defense. The language of the supreme court in *Johnson v. Hassett* brings this to light and merely states the fact that society no longer needed the guest statute.

Our thoughts cannot be better stated than what Chief Justice Hallwhols of the Wisconsin Supreme Court said in *Bielski v. Schultze.*[20] In that leading comparative negligence case, Wisconsin overruled the guest statute and said:

> 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 higher 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.

D. *Jury Verdicts*

If we could assume in our supposed fact situation that *A* might have been under the influence of alcoholic beverages or that he was known to be a fast and reckless driver, then, of course, we could assume that in the answers to *B*'s complaint there would be raised an affirmative defense of assumption of risk. It could well be that the jury would assess negligence on *B* under the theory of assumption of risk of fifteen to twenty percent, but as to other types of negligence such as lookout, in a case such as this, under the present North Dakota decisions, the imputation of negligence of the driver to a passenger-owner, or just a passenger, is often not the case.[21] However, from experience in other jurisdictions where comparative negligence has been the rule for some time, the finders of fact are frequently finding small percentages of negligence which are passed on to the plaintiff and reduce his damages. This is consistent with the theory behind the whole doc-

20. Bielski v. Shultze, ——Wis.——, 114 N.W.2d 105 (1962).

21. *See* Emery v. Northern Pac. Ry. Co., 407 F.2d 109 (8th Cir. 1969). Negligence of driver not imputed to passenger decedent; Mertz v. Weibe, 180 N.W.2d 664 (N.D. 1970). Negligence of father-driver could not be imputed to mother and daughter to bar recovery for their injuries.

trine. Under the former rule of contributory negligence the finding of a small percent of contributory negligence was a complete bar to this plaintiff. Now the jury precisely determines the respective contributing negligence percentages and the end result is that the plaintiff's damages are reduced accordingly.

When the case is submitted to a jury using the special verdict procedure, under the new statute it is the jury's duty to:

1. Answer the question as to whether or not the parties involved were negligent.
2. Then, if so, the question becomes whether or not such negligence was a direct or proximate cause of the claims presented.
3. Taking the combined negligence of those whose negligence had a causal effect to be one hundred percent, break down the one hundred percent, or attribute that portion of the one hundred percent to the parties causally negligent.
4. Normally last, the amount of damages or award, undiminished by any calculation or reduction.

We placed damages as the jury's last question, but some proponents would say that damages should be the first question. Theoretically, at least, they would contend that you get a truer picture of damages because the jury at that point should have no thoughts of mitigating or otherwise reducing the damages because of its previous consideration of the negligence questions. The general charge to the jury makes a positive direction that the damages question be answered regardless of how they have answered the negligence question. In a true special verdict type situation the court so armed with the percentages of causal negligence determines the verdict. Of course, if the plaintiff's negligence is greater than the defendant's, then the plaintiff is nonsuited. If plaintiff's negligence is less than fifty percent and the negligence of a defendant is greater, then there is a finding for plaintiff, but plaintiff's damages are reduced by his percent of negligence.

It is to be noted that North Dakota permits the special verdict and,[22] further, that the court has supervision over the verdicts to set them aside if unconscionable or not justified by the evidence.[23]

Court supervision here is concerned with more than the propriety of the damage award. It also entails a determination as to whether the percent of negligence proration between the parties is justified by the evidence. Courts consistently have ruled that the breakdown of percentages in a given case is for the trier of fact,

22. N.D. R. CIV. P. 49(2).
23. N.D. R. CIV. P. 50(1).

and on appeal, courts will not set aside what the jury has found and substitute what they should have found by way of a given percentage proration.[24] The appellate courts, rather, state that the percentages are not as found by the jury and order a new trial.[25]

In actual practice, it is amazing how well the jury perceives the end result of its participation in the comparative negligence machinery. Real proof of that is shown in cases where there are close negligence questions such as the plaintiff's contributory negligence. When the jury wants to compensate, they return percentages of 45-55, 49-51 and similar combinations with the plaintiff's being the smaller percentage. Further, on occasion the jury may find the answer to question number one (Was the defendant negligent?) no, or carrying it a step further, may find defendant's negligence fifty percent, or less than the plaintiff's. In either case, the jury does not answer the damage question at all or they will come back for further instructions; "Having found thusly, must we spend time answering the damage question?" This again proves that the composite makeup of juries results in an intelligent judgment. The juries' intelligence should never be underestimated.

To review some other portions of the statute as to its practical application, we should note that the Minnesota statute when adopted in 1969 was identical to the Wisconsin statute as it then existed. North Dakota's statute is identical to the Minnesota statute, as far as that statute went. However, North Dakota added the following language:

> Upon the request of any party this section shall be read by the court to the jury and *the attorneys representing the parties may comment to the jury regarding this section.*

In order to ascertain what this means, the question may be asked, did North Dakota really want to copy the Minnesota law?

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24. Bruno v. Biesecker, ——Wisc.——, 162 N.W.2d 135, 138 (1968). "The general rule is that a jury's findings to apportionment of negligence will be sustained if there is credible evidence which under any reasonable view supports such findings. . . . apportionment of negligence is peculiarly within the province of the jury to determine." *See also,* Martin v. Bussert, ——Minn.——, 193 N.W.2d 134, 139 (1971). "Upon a review of a jury's apportionment of negligence between tort-feasors, we are governed by those same standards—that is, we will not substitute our judgment for that of the jury unless there is evidence reasonably tending to sustain the apportionment or the apportionment is manifestly and palpably against the weight of the evidence."

25. Winge v. Minnesota Transfer Ry. Co., ——Minn.——, 201 N.W.2d 259 (1972). In this case the plaintiff, an automobile driver, drove into the side of the defendant's train at a crossing. Apparently, this was a crossing on the road which the plaintiff was acquainted with although for some reason did not see the train. The facts further revealed that the operators of the train apparently noticed that the plaintiff had not observed the crossing, and that they even attempted to stop the train for him. However, they failed and the plaintiff did collide with about the second car of the train. In that case the court directed a verdict for the defendant Railway Company and on appeal the Minnesota High Court sustained the lower court's ruling by stating that, " . . . plaintiff's negligence was equal to, if not greater than, defendant's is compelled by the record in view of the plaintiff's familiarity with the crossing, its unobstructed nature, the existence of arc lights, and the condition of the road and weather." *Id.* at 264.

By court rule, following adoption of its comparative negligence statute, and at about the time North Dakota adopted its statute, Minnesota amplified its law:

> . . . the court shall inform the jury of the effect of its answers to the percentage of negligence question and shall permit counsel to comment thereon, unless the court is of the opinion, that doubtful or unresolved questions of law, or complex issues of law or fact are involved, which may render such instruction or comment erroneous, misleading or confusing to the jury.[26]

This is where the Minnesota and North Dakota statutes differ from Wisconsin. Wisconsin does not permit the attorney to argue the effect of the findings of the percentages of negligence. Though Minnesota, by court rule, implies such permission, no case law has been found which specifically deals with the question since the rule's adoption. If it does mean what it says it seems to be in conflict with prior Minnesota case holdings.[27] Our research reveals no North Dakota case law which has spoken on the question of the right of an attorney to argue the effect, or end result, of answering a special interrogatory question one way or the other. We can assume that such will be permitted under our North Dakota statutory language.

It is well to spend a little time discussing possible comments to the jury by attorneys as to percentages of negligence. We are not aware that it has ever been a bar in the comparative negligence law to argue what percentage of negligence or contributory negligence a party may have in a given circumstance. Going back to our hypothetical, it could be argued that *A* was guilty of sixty percent negligence because of a composite of his negligent acts. It could be argued that the composite of factors to *C* would make him twenty-five percent negligent. What our statutory provision apparently permits is for the attorney to argue the effect of those percentages as relates to the plaintiff's right of recovery. It may be easier to explain where you have only one plaintiff and one defendant. Let us take A and B in a one-car roll-over. If we had a serious question of assumption of risk, the parties could argue that they were equally wrong because of some imputation of negligence or of joint venture, and then such argument could become very significant. It may well be argued, in such a case, that if the jury should conclude that *A* was fifty percent negligent, then it will be sending this poor, badly-injured individual home without a penny. On the other hand, the defense may well state that this is

26. Minnesota Rules of Court 49.01 subparagraph (2).
27. Johnson v. O'Brien, ——Minn.——, 105 N.W.2d 244 (1960).

nothing more than a wild adventure between the parties and that the real way for the jury to do justice in this case is to find both parties fifty percent negligent. The jury should therefore leave them as they entered the courtroom and nobody should have recovery. It is plain to see that this type of argument can be devastating and it, in no uncertain terms, makes it very obvious to the jury what their task is. Such type of argument is much disfavored by Heft, and he concludes by asking whether it is an advantage that you want, or justice?[28]

E. *Contribution*

It would seem that our contribution statute as to sharing of the loss is amended by adoption of the comparative negligence statute. Our contribution statute heretofore provided that the tortfeasors should share "pro rata."[29]

> The comparative negligence statute provides:
> When there are two or more persons who are jointly liable, *contributions to award shall be in proportion to the percentage of negligence attributable to each.*[30]

The above should not be confused with the portion immediately following the above quote:

> . . . [p]rovided, however, that each shall remain jointly and severally liable for the whole award.[31]

This is really not different except as a matter of degree. If we can use the example that plaintiff *A* receives an award of $10,000 and that no percentage of negligence is attributed to the plaintiff, defendant *B* is found ninety-five percent negligent, and *C* a mere five percent negligent. Let us assume that *B* is completely insolvent. Plaintiff need not wait to collect his judgment. He can immediately collect against the solvent defendant. If we have no question of solvency, *C* would pay only $500; however, due to the insolvency of *B*, *C* must pay the whole $10,000 as his negligence is greater than plaintiff's. Of course, he has a right of contribution against *B* for whatever that might be worth. This is not really a change because, before, there also was joint and several liability and *B* then would be required to pay $5,000 under a sharing of negligence the-

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28. C. HEFT & J. HEFT, *supra* note 2.

29. N.D. CENT. CODE § 32-38-01(2) (1960).
> "The right of contribution exists only in favor of a tort feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort feasor is compelled to make contribution beyond his pro rata share of the entire liability."

30. N.D. CENT. CODE § 9-10-07 (1975). (Emphasis added).

31. *Id.*

ory, before comparative negligence, and he would then, due to *B*'s insolvency, pay $10,000.

Let us take the above situation and merely find the plaintiff *A* ten percent negligent, *C* five percent negligent and *B* eighty-five percent negligent. You would have a situation where the plaintiff *A*'s negligence is greater than the solvent *C*. *A* then has his $10,000 judgment against the insolvent *B*.

Pleadings have not really changed because of the advent of comparative negligence. We still have our affirmative defenses and the rules as to asserting them are the same.[32] These defenses may be argued in an attempt to show mitigation or a complete bar to recovery. It has been held that you can pool or combine the negligence of parties who are in concert of action or joint venture to make a percentage greater than the party seeking recovery.[33]

As an example let us look at our fact situation. *B* commenced an action against *A* and *C*. *C* counterclaims against *B* and cross-claims against *A* for his injuries contending that they were not only both negligent but at the time they were in a joint venture or that their activities were in concert. The jury decides to leave them all as they were and finds them all equally negligent—*A* - 33⅓ percent, *B* - 33⅓ percent and *C* - 33⅓ percent. *B* could not recover as his negligence is as great as the other defendants' and *A* and *C* could not be in concert. The same is true of *A*. However, *C* is able to combine the negligence of *A* and *B* to a total of 66 2/3 percent. *C*'s negligence being 33⅓ percent, he would recover; with his damages being diminished by the 33⅓ percent. Maybe, in this specific case, the jury has been outsmarted.

It is important that we might consider indemnity and contribution pleading in the light of our assumed fact situation. Now let us assume that both *A* and *B* commence a suit against *C* for personal injury. *C* now counterclaims against *A* and *B* for his injury and against *A* for indemnification or contribution on the claims of *B*. In all of these assumed fact situations we consider the jury's findings to be that of causal negligence to the injuries complained of. Now let us assume the jury finds: *B* ten percent negligent and his damages to be $10,000; *A*'s negligence forty-five percent and *C*'s negligence forty-five percent. *B* will recover $9,000. $4,500 to be paid by *B* and $4,500 by *C*, assuming both to be solvent.

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32. N.D.R. Civ. P. 8(c).

33. Krengel v. Midwest Automatic Photo, Inc., ——Minn.——, 203 N.W.2d 841 (1973). Plaintiff here was a customer who fell over a door riser in a photo booth which was located on property owned by one defendant, manufactured by a second defendant and installed by a third defendant. The jury found negligence on plaintiff to be thirty percent, defendant owner thirty percent, defendant manufacturer thirty percent and installer ten percent. The court found that defendants were jointly liable, but since one defendant was less negligent than the plaintiff no recovery could be had against that one, and, therefore, the two defendants equally shared seventy percent of plaintiff's damages.

Through experience, guidelines have been developed to relate the comparative negligence between drivers in the more normal or usual cases:

Rear End	100%
Intersection:	
Uncontrolled	60-40%
Stop Sign	85-15%
Signal Light	90-10%
Left Turn	
Oncoming	80-20%
Fail to Yield	70-30%
Improper Pass	75-25%
Wrong Side of Road	90-10%
Improper Turn	80-20%

These have been helpful, but of course each case must be reviewed to see how close to normal and usual your case is.

The real goal of your representation of a plaintiff is to achieve a result which finds plaintiff less negligent than a *solvent defendant*, and, a step further, to keep plaintiff's negligence to a minimum. Experience reveals that whereas formerly juries were reluctant to find contributory negligence because that would be a bar to any recovery, now juries, without much difficulty, find some percentage of contributory negligence as long as it is less than fifty percent. It is sometimes wise in a proper case to concede that your plaintiff is negligent, for instance, as to lookout, but to argue that such is minimal and even suggest to them a specific minimal percentage. It is easier for the jury to see the real comparison or relationship between the parties. It must be remembered the pooling of negligence that is possible.

III. SUMMARY

Comparative negligence and the accompanying special jury verdict would seem to be a very convenient procedure, where, in one trial, various third party proceedings, crossclaims, and counterclaims can be disposed of. In the special verdict questions, without reference to the nature of the pleadings, the jury is directed to determine the negligence of each party, taking those contributing to the causal effect being 100 percent and prorating it. The final solution of the problem is with the court. Though we have only discussed the question of extent of damages in respect to one person, of course, there can and will be many cases wherein several parties' damages will be ascertained by the jury but,

again, the actual applying of the respective conclusions of their percentage findings of negligence to that damage is for the court.

We have been quite accustomed to severance and separate trials of third party and other proceedings ancillary to the basic action on the premise that such could be confusing to the jury. Now the jury can take the case one question at a time and not be concerned with the end result. Comparative negligence, then, should lead to just results in multi-party actions. The jury compares the negligence of one party to that of another party as relates to the injured or damaged party.

IV. CONCLUSION

We have merely scratched the surface of the numerous aspects of comparative negligence. The law is new in North Dakota and many practitioners are looking forward to their first encounters with it. We intended to merely raise some points for their consideration.

Now that North Dakota has comparative negligence, it is not too early to consider how it can be improved. We have discussed the anomaly of degrees of negligence. Even though the guest statute is removed, there are still other degrees of negligence which permit unequal or preferred treatment. If we are to be concerned about consistent application of the doctrine, then we must also consider the preferences given in landlord cases, cases involving trespassers, licensees, or business invitees. Further, to be wholly consistent with a complete comparison of negligence between parties, the various governmental[34] and charitable immunities available as a defense seem illogical.

We think it is fair to conclude that we will see a continuting number of states adopting comparative negligence and that we will see removal of strict and rigid bars to recovery. Those states which retain the defenses of charitable and governmental immunity as to negligent acts will be required to insure against such potential liability or the immunities will be removed. These enactments reflect social change. Society is now demanding that the route to recovery for injured persons be smoothed out and that the resultant losses be borne by those responsible on a more equitable basis, such as where fault becomes a matter of degree.

34. Kitto v. Minot Park District, 224 N.W.2d 795 (N.D. 1974). Governmental immunity was struck down in this case by the North Dakota Supreme Court.