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FROM CONTRIBUTORY TO COMPARATIVE NEGLIGENCE: A NEEDED LAW REFORM

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The Problem

One of the most pressing social problems facing the American people today is the automobile accident problem. In 1957, 38,700 Americans died in automobile accidents, to say nothing of the 2,525,000 injured, many so seriously as to be permanently disabled.[1] Florida, with its myriad tourist attractions and beckoning highways, had more than its share of such accidents. In 1956, 1,205 people were killed and 29,629 were injured in Florida alone.[2]

This problem has two principal aspects, accident prevention and adequate compensation of accident victims. As a step toward a better accident prevention program, a comprehensive Model Traffic Ordinance for proposed municipal adoption was promulgated by the 1957 Florida legislature following two years of intensive study by the Florida Legislative Reference Bureau.[3] It is as yet too early to evaluate this new legislation, but this is perhaps an appropriate time to examine the other side of the coin, the compensation of automobile accident victims. It is of course true that "the prevention of accidents is much more satisfying than the compensation of their victims,"[4] but this is no excuse for burying our heads in the sand and refusing to evaluate the current system for compensating such victims.

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[1]THE TRAVELLERS INSURANCE COMPANIES, THE ROAD TOLL 27 (1958).

[2]These statistics were derived from Florida Highway Patrol, Monthly Summary of Motor Vehicle Traffic Accidents in the State of Florida.

[3]FLA. STAT. c. 186 (1957).

[4]Varnum, *Comparative Negligence in Automobile Cases*, 24 INS. COUNSEL J. 60, 61 (1957).

Presently all American jurisdictions, including Florida, base liability on the fault of the party assertedly causing the injury. They differ, however, in the legal effect that they attach to the contributory fault of the victim. In the great majority, contributory fault or contributory negligence, on the legal level at least, is held to be a complete bar to recovery.

A change that would lead to more equitable and more uniform compensation would be the replacement of this contributory negligence rule with a comparative negligence approach, or more accurately a rule providing for division of damages on the basis of comparative fault. This possibility has been considered and rejected in the past several sessions of the Florida legislature.[5] It is the purpose of this article to examine these comparative negligence proposals and to decide whether this type of legislation, perhaps along with new types of insurance coverage designed to provide at least minimum protection for accident victims unable to recover under the fault system,[6] would not produce a more desirable allocation of the losses resulting from Florida's automobile accidents.

The analysis will begin with an examination of the fault concept itself. This will be followed by a critical examination of the contributory negligence doctrine as it has developed and is applied in most American jurisdictions to accident litigation and settlement processes. The contributory negligence doctrine will then be contrasted with the comparative negligence approach that is employed throughout most of the rest of the world, and the development of that doctrine will be examined. Various types of comparative negligence statutes will be investigated and their strengths and weaknesses pointed out.

The relationship between multiple party accidents and the comparative negligence doctrine will be scrutinized, together with the advisability of apportioning damages when the plaintiff is more negligent than the defendant and the possibility of employing special verdicts in the administration of the comparative negligence rule. The article will conclude with an over-all evaluation of the desirability of

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[5]See H.B. 40, Reg. Sess. (1957), which was rejected by the House committee; a companion bill died in Senate committee. S.B. 267 Reg. Sess. (1957). Similar legislation failed of enactment in the 1955 session. H.B. 215.

[6]One example of such extended coverage is found in current policy provisions for payment of medical expenses of guests in the automobile of the insured. See Miller, *New "Uninsured Motorist" Endorsement to Family Automobile Policies — The 1960 Look*, 24 INS. COUNSEL J. 134 (1957); Risjord and Austin, *The Problem of the Financially Irresponsible Motorist*, 24 U. KAN. CITY L. REV. 82, 85-95 (1955).

a legislative switch from the contributory to the comparative negligence concept in Florida.

THE FAULT CONCEPT

Before comparing the contributory and comparative negligence concepts, both operative within the fault system, it may be well to consider an important underlying development in the operation of the fault system itself. The early common law placed liability for personal injuries on the one who caused the injury, regardless of his innocence or culpability,[7] on the theory that if one of two innocent people must suffer, he should be the one to pay for it, rather than the injured party.[8]

About the time of the industrial revolution in England, however, this early doctrine of strict liability was superseded by the rule that one was not liable for injuring another unless the injury resulted from misconduct or fault, either intentional or negligent, on the part of the one causing the injury.[9] At this time insurance against accidents was practically unknown, and the legal problem was whether the loss resulting from the injury should fall on one party or the other. In the laissez faire climate of the time, it was thought to be the better practice under such circumstances not to penalize the actor unless he was at fault; otherwise men would be unwilling to embark on new and untried enterprises for fear of the crushing liability that might ensue. As one of the most famous jurists of the time put it: "[T]he public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor."[10] An injury inflicted without fault, in the sense that it was not a result reasonably to be anticipated from the conduct of the actor, was looked upon as an accident, and "loss from accident must lie where it falls . . . ."[11]

But where does such loss fall? In the automobile accident cases

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[7]Weaver v. Ward, Hobart 134, 80 Eng. Rep. 284 (K.B. 1617).

[8]See Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 383, 441 (1894).

[9]"For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid." Holmes v. Mather, L.R. 10 Ex. 261 (1875).

[10]HOLMES, THE COMMON LAW 95 (1881).

[11]*Id.* at 94.

at least, studies indicate that it most often falls on wage earners receiving relatively small wages, often the heads of families of what has been described as the "middle working class."[12] Serious uncompensated injury to one of the members of a family in this group may well lead to pauperism. Even so, if the alternative is perhaps pauperizing the one who caused the injury and, since the loss must fall on the one or the other, distributing loss on the basis of fault appears to be a logical and just way of handling the problem. However, it does not necessarily follow that when both parties are partially at fault, the entire loss must be placed on only one — the injured party, who is the least able, from the viewpoint of his earning capacity, to bear it.

But in the great majority of automobile accidents today it is no longer a question simply of placing the loss solely on the shoulders of the injured party or the one who injured him. If the burden is initially placed on the one causing the accident, in most cases it is promptly shifted from his shoulders to those of an insurance company. The company in turn distributes the burden to its policyholders, so that a large group of automobile owners shares the burden.[13] Realistically, in these cases the choice then becomes one of placing the loss on the injured party, who most frequently has no means of passing on a part of his loss to anyone else, or distributing it among the group benefiting from the use of the dangerous instrumentalities involved.

The Supreme Court of Florida was among the first to recognize the desirability of making the owners of automobiles responsible for the negligence of drivers to whom they had entrusted their vehicles. This

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[12]COLUMBIA UNIVERSITY RESEARCH COUNCIL, REPORT BY COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 219-20 (1932), reprinted in SHULMAN AND JAMES, TORTS 610-611 (1942).

[13]Such distribution is of course defeated if the offending motorist is uninsured or a hit-and-run driver. Most Canadian provinces and the states of North Dakota and New Jersey have established unsatisfied judgment funds to provide a possibility of minimum compensation to parties injured in such accidents. See, *e.g.*, N.J. STAT. ANN. §§39:6-61 to 39:6-91 (Supp. 1955); N.D. REV. CODE c. 39-17 (Cum. Supp. 1953); ONT. REV. STAT. c. 167, §§97-109 (1950). The New Jersey fund is discussed in Bambrick, *A Look at the New Jersey Unsatisfied Claim and Judgment Fund*, 1956 INS. L.J. 725; Molnar, *New Jersey's Answer to Financial Irresponsible Motorists*, 1955 INS. L.J. 729, 732-33. Still further coverage is not being provided by uninsured motorist clauses available in some policies; see Miller, *New "Uninsured Motorist" Endorsement to Family Automobile Policies — The 1960 Look*, 24 INS. COUNSEL J. 134 (1957).

the Court accomplished by extending the dangerous instrumentality doctrine to automobiles in the 1920 case of *Southern Cotton Oil Company v. Anderson.*[14] Vehicle owners are normally insured, particularly in these days of financial responsibility laws[15] and motor vehicle safety responsibility acts;[16] and the dangerous instrumentality doctrine thus serves as a vehicle for distributing the loss caused by the fault of negligent drivers through assuring the injured party an opportunity to sue a financially responsible defendant. About half of the American courts have brought about a similar extension of liability, though on a more limited scale, through the family car doctrine.[17] The legislatures of a number of other states, recognizing the desirability of the approach evolved by the Florida Court, have enacted statutes making vehicle owners liable for the negligence of those to whom they entrust their vehicles.[18]

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[14]80 Fla. 441, 86 So. 629 (1920). See Note, 5 U. FLA. L. REV. 412 (1952).

[15]*E.g.*, FLA. STAT. c. 324 (1957). Comment, 6 KAN. L. REV. 358 (1958), indicates that laws providing for financial responsibility are now found in 46 states, with compulsory insurance being required in the other two, New York and Massachusetts. For a note on the New York law, see 32 N.Y.U.L. REV. 147 (1957). For a general comment on financial responsibility laws, see 4 MIAMI L.Q. 502 (1950).

[16]So named to distinguish it from the older type financial responsibility laws, which gave the offending motorist a free "first bite." For a recently enacted statute of this type, see KAN. GEN. STAT. ANN. §§ 8-722 to 8-769 (Supp. 1957), Comment, 6 KAN. L. REV. 358 (1958). The Florida Responsibility Law of 1955, FLA. STAT. c. 324 (1957), is basically a statute of this latter type.

[17]PROSSER, TORTS, 369-371 (2d ed. 1955).

[18]CAL. VEH. CODE ANN. §402 (West 1956); D.C. CODE §40-403 (1951); IDAHO CODE ANN. §49-1004 (1948); MICH. STAT. ANN. §9.2101 (1952); MINN. STAT. 170.54 (1957); N.Y. VEHICLE & TRAFFIC LAW §59; R.I. GEN. LAWS §31.31.3 (1957). While other states are following Florida's lead in extending liability to those in the best position to distribute it, the Supreme Court of Florida has recently shown less awareness of the loss distribution policy underlying the dangerous instrumentality doctrine. In the case of Weber v. Porco, 100 So.2d 146 (Fla. 1958), the Court used the doctrine to impute the negligence of a driver to the nonnegligent owner for the purpose of barring the owner's action against a negligent third party tortfeasor. The Court was apparently following (without citing) the federal courts which had already so interpreted the Florida doctrine. MacCurdy v. United States, 143 F. Supp. 60 (N.D. Fla. 1956), *aff'd*, 246 F.2d 67 (1957), *cert. denied*, 355 U.S. 933 (1958). The *Weber* case was followed in Gulick v. Whitaker, 102 So.2d 847 (Fla. 1958). Other jurisdictions with more awareness of the policy considerations involved have refused to construe their statutes to thus limit loss distribution rather than extend it. See Stuart v. Pilgrim, 247 Iowa 709, 74 N.W.2d 212 (1956), overruling an earlier line of cases to the contrary; Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406 (1943); Mills v. Gabriel, 359 App. Div. 60, 18

From a purely sociological viewpoint, it may be and has been argued that the modern possibilities for loss distribution resulting from widespread use of the insurance device call for a further extension of loss distribution through a return to the earlier legal rule placing original liability, without regard for fault, on the one who causes an injury,[19] since liability will then automatically be spread among those who choose to use the instruments involved.[20] Thus numerous proposals have been made for the establishment of a system of compensation by administrative boards patterned after the workmen's compensation systems now almost universally employed in industrial accident cases.[21] Those who propose such a change hope to accomplish two basic reforms: the achievement of more uniform and more adequate compensation for the injured and the elimination of the law's delays in affording such compensation as is now available.

Recent studies of the time lapse before settlement of contested workmen's compensation cases cast considerable doubt on whether the objective of speedy settlement of accident claims would be effectively accomplished by shifting the basic decision as to liability to administrative boards.[22] The inadequacy of awards in workmen's compensation cases has been another point of major criticism of that approach.[23] Fuller coverage of the merits of these proposals is beyond the scope of this article.[24] Suffice it to say that the shift to strict lia-

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N.Y.S. 2d 78 (2d Dep't), *aff'd*, 284 N.Y. 755, 31 N.E.2d 512 (1940). *Contra*, National Trucking & Storage Co. v. Driscoll, 64 A.2d 304 (D.C. Mun. App. 1949); Davis Pontiac Co. v. Sirois, 82 R.I. 32, 105 A.2d 792 (1954).

[19]For an interesting historical study indicating that the common law has gone through several cycles, "alternately approaching and receding from the culpability theory," see Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954 (1918).

[20]See James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

[21]For a bibliography, see INSTITUTE OF JUDICIAL ADMINISTRATION, ADMINISTRATIVE BOARDS FOR AUTOMOBILE TORT CASES — WORKMEN'S COMPENSATION COMPARED 34 (1956). The most recent proposal may be found in Marx, *A New Approach to Personal Injury Litigation*, 19 OHIO STATE L.J. 278 (1958).

[22]INSTITUTE OF JUDICIAL ADMINISTRATION, *op. cit. supra* note 21, App. 11, pp. 30, 31.

[23]See Larson, *The Myth of Administrative Generosity: A Lesson From British Experience*, 40 *A.B.A.J.* 195 (1954); Pollack, *A Policy Decision for Workmen's Compensation*, 1954 INS. L.J. 14 (1954).

[24]The fullest American treatment of the "compensation" approach will be found in EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM (1954). A revised and abbreviated version of this book appears under the same title in 43 CALIF. L. REV. 1 (1953).

bility has not as yet been adopted[25] in any American jurisdiction,[26] and many have serious doubts as to its workability in the automobile accident field.[27] In fact, it seems safe to predict that liability for automobile accidents will remain based on fault for many years to come.

Even if we are not prepared to fall back on the older principle of strict liability now universally applied to industrial accidents, we may still question the desirability of retaining an ancient rule of law under which any contributory fault on the part of the injured party places the entire loss on his shoulders.

Origin of the Contributory Negligence Rule

Where did the rule that contributory negligence is a complete bar to recovery originate? Most scholars attribute its origin to the English case of *Butterfield v. Forester,*[28] decided by the Court of King's Bench in 1809. The case involved a defendant who negligently blocked part of a highway with a pole; thereafter the plaintiff, leaving a "public house," mounted his horse and, "riding violently," "cast himself upon" the pole and was injured. The Court found for the defendant in a very brief opinion in which one of the judges, Bayley, stated that the plaintiff appeared to have been injured "entirely from his own fault."[29] Such was the beginning of the rule. One wonders whether the case might have been decided differently if the proportion of fault of the plaintiff had not been so great. Indeed, only thirty years later a case arose in which the plaintiff had negligently anchored his sloop partly in the channel of the Thames, after which defendant's ship ran into it in a fog.[30] At the trial the Court of Common Pleas instructed the jury, apparently on the basis of *Butterfield v. Forester,* that if they found that the injury was "imputable in any degree to any

[25]Such a proposal passed the Wisconsin Senate in 1929, but agitation for its adoption ceased following the passage of comparative negligence legislation in 1931. Hayes, *Rule of Comparative Negligence and its Operation in Wisconsin,* 23 OHIO STATE BAR ASS'N REP. 233, 234 (1950).

[26]The Province of Saskatchewan, Canada, adopted a Compensation Plan in 1946. SASK. REV. ST. c. 371 (1953).

[27]See Flynn, *Answering Justice Hofstadter—Compensation Is No Solution,* 27 N.Y.S.B. BULL. 406 (1955); Greene, *Must We Discard Our Law of Negligence in Personal Injury Cases?,* 19 OHIO STATE L.J. 290 (1958); Ryan and Greene, *Pedestrianism: A Strange Philosophy,* 42 A.B.A.J. 117 (1956).

[28]11 East 59, 103 Eng. Rep. 926 (K.B. 1809).

[29]*Id.* at 61, 103 Eng. Rep. at 927.

[30]Raisin v. Mitchell, 9 Car. & P. 613, 173 Eng. Rep. 979 (C.P. 1839).

want of care or any improper conduct on the part of the plaintiff,"[31] they should find for the defendant. The jury brought in a verdict for the plaintiff for half of the admitted damages and when asked why, "answered that there were faults on both sides."[32] The court allowed the verdict to stand, in the teeth of the *Butterfield* case. If the case had been tried in admiralty, the result would have been expected, for the English admiralty courts had been dividing damages in cases of mutual fault since at least 1695.[33] In common law courts, however, approval of such a division of damages by a jury was restricted to maritime cases, and the practice of apportioning damages was not always approved even then.[34]

In other than maritime cases, the rule that contributory negligence is a complete bar to recovery was strictly applied, and was soon adopted by American courts.[35] Several reasons have been given for the early acceptance of the rule in its all-or-nothing form rather than the admiralty approach of diminishing damages when the plaintiff was partly at fault. One writer suggests as a partial explanation that the courts applied the medieval concept of causation, sometimes referred to as the last wrongdoer rule, under which the last responsible human being was regarded as the sole proximate cause of the injury.[36] The fact that, in *Butterfield v. Forester* and other very early contributory negligence cases, the defendant's negligence came before that of the plaintiff in point of time lends support to this theory.[37]

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[31]*Id.* at 616, 173 Eng. Rep. at 981.

[32]*Ibid.*

[33]See Beckman v. Chapman, Ad. Ct. Ass. Bk., Jan. 20, 1695. Noden v. Ashton, Libels, File 128, No. 250, Ass. Bk., June 20, 1706, both discussed in MARSDEN, A TREATISE ON THE LAW OF COLLISIONS AT SEA 142, 143 (10th ed. McGuffie 1953). The equal division approach was used in English admiralty courts until 1911, when the rule promulgated by the Brussels Maritime Convention of 1909-1910 apportioning damages in proportion to the gravity of the respective faults was adopted through passage of the Maritime Conventions Act, 1 & 2 GEO. 5, c. 57, §1. See Huger, *Proportional Damage Rule in Collisions at Sea,* 13 CORNELL L.Q. 531 (1928).

[34]See MARSDEN, *op. cit. supra* note 33, at 155.

[35]The first American case seems to be Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824).

[36]James, *Contributory Negligence,* 62 YALE L.J. 691, 693, 696 (1953).

[37]Compare Raisin v. Mitchell, 9 Car. & P. 613, 173 Eng. Rep. 979 (C.P. 1839), in which the court allowed a division of damages when the plaintiff's negligence preceded that of the defendant.

Whatever the logic of the rule, it fitted in with the laissez faire philosophy of the time[38] and the unspoken social policy of protecting valuable new industries, particularly the transportation industry,[39] from the supposedly crippling threat of large and numerous verdicts imposed by "incurably plaintiff minded" juries.[40] The strict contributory negligence rule provided a method of controlling the juries (often by preventing cases from reaching them) in those cases in which contributory negligence was available as a defense. It is interesting to note in passing that the railroads, which were the early beneficiaries of the strict no-apportionment rule, are now the major group that has lost this protection. The federal government[41] and twenty-seven states,[42] including Florida,[43] have enacted legislation requiring apportionment of damages in negligence actions against railroads by contributorily negligent employees.

ROLE OF THE JURY IN APPLICATION OF THE CONTRIBUTORY NEGLIGENCE RULE

American juries are still plaintiff-minded, although in a different sense from the plaintiff-mindedness of the juries that sometimes returned excessive verdicts in the early railroad cases. As a matter of fact, studies of the University of Chicago Jury Project indicate that in the ordinary automobile accident cases there is usually very little difference in amount between a jury verdict and the judge's award in

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[38]For an exposition of this philosophy and its effects in the United States, see HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 1860-1915 (1945).

[39]In Louisiana, between 1854 and 1888, 20 out of 21 contributory negligence decisions concerned railways and similar forms of transportation. "This called for caution lest the valuable new service be crippled . . .," Malone, *Comparative Negligence—Louisiana's Forgotten Heritage,* 6 LA. L. REV. 125, 139 (1945).

[40]That the early juries were so regarded, vis-a-vis the railroads, see Malone, *The Formative Era of Contributory Negligence,* 41 ILL. L. REV. 151, 156-58 (1946).

[41]The Federal Employers' Liability Act, 35 STAT. 65 (1908), as amended, 45 U.S.C. §§51-60 (1952). The section providing for diminution of damages in case of contributory negligence is §53.

[42]The state legislation is collected and briefly summarized in INSTITUTE OF JUDICIAL ADMINISTRATION, COMPARATIVE NEGLIGENCE 24-32 (1955).

[43]FLA. STAT. §768.06 (1957). The predecessor of this statute was enacted in 1887, Fla. Laws 1887, c. 3744, after McWhorter, C.J., in Louisville and N.R.R. v. Yniestra, 21 Fla. 700 (1886), while denying recovery to a contributorily negligent pedestrian, had castigated the all-or-nothing rule and suggested legislation apportioning the damages in such cases. *Id.* at 737-38. For a note on the current statute, see 2 U. FLA. L. REV. 124 (1949).

the same case.[44] In fact, the judge would have awarded more to the plaintiff than the jury in some thirty-three per cent of the cases studied.[45] The old bugaboo of the runaway jury simply was not borne out by the facts.

The study did confirm something about the operation of juries in cases involving contributory negligence that had long been suspected by lawyers and judges alike.[46] Using experimental juries picked from actual jury panels, the Chicago group repeated a negligence trial before a number of juries. In some instances the facts were varied to indicate contributory negligence on the part of the plaintiff. In these cases, despite standard contributory negligence instructions, the juries found for the plaintiff but reduced the damages to take into account the fault of the plaintiff.[47]

This proclivity of the jury, to disregard contributory negligence instructions when the negligence of the plaintiff is not too great and to apply its own comparative negligence standard instead, is confirmed by other studies. These indicate that when negligence cases get to the jury, the plaintiff wins at least two thirds of the time,[48] despite the fact that the great majority of cases in which liability is clear are settled before trial.[49] The jury has thus become a means for ameliorating the harshness of the strict contributory negligence rule, because in many cases the jurors will disregard instructions on the law and

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[44]KALVEN, REPORT ON THE JURY PROJECT, CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 30, 31 (Univ. of Mich. Law School 1955); *A Report on the Jury Study Project of the University of Chicago Law School,* 24 INS. COUNSEL J. 368, 379-380 (1957).

[45]KALVEN, REPORT ON THE JURY PROJECT, CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 31 (Univ. of Mich. Law School 1955).

[46]See, *e.g.,* the statement in Karcesky v. Laria, 382 Pa. 227, 234-35, 114 A.2d 150, 154 (1955). See also note 51 *infra.*

[47]KALVEN, REPORT ON THE JURY PROJECT, CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 28 (Univ. of Mich. Law School 1955). See also Kalven, *The Jury, The Law, and the Personal Injury Damage Award,* 19 OHIO STATE L.J. 158, 167-168 (1958).

[48]See 14 ANN. REP. OF THE JUDICIAL COUNCIL OF N.Y., Table 6, 94-99 (1948), indicating verdicts for plaintiffs in New York in 1947 in between 60% and 66% of negligence cases. THE 23RD REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS gives a 73.5% figure for all jury cases. 32 MASS. L.Q., Table 4, 84 (1947). See also James, *Functions of Judge and Jury in Negligence Cases,* 58 YALE L.J. 667, 687 (1949).

[49]"[T]he cases that are litigated . . . are presumably those which the defendant feels are exceptionally favorable or feels that the damages are higher than a jury would award." Powell, *Contributory Negligence: A Necessary Check on the Ameri-*

"do equity" as they see it. The desirability of using the jury in this way will be commented on later.[50] Suffice it to say at this point that the proclivity is there.[51] To the extent that other rules of law are relaxed to allow more cases to reach the jury, the chances of sub rosa apportioning of fault among all those responsible, rather than placing the entire burden on a contributorily negligent plaintiff, are likewise increased.

It is therefore appropriate to examine the various ways in which cases are today reaching juries despite allegations of contributory negligence by the defendant.[52] The first and perhaps the most important of these is through application of the doctrine of the last clear chance.

Last Clear Chance

This rule, which had its origin in 1842 in the English case of *Davies v. Mann,*[53] shifts the entire burden of the loss from a contributorily negligent plaintiff to a defendant whose negligence follows that of the plaintiff.[54] As in the case of the contributory negligence rule itself, its explanation may lie at least partially in the medieval tendency to regard the last wrongdoer as the sole proximate cause of the injury. Perhaps coupled with this was the idea that the later negligence must necessarily be the greater negligence.[55] If one needs convincing that this is not always so, he has only to consider the

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can Jury, 43 A.B.A.J. 1005, 1007 (1957).

[50]See notes 91-93 *infra* and accompanying text.

[51]As Justice Holt put it in Haeg v. Sprague, Warner & Co., 202 Minn. 425, 430, 281 N.W. 261, 263 (1938), "We but blind our eyes to obvious reality to the extent that we ignore the fact that in many cases juries apply it [apportionment of damages] in spite of us." See also ULMAN, A JUDGE TAKES THE STAND 30-34 (1933).

[52]Oklahoma has guaranteed this result by a constitutional provision that the defense of contributory negligence shall in all cases be left to the jury. OKLA. CONST. art. 23, §6. For studies of breakaways from strict application of the contributory negligence rule in Arkansas and Colorado, see DeMuth, *Derogation of the Common Law Rule of Contributory Negligence,* 7 ROCKY MT. L. REV. 161 (1935); Leflar, *The Declining Defense of Contributory Negligence,* 1 ARK. L. REV. 1 (1946).

[53]10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842).

[54]The doctrine has also been used to shift the loss from one defendant who satisfies plaintiff's claim to a co-tortfeasor who is found to have had the "last clear chance to avoid the accident." See, *e.g.,* Nashua Iron & Steel Co. v. Worcester, 60 N.H. 159 (1882). For a critical discussion of the use of the doctrine for this purpose, see Jones, *Contribution Among Joint Tortfeasors, infra* p. 175.

[55]See Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 472 (1953).

case of *Poindexter v. Seaboard Air Line Railroad,*[56] in which the Supreme Court of Florida applied the doctrine in favor of a motorist who drove at a very high rate of speed into a standing railway engine on an unobstructed crossing. Despite the factual similarity to *Butterfield v. Forester,* the Court found for the motorist because the engineer admitted he saw the automobile approaching, and the Court with unimpeachable logic found that he had the last clear chance to avoid the accident by blowing his whistle.

As originally enunciated, the last clear chance doctrine was applicable to situations in which the plaintiff or his property was in helpless peril because of his antecedent negligence and the defendant discovered the plaintiff's situation but negligently failed to avoid the consequences of it.[57] Some few jurisdictions have refused to extend the doctrine beyond discovered peril,[58] but today most American courts apply it to situations in which the plaintiff is not in helpless peril, but only negligently inattentive, so long as the defendant discovers his danger.[59] In addition, the helpless peril branch of the doctrine has been extended to include situations in which the defendant did not discover the peril but would have discovered it but for his negligent inattention.[60] In most jurisdictions, the doctrine is inapplicable to a negligently inattentive plaintiff whose danger is not discovered by an inattentive defendant. Logically, the doctrine should

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[56]56 So.2d 905 (Fla. 1951).

[57]As is so often the case, it is not at all clear from the facts given by the court in the originating case of *Davies v. Mann* that the defendant's servant was in fact aware that the plaintiff's ass was helpless in the highway, even though later courts assume awareness. The last clear chance doctrine is not identified as such in *Davies v. Mann,* which talks in terms of defendant's negligence as the proximate cause of the injury.

[58]Hamlin v. Roundy, 96 N.H. 123, 71 A.2d 419 (1950); Chadwick v. City of New York, 301 N.Y. 176, 93 N.E.2d 625 (1950); Cleveland Ry. v. Masterson, 126 Ohio St. 42, 183 N.E. 873 (1932).

[59]Gardner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915 (1932); Merrill v. Stringer, 58 N.M. 372, 271 P.2d 405 (1954); Browning v. Bremerton Elec. Transit Co., 28 Wash.2d 713, 183 P.2d 1005 (1947). This more liberal approach is approved by the American Law Institute. RESTATEMENT, TORTS §480 (1934).

[60]Casey v. Marshall, 64 Ariz. 232, 168 P.2d 240 (1946); Lindsay v. Thomas, 128 Fla. 293, 174 So. 418 (1937); Leinbach v. Pickwick Greyhound Lines, 138 Kan. 50, 23 P.2d 449 (1933); RESTATEMENT, TORTS §479 (1934). Some courts, including Florida, have been extremely liberal in finding the plaintiff in helpless peril, applying this branch of the last clear chance doctrine to cases in which that peril arose out of the plaintiff's prior negligent inattention and existed only for the briefest period before the accident. Independent Lumber Co. v. Leatherwood, 102

not apply to this situation since no one had a last chance to avoid the accident. As Dean Prosser points out, this means that "as the defendant's negligence increases the less his liability will be — the man who looks and discovers the danger but is slow in applying his brakes may be liable, where the man who never looks at all or who has no brakes to apply is not."[61] The injustice of this result has led Missouri into illogically applying the doctrine to take some of the negligently inattentive plaintiff-negligently inattentive defendant cases to the jury, in effect doing away with the contributory negligence rule in these cases.[62] Just when this "humanitarian" variation of the last clear chance doctrine is applicable, only the judges on the Missouri court know;[63] but there seems to be a tendency for the Florida Court to follow in their footsteps in a few recent cases.[64]

Of course, the more liberally the last clear chance doctrine is applied, the more cases get to the jury in spite of the harsh contributory negligence rule. They reach the jury, however, with instructions that if the doctrine is applicable, the plaintiff is entitled to recover full damages despite his own fault. It may be suspected that the jury will often disregard the court's instructions and apportion damages according to fault.[65] Yet if it is just to base liability on fault, to the extent that the instructions are followed an injustice is done a defendant who is charged with the entire loss occasioned by the fault of both parties.

Although the last clear chance doctrine has made substantial inroads on the contributory negligence rule, it nevertheless cannot be applied to the majority of contributory negligence cases in which the

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Colo. 460, 79 P.2d 1052 (1938); Panama City Transit Co. v. DuVernoy, 159 Fla. 890, 33 So.2d 48 (1947), 1 U. FLA. L. REV. 300 (1948). *But see* O'Neal v. Lahnala, 253 F.2d 663 (5th Cir. 1958), in which the court of appeals upheld a refusal by the District Court for the Northern District of Florida to charge on the doctrine under such circumstances.

[61]PROSSER, *supra* note 55, at 473.

[62]McCall v. Thompson, 348 Mo. 795, 155 S.W.2d 161 (1941); Barrie v. St. Louis Transit Co., 102 Mo. App. 87, 76 S.W. 706 (1903).

[63]See Becker, *The Humanitarian Doctrine,* 3 MO. L. REV. 392 (1938); Gaines, *The Humanitarian Doctrine in Missouri,* 20 ST. LOUIS L. REV. 113 (1935).

[64]Springer v. Morris, 74 So.2d 781 (Fla. 1954), 8 U. FLA. L. REV. 336 (1955); see 1 U. FLA. L. REV. 300 (1948).

[65]Lewis F. Powell, Jr., of the Virginia Bar, an advocate of retaining the present system, suggests that instructions on the last clear chance often "confound" the jury. Powell, *Contributory Negligence: A Necessary Check on the American Jury,* 43 A.B.A.J. 1005, 1006 (1957).

negligence of both parties concurs in producing the injury,[66] or in which the plaintiff's negligence comes later in point of time than that of the defendant.

Relaxation of Negligence Per Se

What other legal techniques are available to get such cases to the jury? One device is the relaxation of the older negligence per se approach of applying fixed standards in the determination of contributory negligence. Thus, whereas Mr. Justice Holmes in *Baltimore & Ohio R.R. v. Goodman* laid down a rule "once for all" that failure to stop, look, and listen at a railroad crossing when the view was obstructed is contributory negligence per se,[67] the Florida Court repudiated the same rule in 1948.[68] Likewise the older Florida cases established that one who ran into a standing train was barred from recovery, despite the comparative negligence statute applicable to railroad accidents, since the plaintiff's negligence was the sole proximate cause of his own injuries.[69] The question of the extent of such contributory negligence has recently been held to be one for the jury.[70] The negligence per se approach recently has been rejected by a federal court applying Florida law in a case involving the overdriving of headlights.[71] Likewise jay-walking in violation of statute has been held not to be negligence per se.[72] In summation, a commentator's recent description of the negligence per se approach in range of vision cases as a "waning rule of law"[73] seems to be an accurate portrayal of the Florida Court's attitude toward negligence per se in general.

In most American jurisdictions the negligence per se rule is

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[66]See, *e.g.*, Surico v. Deutsch, 8 Fla. Supp. 24 (1955).

[67]Baltimore & O.R.R. v. Goodman, 275 U.S. 66 (1927). The per se approach was rejected by the Court only six years later. Pokora v. Wabash R.R., 292 U.S. 98 (1933).

[68]Seaboard Air Line Ry. v. Boles, 160 Fla. 910, 37 So.2d 578 (1948), 2 U. FLA. L. REV. 443 (1949).

[69]Kimball v. Atlantic C.L.R.R., 132 Fla. 235, 181 So. 533 (1938); Clark v. Atlantic C.L.R.R., 141 Fla. 155, 192 So. 621 (1939).

[70]Horton v. Louisville & N.R.R., 61 So.2d 406 (Fla. 1952); see Note, 7 U. FLA. L. REV. 311 (1954).

[71]Nesbit v. Everette, 227 F.2d 157 (5th Cir. 1955), 9 U. FLA. L. REV. 234 (1956); *accord,* Townsend Sash Door & Lumber Co. v. Silas, 82 So.2d 158 (Fla. 1955).

[72]Coleman v. Phipps, 82 So.2d 682 (Fla. 1955).

[73]9 U. FLA. L. REV. 234 (1956).

also applied in cases involving violation of safety statutes[74] on the ground that, the standard having been set by the legislature, "jurors have no dispensing power to relax it."[75] In a number of these jurisdictions, the rule is currently being softened by the doctrine of "justifiable violation,"[76] or by finding that the legislature did not intend the statute to apply to the situation under consideration.[77] This finding is not too difficult to make because of the paucity, at state level, of records showing legislative intent. This particular problem has not been as acute in Florida, due to a judicially promulgated double standard for determining the effect of violation of criminal statutes in negligence cases. Thus, while the Court has followed the majority view in holding that violation of statutes not relating to motor vehicles is negligence per se,[78] in the case of motor vehicles laws a violation is regarded only as prima facie evidence of negligence.[79] As a result, in automobile accident cases statutory violations usually go to the jury, which, in the words of one writer, "will exercise its function — in the generality of cases — so as to expand liability and cut down the defense."[80]

Willful, Wanton, or Reckless Misconduct Exception

Another method of avoiding the defense of contributory negligence is by categorizing the defendant's conduct as willful, wanton, or reckless.[81] An early Florida case took cognizance of this possibility,[82] but absence of any reference to it in later cases, other than those involving the Automobile Guest Statute,[83] indicates that this device is little used in Florida. However, in one fairly recent case

[74]Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920); PROSSER, TORTS 161 (2d ed. 1955).

[75]Cardozo, J., in Martin v. Herzog, 228 N.Y. 164, 169, 126 N.E. 814, 815 (1920).

[76]See James, *Statutory Standards and Negligence in Accident Cases,* 11 LA. L. REV. 95, 117-20 (1950).

[77]Tedla v. Ellman, 280 N.Y. 124, 19 N.E.2d 987 (1939).

[78]Hoskins v. Jackson Grain Company, 63 So.2d 514 (Fla. 1953) (seed labeling statute).

[79]Allen v. Hooper, 126 Fla. 458, 171 So. 513 (1937); Miami v. Thigpen, 151 Fla. 800, 803, 11 So.2d 300, 301 (1943) (dictum).

[80]James, *Contributory Negligence,* 62 YALE L.J. 691, 724 (1953). To the same effect see Thayer, *Public Wrong and Private Action,* 27 HARV. L. REV. 317, 340 (1914).

[81]James, *Contributory Negligence,* 62 YALE L.J. 691, 709-12 (1953).

[82]Florida Sou. Ry. v. Hirst, 30 Fla. 1, 39, 11 So. 506, 513 (1892) (dictum).

[83]FLA. STAT. §320.59 (1957).

involving injury inflicted on a landowner's child by an allegedly negligent trespasser, the Court held that the defense of contributory negligence was unavailable to the trespasser, even though the trespass itself was not deliberate and the suit was being brought by the child for his injuries rather than by the landowner himself.[84]

The Automobile Guest Statute bars actions by automobile guests against their hosts in the absence of "gross negligence or willful and wanton misconduct by the owner or operator . . . ."[85] By also providing that the issue of such misconduct "shall in all cases be solely for the jury,"[86] however, the legislature has seen to it that most of the guest cases will get to the jury; and the Florida Court has seemingly interpreted the phrase *gross negligence or willful and wanton misconduct* to be something less culpable than the "recklessness" defined by the American Law Institute as differing in kind from negligence.[87] At the same time, the Florida Court has indicated that contributory negligence will be a defense even to misconduct that will take a case out of the Guest Statute.[88] However, because the issue of contributory negligence will also normally be decided by the jury, the tendency of the jury to disregard instructions and "do equity" as they see it can still operate.

Is the solution of relaxing judicial control and sending more cases to the jury[89] in the hope that they will disregard the letter of the law

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[84]St. Petersburg Coca-Cola Bottling Co. v. Cuccinello, 44 So.2d 670 (Fla. 1950), 4 U. FLA. L. REV. 125 (1951). RESTATEMENT, TORTS §380, comment *c* (1934), is in accord in holding a trespasser to land liable to members of the landowner's household regardless of whether his conduct would create liability if he were not a trespasser.

[85]FLA. STAT. §320.59 (1957).

[86]*Ibid.*

[87]RESTATEMENT, TORTS §500 (1934); see Silliman, *Standard of Care Under the Florida Guest Statute,* 27 FLA. BAR J. 298 (1953); Note, 4 U. FLA. L. REV. 79 (1951); 9 U. FLA. L. REV. 232 (1956). But for a recent case extending coverage of the statute to include a guest while outside the automobile, see Fishback v. Yale, 85 So.2d 142 (Fla. 1955), 9 U. FLA. L. REV. 235 (1956).

[88]Henley v. Carter, 63 So.2d 192 (Fla. 1953).

[89]Modern developments in two other rules of law sometimes result in getting additional cases to the jury. The joint enterprise doctrine is most often used to impute the contributory negligence of an automobile driver to his passengers, and therefore tends to restrict rather than expand liability in such cases. Nevertheless there is one way in which this doctrine is sometimes used to extend liability. It is generally held that the doctrine cannot be used in actions among the parties to a joint enterprise to impute the negligence of the driver to his co-enterprisers. Whiddon v. Malone, 220 Ala. 220, 124 So. 516 (1949); Perry v. Ryback, 302 Pa. 559,

a sound one? Perhaps from a utilitarian point of view it may produce the socially desirable result of better loss distribution. But there still will remain a considerable group of cases in which the courts will feel obliged to find contributory negligence as a matter of law, thus placing the entire burden of the loss on the injured plaintiff.[90] In addition, despite the fact that most jurors can be counted on to disregard their oaths in order to do justice as they see it, there will always be some juries that will respect the law as charged by the court and refuse to apportion the loss as conscience dictates.

Moreover, there is something basically wrong with a rule of law that is so contrary to the settled convictions of the lay community that laymen will almost always refuse to enforce it, even when solemnly told to do so by a judge whose instructions they have sworn to follow. Service as jurors is the only formal point of contact with the judicial system for many, if not most, of the citizens concerned. What sort of an opinion of that system is engendered by the instructions they receive in negligence cases? As one prominent Pennsylvania attorney has put it, "it breeds contempt for law in general and it breeds contempt for judges and lawyers."[91]

There are those who argue that the contributory negligence rule should not be changed because the jury will apply comparative negligence anyhow, and the rule is needed as a check on the jury.[92] But the disrespect for law engendered by putting our citizens in a position

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153 Atl. 770 (1931); RESTATEMENT, TORTS §491, comment *c* (1934). But a joint enterprise is incompatible with a host-guest relationship. Thus the joint enterprise doctrine may be used to avoid the adverse effect of an automobile guest statute and place liability of the driver to his passengers on an ordinary negligence basis. Bradley v. Clarke, 118 Conn. 641, 174 Atl. 72 (1934); Pence v. Berry, 13 Wash.2d 564, 125 P.2d 645 (1942); see Note, 7 U. FLA. L. REV. 69 (1954).

The attractive nuisance doctrine, though not directly related to the defense of contributory negligence, also results in getting more cases to the jury by imposing a duty on landowners to protect trespassing children. The law of negligence is thus extended into an area in which landowners were traditionally immune from liability. For a discussion of the development of the attractive nuisance doctrine in Florida, see Note, 1 U. FLA. L. REV. 271 (1948).

[90]"Jurymen will do a little wrong in order to do a great right. They endeavour to do justice without regard to strict law. A judge, bound by precedent, must tread the straight and narrow path." Jacobs, *Trial by Jury — Its Origin and Merits,* 21 AUSTR. L.J. 462, 463 (1948).

[91]Eldredge, *Contributory Negligence: An Outmoded Defense That Should Be Abolished,* 43 A.B.A.J. 52, 53 (1957).

[92]Powell, *Contributory Negligence: A Necessary Check on the American Jury,* 43 A.B.A.J. 1105 (1957).

in which they feel it is necessary to deliberately violate the law is not something to be lightly brushed aside; and it comes ill from the mouths of lawyers, who as officers of the courts have sworn to uphold the law, to defend the present system by arguing that it works because jurors can be trusted to disregard that very law.[93]

Intelligent instructions authorizing jurors to apportion damages in cases involving contributory negligence would change jury cynicism and disrespect to respect for our courts and judicial system. Would the price in dollars to be paid by society for this respect be too high? There are those who argue that it would.[94] It is therefore appropriate at this point to examine the development of the alternative comparative negligence approach and see how it is working in jurisdictions that have adopted it.

Development of the Comparative Negligence Doctrine

Other Countries

The concept of dividing or apportioning damages when both defendant and plaintiff were at fault probably originated in fourteenth century maritime law, although some writers claim to find traces of it in early Roman law.[95] Thus the Laws of Oleron, an island off the west coast of France, as compiled in 1344, provided for an equal division of damages in case of collision between two ships when it was impossible to fix the blame for the collision.[96] On the other hand, the *Consulato del Mare,* a compilation of Spanish decisions published at about the same time, provided for apportionment of damages according to the conscience of "experienced men, who are well and accurately versed in the art of the sea."[97] The Laws of Oleron became

[93]*Ibid.;* Harkavy, *Comparative Negligence,* 43 A.B.A.J. 1115 (1957). But apparently most experts in the tort field favor the apportionment approach. See Eldredge, *supra* note 91, at 53, indicating that an informal poll of the Committee on Torts of the American Law Institute unanimously opposed the rule of contributory negligence and unanimously favored apportionment of damages.

[94]Benson, *Can New York State Afford Comparative Negligence?,* 27 N.Y. State Bar Bull. 291 (1955).

[95]Hillyer, *Comparative Negligence in Louisiana,* 11 Tul. L. Rev. 112, 120-21 (1936). This position is strongly opposed by Turk, *Comparative Negligence on the March,* 28 Chi.-Kent L. Rev. 189, 216-18 (1950).

[96]Articles of Oleron art. XV, as reproduced in summary form in Sanborn, Origins of the Early English Maritime and Commercial Law 66 (1930).

[97]Consulato del Mare c. 157, a translation of which is reproduced in Turk, *supra* note 95, at 223, n.88.

a part of the common law of the Atlantic ports,[98] and probably from them the idea of equal division found its way into English admiralty law. Meanwhile the *Consulato del Mare,* with its concept of apportionment according to the degree of fault of the parties, became a part of the admiralty law of the Mediterranean countries.[99] The first English admiralty case involving equal division in which fault was expressly found on both sides was decided in 1706.[100] The rule of equal division was followed in England until the adoption of the apportionment according to fault principle by the Maritime Convention Act of 1911.[101] Most important maritime nations follow the latter rule today,[102] although the United States still clings to the equal division rule adopted from earlier English admiralty law.[103]

The inherent superiority and justice of the doctrine of apportionment of damages in cases involving accidents resulting from joint

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[98]SANBORN, *op. cit. supra* note 96, at 70.

[99]*Id.* at 86.

[100]Noden v. Ashton, Libels, File 128, No. 250, Ass. Bk., June 20, 1706, noted in MARSDEN, COLLISIONS AT SEA 143 (10th ed., McGuffie 1953).

[101]1 & 2 GEO. 5, c. 57, §1.

[102]BENEDICT, AMERICAN ADMIRALTY 4 (6th ed., Knauth 1941) lists ratifications and adherences to the Brussels Maritime Convention of 1909-10 containing the same apportionment provisions as the English act. According to Benedict, as of 1940, 32 nations and the British, French, Portugese and German empires were committed to the Convention.

[103]Turk, *supra* note 95, at 231-38. 4 BENEDICT, AMERICAN ADMIRALTY 49 (Supp. 1948), points out that the United States Senate held hearings on the Brussels Maritime Convention, and reported favorably on it in June 1939; but World War II intervened and the Convention was finally withdrawn from further consideration in 1947. There are indications, however, that the federal courts are becoming dissatisfied with the equal division rule. In Pope & Talbot, Inc. v. Hawn, 99 F. Supp. 226 (E.D. Pa. 1951), the district court refused to halve damages for personal injuries and reduced them by only 17½%, the extent to which the plaintiff's negligence contributed to his injuries, on the ground that the rule of equal division was traditionally applicable to property damage but not binding as to personal injuries. The court of appeals, while somewhat critical of the method of division, affirmed the judgment, 198 F.2d 800 (3d Cir. 1952), and the Supreme Court affirmed without discussing the basis for apportionment, 346 U.S. 406 (1953). And in Hartford Acc. & Indemnity Co. v. Gulf Refining Co., 127 F. Supp. 469 (E.D. La. 1954), the district court applied the equal division rule to property damage resulting from an explosion on a gasoline barge, but diminished recovery for personal injuries of two seamen against the owner of the terminal facilities by only 5%, which was found to be the extent of their negligent contribution to the explosion. The court of appeals affirmed on this point, 230 F.2d 346 (5th Cir.), and certiorari was denied by the Supreme Court *sub. nom.* Gulf Refining Co. v. Black Warrior Towing Co., 352 U.S. 832 (1956).

negligence has led to its incorporation in the codes of Austria, France, Germany, Portugal, and Switzerland;[104] and it has been adopted by judicial interpretation in Italy.[105] The modern European developments are detailed in an excellent series of articles by Turk,[106] who points out that the apportionment rule has also been adopted in China, Japan, Persia, Poland, Russia, Siam, and Turkey.[107]

Likewise England[108] and all of the Canadian Provinces[109] provide for apportionment in negligence cases. Saskatchewan has an Automobile Insurance Act providing for compensation without regard to fault;[110] but if an injured party is not satisfied with the compensation award, he may bring a negligence action in which the amount of compensation received under the Automobile Insurance Act will be credited against any judgment he may recover. The Saskatchewan comparative negligence statute[111] applies to such actions.

Early American Developments

To what extent has the comparative negligence doctrine been

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[104]The statutes are collected and discussed in Turk, *supra* note 95, at 240-42.

[105]*Id.* at 243.

[106]Turk, *supra* note 95, at 238-44.

[107]*Id.* at 242, n.97. The statutes of the countries enumerated (with the exception of Russia) are discussed in 6 SCHLEGELBERGER, RECHTVERGLEICHENDES HANDWORTERBUCH 131 (1938). As in Italy, the Russian development has apparently been judicial rather than statutory. Schlegelberger points out that the statutes of a number of these countries, including Poland, Portugal, and Switzerland, are phrased in terms of comparative causation rather than comparative fault, and that under them damages may be apportioned on the basis of causation not only in negligence cases but also in cases of intentional torts and situations in which the plaintiff's injuries were inflicted without fault or blame on the part of either party. *Id.* at 131-33.

[108]Law Reform (Contributory Negligence) Act of 1945, 8 & 9 GEO. 6, c. 28.

[109]ALTA. REV. STAT. c. 56 (1955); B.C. REV. STAT. c. 68 (1948); MAN. REV. STAT. c. 266, §4 (1954); NEWF. REV. STAT. c. 159 (1952); N.B. REV. STAT. c. 36 (1952); N.S. REV. STAT. c. 51 (1954); ONT. REV. STAT. c. 252, §§4, 5 (1950); P.E.I. REV. STAT. c. 30 (1951); SASK. REV. STAT. c. 83 (1953), as amended, SASK. STAT. c. 30, §§9a, b (1957). There is no statutory provision in Quebec, but the doctrine has been judicially promulgated. Wawanesa Mut. Ins. Co. v. Boucher, [1956] Que. Q.B. 705; C.P.R. Ry. v. Frechette, 24 Que. 459 (K.B.), *rev'd*, [1915] A.C. 871, with dictum recognizing the *"faute commune"* doctrine; Nichols Chem. Co. v. Lefebvre, 42 Can. Sup. Ct. 402 (1909).

[110]The Automobile Accident Insurance Act, SASK. REV. STAT. c. 371 (1953); see Green, *Automobile Accident Insurance Legislation in the Province of Saskatchewan,*

accepted in the United States? Study of the laws of the various jurisdictions reveals much more widespread employment of the doctrine than is generally realized. And in addition to judicial and legislative development of the apportionment of damages approach, an ill-starred attempt to develop a different type of comparative negligence doctrine was undertaken by the Supreme Court of Illinois just a century ago.[112]

Using as authority the case of *Raisin v. Mitchell*[113] and another English case in which the court had refused to apply the contributory negligence doctrine against a seven-year-old boy who climbed into defendant's unattended horse cart on the ground that the child's "misconduct bears no proportion to that of the defendant,"[114] the Illinois court, in *Galena & Chicago Union Railroad v. Jacobs,* refused to apply the contributory negligence doctrine on the ground that "the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."[115]

Under this approach, the negligence of the parties was compared, and if that of the defendant was substantially greater than that of the plaintiff, he was entitled to recover full damages. The doctrine was followed for a short time in Kansas also,[116] but was soon abandoned in both states.[117] The requirement of finding degrees of negligence added new complications to the already complicated law of negligence, and proved unworkable.[118] It has also been suggested that although the doctrine was found acceptable in a series of early railroad cases, with an increase in industrial accident cases the court perhaps reassessed the ability of these new defendants to bear the

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31 J. COMP. LEG. & INT'L LAW 39 (3d ser. 1949), reprinted in LAWSON, NEGLIGENCE IN THE CIVIL LAW 315-35 (1950).

111SASK. REV. STAT. c. 83 (1953).

112See Green, *Illinois Negligence Law,* 39 ILL. L. REV. 36, 45, 54 (1944).

1139 Car. & P. 613, 173 Eng. Rep. 979 (C.P. 1939); see note 30 *supra* and discussion in accompanying text.

114Lynch v. Nurdin, 1 Q.B. 29, 39, 113 Eng. Rep. 1041, 1044 (1841).

11520 Ill. 478, 497 (1858).

116Pacific R.R. v. Houts, 12 Kan. *328 (1873); Sawyer v. Sauer, 10 Kan. *466 (1872).

117Lake Shore & Mich. So. Ry. v. Hessions, 150 Ill. 546, 37 N.E. 905 (1894); Atchison, T. & S.F.R.R. v. Morgan, 31 Kan. 77, 1 Pac. 298 (1883).

118Green, *Illinois Negligence Law,* 39 ILL. L. REV. 36, 45, 54 (1944); see Elliot, *Degrees of Negligence,* 6 SO. CALIF. L. REV. 91, 136 (1933).

loss and abandoned the doctrine in order to afford them greater protection.[119]

At about the same time that the Illinois scheme of comparing negligences for the purpose of determining entire liability was getting under way, the State of Georgia embarked on a comparative negligence development that was partly judicial and partly legislative. In a series of cases beginning in 1851[120] and based in part on the English case of *Lynch v. Nurdin*[121] (also used as authority by the Illinois court), the Georgia Supreme Court approved the concept of apportioning damages "where both parties are in fault, but the defendant most so."[122] In one of these early cases the court also suggested a sort of reverse application of the last clear chance doctrine, under which a plaintiff who failed to use a reasonable opportunity to avoid the consequences of the defendant's negligence would not have his damages apportioned but would be completely barred from recovery.[123] These developments were probably the basis for two statutes that first appeared in a codification of Georgia law in the Georgia Code of 1860-62.[124] The first of these provides for apportionment of damages in actions against railroad companies in which the complainant is contributorily negligent;[125] and the second, while somewhat ambiguous, has been interpreted as codifying the application of the last clear chance doctrine in lieu of comparative negligence when either defendant or plaintiff had the last chance to avoid the accident.[126]

The fact that the comparative negligence statute grew out of a series of railroad decisions[127] perhaps explains why it refers only to

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[119]Green, *supra* note 118, at 51. Malone attributes the failure of Louisiana to develop a comparative negligence doctrine in part to a similar desire to protect a growing street railway system. Malone, *Comparative Negligence,* 6 LA. L. REV. 125, 138-40 (1945).

[120]Macon & W. R.R. v. Winn, 26 Ga. 250, 254 (1858) (dictum).

[121]1 Q.B. 29, 113 Eng. Rep. 1041 (1841).

[122]Flanders v. Meath, 27 Ga. 358, 362 (1859) (dictum).

[123]Macon & W.R.R. v. Winn, 19 Ga. 440 (1856).

[124]GA. CODE §§2979, 2914 (1860-62); see Turk, *supra* note 95, at 327.

[125]GA. CODE ANN. §94-703 (1937).

[126]*Id.* §105-603. The use of the last clear chance doctrine in such cases is criticized in Hilkey, *Doctrine of Last Clear Chance in Georgia,* 13 GA. B.J. 104 (1950); *The Last Clear Chance Doctrine in Florida and Georgia,* 28 FLA. B.J. 24 (1954).

[127]These code sections were apparently added by the commissioners who prepared the Code of 1860-62 rather than having their genesis in the legislature. Turk, *supra* note 95, at 327-30, believes the commissioners felt they were simply codifying the case law of the time.

railroad accidents. But the Georgia court has applied the statutory doctrine to automobile accidents[128] as well as other types of negligence not involving railroads,[129] so that by a species of judicial legislation it has apparently become applicable to all types of negligence cases. At the same time, however, the doctrine has been unnaturally limited by the plaintiff's last clear chance limitation,[130] a limitation that has been justly criticized for its restrictive effect in comparative negligence cases.[131]

Florida Developments

The Georgia development has important ramifications for Florida because the Georgia comparative negligence statute was adopted verbatim by the Florida legislature in 1887.[132] As in Georgia, its adoption was preceded by a railroad case involving contributory negligence, *Louisville & Nashville R.R. v. Yniestra.*[133] Unlike the Georgia court, the Supreme Court of Florida considered itself barred by the strict contributory negligence doctrine as set out in *Butterfield v. Forester,*[134] which the Court cited as authority in denying recovery to a contributorily negligent pedestrian run down by an engine backing without a rear light. In the opinion, Chief Justice McWhorter castigated the all-or-nothing rule, which he labeled "unjust and inequitable."[135]

In calling upon the legislature to provide for apportionment of damages, the Chief Justice did not suggest that apportionment be limited to railroad accident cases. But the Georgia statute was at hand and would remedy the specific injustice complained of. It was enacted at the next session of the legislature, and no doubt it adequately covered the most serious type of negligence case arising in

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[128]Barnett v. Whatley, 87 Ga. App. 860, 75 S.E.2d 667 (Div. 1, 1953); Cox v. Nix, 87 Ga. App. 837, 75 S.E.2d 331 (Div. 2, 1953); McDowall Transport, Inc. v. Gault, 80 Ga. App. 445, 56 S.E.2d 161 (Div. 1, 2, 1949).

[129]Wynne v. Southern Bell Tel. & Tel. Co., 159 Ga. 623, 126 S.E. 388 (1925) (invitee in building); Elk Cotton Mills v. Grant, 140 Ga. 727, 79 S.E. 836 (1913) (employee in factory).

[130]Macon & W.R.R. v. Winn, 19 Ga. 440 (1856).

[131]GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 126-34 (1936); Hilkey, *supra* note 126 (both articles).

[132]Fla. Laws 1887, c. 3744, now FLA. STAT. §768.06 (1957).

[133]21 Fla. 700 (1886).

[134]11 East 59, 103 Eng. Rep. 926 (K.B. 1809), discussed under heading "Origin of the Contributory Negligence Rule" *supra.*

[135]21 Fla. at 737.

Florida at the time of its passage. As other types of cases involving industrial and, later, automobile accidents came to the fore, however, the Florida Court, less inclined toward judicial legislation than its sister court to the north, did not extend the statute beyond the railroad cases specifically covered by it, and the contributory negligence defense remained available in these other cases.[136] It should be noted in passing, however, that the Florida legislature, while taking the Georgia railroad comparative negligence statute as its pattern, did not adopt the companion legislation causing the last clear chance doctrine to defeat recovery when applicable.[137] And the Florida Court, after first applying the last clear chance doctrine to allow an extremely negligent plaintiff full recovery,[138] has recently adopted the sounder view that the doctrine has no application to cases in which the comparative negligence statute is involved.[139]

If the members of the legislature of 1887 could have foreseen the flood of automobile accident cases in which injured plaintiffs would be denied relief against admittedly culpable defendants because of the harsh application of the contributory negligence rule, it seems likely that, heeding the plea of Chief Justice McWhorter that "the law, in cases at least where human life is concerned, certainly needs legislative revision,"[140] they would have included such cases within the coverage of the statute. Legislators are not always prescient, however, and the opportunity was lost. But the words of the Chief Justice are as appropriate today as they were in 1887, and the 1959 Legislature might well ask itself whether the time has not come to apply them to the automobile, a newer and far more dangerous[141] mode of transportation than the railroads of 1887.[142]

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[136]Macasphalt Corp. v. Murphy, 67 So.2d 438 (Fla. 1953); Petroleum Carrier Corp. v. Robbins, 52 So.2d 666 (Fla. 1951). In Florida Motor Lines, Inc. v. Ward, 102 Fla. 1105, 137 So. 163 (1931), the Court considered and rejected the Georgia argument for extending the railroad comparative negligence statute to motor carriers.

[137]GA. CODE ANN. §105-603 (1956). See note 126 *supra*.

[138]Poindexter v. Seaboard Air Line Ry., 56 So.2d 905 (Fla. 1951).

[139]Loftin v. Nolin, 86 So.2d 161 (Fla. 1956), 8 U. FLA. L. REV. 339 (1955).

[140]Louisville & N.R.R. v. Yniestra, 21 Fla. 700, 738 (1886).

[141]See notes 1, 2 *supra*. For further development of the argument that this element of danger calls for the extension of comparative negligence to motor vehicle accidents, see Note, 2 U. FLA. L. REV. 124 (1949).

[142]The element of danger was apparently the basis for the enactment of Florida's other comparative negligence statute applicable to employees in certain specified hazardous occupations. FLA. STAT. §§769.01-.06 (1957).

Other American Legislation

The injustice worked by the defense of contributory negligence in railroad accidents led in 1906 to another type of statute, the Federal Employers' Liability Act, designed to protect interstate railroad employees injured by the negligence of their employers.[143] This federal statute soon became the pattern for similar legislation protecting intra-state railroad employees. Similar statutes are now found in at least twenty-three states,[144] while several additional states have even broader statutes covering employees of railroads and those in other occupations.[145]

While the railroads bore the brunt of the earlier legislative attacks on contributory negligence, bills currently being introduced are of broader scope and provide for adoption of the comparative negligence approach in all types of negligence cases. Thus, in addition to the judicial extension of the comparative negligence doctrine in Georgia,[146] five states and the Commonwealth of Puerto Rico now have comparative negligence statutes applicable to all types of negligence cases.[147]

The first, and simplest, of these statutes was enacted in Mississippi in 1910.[148] Nebraska came next, enacting a statute providing for apportionment of damages when plaintiff's negligence is slight and defendant's is gross in comparison.[149] This statute was duplicated in South Dakota in 1941.[150] Wisconsin's statute, enacted in 1931,[151] is implemented by the use of special verdicts[152] and is applicable when

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[143]35 STAT. 65 (1908), as amended, 45 U.S.C. §51 (1952). On the federal level the same principle was later written into the Merchant Marine, or Jones, Act, 41 STAT. 1007 (1920), 46 U.S.C. §688 (1952), and the act relating to death on the high seas, 41 STAT. 537 (1920), 46 U.S.C. §766 (1952).

[144]See note 42 *supra.*

[145]*E.g.,* ARK. STAT. ANN. §§73-914 to 919, 81-1201 to 1203, 81-1208 (1947); CAL. LAB. CODE ANN. §2801 (West 1955); ORE. REV. STAT. §§654.305-.335 (1955).

[146]See notes 122-131 *supra* and accompanying text.

[147]ARK. STAT. ANN. §§27-1730.1, .2 (Supp. 1957); MISS. CODE ANN. §1454 (1957); NEB. REV. STAT. ANN. §25-1151 (1956); S.D. CODE §47.0304-1 (Supp. 1952); WIS. STAT. §331.045 (1955); P.R. LAWS ANN. tit. 31, §5141 (Supp. 1957).

[148]Miss. Laws 1910, c. 135. The statute originally covered only personal injuries. It was extended to injuries to property by Laws 1920, c. 312.

[149]The Nebraska statute was adopted in 1913. Neb. Laws 1913, c. 124, §1.

[150]S.D. Laws 1941, c. 160, §1.

[151]Wis. Laws 1931, c. 242.

[152]See INSTITUTE OF JUDICIAL ADMINISTRATION, COMPARATIVE NEGLIGENCE 103 (1955); Hayes, *New York Should Adopt a Comparative Negligence Rule,* 27 N.Y. STATE BAR ASS'N BULL. 288, 289 (1955).

plaintiff's negligence is not as great as defendant's. Arkansas enacted a statute of general application in 1955[153] that specifically required special verdicts, but in 1957 the Arkansas legislature did away with this requirement while adding the Wisconsin limitation that plaintiff in order to recover must be less negligent than defendant.[154] Puerto Rico enacted the most recent statute in 1956.[155] Moreover, since 1951 across-the-board comparative negligence legislation has been introduced in the legislatures of at least eighteen states[156] and seriously considered in at least three more.[157] All of this activity indeed indicates that comparative negligence is "on the march."[158]

Objections to Comparative Negligence Legislation

Why is it, then, that the march is so slow? What is it that impedes the adoption of comparative negligence legislation in Florida and other states where comparative negligence bills are introduced in almost every session of the legislature?

One factor is the general inertia and resistance to change that are encountered whenever substantial changes in the law are proposed. Advocates of the status quo tell us that the jury handles the majority of such cases adequately now (albeit in the teeth of the instructions they receive), so why rock the boat?[159]

This same group argues that the contributory negligence rule serves "as a salutary check on the gambling instincts of the litigating public"[160] and makes dire predictions about the increase in litigation

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153Ark. Acts 1955, No. 191. A symposium on the prospective operation of this short-lived version of the Arkansas law may be found in 10 Ark. L. Rev. 54-113 (1956).

154Ark. Stat. Ann. §§27-1730.1-.2 (Supp. 1957).

155P.R. Laws Ann. §5141 (Supp. 1957).

156Ala., Ariz., Ark. (where the legislation was successfully enacted), Calif., Colo., Fla., Kan., Mass., Mich., Mo., N.Y., N.D., Ohio, Ore., Pa., Tenn., Wash. See Institute of Judicial Administration, Comparative Negligence 9 (1955); Lipscomb, *Comparative Negligence,* 1951 Ins. L.J. 667, 674.

157Ky., N.D., Okla.; see Institute of Judicial Administration, Comparative Negligence 9 (1955).

158See Turk, *supra* note 95, at 304.

159Benson, *Comparative Negligence—Boon or Bane,* 23 Ins. Counsel J. 204 (1956); Harkavy, *supra* note 93; Powell, *supra* note 92, at 1005.

160Benson, *supra* note 159, at 214. But plaintiffs are not the only gamblers. The present system arguably encourages defendants to litigate cases when there is hope that the court will apply the contributory negligence rule to bar recovery. See Averbach, *Comparative Negligence Legislation,* 19 Albany L. Rev. 4, 17 (1955).

that would follow a switch to the comparative negligence approach.[161] The contributory negligence rule has even been eulogized by one writer as "the last bar . . . to complete chaos in our courts."[162]

Another objection raised by the same writer is perhaps more informative. This author, the superintendant of claims of a large casualty company, and the powerful group he represents fear that "the average verdict and settlement will have to be greater."[163] The validity of this claim will be examined later. The opposition of this group,[164] and of other perennial defendants who are rarely on the plaintiff's side of negligence litigation,[165] has to date been effective in Florida, as elsewhere, in blocking comparative negligence legislation.

An additional objection is that the contributory negligence rule should be retained for its deterrent effect in connection with accident prevention. But if the fear of serious personal injury and perhaps death is not sufficient to prevent contributory negligence, it seems highly unlikely that the more remote fear of losing a personal injuries suit will be a real deterrent to negligent driving.[166]

A final argument against comparative negligence is that the doctrine would be so complicated to administer that the average jury would not be competent to apply it and would simply bring in a compromise verdict.[167] Although this contention has some basis, as will be pointed out, not all comparative negligence legislation is equally open

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[161]Benson, *supra* note 159, at 207. See also Benson, *Can New York State Afford Comparative Negligence?*, 27 N.Y. STATE BAR BULL. 291, 298-99 (1955).

[162]Benson, *Comparative Negligence—Boon or Bane*, 23 INS. COUNSEL J. 204, 214 (1956).

[163]Benson, *Can New York State Afford Comparative Negligence?*, 27 N.Y. STATE BAR BULL. 291, 299 (1955); see Powell, *supra* note 159, at 1007.

[164]To quote Robert N. Gilmore, Jr., Assistant Counsel, Association of Casualty and Surety Companies, an association of 133 stock companies, "Our Association is opposed to comparative negligence in any form . . . ." Gilmore, *Comparative Negligence from a Viewpoint of Casualty Insurance*, 10 ARK. L. REV. 82 (1955).

[165]"The law of contributory negligence favors corporate defendants, insurance companies, and public utilities. They are not subject to the denial of justice which a strict application of the rule produces, as they do not come into court in the capacity of a plaintiff . . . . Their opposition . . . will be strenuous." Note, 17 TEMPLE L.Q. 276, 286 (1943).

[166]It is also true that there is a growing tendency to recognize that the compensatory function of tort law in automobile accident cases outweighs the admonitory function. See Leflar, *Negligence in Name Only*, 27 N.Y.U.L. REV. 564 (1952).

[167]Benson, *Comparative Negligence—Boon or Bane*, 23 INS. COUNSEL J. 204 (1956).

to this criticism; and there are ways of meeting and minimizing this objection.[168]

Answers to the Objections

Before the workability of the various types of comparative negligence statutes is considered, it may be appropriate to evaluate the other objections and consider the benefits which would be derived from such legislation.

As previously noted, the fact that the jury uses a comparative negligence approach in most situations in which the plaintiff was contributorily negligent is not an adequate reason for preserving the contributory negligence rule. Leaving aside the cases in which juries literally follow their instructions and deny recovery,[169] retention of the existing rule leads laymen to disrespect and ridicule our system of accident law. This is a high price to pay for the status quo when comparative negligence legislation would bring the law into line with the realities of jury operation and change that disrespect to respect for the justice administered by our courts.[170]

Moreover, there are sound reasons for believing that adoption of the comparative negligence rule would decrease rather than increase negligence litigation. The University of Chicago Jury Study Project has indicated,[171] and even some opponents of comparative negligence admit,[172] that when the measure of damages is the sole issue, judges are likely to be as liberal as juries in assessing damages. The real reason for plaintiffs' demands for jury trial in many cases today is not so much the hope of a larger award by the jury as the fear that the judge will apply the contributory negligence rule literally, where-

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[168]See discussion under heading "Use of Special Verdicts" *infra*.

[169]"[T]he reports abound in cases where the jury has been extremely literal in interpreting the judge's charge . . . to the detriment of the plaintiff." Averbach, *supra* note 160, at 11. (Mr. Averbach is a trial lawyer of 30 years' experience and former President of the International Academy of Trial Lawyers). In addition, as Dean Prosser points out, *supra* note 55, at 469, "there are many directed verdict cases, where the plaintiff's negligence, however slight it may be in comparison with that of the defendant, is still clear beyond dispute, and the court has no choice but to declare it as a matter of law."

[170]See notes 91-93 *supra* and accompanying text.

[171]KALVEN, REPORT ON THE JURY PROJECT, CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 29-31 (Univ. of Mich. Law School 1955).

[172]Benson, *Can New York State Afford Comparative Negligence?*, 27 N.Y. STATE BAR BULL. 291, 298 (1955).

as jurymen will probably apportion damages according to the fault of the parties as they see it.[173] Under comparative negligence, not only would more cases now being tried before juries be submitted to judges, thus substantially cutting down the time required for adjudication of cases,[174] but if defendants were deprived of the hope of avoiding recovery through the application of the contributory negligence rule, there would be a tendency to settle these cases, thus decreasing the percentage of cases tried. This has apparently been the experience with comparative negligence legislation in Wisconsin, where, to quote a past president of that state's bar, the number of negligence cases tried "has been vastly decreased."[175]

The same authority indicates that the fear that the size of verdicts would increase under comparative negligence apparently has not been borne out in Wisconsin,[176] and it is interesting to note that insurance counsel who make this argument[177] fail to produce statistics to support their claims, although they are in the best position to obtain statistics as to whether the facts bear out their claims.

Is the comparative negligence rule too complex to be properly administered by a jury? Juries have been making apportionments on the basis of comparative negligence with apparent success in Florida in railway accident cases since 1887;[178] and in Wisconsin they have been applying the rule to all types of negligence cases, apparently to the complete satisfaction of the Wisconsin bar, since 1931.[179] Florida juries have also been successfully apportioning damages in automobile accident cases in which the accident occurred in a comparative negligence state such as Mississippi, so that conflict of laws principles have

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[173]See Bress, *Comparative Negligence,* 43 A.B.A.J. 127, 130 (1957).

[174]INSTITUTE OF JUDICIAL ADMINISTRATION, STATE TRIAL COURTS OF GENERAL JURISDICTION CALENDAR STATUS STUDY — 1956, pp. 2, 5, indicates that the average number of months elapsing from "at issue" to trial in jury cases in Kings County, N.Y., was 26 months, in nonjury cases 4 months; in New York County in jury cases 41 months, in nonjury cases 3 months; in Queens County in jury cases 46 months, in nonjury cases 16 months; and in Bronx County in jury cases 39 months, whereas the nonjury calendar was completely up to date. The average delay in Dade County, Fla., was relatively short, being 6 months for jury cases compared to 2 months for nonjury cases.

[175]Hayes, *supra* note 152, at 289.

[176]Bress, *supra* note 173, at 129, says "it is widely accepted that, with comparative negligence, there has ensued a decrease in the over-all size of verdicts."

[177]See note 163 *supra.*

[178]See discussion under heading "Florida Developments" *supra.*

[179]See Hayes, *supra* note 152, at 290.

called for application of the apportionment rule in Florida trials.[180] The determination of the percentage of negligence attributable to each party in such cases is perhaps not exact,[181] but apportionment can hardly be claimed to be more speculative than establishment of the dollar value of pain and suffering or a broken leg. Moreover, as the opponents of comparative negligence freely admit, most juries are making apportionments sub rosa anyhow.[182] The real problem is selection of the type of legislation that will be most helpful to them in doing their job honestly and openly. In connection with the difficulty of accurate apportionment, it is interesting to note that all the Canadian statutes provide that when it is not possible to establish different degrees of fault, liability shall be apportioned equally.[183]

The Multiple Party Problem

The difficulties in apportionment faced by a jury are of course multiplied if the trial involves multiple parties and the jury is required to determine the respective percentages of negligence attributable to each party. The critics may be correct in suspecting that in these cases some juries simply add up the number of acts of negligence and use this figure as the basis of apportionment.[184] Even this, however, is better than no apportionment at all, with the resulting allocation of the entire loss to the plaintiff, whose negligence may have played only a minor part in causing his injuries. Theoretical practice would no doubt be best served by bringing all the parties in a multiple party accident into the same suit, determining the proportion of fault of each, and allocating the damages on this basis.[185]

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[180]See Institute of Judicial Administration, Comparative Negligence 13 (1955).

[181]The difficulty of making an exact apportionment has led to one recent proposal calling for division of damages not according to percentage of fault but equally among all the negligent parties. O'Toole, *Comparative Negligence: The Pennsylvania Proposal,* 2 Vill. L. Rev. 474, 486 (1957). Prosser, *supra* note 55, at 475, while recognizing the difficulty, points out that it "is at least more accurate than one based on the arbitrary conclusion that 100 per cent of the responsibility rests with the plaintiff and none whatever with the defendant, or, if the last clear chance is applicable, 100 per cent with the defendant and none with the plaintiff — both of which are demonstrably wrong."

[182]See discussion under "Role of the Jury" *supra.*

[183]The Canadian statutes are collected at note 109 *supra.*

[184]Benson, *Can New York State Afford Comparative Negligence?,* 27 N.Y. State Bar Bull. 291, 301 (1955).

[185]This is the approach advocated in Gregory, Legislative Loss Distribution in Negligence Actions c. XIV (1936).

The English and Canadian comparative negligence acts provide for such joinder,[186] but Dean Prosser has pointed out that the jury has practically disappeared from negligence litigation in these jurisdictions,[187] and that a skilled judge at his leisure with a transcript of the record before him is in a position to do an adequate job of unravelling the complex problems of the multiple party suit.[188] An untrained jury without a transcript can hardly be expected to perform as sound a job. A system frequently employing the jury, therefore, to be workable, should make it possible to avoid forcing this difficult problem on the jury. Fortunately, none of the American statutes require such joinder.[189]

It is true that, under American law, multiple wrongdoers are jointly and severally liable for the injuries they cause and that the injured party can join them in a single unit if he sees fit.[190] But if he is not required to litigate against all at once, he will do well to avoid joinder when comparative negligence is involved. The paucity of appellate cases involving this difficult multiple apportionment problem[191] probably indicates that well-represented plaintiffs are following

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[186]See Law Reform (Contributory Negligence) Act of 1945, 8 & 9 GEO. 6, *c.* 28. Problems in the Administration of the English Act are discussed in WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE cc. 16, 19 (1951). For the Canadian statutes see note 109 *supra*. Commenting on the Ontario Act, Mole and Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 604, 653 (1932), state: "[O]ther jurisdictions are satisfied merely to set out the statutory rule of comparative negligence and to rely upon judicial wisdom in solving the various problems of construction which naturally arise under comparative negligence, and there is no reason to expect the courts of New York to deviate from their record of sound judgment if the comparative negligence doctrine should be adopted in this state."

[187]Prosser, *supra* note 55, at 504; see O'Halloran, *Problems in the Modern Appeal in Civil Cases*, 27 CAN. B. REV. 259, 263 (1949).

[188]Prosser, *supra* note 55, at 506.

[189]Dean Prosser, *id.* at 506, n.223, points out that such a proposal was rejected in Minnesota in 1940. *But see* Teller, *Proposed Comparative Negligence Law and Contribution Among Joint Tortfeasors*, 5 BROOKLYN BARR. 100 (1954), criticizing a 1953 New York bill for not requiring complete adjudication of multiple party accidents in a single suit.

[190]See PROSSER, TORTS §46 (2d ed. 1955). If the wrongdoers concurred in producing the entire injury, they are looked upon as joint tortfeasors and are held jointly and severally liable for the whole damage. Louisville & N.R.R. v. Allen, 67 Fla. 257, 65 So. 8 (1914); Arnst v. Estes, 136 Me. 272, 8 A.2d 201 (1939). Successive wrongdoers, however, are jointly liable only as to that part of the injury to which they both contributed. Viou v. Brooks Scanlon Lumber Co., 99 Minn. 97, 108 N.W. 891 (1906).

[191]As of 1953, Prosser could find only ten such cases. Prosser, *Comparative*

the course of discretion and avoiding the unnecessary complications and dangers[192] lurking in joinder of multiple defendants when comparative negligence is involved. The fact that Florida does not permit third party practice[193] would help make it possible to avoid this problem if a system of comparative negligence were adopted.

Relationship to the Problem of Contribution Among Tortfeasors

The problem of apportionment among multiple parties becomes further complicated if the jurisdiction has legislation providing for contribution among joint tortfeasors. This type of legislation is discussed in detail in the following article, but its relationship to the comparative negligence problem may be suggested at this point. As pointed out above, the English system effects contribution through joinder of all negligent parties in a single action. But with the jury involved, proposals to include a contribution provision in American comparative negligence statutes might raise such fear of complicated litigation as to give, in the words of Dean Prosser, "the kiss of death to the whole bill."[194]

Moreover, the combination of a contribution statute with comparative negligence legislation might operate, in the case of insured motorists, to defeat the apportionment of damages that seemingly would result from a comparative negligence law.[195] Because of their complexity and the possible undesirable side effects that would result from contribution provisions, the wisest course, in so far as futhering

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Negligence, 51 MICH. L. REV. 465, 507 (1953).

[192]One obvious danger is that of reversible error in the complicated jury instructions that would be necessary in such multiple party proceedings.

[193]Florida Fuel Oil, Inc. v. Spring Villas, Inc., 95 So.2d 581 (Fla. 1957); Pan American Surety Co. v. Jefferson Constr. Co., 99 So.2d 726 (3d D.C.A. Fla. 1958).

[194]Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 506 (1953).

[195]James offers the following example. "A and B run into each other at an intersection. Let's assume they are equally negligent . . . that each of them is hurt $10,000 worth . . . [and] both are insured . . . . Now, if you have comparative negligence, A is entitled to recover $5,000 against B. He is hurt $10,000 worth, but he only get $5,000 because he is half negligent, and B is entitled to recover $5,000 against A . . . . Now if his [A's] insurance company is entitled to cancel out that $5,000 that it owes because of its policy undertaking to B, you are allowing the insurance company to credit its insured's personal loss against the insurance company obligation." James, *Comparative Negligence,* 26 UTAH BAR BULL. 109, 118 (1956).

the ends of comparative negligence legislation is concerned, is to leave the rule against contribution in Florida as it now stands.[196]

Basis for Apportionment When Multiple Parties Are Involved

Even in the absence of forced contribution, the very fact that multiple parties were involved in the accident that resulted in the plaintiff's suit against one of them raises the question of whether apportionment should be made by comparing only the negligence of the parties to the suit or by reducing the plaintiff's recovery by the proportion that his fault bore to the total negligence of all the parties to the accident. The few cases that have considered the question have adopted the latter approach.[197] If the comparison

[196]Proposed contribution legislation such as the Uniform Contribution Among Tortfeasors Act has two goals. The most obvious of these is to make provision for one wrongdoer to obtain contribution from co-tortfeasors after he has been required to pay full compensation to an injured party. The other goal, perhaps not so well known, is to make it possible for the injured party to settle with one such tortfeasor without releasing his claims against the others. There are several reasons why such settlements are desirable and in accord with the modern social policy looking toward prompter and more adequate compensation of tortiously injured parties. In many jurisdictions it may take years to bring a negligence case to trial; meanwhile the injured party, who may be in dire need of funds to defray the cost of medical and hospital attention, or for living expenses during a period of total disability, may be very desirous of accepting a reasonable settlement offer by the tortfeasor who was least at fault in injuring him. In addition, from the wrongdoer's viewpoint, it may be desirable to settle the case rather than have a potential lawsuit hanging over his head for a protracted period. If the tortfeasor is insured, his insurance carrier will likewise be interested in closing the matter rather than carrying the case on its records for a protracted period; thus the carrier may be much more willing to make a reasonable settlement with the injured party if it can be made promptly.

But in the absence of legislation most American courts still follow the rule, which originated in the Year Books, that the release of one joint tortfeasor releases all the other joint tortfeasors. Coche v. Jennor, Hob. 66, 80 Eng. Rep. 214 (K.B. 1614); see PROSSER, TORTS 243 (2d ed. 1955); Shackleford, *The Joint and Several Liability of Tortfeasors and Their Release,* 46 CENT. L.J. 387, 390 (1898).

The Florida Legislature in 1957 made the use of partial releases possible by providing that the release of one tortfeasor shall not operate to release any other tortfeasor who may be liable for the same tort. FLA. STAT. §54.28 (1957). The statute also does away with the artificial distinction between releases and covenants not to sue, validating both types of settlement devices, and provides for a setoff from any judgment against co-tortfeasors. The second goal of the Uniform Contribution Among Tortfeasors Act has thus been achieved. The balance of the act, providing for contribution among tortfeasors, is not needed in Florida.

[197]Hartford Acc. & Indemnity Co. v. Gulf Refining Co., 127 F. Supp. 469 (E.D. La. 1954), *modified on other grounds,* 230 F.2d 346 (5th Cir.), *cert. denied sub nom.*

were only between the negligence of the plaintiff and the individual defendant sued, a sort of indirect contribution among the tortfeasors would result, since the percentage of the plaintiff's negligence would necessarily be higher when the fault of third parties was omitted from consideration.[198] This approach might be more equitable as among the tortfeasors who injured the plaintiff,[199] but it has the socially undesirable feature of placing more of the burden of loss on an injured party who is usually in the poorest position to bear it.[200]

RULE WHEN PLAINTIFF IS MORE AT FAULT THAN DEFENDANT

A related problem concerns the advisability of limiting the injured party's recovery to cases in which his negligence is less than that of the defendant. The English[201] and Canadian[202] statutes contain no such limitation, nor do most of the numerous statutes of special application discussed previously,[203] such as the railroad liability statutes. On the other hand, the American statutes of general application, those of Arkansas,[204] Nebraska,[205] South Dakota,[206] and

Gulf Refining Co. v. Black Warrior Towing Co., 352 U.S. 832 (1956); Smith v. American Oil Co., 77 Ga. App. 463, 49 S.E.2d 90 (1948); Mishoe v. Davis, 64 Ga. App. 700, 14 S.E.2d 187 (1941); Quady v. Sickl, 260 Wis. 348, 51 N.W.2d 3 (1952); Bohlmann v. Penn Elec. Corp., 232 Wis. 232, 286 N.W. 552 (1939).

198In Hartford Acc. & Indemnity Co. v. Gulf Refining Co., *supra* note 197, the percentage of negligence of one of the plaintiffs was found to be 5%, this 5% being a part of that of his employer, which was determined to be 50%, while that of the defendant was assessed at 50%. The plaintiff was authorized to recover 95% of the value of his injuries from the defendant. If his recovery had been reduced by the proportion that his fault bore to that of the defendant, or 5% compared with 50%, his damages would have been reduced by 1/11th rather than 1/20th.

199The force of this argument is greatly reduced in jurisdictions such as Georgia and Wisconsin, which have legislation providing for contribution among tortfeasors in addition to a comparative negligence statute. GA. CODE ANN. §105-2012 (1956); WIS. STAT. ANN. §§113.01-.09, 272.59, 272.61 (1958). For a detailed analysis of this problem see GREGORY, *op cit supra* note 185, c. IX.

200This will be particularly true when one of the parties to the accident is insolvent. For the argument that the plaintiff should bear a share of the risk of such insolvency, see GREGORY, *op. cit. supra* note 185, at 142-48.

201Law Reform (Contributory Negligence) Act of 1945, 8 & 9 GEO. 6, c. 28.

202See note 109 *supra*.

203See discussion under heading "Other American Legislation" *supra*.

204ARK. STAT. ANN. §§27-1730.1-.2 (Supp. 1957). The original Arkansas statute enacted in 1955 did not contain such a limitation, but it was added by the 1957 legislature.

205NEB. REV. STAT. §25-1151 (1956).

206S.D. CODE §47.0304-1 (Supp. 1952).

Wisconsin,[207] contain specific limitations of this sort; and the Georgia Supreme Court has judicially engrafted a similar limitation into its statute.[208] Only Mississippi[209] and Puerto Rico[210] have statutes without such a limitation.

One of the leading authorities has referred to this limitation as absurd,[211] and it undoubtedly does defeat the policy of broader loss distribution, which is one of the motivating forces behind comparative negligence legislation. On the other hand, as long as fault is the basis of automobile accident liability, allowing recovery only when the defendant is more at fault than the plaintiff is arguably more in accord with that doctrine, whereas allowing plaintiffs to recover in cases in which their negligence is the major responsibility for an accident approaches closer to strict liability than liability based on fault. Recovery under the Federal Employers' Liability Act and the Mississippi statute by plaintiffs almost entirely responsible for their own injuries has been criticized on this basis;[212] and a statute limiting recovery to cases in which the plaintiff's fault is not as great as that of the defendant may stand a better chance of legislative acceptance and enactment than the Mississippi type, which has no such limitation.[213]

A further argument made for the limited type of statute has been that one purpose of the comparative negligence rule is to reduce the burden on the courts by encouraging settlement of cases now being litigated, very often cases in which the plaintiff sues and demands a jury trial in the hope that the jury will shut its eyes to his contributory negligence. If the plaintiff's fault is much beyond fifty per cent, his chances for a successful jury verdict become slim. The Mississippi unlimited type of statute would encourage litigation of these cases,

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207WIS. STAT. ANN. §331.045 (1958).

208Central R.R. & Banking Co. v. Newman, 94 Ga. 560, 21 S.E. 219 (1894); Smith v. American Oil Co., 77 Ga. App. 463, 49 S.E.2d 90 (1948); Mishoe v. Davis, 64 Ga. App. 700, 14 S.E.2d 187 (1941).

209MISS. CODE ANN. §1454 (1956).

210P.R. LAWS ANN. tit. 31, §5141 (Supp. 1957).

211GREGORY, *op cit. supra* note 185, at 64; for similar criticisms see Turk, *supra* note 95, at 338; Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 494 (1953).

212Powell, *supra* note 92, at 1008, 1061.

213See Lipscomb, *Comparative Negligence,* 1951 INS. L.J. 667, 674. If the Canadian type provision (discussed under heading "Other Countries" *supra)* for equal apportionment when it is not possible to establish different degrees if fault were adopted, the limitation would necessarily have to be to the effect that the plaintiff could not recover when his fault was *more* than that of the defendant.

whereas "limiting actions to those in which the defendant is more than half responsible for the accident would probably not inspire any more cases than we already have . . . ."[214] On the other hand, the present Florida railway accident statute contains no such limitation,[215] and its long successful operation possibly indicates that Florida juries can be trusted to properly administer the broader type of statute in the automobile accident field.[216]

USES OF SPECIAL VERDICTS

Another problem in the administration of the comparative negligence rule is the reliability of jury verdicts in cases in which the plaintiff's injuries are of a sort likely to evoke excess sympathy from the jury. One method of controlling the jury is the special verdict.[217] Although it has long been available in Florida,[218] it has not been used in the state courts, other than perhaps under the Declaratory Judgments Law;[219] and the special verdict provisions of the Federal Rules of Civil Procedure are rarely taken advantage of.[220]

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[214]Kreindler, *Comparative Negligence in New York,* 11 N.Y. COUNTY BAR BULL. 81, 86 (1953).

[215]"The plaintiff is entitled to recover if defendant's negligence was one of the proximate contributing causes to the injury of the deceased, notwithstanding the deceased's negligence was greater than that of the defendant." Florida C. & P. Ry. v. Foxworth, 41 Fla. 1, 63, 25 So. 338, 344 (1899).

[216]But recent verdicts like that in Martin v. Tindel, 98 So.2d 473 (Fla. 1957), *cert. denied,* 355 U.S. 959 (1958), may cast some doubt on this assumption, at least when large corporate defendants are involved.

[217]As to special verdicts see Frank, *The Case for the Special Verdict,* 32 J. AM. JUD. SOC. 142 (1949); Green, *A New Development in Jury Trial,* 13 A.B.A.J. 715 (1927); Sunderland, *Verdicts, General and Special,* 29 YALE L.J. 253 (1920).

[218]Beckwith v. Bailey, 119 Fla. 316, 161 So. 576 (1935); Florida E.C. Ry. v. Lassiter, 58 Fla. 234, 50 So. 428 (1909).

[219]Under the earlier cases, *supra* note 218, the Supreme Court of Florida took the position that a trial court could request the jury to bring in a special verdict but the jury had the right to decline to do so. Understandably, trial judges were reluctant to make such requests. But FLA. STAT. §587.08 (1957) apparently gives the court the right to require the jury to settle questions of fact in declaratory judgment proceedings not falling within the category of "equity cases." The Supreme Court of Florida, however, has classified the only case in which the provision has been referred to as an equity case, and there is as yet no record in the appellate cases of any actual case in which the special verdict procedure has been utilized.

[220]Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 501 (1953). The major advantages to be gained by use of special verdicts have been detailed as

A part of this reluctance may stem from the general trend toward extending liability in negligence cases through the use of general verdicts.[221] In jurisdictions following the contributory negligence rule, a general verdict may often hide a jury application of the comparative negligence approach. With the comparative negligence doctrine brought out into the open by legislation authorizing its use, the special verdict will not prevent recovery by a contributorily negligent plaintiff. Instead, it will protect a defendant from an overly sympathetic jury that might be so impressed by the plaintiff's injuries as to assess the entire damages against the defendant. If liability is to be based on comparison of fault, the special verdict can be a useful tool for assuring that damages will be apportioned on that basis. The jury can be required to state the amount of the plaintiff's damages and the percentage of the total negligence attributable to him and to the defendant.[222] The judge can then make the appor-

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follows by Lipscomb, *Special Verdicts Under the Federal Rules,* 25 WASH. U.L.Q. 185, 213 (1940):

"By its use the trial judge is relieved from the difficult task of charging the jury on the law of the case, and thus the danger of errors incident to a lengthy charge is eliminated. At the same time the jury's task is simplified. Instead of attempting to understand the court's charge the jury may devote its entire efforts to the task of answering definite questions of fact. The fact that the jury is relieved from the task of resolving the controversy for one party or the other, eliminates as far as possible the ever present dangers of a verdict prompted by sympathy, bias, or prejudice. Under the necessity of answering definite questions concerning the facts in issue, the jury is constrained to answer each question in accordance with the preponderance of the evidence. The individual juryman would be embarrassed to do otherwise. The very nature of the procedure, the method of allocating the burden of proof, the placing of emphasis on facts rather than on parties, all tend toward the development of a scientific and sensible procedure for the jury trial.

"By the use of the special verdict both sides of a controversy may be more efficiently presented to the jury than under the method of presenting alternates in in the general charge. Furthermore, if the trial judge misapplies the law to the special verdict he may correct his error without the necessity of a new trial. And of outstanding importance is the fact that the definite factual findings furnish a practical, concrete basis for the appellate court's evaluation of the case on review. If the only error involves a point of law or a misapplication of law to the facts by the trial judge, the necessity for a new trial should be eliminated."

[221]See generally discussion under heading "Role of the Jury" *supra.*

[222]Dean Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 497 (1953), has suggested the following as a typical series of questions and answers in a special verdict in an automobile accident case:

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

tionment; and the jury need not even be told that an apportionment will follow, though in most cases they will undoubtedly realize the reason behind the special questions they are required to answer. But, as Dean Prosser has pointed out, "A jury which on general principles would return a large verdict in favor of a pretty woman and against a railroad company may well hesitate to return special findings which it knows to be against the evidence."[223]

The widespread approval of the comparative negligence doctrine in Wisconsin, as contrasted with the criticism leveled at the Mississippi legislation, has been attributed to the fact that special verdicts are used in the application of the doctrine in Wisconsin, whereas Mississippi retains the general verdict.[224] On the other hand, Arkansas, lacking Wisconsin's experience with the special verdict on an across-the-board basis,[225] apparently found it unwieldy when restricted to comparative negligence cases; and the Arkansas legislature did away with the compulsory special verdict after only two years of operation under it.[226]

The comparative negligence bills that failed of enactment in the 1955 and 1957 Florida Legislatures were of the Mississippi type and contained no special verdict provisions.[227] Since such a requirement gives added protection to the defendant against overly sympathetic

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"2. If you answer Question 1 "Yes," then answer this: Was the defendant Smith's negligence a cause of the collision? Yes.

"3. In operating his automobile at the time of and immediately preceding the collision, was the plaintiff Jones negligent with respect to failure to stop before entering the intersection? Yes.

"4. If you answer Question 3 "Yes," then answer this: Was the plaintiff Jones's negligence a cause of the collision? Yes.

"5. If you answer all of Questions 1, 2, 3 and 4 "Yes," then answer this: What percentage of the total negligence was attributable to the defendant Smith? 60%. To the plaintiff Jones? 40%.

"6. What is the amount of the damages plaintiff Jones has sustained? $10,000."

[223]Prosser, *supra* note 222, at 502.

[224]Gilmore, *Comparative Negligence from a Viewpoint of Casualty Insurance,* 10 ARK. L. REV. 82, 83, 85 (1955); Hayes, *supra* note 152, at 289; Snow, *Comparative Negligence,* 1935 INS. L.J. 235, 240-41. Mr. Snow, vice president and general counsel of the Pacific Indemnity Co., refers to "the obvious success of the Wisconsin statute . . . ."

[225]The Wisconsin practice was first authorized in 1856. Wis. Laws 1856, c. 120, §71. It was expanded by Wis. Laws 1874, c. 194, and it was in wide use by 1876; see McNarra v. Chicago & N.W. Ry., 41 Wis. 69 (1876); Williams v. Porter, 41 Wis. 422 (1877); Hutchinson v. Chicago & N.W. Ry., 41 Wis. 541 (1877). The present statute is WIS. STAT. ANN. §§270.27-.30 (1957).

[226]ARK. STAT. ANN. §27-1730.1-.2 (Supp. 1957).

[227]H.B. 40, Reg. Sess. 1957; a companion bill died in Senate committee. S.B.

juries, special verdict provisions might make a future bill more palatable to the interests that generally oppose such legislation.[228]

CONCLUSION

The injustice of Florida's harsh contributory negligence rule calls for legislative correction. The criticism leveled at the rule by Chief Justice McWhorter in 1886[229] is currently being echoed by the Supreme Court of the United States.[230] Moreover, the contributory negligence rule is today discredited in the land of its origin.[231] It stands condemned by the courts, by such respected American writers as Pound,[232] James,[233] Prosser,[234] and others,[235] by the State Bar of California,[236]

267, Reg. Sess. 1957. Similar legislation failed of enactment in the 1955 session, H. B. 215.

[228]Herbert S. Lipscomb, a Mississippi attorney, addressing the Federation of Insurance Counsel, after criticizing the general verdict practice in Mississippi, says, "We have not had much experience with special verdicts, because there has never been any provision for them in this state, but in our humble opinion a provision for special verdict should go along with a comparative negligence statute as one of the Siamese twins goes along with the other." *Comparative Negligence,* 1951 INS. L.J. 667, 673.

[229]Louisville & N.R.R. v. Yniestra, 21 Fla. 700 (1886). See discussion under heading "Florida Developments" *supra.*

[230]Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). Mr. Justice Black, speaking for the majority, referred to the contributory negligence rule as "a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight." *Id.* at 409.

[231]Goodheart, who helped write the present English Comparative Negligence Act, is quoted as saying: "Although at the time when the law was altered here in England there was some objection to the amendment, all objections to it have now disappeared. The fear that there would be an inordinate increase in litigation has proved unfounded. Parties are much more ready to reach a reasonable settlement as they know that the answer is no longer 'all or nothing.'" See Eldredge, *supra* note 91, at 54.

[232]Pound, *Comparative Negligence,* 13 NACCA L.J. 195 (1954).

[233]James, *Comparative Negligence,* 26 UTAH BAR BULL. 109 (1956); *Contributory Negligence,* 62 YALE L.J. 691 (1953).

[234]Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465 (1953).

[235]A definitive early article is that of Mole and Wilson, *A Study of Comparative Negligence,* 17 CORNELL L.Q. 333, 604 (1932). For a complete bibliography as of August 1955, see INSTITUTE OF JUDICIAL ADMINISTRATION, COMPARATIVE NEGLIGENCE 16-21 (1955). At least 15 more recent articles, the great majority of which advocate a switch to comparative negligence, may be found by consulting the INDEX TO LEGAL PERIODICALS for the last two years under the topics "Negligence" and "Contributory Negligence."

[236]See 28 CALIF. S.B.J. 23 (1953).

by the Association of the Bar of the City of New York,[237] and by the Philadelphia Bar Association.[238] It has been replaced by apportionment of damages based on comparative negligence throughout most of the civilized world. It is engendering disrespect for our courts and creating unnecessary litigation. The superiority of the comparative negligence approach appears obvious. It is a reform worthy of serious consideration by the bar of Florida.

A careful review of comparative negligence legislation in other jurisdictions would be a sound first step.[239] The Wisconsin statute,[240] though not perfect,[241] seems to be the most successful of these laws. It has won widespread respect, and has the strong support of the Wisconsin bar. Its provisions are broad enough to overcome some of the weaknesses previously pointed out in the Mississippi type of statute,[242] and at the same time it avoids the third party complications that raise doubts as to the workability of the more complicated Canadian legislation.[243] It might well form the starting point for a careful study by The Florida Bar designed to produce a workable statute tailored to the problems and needs of Florida.

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[237]See 39 A.B.A.J. 427 (1953).

[238]The Legal Intelligencer, Jan. 18, 1957, p. 1.

[239]Some of the American legislation, current and proposed, is collected in Averbach, *supra* note 160, at 13-16. The British and Canadian statutes may be found in WILLIAMS, JOINT TORTFEASORS AND CONTRIBUTORY NEGLIGENCE, App. 1, 2 (1951). See also GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 56-71, 156-72 (1936).

[240]WIS. STAT. ANN. §331.045 (1958).

[241]For a critical and constructive analysis of the Wisconsin statute, see Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289.

[242]See note 148 *supra*.

[243]See notes 109-11 *supra* and accompanying text.