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# Negligence - Contributory Negligence - The Doctrine of Comparative Negligence

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follow adoption of the dissent, it is to be hoped that North Dakota will follow the rule of this case.[45] GORDON THOMPSON.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — THE DOCTRINE OF COMPARATIVE NEGLIGENCE. — There is a pronounced trend in this country today toward the adoption of damage apportionment or "comparative negligence" acts. In 1951, for instance, legislation to that effect was introduced in sixteen states.[1] The reason for the present trend probably lies in the great post-war increase in automobile accidents, the litigation arising therefrom, and the corresponding need for aiding the uncompensated victims. In view of the growing prominence of the doctrine of comparative negligence, it seems desirable that any discussion of it should include at least some background, by way of a brief treatment of the doctrine of contributory negligence, its modifications and the beginnings of comparative negligence—followed by a judicial and legislative history of the doctrine of comparative negligence, as well as a discussion of some of the problems it entails.

*Contributory Negligence*

The doctrine of contributory negligence was born with the English case of *Butterfield v. Forester.*[2] Plaintiff, riding away from the public tavern at a furious pace, failed to observe a pole the defendant had left lying across the road and rode into it. He was subsequently disallowed recovery for his injuries on the theory that he had contributed to his own harm by failing to use common and ordinary caution.

In 1824 the doctrine was accepted in America.[3] It has operated, essentially, to preclude a plaintiff from recovery where his act contributed as an efficient or "proximate" cause to his own injury.[4]

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45. Care must be used in the preparation of the pleadings, in order to bring the action within the provisions of the Uniform Fraudulent Conveyance Act. In the case of Irwin v. Meese, 325 Mich. 344, 38 N.W.2d 867 (1949), an equitable action was brought to enjoin the transfer of assets, previous to the adjudication of a tort claim. Plaintiff's counsel evidently overlooked the Uniform Act in the theory of the case, for the Act, in effect in Michigan at the time, was not pleaded. The Supreme Court of Michigan refused to enjoin the transfer, although it was perfectly obvious that if the Uniform Act had been pleaded, the transfer would have been ruled a fraudulent conveyance.

1. Prosser, *Comparative Negligence*, 41 Calif. L. Rev. 1 n.1, citing Lipscomb, *Comparatice Negligence*, 344 Ins. L.J. 667. The sixteen states are: Arizona, Arkansas, California, Colorado, Kansas, Massachusetts, Michigan, Missouri, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah and Washington.

2. 11 East 60, 103 Eng. Rep. 926 (1809).

3. Smith v. Smith, 19 Mass. 621 (1824).

4. Cleveland Ry. Co. v. Halterman, 22 Ohio App. 234, 153 N.E. 922 (1926); McLeod v. City of Spokane, 26 Wash. 346, 67 Pac. 74 (1901).

Nor are the plaintiff's damages merely mitigated by his acts; "precluded" means what it says.[5] It is worth noting that a few jurisdictions transfer the burden of proof to a plaintiff so that he must plead and prove freedom from contributory negligence.[6] Consideration of the parties as practically *in pari delicto,* however, is the principal feature of the doctrine.

Supporters of the theory of contributory negligence say that it tends to make people more cautious through their knowledge that a plaintiff is responsible for his own safety; conversely, it has been said that such a rule encourages negligence since a defendant is allowed to escape the consequences of his own wrongful act.[7] Both arguments seem fallacious. It is improbable that the average motorist, for instance, stops to reflect on the possibilities of liability or litigation when confronted with an impending accident! At any rate the defense of contributory negligence has become considerably less popular that it was at common law.[8]

Certain modifications of and exceptions to the doctrine have resulted from the growing dissatisfaction it has inspired. The rule that contributory negligence is no defense to an action to recover for injury caused by a defendant's "wilful negligence,"[9] the imposition of absolute liability in cases of violation of certain statutes by the defendant,[10] and the last clear chance doctrine are examples. The latter, sometimes called the "jackass doctrine," originated with *Davies v. Mann.*[11] In that case the plaintiff was allowed to recover for injuries inflicted on his donkey (left fettered on the highway) by the defendant's vehicle, on the theory that because the defendant had the last clear chance to avoid the harm, the plaintiff's own negligence was not a proximate cause of the injury. Although the doctrine has been thought to be a step toward apportionment of damages (i.e. what is known as "comparative negligence"), in

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5. Rice v. Crescent City R. Co., 51 La. Ann. 108, 24 So. 791 (1899).

6. Green, *Illinois Negligence Law,* 39 Ill. L. Rev. 116, 125 n.33 (1945). In Iowa, for instance, the burden is on the plaintiff except as to employees and passengers.

7. Lowndes, *Contributory Negligence,* 22 Geo. L.J. 674, 681 (1934).

8. *See* Haeg v. Sprague, Warner & Co., 202 Minn. 425, 430, 281 N.W. 261, 263 (1938).

9. Ziman v. Whitley, 110 Conn. 108, 147 Atl. 370 (1929); Atchison, T. & S. F. Ry. Co. v. Baker, 79 Kan. 183, 98 Pac. 804 (1908); Mihelich v. Butte Electric Ry. Co., 85 Mont. 604, 281 Pac. 540 (1929).

10. Terry Dairy Co. v. Nalley, 146 Ark. 448, 225 S.W. 887 (1920) (brought under child labor act); Bennet Drug Store v. Mosely, 67 Ga. App. 347, 20 S.E.2d 208 (1942) (sale of poison to a person who knows its character); Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 176 N.W. 482 (1920) (brought under a child labor act); Pizzo v. Wiemann, 149 Wis. 235, 134 N.W. 899 (1912) (prohibiting the sale of dangerous articles to minors).

11. 10 M. & W. 546, 125 Eng. Rep. 588 (1842).

reality it has been an extremely confused and misapplied doctrine.[12] One leading writer, concluding his discussion of "last clear chance," has said: "This variety of irreconcilable rules, all purporting to be the same, and the lack of any rational fundamental theory to support them, suggest that the 'last clear chance' doctrine is more a matter of dissatisfaction with the defense of contributory negligence than anything else."[13] Other modifications of the rule of contributory negligence include a rule of strict liability in cases of extra-hazardous activities by the defendant,[14] and holdings that the keeping of vicious animals by a defendant bars his right to the defense of contributory negligence.[15]

The foregoing "modifications" benefited the doctrine of contributory negligence in a peculiar fashion. While insuring a plaintiff that he would be "equitably" treated, they made the defendant absolutely liable—with few exceptions. Thus there seemed to be no point in compromise: in some circumstances a plaintiff could recover regardless of his own negligence; in others his negligence would bar his recovery. That the answer to the thorny problems involved seemed to lie in damage apportionment or comparative negligence was fervently voiced by a Minnesota court.[16] A sort of apportionment, of course, has often been made by juries which disregard any instructions regarding contributory negligence and award the negligent plaintiff diminished damages. The courts of admiralty in collision cases have long divided damages between the negligent parties.[17] Not until 1908, however, was there adopted any real system of apportionment of damages in the American laws of negligence.

### *Comparative Negligence*

In 1908, the Federal Employer's Liability Act was passed.[18] It

12. Prosser, *supra* note 1, at 7; see also Note, 26 N.D. Bar Briefs 30 (1950).
13. Prosser, Torts 416 (1941).
14. Luthringer v. Moore, 31 Cal.2d 489, 190 P.2d 1 (1948); Whitman Hotel Corp. v. Eliott & Watraus Eng. Co., 137 Conn. 562, 79 A.2d 591 (1951).
15. Tidal Oil Co. v. Forcum, 189 Okla. 268, 116 P.2d 572 (1941); Moore v. McKay, 55 S.W.2d 865 (Tex. Civ. App. 1932).
16. Haeg v. Sprague, Warner & Co., 202 Minn. 425, 430, 281 N.W. 261, 263 (1938) "No one can appreciate more than we the hardship of depriving plaintiff of his verdict and of all right to collect damages from defendant; but the rule of contributory negligence, through no fault of ours remains in our laws and gives us no alternative other than to hold that defendant is entitled to judgement notwithstanding the verdict. It would be hard to imagine a case more illustrative of the truth that in operation the rule of comparative negligence would serve justice more faithfully than that of contributory negligence."
17. White Oak v. Boston Canal Co., 258 U.S. 341 (1922); The Eugene F. Moran, 212 U.S. 466 (1909); The Atlas, 93 U.S. 302 (1876).
18. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§51-60 (1946); see Edwards v. Baltimore & O. R. Co., 131 F.2d 266 (7th Cir. 1942); Grand Trunk Western R. Co. v. Boylen, 81 F.2d 91 (7th Cir. 1936).

provided for apportioning damages in all negligence actions, in federal or state courts, involving injuries to railroad employees employed in interstate commerce. Section 53 of the Act reads:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *Provided*: That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."[19]

Subsequent to the passage of the Act several states adopted exact or similar provisions in state "employer's liability acts."[20] Some states passed other types of comparative negligence statutes as well, limiting their scope to special classes or circumstances.[21] All of the foregoing legislation concerning comparative negligence, however, is of a relatively minor nature in any general treatment of the subject. A discussion of major judicial and statutory developments follows.

### *Developments in Case Law*

It is interesting to note that several American jurisdictions have at one time or another employed the theory of comparative negligence. From 1858 with the case of *Galena & Chicago Union Railroad Company v. Jacobs*[22] until 1894, Illinois followed a "hybrid" system of comparative negligence by which the plaintiff whose negligence was slight in degree could recover his total damages

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19. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§51-60 (1946).

20. Ark. Stat. Ann. §73-916 (1947); Colo. Stat. Ann. c. 139, §87 (2) (1935); Iowa Code Ann. §§479-124 and 479-125 (1949); Kan. Gen. Stat. §66-238 (1949); Ky. Rev. Stat. §277.320 (1950); Minn. Rev. Laws §72-649 (1947); Mich. Comp. Laws §419.52 (1948); Neb. Rev. Stat. §74-704 (1943); N.C. Gen. Stat. c. 60 §67 (1943); N.D. Rev. Code §49-1603 (1943); Ohio Gen. Code Ann. §9018 (Page, 1945); S.C. Code §8376 (1942); S.D. Code §52.0945 (1939); Tex. Div. Stat. Ann. art. 6440 (Vernon, 1949); Va. Code Ann. §5792 (1942); Wyo. Comp. Stat. Ann. §65-502 (1945).

21. Ariz. Code Ann. §56-801 (determines classes of employees benefited, *i.e.*, railroad, manufacturing, mining, milling, etc.), §56-805 (proclaims comparative negligence as applicable in the above cases) (1933); Cal. Lab. Code §2801 (1937) (covers all employees); Fla. Stat. §769 (1941) (relates to hazardous employment and apportionment of damages between parties unless employee was injured by a fellow servant).

22. 20 Ill. 478 (1858).

from a defendant whose negligence was gross in comparison.[23] The lack of any actual apportionment of damages made this system fall short of true comparative negligence; Illinois abandoned it in 1894 with *Lake Shore & M. S. Ry. v. Hessions.*[24] Kansas also recognized this theory of negligence and allowed a plaintiff to recover under the same circumstances as prescribed by the Illinois court.[25] In 1883, however, Kansas likewise refused to preserve the system.[26]

Tennessee adopted a rule which went beyond the Illinois and Kansas rules by providing for an actual apportionment of damages; *i.e.*, if a plaintiff's negligence were of a remote character only, his negligence was to be considered in mitigation of damages.[27] The old rule, however, which saw a plaintiff whose negligence was a "proximate cause" barred from recovery, was retained.[28] Nevertheless a step toward actual comparative negligence had been made.

Louisiana had, in 1825, passed a comparative negligence statute which stated:

> "The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently."[29]

That provision, however, has been ignored by the Louisiana courts which have stubbornly clung to the principles of contributory negligence.[30] Georgia's comparative negligence statute as construed by the courts has been so inextricably joined with the confusing

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23. The rule is reflected today by the application of the following statutes: N.D. Rev. Code §1-0116 "There are three degrees of negligence mentioned in this code, namely, slight, ordinary, and gross. Each of the last two includes any lesser degree or degrees.", N.D. Rev. Code §1-0117 "Slight negligence shall consist in the want of great care and diligence, ordinary negligence, in the want of ordinary care and diligence, and gross negligence, in the want of slight care and diligence.", see Hart v. Hanson, 14 N.D. 570, 105 N.W. 942 (1905); Ga. Code Ann. §3471 (ordinary), §3472 (slight), §3473 (gross) (1926), see Southern Ry. Co. v. Davis, 132 Ga. 812, 65 S.E. 131 (1909); La. Civ. Code §3556 (13) (Dart. 1945); Okla. Stat. tit. 25 §§5, 6 (1951). Speaking of the doctrine of "degrees of negligence," Prosser says ". . . it has been condemned by the great majority of writers and rejected by the greater number of courts, as a distinction vague and impracticable in its nature, unfounded in principle, which adds nothing but confusion to the already nebulous and uncertain standards which must be given to the jury," Prosser, Torts 258 (1941).

24. 150 Ill. 546, 37 N.E. 905 (1894).

25. Pacific R. Co. v. Houts, 12 Kan. 259 (1873); Sawyer v. Sauer, 10 Kan. 351 (1873).

26. Atcheson, T. & S. R. Co. v. Morgan, 31 Kan. 77, 1 Pac. 298 (1883).

27. Southern Ry. Co. v. Pugh, 97 Tenn. 624, 37 S.W. 555 (1896).

28. Bejach v. Colby, 141 Tenn. 686, 214 S.W. 869 (1919).

29. La. Code art. 2303 (1825); the same provision is contained in La. Civ. Code art. 2323 (Dart. 1945).

30. See Hillyer, *Comparative Negligence In Louisiana,* 11 Tulane L. Rev. 112 (1936); Malone, *Comparative Negligence—Louisiana's Forgotten Heritage,* 6 La. L. Rev. 125 (1945).

doctrine of "avoidable consequences"[31] as to render any discussion of it here more academic than beneficial.

### *Major American Statutory Law*
### *I. United States*

South Dakota, Nebraska, Wisconsin and Mississippi are the only jurisdictions to have enacted comparative negligence statutes designed to apply to property as well as personal injuries in all kinds of accidents. Nebraska's statute, adopted in 1913, states:

> "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury."[32]

In construing the statute it was held that if the negligence of the plaintiff was found to be more than "slight" in degree, or if the negligence of the defendant fell short of being "gross," the contributory negligence of the plaintiff would defeat his recovery.[33] As to what constitutes more than "slight" negligence in Nebraska, the following are good examples: Where the plaintiff stopped her car on the defendant's south track while waiting for a train to pass on the next track and was struck by a train approaching from the west, it was held that the plaintiff was, as a matter of law, guilty of contributory negligence more than slight under the comparative negligence statute and thus barred from recovery.[34] Where the plaintiff, passenger in an automobile, had an opportunity to warn the driver of an unseen culvert and failed to do so, and the car went off the culvert, it was held as a matter of law that the plaintiff's negligence was more than slight as compared to the defendant's.[35]

South Dakota's statute is identical to that of Nebraska,[36] and has had a similar history of judicial construction.[37]

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31. Turk, *Comparative Negligence On The March*, 28 Chi-Kent L. Rev. 304, 333 (1950).
32. Neb. Rev. Stat. §25-1151 (1943); Neb. Rev. Stat. §7892 (1913).
33. Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N.W. 158 (1920).
34. Huckfeldt v. Union Pac. R. Co. 154 Neb. 873, 50 N.W.2d 110 (1951).
35. Tomjack v. Chicago & N.W.R.Co. 116 Neb. 413, 217 N.W. 944 (1928).
36. S.D. Laws 1941 c. 160, p. 184.
37. *E.g.*, Kundert v. B. F. Goodrich Co., 70 S.D. 464, 18 N.W.2d 786 (1945) (example of more than slight negligence); Friese v. Gulbrandson, 69 S.D. 179, 8 N.W.2d 438 (1943) (defines "slight" negligence as being a "quantum of want of such ordinary care as a reasonable man would exercise under the circumstances.").

Different from Nebraska and South Dakota, Wisconsin's statute does not incorporate degrees of negligence. In that state a plaintiff need be only *less* negligent than the defendant to recover damages.[38] The statute reads:

> "Contributory negligence shall not bar a recovery in an action by any person or his legal representatives to recover damages for negligence resulting in death or 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."[39]

Though the practical problems in apportioning damages will be discussed at greater length later, one thing is readily apparent from a reading of the Wisconsin statute: a plaintiff chargeable with forty-nine percent of the total negligence can recover fifty-one percent of his damages; a plaintiff fifty percent negligent recovers nothing.

The Mississippi statute does not require that a plaintiff, in order to recover, must be guilty of some degree or kind of negligence less than the defendant. Thus, a grossly negligent plaintiff ("grossly" being used definitively, as "greatly," since Mississippi does not have "degrees" of negligence)[40] was allowed to recover diminished damages.[41] The section is set forth:

> "In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or 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."[42]

Thus Mississippi embraces one method; South Dakota and Nebraska another, and Wisconsin still another.

### *II. Canada*

*All* Canadian provinces have adopted the rule of comparative

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38. Wis. Stat. §333.045 (1949).
39. *Ibid.*
40. See Yazoo & M.V.R.R. v. Carrol, 103 Miss. 830, 60 So. 1013 (1913) "This statute does not deal with, and was not intended to introduce into our jurisprudence, degrees of contributory negligence, but it deals with contributory negligence proper of every character."
41. Yazoo & M.V.R. Co. v. Williams, 114 Miss. 236, 74 So. 835, 837 (1917).
42. Miss. Code Ann. §1454 (1942).

negligence either by statute[43] or judicial decision[44]—a fact not generally realized in the United States. Ontario, Alberta and Saskatchewan have similar statutes, based on what they call a "Uniform Contributory Negligence Law," although Ontario's Act does not include the reference to "last clear chance" contained in the Alberta and Saskatchewan Acts.[45] The Alberta statute,[46] as even a cursory examination indicates, is far more comprehensive than any in the United States—especially since it provides for a single action where multiple parties (later discussed) are involved, which is something the various state statutes have avoided. One writer has commented that the references it contains to "last clear chance," however, are likely to "continue confusing juries."[47]

*Apportionment of Damages*

A claimant under a comparative negligence act is entitled to re-

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43. Alberta Rev. Stat. c. 116 (1942); Rev. Stat. Man. c. 215 (1940); Rev. Stat. Ont. c. 103 §3 (1927), amended by Ont. Stat. c. 27 (1930) and Ont. Stat. c. 26 (1931); Sask. Stat. c. 23 (1944); see also Prosser, *supra* note 1, at 2 n. 9, wherein he cites Brit. Col. Rev. Stat. c. 52 (1936), amended by Rev. Stat. c. 68 (1948); New Br. Rev. Stat. c. 143 (1927); Nov. Sc. Stat. c. 3 (1926); E.I. Stat. c. 5 (1938).

44. Montreal Tramways Co. v. McAllister, 26 Que. K.B. 174, 34 D.L.R. 565 (1916).

45. Alberta Rev. Stat. c. 116 (1942); Sasks. Stat. c. 23 (1944).

46. Alberta Rev. Stat. c. 116 (1942) reads as follows:

"Proportional Liability For Loss

"2. Where by the fault of two or more persons damages or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which such person was at fault:

"Provided that,—

(a) if, having regard to all circumstances of the case, it is not possible to establish the different degrees of fault, the liability shall be apportioned equally, and

(b) nothing in this section shall operate as to render any person liable for any loss or damage to which his fault has not been contributed.

Degree of Fault

3. Where such damages have been caused by the default of two or more persons, the court shall determine the degree in which each was at fault, and where two or more persons are found liable they shall be jointly and severally liable for the fault to the person suffering loss or damage, but as between themselves in the absence of any contract express or implied, they shall be liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

4. In any action the amount of damage or loss, and the degrees of fault shall be questions of fact.

5. Where the trial is before a judge with a jury the judge shall not submit to the jury any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless in his opinion there is evidence upon which the jury could reasonably find that the act or the omission of the latter was clearly subsequent to and severable from the act or omission of the former so as to be contemporaneous with it.

6. Where the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless he is satisfied by the evidence that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous therewith.

7. When it appears that a person not a party to an action is or may be wholly or partly responsible for the damages claimed, he may be added as a party defendant upon such terms as are deemed just.

8. This Act shall be so interpreted and construed as to effect its general purpose of making uniform the laws of those provinces which enact it."

47. Wright, *The Law of Torts–1923-1947*, 26 Can. Bar Rev. 46, 71 (1948).

cover his entire damages less an amount which is in the same proportion to the total damages as his own negligence bears to the combined negligence of both parties. This has been the way the various damage apportionment statutes have been construed.[48] To illustrate: *A*, chargeable with twenty percent of the total negligence, can recover $800 of his $1,000 damages from *B* who was guilty of eighty percent of the total negligence. This is a comparison of negligence and damages and has prevailed over the theory which advocates solely a comparison of the negligence of the two parties.[49] To illustrate the latter theory using the facts above: *A's* negligence of twenty percent is one-fourth of *B's* negligence of eighty percent, so *A's* damages are diminished by that one-fourth. Thus *A* would receive only $750 instead of $800. As indicated, however, this theory has been rejected.

In applying the principles of apportionment in Nebraska and South Dakota, the courts have been hampered by the statutory provisions allowing such apportionment only when the plaintiff's negligence is "slight" in comparison to the "gross" negligence of the defendant. Determination of what *percent* of negligence constitutes more than "slight" so as to preclude the plaintiff's recovery has been most difficult.[50] In most instances, however, any such difficulties have been resolved in favor of the defendant. It has been said of this problem in Nebraska: "The great majority of appeals have resulted in a decision that the contributory negligence was more than 'slight' and all recovery was barred even though the defendant's negligence was the greater of the two; so that the limitation (*i.e.* the "slight"-"gross" statute) has had the effect of restricting apportionment to a relatively small number of cases.[51]

Thus, although there is apportionment in Nebraska and South Dakota, the effect of the statutes has been to merely change the common law definition of contributory negligence to something more than "slight" negligence. Allowing the plaintiff only slightly negligent to recover diminished damages has resulted in an incongruous situation: in those states with "degrees" of negligence, a slightly negligent plaintiff can recover *all* his damages;[52] in the states with comparative negligence acts involving "degrees," a

48. Norfolk & Western Ry. v. Earnest, 229 U.S. 114 (1913); Tendall v. Davis, 129 Miss. 30, 91 So. 701 (1922).
49. Prosser, *supra* note 1, at 15.
50. One writer has said twenty percent is more than "slight." Grubb, *Comparative Negligence*, 32 Neb. L. Rev. 234, 239 (1935).
51. Prosser, *supra* note 1, at 20.
52. See note 23 *supra*.

plaintiff finds his damages diminished!

In Wisconsin, the plaintiff guilty of forty-nine percent of the total negligence can recover fifty-one percent of his damages—in view of the statute allowing the less negligent party to recover apportioned damages. Thus a plaintiff forty-nine percent negligent, having sustained injuries of $10,000, can recover $5,100. Had the plaintiff been guilty of one percent more of negligence, however, he would have recovered nothing. This is a drawback which cannot be reconciled in theory. As a practical matter, however, it is extremely seldom that such cases arise; in nearly all cases the juries have found percentages of fault in simple fractions like one-third, or in even multiples of five or ten.[53]

Mississippi gives a party sustaining injury to his property or person the right to recover some damages irrespective of his negligence. This means, for example, that a man seventy-five percent negligent can recover twenty-five percent of his loss. Where both parties are injured, however, both can recover, for the statute cannot be construed to defeat a counterclaim. In Wisconsin on the other hand, the party guilty of fifty percent negligence or more must fail in either an original suit or counterclaim. For example: in Wisconsin, *A* who is forty percent negligent sustains $5,000 in injuries; *B*, sixty percent negligent, suffers a $3,000 loss. *A* gets $3,000 and *B* gets nothing. In Mississippi *A* recovers $3,000 but *B* in his counterclaim recovers $1,200—so *A* actually receives only $1,800. In the usual situation involving injuries to both parties, it would thus seem that the Mississippi statute provides for equitable treatment for either party.

The statute could create untoward ramifications where the damages are not at all akin to the amount of negligence of a party.[54] For instance: *X* is forty percent negligent and sustains a $5,000 loss; *Y* who counterclaims is sixty percent negligent and suffers a $10,000 loss. *X* is entitled to recover $3,000 from *Y* but *Y* recovers $4,000 from *X*. Or assuming *X* and *Y* are equally negligent: *X* pays *Y* $5,000 and *Y* pays *X* $2,500. The amount of damages evidently prevails over the amount of negligence and the Mississippi statute becomes in such instances a "comparative damage" act!

### *Multiple Parties*

The problems of apportionment become more complex when

53. Prosser, *supra* note 1, at 25, n. 173.
54. The writers found no cases like these and must needs hypothesize.

three parties, each suffering damage and each negligent, are involved in litigation. The determination of fault of one not a party to the action, the prospect of a second suit by or against him before a new jury, and the difficulties of contribution between joint tort-feasors are examples. Various Canadian statutes, as evidenced by the Alberta act,[55] afford a solution by allowing claims arising from a single transaction to be settled in one suit, as well as joint contribution.

Suppose that *T*, *A* and *B* collide, each being negligent.[56] In Alberta *T* may sue *A* and *B* jointly; *A* and *B* may file cross claims against each other for contribution and damages, besides counterclaims against *T* for damages. Thus *A* sues *T* and *B* jointly and *B* sues *T* and *A* jointly for damages, which may result in cross-claims between *T* and *A* for contribution as regards joint liability for *B's* damages, and between *T* and *B* for *A's* damages. Subsequent to the pleading it is found that *T*, twenty percent negligent, sustained a $5,000 loss and *A*, thirty percent negligent, suffered a $4,000 loss, and *B*, fifty percent negligent, was injured in the amount of $3,000. The total damages being $12,000, *B's* share of the burden is fifty percent or $6,000, *A's* burden is $3,600 and *T's* is $2,400. *T* receives the difference between his loss of $5,000 and his share in the burden of loss ($2,400), or a net of $2,600. *A* receives the difference between his loss of $4,000 and burden of $3,600 or $400. *B* must then supply the difference between his loss of $3,000 and his share of the burden in the amount of $6,000, or $3,000. Thus *T* will get a judgment against *B* for $2,600 and *A* against *B* for $400. This is just one of the many possible multiple party situations which could arise.

Although the hypothetical case posed above would seem to have reached a sound conclusion, one should remember that the system of solution, while practicable in Canada, might not be thus in the United States—even if the various states adopted statutes allowing a single action between multiple parties and contribution between joint tort-feasors.[57] The relative success enjoyed in Canadian courts in regard to solution of multiple party problems likely lies in the fact that juries are giving way to administration by judges.[58] At

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55. Note 46 *supra*.
56. These examples are set forth in Gregory, *Loss Distribution By Comparative Negligence*, 21 Minn. L. Rev. 1, 9 (1936).
57. Only nine jurisdictions have adopted the Uniform Contribution Among Tort-feasors Act, Prosser, *supra* note 1, at 35 n. 224.
58. Prosser, *supra* note 1, at 34 n. 219.

any rate the number of appealed cases involving multiple parties in the United States has been extremely small.[59]

*Special Verdicts*

Where the general verdict is employed in comparative negligence cases it is the custom for juries to return a diminished amount of damages.[60] In Wisconsin a jury is not asked to return a general verdict, but rather to answer certain questions pertinent to apportionment of damages. The following represents a typical special verdict interrogatory [61] where a complaint and counterclaim are involved:

"1. In operating his automobile at the time of and immediately preceding the collision, was the defendant Smith negligent in respect to speed and control of his car?
2. If you answer Question 1 'yes,' then answer this: Was the defendant Smith's negligence a cause of the collision?
3. In operating his automobile at the time of and immediately preceding the collision, was the plaintiff Jones negligent in respect to the speed of his car?
4. If you answer Question 3 'yes,' then answer this: Was the plaintiff Jones' negligence a cause of the collision?
5. In the event you answer all of Questions 1, 2, 3 and 4 'yes,' then answer this: Was the negligence of the defendant Smith greater or less than the negligence of the plaintiff Jones?
6. In the event you answer all of Questions 1 and 2 'yes,' and 3 and 4 'no,' then answer this: What is the full damage Jones has sustained?
7. In the event you answer all of Questions 1, 2, 3, and 4 'yes' and 5 'greater,' then answer this: What is the plaintiff Jones' damage as diminished in the proportion to the amount of negligence attributable to him?
8. In the event you answered all of Questions 1 and 2 'no,' and 3 and 4 'yes,' then answer this: What is the full damage Smith has sustained?
9. In the event you answered all of Questions 1, 2, 3 and 4 'yes,' then answer this: What is the defendant Smith's damage as diminished in the proportion to the amount of negligence attributable to him?"[62]

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59. Prosser, *supra* note 1, at 36. Prosser states that he found only ten such cases, none of which had very satisfactory results.

60. Campbell, *Wisconsin's Comparative Negligence Law*, 7 Wis. L. Rev. 223, 229 (1932).

61. Padway, *Comparative Negligence*, 16 Marq. L. Rev. 3, 23 (1932); see Hamus v. Weber, 199 Wis. 320, 226 N.W. 392 (1929).

62. Notice that questions 5 and 7 correspond to the statutory requirement that a plaintiff's negligence must be less than a defendant's to allow a recovery of diminished damages. Since this is a complaint and counterclaim situation, whichever party is found less negligent assumes the role of plaintiff.

One argument against comparative negligence has related to the free rein given juries in apportioning damages. Under the special verdict, however, the court is informed as to what the jury has done; if the jury errs by disregarding instructions, making mathematical errors or the like, the court may order a *remittitur*. It is possible, too, that the special verdict might displace long and complicated instructions.

### *Objections to Comparative Negligence*

Opponents of the doctrine of comparative negligence have raised the following objections to its adoption: (1) Insurance premium rates would rise since insurance companies would have to pay damages in many instances where they now pay nothing under the rule of contributory negligence. (2) It would be almost impossible for juries to determine accurately the proportions of negligence of the litigants. (3) The court would have no more control over the jury than before the adoption of comparative negligence. (4) Existing common law and statutory law would be greatly affected.

It is very possible that insurance premium rates would go up after the passage of a comparative negligence act. A recently completed ten year study[63] in Wisconsin reveals that automobile liability insurance premiums were from seventeen to sixty-four percent higher than in comparable cities or rural areas in Illinois, Michigan and Iowa. Nebraska insurance rates, on the other hand, have shown no appreciable difference from surrounding states. It has been pointed out, however, that Nebraska has had few cases involving apportionment.[64]

Juries very likely would not be able to determine the proportions of negligence of each party with a great deal of accuracy. Any apportionment, though, would be more fair than none. Also, jury members could certainly be as accurate in finding percentages of negligence as they are omniscient in computing the value of loss of a limb, for instance! As for claims that the court has no control over a jury under comparative negligence, the opponents of the doctrine have not reckoned with the above described special verdict. Even under a general verdict the duty of the jury to diminish damages

63. Grubb, *supra* note 50, at 246.
64. Note 51 *supra*.

in proportion to the plaintiff's fault is mandatory,[65] and a failure to consider the plaintiff's fault will result in a *remittitur*.[66]

The statement that the adoption of a comparative negligence act would affect existing law is probably true—just as it would be true of any new law. Nevertheless it has been held in Wisconsin that comparative negligence does not apply in the case of assumption of risk,[67] and suggested that the rules of imputed negligence and negligence *per se* through breach of a statute would not be affected either.[68] Also, Nebraska has retained its "last clear chance" doctrine.[69] One change in prior existing law appears in Wisconsin, where it has been said the purpose of the Act was to alter the doctrine of "degrees" of negligence.[70]

No one of the three major comparative negligence statutes seems entirely satisfactory. Yet Mississippi and Wisconsin have reported a history of success in applying their Acts. The merit of comparative negligence has been conceded by the great majority of writers. Certain problems, of course, should be scrutinized by any legislature considering the adoption of the doctrine. The multiple party situation, for instance, with its necessary joinder of and contribution between joint tort-feasors has been neglected in the various statutes. A provision relating to the equal division of damages between parties where the proportions of negligence are unascertainable might well be desirable.[71]

These and other improvements on current apportionment statutes should be carefully considered; a perfunctory comparative negligence act is no better than none at all.

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65. See Tendall v. Davis, 129 Miss. 30, 91 So. 701 (1922).

66. Siefferman v. Leach, 161 Miss. 853, 138 So. 563 (1932); Yazoo & M.V.R. Co. v. Williams, 114 Miss, 236, 74 So. 835 (1917).

67. Shrofe v. Rural Mutual Cas. Ins. Co., 258 Wis. 128, 45 N.W.2d 76 (1950).

68. Campbell, *Wisconsin's Comparative Negligence Law*, 7 Wis. L. Rev. 222, 235 (1932).

69. Such retention has been called foolish and unnecessary, Gregory, *supra* note 56, at 3.

70. Campbell, *supra* note 68, at 232.

71. See note 46 (2a) *supra*.