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Comparative Negligence

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COMPARATIVE NEGLIGENCE

As a result of action by the 1973 Legislature,¹ on April 1, 1974, the State of Washington will abandon the doctrine of contributory negligence and replace it with the increasingly popular rule of comparative negligence. Comparative negligence has been described as "a fault concept that apportions liability for damages in proportion to the contribution of each tortfeasor causing the injury or damages."²

This note will discuss briefly the policy considerations underlying a choice between comparative negligence and contributory negligence, and will attempt to predict the effects, both procedural and substantive, of the new Act on practice in Washington.

I. WASHINGTON'S NEW COMPARATIVE NEGLIGENCE ACT

The new Washington Act provides:

Section 1. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages caused by negligence resulting in death or in injury to person or property, but any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering.³

Section 2. The negligence of one marital spouse shall not be imputed to the other spouse to the marriage so as to bar recovery in an action by the other spouse to the marriage, or his or her legal representative, to recover damages from a third party caused by negligence resulting in death or in injury to the person.⁴

Section 1 of the new Act replaces the rule of contributory negligence with the rule of comparative negligence; Section 2 abrogates a long standing community property rule. Some comparative negligence statutes permit only those plaintiffs who are themselves responsible for less than a specified percentage of the total negligence to recover; these

1. Ch. 138, [1973] Wash. Laws, 1st Ex. Sess. The Washington Comparative Negligence Act is codified in WASH. REV. CODE §§ 4.22.010-.910 (Supp. 1973).

2. C. R. HEFT & C. J. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 1.10, at 1 (1971) [hereinafter cited as HEFT & HEFT].

3. WASH. REV. CODE § 4.22.010.

4. *Id.*, § 4.22.020.

statutes enact "modified" comparative negligence. Section 1 of the Washington Act contains no such qualification, placing Washington among the states adopting "pure" comparative negligence. These two forms of comparative negligence have much in common, of course, and the experiences and judicial decisions of jurisdictions which have adopted pure as well as modified comparative negligence will exert persuasive force in construing the new Act.⁵

Although subject to conflicting interpretations,⁶ Section 2 of the new Act apparently abrogates the common law rule imputing the negligence of one marital spouse to the other so as to bar the latter's recovery in an action for damages caused by the negligence of a third party. Prior to the Act, the courts held that because the damage claim for personal injuries of one spouse is community property, the contributory negligence of the other spouse will bar recovery.⁷

II. HISTORY, ALTERNATIVE FORMS, AND EFFECT ON PROCEDURE OF COMPARATIVE NEGLIGENCE

Adoption of comparative negligence has been a response, by either the legislature or the courts, to the often inequitable results produced by the doctrine of contributory negligence. The judicially-created rule of contributory negligence,⁸ by which a plaintiff recovers all or

5. For jurisdictions which have adopted pure comparative negligence, see note 20 *infra*. For jurisdictions which have adopted modified comparative negligence, see notes 28-30 *infra*.

6. Sections 1 and 2, read together, suggest that the Legislature intended each spouse's recovery to be diminished in proportion to the percentage of negligence attributable to the negligently acting spouse: imputed negligence lessens but does not bar recovery. This is consonant with the mandate of Section 1 that "any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering." But when read alone, the absolute prohibition of Section 2 that "the negligence of one marital spouse shall not be imputed to the other spouse . . ." appears to prohibit considering the acting spouse's fault when comparing the negligence of the other; to do so would be "impute" one spouse's negligence to the other. The first interpretation reduces Section 2 to a mere expression of an obvious inference from Section 1: the latter interpretation seems to express better the probable legislative intent.

7. See *Ostheller v. Spokane & Inland Empire R.R.*, 107 Wash. 678, 182 P. 630 (1929).

8. The doctrine originated in *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809), wherein the plaintiff was denied recovery for injuries resulting from a horse riding accident on the ground that he was partially responsible for the accident.

nothing, frequently frustrates the attainment of full and fair compensation for the victims of tortiously caused accidents. This "all or nothing" approach contrasts sharply with comparative negligence under which the fault of the plaintiff reduces his recoverable damages but does not act as a total bar to recovery.⁹

A. *The Debate*

Advocates of comparative negligence contend that its adoption reduces court congestion by promoting more settlements and shorter, simpler trials.¹⁰ Although the change may result in an increase in litigation, they argue that the greater certainty of a plaintiff's realizing some recovery under comparative negligence promotes settlement by both sides and reduces the plaintiff's insistence upon a jury trial.¹¹ Those who oppose comparative negligence predict exactly opposite results.¹² Furthermore, they view the doctrine of contributory negligence as a just and equitable check on those individuals who seek to "profit" by their own wrongdoing,¹³ and suggest that any harshness of the rule is ameliorated by the jury's natural sense of justice.¹⁴ Propo-

9. See Schwartz, *Pure Comparative Negligence in Action*, 34 AM. TRIAL LAW. L.J. 117, 118 (1972) [hereinafter cited as Schwartz]; HEFT & HEFT, *supra* note 2.

At the date of this publication, the following states number among those which have enacted some form of comparative negligence: Arkansas, ARK. STAT. ANN. tit. 27-1730.1 (1961); Colorado, COLO. REV. STAT. ch. 41-2-14 (Supp. 1971); Georgia, GA. CODE ANN. § 105-603 (1933); Hawaii, HAWAII REV. STAT. § 663-31 (1968); Maine, ME. REV. STAT. ANN. tit. 14, § 156 (1964); Massachusetts, MASS. GEN. LAWS ANN. ch. 231, § 85 (1969); Minnesota, MINN. STAT. ANN. ch. 604.01 (1969); Mississippi, MISS. CODE ANN. § 3.1454 (1910); Nebraska, NEB. REV. STAT. § 25-1151 (1913); New Hampshire, N.H. REV. STAT. ANN. § 507:7a (1969); Oregon, ORE. REV. STAT. § 18.470 (1971); Rhode Island, R.I. GEN. LAWS ANN. § 9-20-4 (1971); South Dakota, S.D. COMPILED LAWS ANN. § 20-9.2 (1967); Utah, UTAH CODE ANN. § 12-1036 (1969); Wisconsin, WIS. STAT. ANN. § 995.045 (1931).

10. See Note, *Tort-Comparative Negligence Statute*, 18 VAND. L. REV. 327, 329-30 (1964).

11. See Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 ORE. L. REV. 38, 42 (1969) [hereinafter cited as Haugh].

12. See Cotton, *Comparative Negligence: Not in the Public Interest*, 17 LA. B.J. 205 (1969); Burns, *Comparative Negligence: A Law Professor Dissents*, 51 ILL. B.J. 708 (1963).

13. The arguments in favor of retaining contributory negligence as a bar to actions are: (1) A negligent plaintiff gives implied consent to all the consequences of his negligent act; (2) the equitable doctrine of unclean hands demands that where both parties are at fault, the courts should leave them as they are; (3) contributory negligence provides a check on plaintiff-oriented injuries; (4) the plaintiff's negligence is the superceding, legal cause; and (5) by denying recovery, the doctrine restrains carelessness. See Haugh, *supra* note 11, at 39.

14. *Id.* at 41.

nents of comparative negligence have categorically contradicted these claims.¹⁵

Studies indicate that, in actuality, the change to comparative negligence has little practical effect.¹⁶ A survey of the short-lived experiment of Arkansas with a pure comparative negligence statute from 1955 to 1957 resulted in the following conclusions:¹⁷ (1) The introduction of comparative negligence brought about no drastic change in the number of cases burdening the courts; (2) it did not affect the preference for jury trials or the length of trials; (3) it increased potential litigation but promoted more pretrial settlements; (4) damages were harder to determine under comparative negligence; (5) plaintiffs won more, but not larger, verdicts under comparative negligence; and (6) cases had a higher compromise value for settlement under comparative negligence. A follow-up survey studying the experience of Arkansas under a modified form of comparative negligence from 1957 to 1967 affirmed the conclusions of the original survey.¹⁸ In addition, an observer of Wisconsin's experience with comparative negligence indicates that it has not raised insurance rates.¹⁹

15. They point out that: (1) Where the entire burden of the loss falls upon the less negligent party the policy is harsh and unjustifiable; (2) there are exceptions to the rule by which the party can recover despite his negligence; (3) to say the plaintiff's negligence is the sole cause attributes a meaning to legal cause that is inaccurate; (4) it is unlikely that a negligent plaintiff has in mind his loss of recovery when he commits the negligent act; and (5) rendering the defendant immune may encourage carelessness on his part. To rebut the argument that the jury is already employing a form of comparative negligence, one writer has stated that because juries may use a comparative negligence approach in situations where the plaintiff was contributorily negligent, the retention of the contributory negligence rule leads laymen to disrespect our system of accident law and to ignore jury instructions. See generally HEFT & HEFT, *supra* note 2; Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 468, 470-71 (1953) [hereinafter cited as Prosser]; Laugesen, *Colorado Comparative Negligence*, 48 DENVER L.J. 469, 470 (1972); Haugh, *supra* note 11, at 40; Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 162 (1958) [hereinafter cited as Maloney].

16. See Rosenberg, *Comparative Negligence in Arkansas, A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959) [hereinafter cited as Rosenberg]; Note, *Comparative Negligence—A Survey of the Arkansas Experience*, 22 ARK. L. REV. 692 (1969) [hereinafter cited as Survey]; Pfankuch, *Comparative Negligence vs. Contributory Negligence*, 1968 INS. L.J. 725, 731 (1968) [hereinafter cited as Pfankuch].

17. See Rosenberg, *supra* note 16, at 108.

18. See Survey, *supra* note 16, at 713.

19. See Pfankuch, *supra* note 16, at 731.

B. *The Pure Form of Comparative Negligence*

Under "pure" comparative negligence, apportionment of damages is an exact rendering of the fault system.²⁰ The tortfeasor pays only that portion of damages for which he is accountable; conversely, the claimant's damages are diminished in proportion to his negligence.²¹ A plaintiff may recover even if his negligence is greater than that of the defendant, but his recovery is diminished by the amount of his own negligence. In terms of apportionment, if a plaintiff is found guilty of ninety-nine percent of the fault he still recovers one percent of his losses.²² The defendant's only escape from liability under the rule of pure comparative negligence is a finding of no fault on his part.²³

The most severe criticism directed at pure comparative negligence is that it permits a wrongdoer to recover damages even if he is guilty of the greater fault.²⁴ Some writers feel that this result is contrary to the philosophy of our fault system, a system which is premised on the principle that all persons are responsible for their negligent acts and omissions. They find that such a result diminishes the impact of standards of conduct which, because they reflect the moral law, are socially desirable.²⁵ Others fear that under a pure comparative negligence statute the jury would feel compelled to give the plaintiff something in every case.

But, as Dean Prosser asserts, the court still has control over an unjustified apportionment; furthermore, a small recovery often would be less than the nuisance value of a suit.²⁶ Prosser and other commentators agree that pure comparative negligence is the superior rule of

20. Delaware, Mississippi and Rhode Island have adopted this form of comparative negligence by legislative enactment. *See, e.g.*, MISS. CODE ANN. § 11-7-15 (Supp. 1972); R.I. GEN. LAWS § 9-20-4 (Supp. 1972). In *Hoffmand v. Jones*, 280 So. 2d 431 (Fla. 1973), the Florida Supreme Court replaced the rule of contributory negligence with that of pure comparative negligence. The court reasoned that since the doctrine of contributory negligence was not clear and free from doubt at the time Florida's statute adopting the common law of England was enacted, it was not made a part of the statute law of Florida but was a judicially adopted rule subject to judicial abrogation. *Id.* at 434.

21. *See Flynn, Comparative Negligence: The Debate*, 8 TRIAL 49 (1972) [hereinafter cited as Flynn].

22. *See HEFT & HEFT, supra* note 2, § 1.50.

23. *Id.*

24. HEFT & HEFT propose an example: If *A* has been damaged to the extent of \$25,000 and he is 90% negligent, this would permit a recovery of \$25,000 less 90%, or \$2,500. If *B* was damaged in the same accident to the extent of \$1,000 and was 10% at fault, he would recover \$1,000 less 10% or \$900.

25. *Id.*

26. Prosser, *supra* note 15, at 494.

apportionment and that nonpure forms of comparative negligence leave damages undivided in too many cases and often lead to appeals abounding in confusion.²⁷

C. *Modified Comparative Negligence*

Nevertheless, most states which have abandoned the doctrine of contributory negligence have adopted a modified, or "nonpure," form of comparative negligence. One variation of this "nonpure" rule allows recovery to plaintiffs whose negligence is "not greater than" that of the defendant.²⁸ The more common form, however, permits only those plaintiffs whose negligence is "not as great as" the defendant's to recover.²⁹ Two states vary this formula by permitting a plaintiff to recover only when his negligence is "slight" relative to the defendant's "gross" negligence.³⁰

III. IMPACT OF COMPARATIVE NEGLIGENCE IN PRACTICE

A. *Retroactive Applicability*

Comparative negligence will not apply to causes of action which arise before April 1, 1974. In those states in which the issue has been litigated, the courts have unanimously and unequivocally denied retroactive application to comparative negligence unless required by statute;³¹ the new Act does not require retroactive applicability on its

27. See Prosser, *supra* note 15, at 508; Keeton, *Comment on Maki v. Frelk*, 21 VAND L. REV. 906, 911 (1968); Schwartz, *supra* note 9.

28. Three states follow this form of comparative negligence: New Hampshire, N.H. REV. STAT. ANN. § 507:7a (1970); Vermont, VT. STAT. ANN. tit. 12, § 1036 (1937); and Wisconsin, WIS. STAT. § 895 (1971).

29. Eight states follow this rule, but with individual variations: Arkansas, ARK. STAT. ANN. § 27-1730.1 (1947); Colorado, COLO. REV. STAT. ANN. § 41-2-14 (Supp. 1971); Georgia, GA. CODE ANN. § 105-603 (1968); Hawaii, HAWAII REV. STAT. § 663-31 (Supp. 1972); Maine, ME. REV. STAT. ANN. tit. 14, § 156 (1965); Massachusetts, MASS. GEN. LAWS ANN. ch. 231, § 85 (Cum. Supp. 1972); Minnesota, MINN. STAT. ANN. § 604.01 (1945); and Oregon, ORE. REV. STAT. § 18.470 (1953).

30. Nebraska, NEB. REV. STAT. § 25.1151 (1964); and South Dakota, S.D. COMPILED LAWS ANN. § 20-9-2 (1967).

31. See *Fuller v. Illinois Central R.R.*, 100 Miss. 705, 56 So. 783 (1911); *Brewster v. Ludtke*, 211 Wis. 344, 247 N.W. 449 (1933); *Reddell v. Norton*, 225 Ark. 643, 285 S.W.2d 328 (1955). In other states the legislatures have expressly stated the statute either would apply retrospectively or prospectively.

face. While no cases to the contrary have been found, Chief Justice Hallows argued in a recent dissenting opinion that a statutory modification of Wisconsin's comparative negligence rule to allow recovery by the plaintiff so long as his negligence was "not greater than" the defendant's was remedial in character and should have been applied to pending causes of action.³²

B. Application of the Pure Comparative Negligence Statute to Specific Factual Situations

The operation of a pure comparative negligence statute can be demonstrated by reference to certain hypothetical situations.³³

Case 1: Plaintiff is guilty of lesser negligence in a two-party action and defendant sustains no damage. Plaintiff sustains \$10,000 damage. The jury finds plaintiff twenty-five percent at fault and defendant seventy-five percent at fault. Plaintiff's recovery is determined by comparing his negligence with the total negligence involved and reducing his recovery accordingly;³⁴ thus, plaintiff's negligence is twenty-five percent of the total, so he recovers seventy-five percent of his damages, or \$7,500.

Case 2: Plaintiff is guilty of greater negligence in a two-party action and the defendant sustains no damages. Plaintiff sustains \$10,000 damage. The jury finds plaintiff sixty percent at fault, defendant forty percent. Plaintiff's negligence is sixty percent of the total, so plaintiff's damages of \$10,000 are reduced by sixty percent and he recovers \$4,000.³⁵ Plaintiff would have had no recovery in a modified comparative negligence jurisdiction.

Case 3: Plaintiff is more negligent than one of two defendants in a three party situation. Defendant number one (D-1) and defendant number two (D-2) sustain no damage and plaintiff sustains \$10,000

32. *Holzem v. Mueller*, 54 Wis. 2d 388, 195 N.W.2d 635 (1972) (Hallows, C.J., dissenting). Hallows further points out that a defendant, "has no vested rights in a tort defense, the merits of which are not determined until trial and upon which he did not and could not very well rely in causing injury to the plaintiff." *Id.* at 641. While the argument has merit, most courts have ignored it, giving no reason for doing so.

33. These hypothetical situations are taken from Schwartz, *supra* note 9, at 122—25.

34. The case law supports this method of calculation rather than the now discredited procedure of comparing the plaintiff's negligence to that of the defendant. See *Murray v. Pearson Appliance Store*, 155 Neb. 860, 54 N.W.2d 250 (1954); *Cameron v. Union Auto. Ins. Co.*, 210 Wis. 659, 246 N.W. 420 (1933).

35. See *Yazoo & M.V. R.R. v. Carroll*, 103 Miss. 830, 60 So. 1013 (1912).

damage. Suppose plaintiff was forty percent negligent, *D-1* was ten percent negligent and *D-2* fifty percent negligent. Plaintiff's damages of \$10,000 are reduced by his share of the total negligence, forty percent, and he obtains a judgment against *D-1* and *D-2* for \$6,000. *D-1* and *D-2* will be jointly and severally liable to plaintiff; no right of contribution exists between joint tortfeasors in Washington.³⁶

Case 4: A two-party action in which both parties sustain damages. Automobiles owned and driven by *A* and *B* collide. Each sustains \$10,000 damage. *A* sues *B* and *B* files a counterclaim. *A* is found forty percent negligent and *B* is found sixty percent negligent. *A*'s negligence is forty percent of the total, so his damages of \$10,000 are reduced by forty percent and *A* is entitled to recover \$6,000 from *B*. Likewise, *B*'s damages of \$10,000 are reduced by sixty percent and *B* is entitled to recover \$4,000 from *A*. The question of setoff between *A* and *B* is discussed later.³⁷

Case 5: Vicarious liability. Assume that a servant negligently drives his master's truck within the scope of his employment, and it collides with a car being negligently driven by defendant. Servant is guilty of twenty-five percent of the negligence, and defendant is guilty of seventy-five percent of the negligence. The master may recover his damages from the defendant, less twenty-five percent. Similarly, defendant may recover his damages from the master, less seventy-five percent. If the master is assumed not to be negligent in entrusting the truck to the servant, the calculations simply are performed between the servant and defendant, and the master is then substituted for the servant to determine his recovery.³⁸ But if the master were negligent in entrusting the truck to the servant, perhaps knowing that the servant was drunk, the master's recovery would be reduced by his own personal negligence plus that of his servant imputed to him under the doctrine of respondeat superior.³⁹

C. Standard of Apportionment

A primary question arising under a comparative negligence statute

36. See discussion of contribution in text accompanying notes 114-17 *infra*.

37. See discussion of setoff in text accompanying notes 67-71 *infra*.

38. See Dobbs, *Act 191 Comparative Negligence*, 9 ARK. L. REV. 357, 379 (1955) [hereinafter cited as Dobbs].

39. *Id.*

is whether it is the relative degree of causation or of fault which should be the basis for apportionment of damages. Although some cases reduce damages in proportion to causation,⁴⁰ the preferred position among commentators is that once sufficient causation is established, apportionment should be based on the comparative fault of the parties.⁴¹ This is the position of the Wisconsin court; it has held that negligence is compared not on the basis of the kind or character of causal negligence, or the number of respects in which the parties were negligent, but upon each party's contribution to the total negligence causing the accident.⁴² Certainly the jury is not required to attribute the same percentage of negligence to each party merely because each is guilty of the same kind of negligence.⁴³ In any event, a refined distinction between the extent to which the defendant's fault caused the accident and the extent to which he was negligent is likely to be beyond the ken of the jury.

D. Special Verdicts

The special verdict has been called the cornerstone of the comparative negligence concept.⁴⁴ Under a special verdict, the jury is required to determine as findings of fact the total amount of damages and the percentage of negligence attributable to each party; the judge then applies the law and apportions the damages.⁴⁵ This procedure is

40. Baird v. Harrington, 202 Miss. 112, 30 So. 2d 82 (1947).

41. See Prosser, *supra* note 15, at 481; Schwartz, *supra* note 9, at 125; Dobbs, *supra* note 38, at 361; and Bouchard, *Apportionment of Damages Under Comparative Negligence*, 54 MASS. L.Q. 125 (1972) [hereinafter cited as Bouchard].

42. Grana v. Summerford, 12 Wis. 2d 517, 107 N.W. 2d 463 (1961).

43. Strupp v. Farmers Mutual Auto. Ins. Co., 14 Wis. 2d 158, 109 N.W.2d 660 (1961).

44. HEFT & HEFT, *supra* note 2, § 8.10.

45. See Maloney, *supra* note 15, at 171-72; Prosser poses a series of specific questions and answers which might appear in a typical case under a special verdict procedure:

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

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 the above Questions 1, 2, 3, and 4 'yes,' then answer this: What percentage of the total negligence was attributable to defendant Smith? 60 percent. To plaintiff Jones? 40 percent.

useful to assure that the jury does not apportion damages on some basis other than a comparison of fault.

Most commentators support the use of special verdicts, especially with the pure form of comparative negligence.⁴⁶ Although the Washington Act does not require special verdicts,⁴⁷ Washington courts have discretionary power to require a jury to return a special verdict.⁴⁸ In addition to the value of special verdicts as an aid to apportionment, a special verdict requires the jury to find the facts without regard to the actual outcome of the case.⁴⁹ It is claimed that this procedure provides a method for controlling the jury in order to prevent excess sympathy, prejudice, or bias from tainting the fact finding process.⁵⁰ Also, the special verdict makes it possible to localize error and save sound portions of a verdict, whereas a defect in part of a general verdict destroys the whole verdict.⁵¹

Although it is difficult in cases containing numerous complex issues to formulate satisfactory special verdicts either in the form of fact questions or fact findings,⁵² a general verdict does not insure that the jury understood or followed instructions.⁵³ Nevertheless, special verdicts have been opposed as making it difficult for juries to reach

6. What is the amount of damages plaintiff Jones has sustained? \$10,000. Prosser, *supra* note 15, at 497-98.

46. Ghiardi and Hogan, *Comparative Negligence*, 18 DEFENSE L.J. 537 (1969); Kirchen, *Unfairness of "Mississippi Type" Comparative Negligence*, 2 FOR THE DEFENSE 66 (1970); HEFT & HEFT, *supra* note 2, § 8.10; Prosser, *supra* note 15, at 497; Maloney, *supra* note 15, at 171-72; Bouchard, *supra* note 41; Note, *Comparative Negligence, A Look at the South Dakota Approach*, 14 S.D. L. REV. 92 (1969).

Mississippi utilizes general verdicts rather than special verdicts in applying its pure comparative negligence statute. Such use of general verdicts in comparative negligence actions has been criticized on the ground that it is not possible to determine whether the jury does, in fact, diminish the recovery it awards in proportion to the negligence attributed to the person injured. See HEFT & HEFT, *supra* note 2, § 3.3.10.

47. See text accompanying note 3 *supra*.

48. (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answers or may submit written forms of the several special findings which might properly be made under the pleadings and evidence

WASH. SUPER. CT. (CIV.) R. 49 (1972).

49. See HEFT & HEFT, *supra* note 2, § 8.10.

50. See Maloney, *supra* note 15, at 171-72.

51. See Driver, *The Special Verdict—Theory and Practice*, 26 WASH. L. REV. 21, 22 (1951) [hereinafter cited as Driver].

52. See Driver, *supra* note 51, at 24; HEFT & HEFT, *supra* note 2, § 1.70; Schwartz, *supra* note 9, at 134.

53. See HEFT & HEFT, *supra* note 2, § 1.70.

agreement,⁵⁴ and as limiting the historic role of juries in the administration of justice.⁵⁵

E. *Multiple Parties*

Multiple wrongdoers are jointly and severally liable for the injuries they cause, and the injured party has the right to join them as defendants.⁵⁶ In theory, the only satisfactory method of dealing with a multiple party accident through comparative negligence is to bring all the parties into court in a single action, apportion the fault and then allocate the damages based on this apportionment. However, in practice plaintiffs will do well to avoid whenever possible the complexities and danger of jury confusion inherent in the joinder of multiple defendants.⁵⁷

F. *Effect on Conflict of Laws*

There is no uniform rule by which forum courts have resolved choice of law conflicts between jurisdictions embracing comparative negligence and those applying the common law rule of contributory negligence.⁵⁸ Some courts have held that if a comparative negligence statute is in effect where the tort occurred, it must be applied by the forum court.⁵⁹ The rationale of these decisions is that comparative negligence, by granting a right of recovery not recognized by the common law to persons contributorily negligent, directly affects substantive rights of litigants;⁶⁰ consequently, if such a court follows the traditional conflict of laws rule that the substantive law of the place where the wrong occurred governs the action,⁶¹ it will look to that law

54. See Driver, *supra* note 51, at 134.

55. 5 J. MOORE, FEDERAL PRACTICE § 49.05 (1960).

56. See Maloney, *supra* note 15, at 164-65.

57. Multiple party cases are often extremely complex factually. Apportionment of fault and assessment of damages involving three or more parties is a monumental task for the typical jury, especially with only limited time available. When special verdicts are used, they may approach a complexity and number which render the jury totally ineffective in the allocation process. See Prosser, *supra* note 15, at 503—04.

58. See cases collected at 57 AM. JUR. 2d, *Negligence* § 430 (1971).

59. See *Mississippi Power & Light Co. v. Whitescarver*, 68 F.2d 928, 929 (5th Cir. 1934), classifying Mississippi's comparative negligence statute as substantive; see also *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal. 2d 365, 159 P.2d 1, 8 (1945).

60. See *Chisum v. Phelps*, 228 Ark. 936, 311 S.W.2d 297 (1958); *Fitzpatrick v. International Ry.*, 252 N.Y. 127, 169 N.E. 112 (1929).

61. See RESTATEMENT OF CONFLICTS § 377 (1934).

in determining whether the doctrine of contributory negligence or comparative negligence will control.⁶² The Washington court follows the traditional place of wrong rule,⁶³ but since it has not yet characterized comparative negligence as a matter of substance or procedure, it is impossible to predict how the court will apply the law in such a case.

The Mississippi court has replaced the traditional, inflexible conflict of laws rule in tort cases with what is known as the "most significant relationship rule."⁶⁴ Using this doctrine, the court will apply its own comparative negligence law where the forum state has a more significant relationship to the occurrence and parties, even though the accident causing the injuries took place in another state adhering to the common law contributory negligence doctrine.⁶⁵ Conversely, under some modern conflicts rules, the court may decide to apply a comparative negligence statute of the place of the wrong, rather than the common law rule of the forum, on the ground that the foreign jurisdiction has a stronger interest in having its law applied than does the forum.⁶⁶

G. Setoff

Under Washington law, the court has discretion to allow a setoff of one judgment against another when warranted by considerations of equity.⁶⁷ Some commentators oppose the use of setoffs in conjunction with the pure form of comparative negligence,⁶⁸ and Rhode Island has responded to this criticism by incorporating in its pure comparative negligence statute a provision prohibiting setoffs.⁶⁹

62. See *Tri-State Transit Co. v. Monday*, 194 Miss. 714, 12 So. 2d 920, 922 (1943); *Mississippi Power & Light Co. v. Whitescarver*, *supra* note 59; *Chisum v. Phelps*, *supra* note 60; *Fitzpatrick v. International Ry.*, *supra* note 60.

63. See *Maag v. Voykovich*, 46 Wn. 2d 302, 280 P.2d 680 (1955); *Stone Machinery Co. v. Kessler*, 1 Wn. App. 750, 460 P.2d 651 (1970).

64. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 145 (1971).

65. See *Mitchell v. Craft*, 211 So. 2d 509, 516 (Miss. 1968).

66. See *Frummer v. Hilton Hotels Int'l*, 60 Misc. 2d 840, 304 N.Y.S.2d 335, 344 (N.Y. App. 1969).

67. See *Spokane Security Finance Co. v. Bevans*, 172 Wash. 418, 20 P.2d 31, 32 (1933).

68. See *Flynn*, *supra* note 21, at 52; *Schwartz*, *supra* note 9, at 126. Counterclaims, and, consequently, setoff problems, do not arise in connection with the "not as great as" and "slight-gross" forms of comparative negligence, as the plaintiff is permitted to recover only if his contributory negligence is less than that of the other party, thus precluding recovery by the other party. See 11 *ARK. L. REV.* 71, 74 (1956).

69. See *R.I. GEN. LAWS* § 9-20-4.1 (1956).

Whether setoff is permitted or not becomes important, of course, in the context of insurance claims. If both plaintiff and defendant were found equally at fault and sustained equal damages, under pure comparative negligence each would recover one-half of his damages from the other party's insurer. If setoffs are permitted, however, the two judgments would cancel each other out. This result, although pleasing to insurance companies, would negate much of the intended advantage of the pure comparative negligence rule.⁷⁰

Proponents of setoff, on the other hand, suggest that the defendant's insurer can not be expected to argue its client's counterclaim vigorously in the absence of setoff, because proof of its client's damages would not ultimately benefit the insurer by reducing or cancelling the plaintiff's judgment. The insurer's failure to establish a strong counterclaim on behalf of his client could be very damaging to a defendant when the plaintiff's recovery exceeded the limits of the defendant's policy and reached him personally.⁷¹

Encumbering the pure comparative negligence rule with setoff would result in insurance companies paying less than the total damages apportioned to their assureds; this vitiates the recovery of damages expected from the comparison of negligence and allows the liability insurer to ignore part of the risk it contracted to bear.

IV. COMPARATIVE NEGLIGENCE AND ITS EFFECT ON COMMON LAW CONCEPTS

Aside from these changes in the mechanics of negligence law, the change to comparative negligence also may arouse controversy over the application of such traditional common law doctrines and concepts as last clear chance, assumption of risk, *res ipsa loquitur* and degrees of negligence. In Washington, the application of contribution and indemnification seem well settled.

A. Last Clear Chance

Before the adoption of comparative negligence statutes, one of the tools most frequently employed to overcome the contributory negli-

70. See Flynn, *supra* note 21, at 52.

71. See Dobbs, *Comparative Negligence*, 9 ARK. L. REV. 357, 383 (1955).

gence rule as a complete bar to recovery was the doctrine of last clear chance.⁷² This doctrine has been applied to a number of recurring factual situations to prevent the plaintiff's contributory negligence from barring recovery. In the first class of cases the defendant actually perceived that the plaintiff or his property was in peril, and had the opportunity to avoid injuring him, yet made no effort to do so. Courts are unanimous in allowing recovery in this situation.⁷³ In the second class of cases the defendant did not actually see the plaintiff but, if he had been diligent, could have seen the plaintiff's helpless condition and avoided injuring him.⁷⁴ The rationale for recovery in both of these factual situations is that the defendant was the last wrongdoer and hence the proximate cause of the plaintiff's injury.⁷⁵

But this "last wrongdoer" logic fails in a third major class of cases in which only the plaintiff, but for his continued inattentiveness, can realistically be said to have had the last chance to avoid the accident.⁷⁶ These decisions, which nonetheless allow the plaintiff to recover, can-

72. The doctrine of last clear chance originated in the old English case of *Davies v. Mann*, 152 Eng. Rep. 588 (1842), wherein the plaintiff left his ass in the highway and the defendant struck it with his wagon. Dean Prosser, a persistent critic of the doctrine, informs us that this is the reason it later became known as the "jackass doctrine." W. PROSSER, *LAW OF TORTS* § 66, at 427 n.3 (4th ed. 1971) [hereinafter cited as PROSSER].

73. Cases in this category are legion. *But see* PROSSER, *supra* note 72, and cases collected in Annot., 92 A.L.R. 47, 83-86 (1934).

74. The Washington court recognized the applicability of this branch of the doctrine in *Mosso v. Stanton Co.*, 75 Wash. 220, 134 P. 941 (1913). In that case the court stated that the doctrine of last clear chance will apply (1) where the defendant actually sees the peril but fails to exercise normal caution to avoid injuring him and (2) where the defendant does not actually see the plaintiff's peril but by the exercise of reasonable care should have seen his peril. However, in order for the plaintiff to recover in this latter case it will be necessary that the plaintiff's negligence shall have ceased by the time of the accident. For cases dealing with the second prong of last clear chance, see *Leftridge v. Seattle*, 130 Wash. 541, 228 P. 302 (1924); *Lee v. Cotton Bros. Co.*, 1 Wn. App. 202, 460 P. 2d 694 (1969).

75. *See* James, *Last Clear Chance: A Transitional Doctrine*, 47 *YALE L.J.* 704, 710 (1937) [hereinafter cited as James]:

The wrong of the plaintiff is past and has culminated—it has come to rest, albeit in danger. After he could no longer help himself, the plaintiff has been guilty of no fresh wrongdoing, act or omission The defendant's negligence is in the past but occurs later in point of time than plaintiff's does, and there is nothing artificial or forced in calling him the last wrongdoer.

76. This class of cases is best characterized by the old Washington case of *Locke v. Puget Sound Ry.*, 100 Wash. 432, 171 P. 242 (1918). In *Locke* a man hard of hearing approached a street car track without looking for cars and was struck when he walked into the oncoming car's path. Had the plaintiff bothered to look, he could easily have avoided the accident by stepping from the path. The street car driver had looked and began sounding his horn, but foolishly did not attempt to apply the brakes until it was too late for him to stop. Whose negligence was "last"? Clearly the plaintiff's, for by merely stepping aside right up to the moment of impact he could have avoided the accident while an application of the brakes by the motorman at such a late time would have been useless. Neverthe-

not be justified on the usual ground that the defendant was the proximate cause of the accident. Because of the doctrine's logical inconsistency in this third class of cases and because its application in all three classes of cases has the effect of placing the *entire* loss on the defendant despite the plaintiff's negligence, most writers have urged the doctrine be discarded with the passage of comparative negligence statutes.⁷⁷

Nevertheless, not all states which have adopted comparative negligence statutes have done away with the doctrine. Last clear chance and comparative negligence exist side by side in Nebraska,⁷⁸ South Dakota,⁷⁹ and Georgia.⁸⁰ In Arkansas⁸¹ and Mississippi⁸² it is unclear whether the doctrine has been retained. The Wisconsin Supreme

less, the Washington court held the doctrine applicable to such a situation and the railway was held liable. *Locke* is cited in James, *supra* note 75, at 713.

The *Locke* decision was subsequently followed in *Norton v. City of Seattle*, 113 Wash. 408, 194 P. 373 (1920), another street car accident case wherein a deaf and dumb child darted out in front of the streetcar and although seen, was struck anyway when all the gripman did was to sound the gong without slowing down.

77. See, e.g., PROSSER, *supra* note 72, at 427; James, *supra* note 75; and MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1943). In Professor MacIntyre's words, "The whole last clear chance doctrine is only a disguised escape, by way of comparative fault, from contributory negligence as an absolute bar, and serves no useful purpose in jurisdictions which have enacted apportionment statutes." *Id.* at 1251.

78. See *Bezdek v. Patrick*, 170 Neb. 522, 103 N.W.2d 318 (1960).

79. See *Ulach v. Wyman*, 78 S.D. 504, 104 N.W.2d 817 (1960).

80. *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 88 S.E. 2d 6 (1955). The Georgia result, it should be noted, is dictated by the peculiarity of that state's statute which declares:

If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.

GA. CODE ANN. § 105-603 (1968).

The first sentence of the quoted statute has been construed as a plaintiff's last clear chance doctrine. See *Southern Ry. v. Wilbanks*, 67 F.2d 424 (5th Cir. 1933); *United States v. Fleming*, 115 F.2d 314 (5th Cir. 1940). The second sentence is the basis for comparative negligence in Georgia. For an article criticizing the retention of last clear chance in Georgia, see Note, 1 GA. B.J. 500, 505 (1964), wherein the author states that the statute, by retaining the last clear chance doctrine, encroaches on and to that extent impairs the symmetry of the rule of comparative negligence.

81. See *Ed Hopson Produce Co. v. Munoz*, 230 Ark. 179, 321 S.W.2d 203 (1959) (dicta indicating that, had the factual situation been one in which the doctrine of "discovered peril" (the equivalent of last clear chance) could properly have been applied, the trial judge would have erred in refusing to instruct the jury on the doctrine). *But see Reppeto v. Raymond*, 172 F. Supp. 786 (W.D. Ark. 1959) (dicta).

82. Several federal courts construing the Mississippi statute have concluded that the doctrine, while of diminished importance, is still alive in that state. See *Illinois Central R.R. v. Underwood*, 235 F.2d 868 (5th Cir. 1956), and *Brand v. Baker*, 324 F.2d 213 (5th Cir. 1963), in which the court assumed the doctrine applied but found it inapplicable to the factual situations before the court.

Court abolished the doctrine before that state's comparative negligence statute was adopted.⁸³ Florida, which recently adopted a pure comparative negligence rule through judicial fiat, has indicated that the doctrine no longer has any utility.⁸⁴

While it thus appears that the weight of authority would retain the doctrine, more recent and better reasoned decisions abolish it. The leading case for its abolition is the Maine case of *Cushman v. Perkins*⁸⁵ which reversed the trial court for instructing the jury on last clear chance. The Maine Supreme Court concluded that the doctrine was inapplicable because the reason for its existence—mitigation of the harsh rule that contributory negligence bars recovery—was no longer present. The court concurred with Dean Prosser's position that the doctrine cannot be explained merely as a recognition of proximate causation.⁸⁶ *Cushman* emphasized that courts are not to disregard factors "such as the degree of plaintiff's negligence, the efficacy of its causation, defendant's awareness of plaintiff's peril"⁸⁷ Rather, such factors are to be considered by the jury in apportioning fault, not as components of a separate doctrine.⁸⁸

The approach of the Maine court is preferable. By instructing the jury to take into account the elements of last clear chance in apportioning damages rather than retaining a doctrine which at times is applied in a manner inconsonant with its own premise, the Maine position achieves logical consistency and avoids, as the spirit of comparative negligence dictates, placing the entire loss on one party when both are at fault.

B. *Assumption of Risk*

The doctrine of assumption of risk, like that of last clear chance, has been much criticized. Its application is confusing because, as Dean Prosser notes, the term has been applied by the courts in analyt-

83. *Tesch v. Milwaukee Electric Ry. & Light Co.*, 108 Wis. 593, 84 N.W. 823, 826 (1901).

84. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

85. *Cushman v. Perkins*, 245 A.2d 846 (Me. 1968).

86. *Id.* at 849.

87. *Id.* at 851.

88. *See also Loftin v. Nolin*, 86 So. 2d 161 (Fla. 1956), in which the Florida court held the doctrine inapplicable with regard to a Florida comparative negligence statute for railroad claims.

ically dissimilar contexts.⁸⁹ Despite some apparent vacillation,⁹⁰ the Washington court has recognized the doctrine in most situations. Nevertheless, in the master-servant setting the doctrine has been explicitly abrogated⁹¹ and there are indications it will also be held to be unavailing in others.⁹² Where the doctrine does survive, the Washington court until recently had compounded the confusion by distinguishing assumption of risk from the closely analogous if not identical maxim of *volenti non fit injuria*, holding that the former applies to cases involving an express consensual acceptance of a risk known or unknown at the time of agreement, while the latter applies only to a unilateral assumption of a known risk.⁹³

With the adoption of a comparative negligence statute, assumption of risk logically should be abandoned; the plaintiff's voluntary exposure to an appreciated risk merely should increase his proportion of fault for computation purposes. Nevertheless, this reasoning has not been uniformly adopted by the courts. Mississippi,⁹⁴ Georgia,⁹⁵ South

89. Dean Prosser divides assumption of risk into three main categories: (1) Where the plaintiff in advance has given his consent to relieve the defendant of a legal duty towards him; (2) where the plaintiff voluntarily enters into some relation with the defendant, with knowledge the defendant will not protect him against risk; and (3) where the plaintiff already is aware of the risk created by the defendant's negligence but nevertheless proceeds to encounter it. PROSSER, *supra* note 72, at 439.

90. It was thought at one time that the doctrine had been put to rest in Washington. In *Feignbaum v. Brink*, 66 Wn. 2d 125, 401 P.2d 642 (1965), the court held the doctrine of assumption of risk unavailable in a landlord-tenant situation where the lessor was under a duty to repair and maintain common areas. Language in the case indicated that the court might have been willing to abrogate the doctrine completely. A case decided soon after *Feignbaum*, however, makes clear that a broad reading of the decision would be incorrect and that the doctrine has survived. *See e.g.*, *Perry v. Seattle School Dist.*, 66 Wn. 2d 800, 405 P.2d 589 (1971).

91. *Siragusa v. Swedish Hosp.* 60 Wn. 2d 310, 373 P.2d 767 (1962). In *Siragusa* plaintiff nurse was injured at her place of employment when a door with a hook on it was unexpectedly opened by a patient and the hook struck her on the upper portion of her back. In reversing the judgment of dismissal in favor of the defendant hospital, the court held that if an employer negligently fails in his duty to furnish his employees with a reasonably safe place to work, the employee will not be denied recovery simply because he was aware or should have known of the dangerous condition. Rather, knowledge and voluntary exposure to the risk were held properly considered as factors in determining whether the employee was contributorily negligent.

92. *See, e.g.*, *Feignbaum v. Brink*, *supra* note 90.

93. *See Hogenson v. Service Armament Co.*, 77 Wn. 2d 209, 215 n.2, 461 P.2d 311 (1969). *See also Walsh v. West Coast Coal Mines*, 31 Wn. 2d 396, 197 P.2d 233 (1948); *Bailey v. Safeway Stores*, 55 Wn. 2d 730, 349 P.2d 1077 (1960). *But see Lyons v. Redding Construction Co.*, 83 Wn. 2d 86, 515 P.2d 821 (1973).

94. While Mississippi retains the doctrine in most cases, the Legislature has made the doctrine inapplicable in the master-servant relationship. *See MISS. CODE ANN.* § 1456 (1917). For a recent Mississippi decision to the effect that assumption of risk will still be applied absent such a relationship, see *United Roofing and Siding Co. v. Seefeld*, 222 So. 2d 406 (Miss. 1969).

95. In Georgia the assumption of risk by the plaintiff or plaintiff's deceased is an-

Dakota,⁹⁶ and Arkansas⁹⁷ all apparently retain the doctrine as a complete bar to recovery. Wisconsin has abolished it. Because the opinions by the Wisconsin court provide the most lucid analysis, this note will deal only with the experience of that state.

Wisconsin's abandonment of assumption of risk had its genesis in *McConville v. State Farm Mutual Automobile Insurance Co.*,⁹⁸ in which a guest in the defendant's car sued the driver for injuries sustained as a result of negligent driving. Both the plaintiff and defendant had been drinking at a tavern shortly before the accident and were on

other instance, along with last clear chance, where the comparison under the statute will not be made. When the plaintiff knowingly and voluntarily puts himself in obvious peril or exposure to injury without some reason of necessity or propriety in so doing he may not recover notwithstanding the fact the defendant negligently injured him. For statements of this general proposition, see *Columbia R.R. v. Asbell*, 133 Ga. 573, 66 S.E. 902 (1909); *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 88 S.E.2d 6 (1955); and, more recently, *Henry Grady Hotel Corp. v. Watts*, 119 Ga. App. 251, 167 S.E.2d 205 (1969).

96. Actually the authority in South Dakota is very weak. *Raverty v. Goetz*, 82 S.D. 192, 143 N.W. 2d 859 (1966), does make passing reference, however, to the fact that defendant's negligence, plaintiff's negligence, proximate causation and assumption of risk are all matters to be decided by the trier of fact.

97. Although there are no reported Arkansas state court cases in which the doctrine has been challenged, several federal courts in Arkansas reluctantly have held that the doctrine retains its vitality. The leading case is *Harris v. Hercules, Inc.*, 328 F. Supp. 360 (E.D. Ark. 1971), *aff'd*, 455 F.2d 267 (8th Cir. 1972), in which an action was brought for personal injuries sustained by the plaintiff when the boom of a crane he was operating came into contact with an uninsulated high voltage power line. Plaintiff squarely presented the court with the argument that with the adoption of the comparative statute Arkansas would preclude use of the doctrine as a complete bar to recovery. While recognizing that assumption of risk was inconsistent with the philosophy of comparative negligence, Judge Eisele felt bound by the state courts' seemingly uncritical acceptance of the doctrine and held that the plaintiff was completely barred from recovery.

As Judge Eisele points out, language in two Arkansas state cases, *J. Paul Smith Co. v. Tipton*, 237 Ark. 486, 374 S.W.2d 176 (1964), and *Hass v. Kessell*, 245 Ark. 361, 432 S.W.2d 842 (1968), indicate that assumption of risk would not be applicable to a guest's suit against his host. The judge is correct in his conclusion, however, that this reading would be inconsistent with the actual disposition of the claim that arose in those cases and with language in other state cases.

The Eighth Circuit reluctantly affirmed *Harris*, noting that two federal judges in Arkansas were now in agreement that assumption of risk was still viable in Arkansas and that an appellate court should defer to a local federal judge's view of state law rather than seek to substitute its own rule. The other decision referred to is *Rhoads v. Service Machines Co.*, 329 F. Supp. 367 (E.D. Ark. 1971) wherein Judge Henley unequivocally states:

The Arkansas comparative negligence statute . . . did not abolish the common law defense of assumption of risk, and it now seems established in Arkansas that in most tort situations assumption of risk, if established, is a complete defense to an injured person's claim for damages.

Id. at 371 n.2.

98. 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

their way to a Christmas party when it occurred. The jury found the driver eighty-five percent negligent and the plaintiff guest fifteen percent negligent. However, it also found the guest to have assumed the risk and thus barred from recovery. The Wisconsin court reversed and held a guest's assumption of risk no longer to be a separate defense; if a guest's exposure of himself to a particular hazard was unreasonable, such conduct was negligent and subject to the comparative negligence statute. Although *McConville* dealt with only the host-guest situations,⁹⁹ the subsequent case of *Dippel v. Sciano*¹⁰⁰ extended the rule to products liability. The court observed that assumption of risk by a user of consumer products, resulting from a failure to exercise reasonable care, could be considered negligence by the plaintiff to be compared to the defendant's negligence.

Unfortunately, in neither decision was the best reason for abrogating the doctrine well articulated—the fact that retention of assumption of risk, “in all probability . . . defeats the basic intention of the statute since it continues an absolute bar in the case of one important, and very common, type of negligent conduct on the part of the plaintiff.”¹⁰¹ Additionally, it could have been pointed out that in those states which have retained both the doctrine and a comparative negligence statute, a good deal of confusion has reigned, confusion which at least one federal judge has described as “the natural result of permitting the utilization of the assumption of risk doctrine to be extended to areas where it should have no applicability, adding, as it does, nothing to a straightforward analysis in terms of negligence and contributory negligence—nothing, that is, except confusion and anomalous results.”¹⁰²

The Washington Supreme Court has apparently accepted this rea-

99. The court noted also that present day customs and community attitudes toward the use of the automobile are out of line with the old notion that a guest rides as a mere supplicant. 113 N.W.2d at 16.

100. 37 Wis. 2d 443, 155 N.W. 2d 55 (1967). In *Dippel* the plaintiff and others were skidding a pool table along a tavern floor to get it into a playing position. One of the legs collapsed, crushing plaintiff's foot, and he sued both the tavern owner and the manufacturer.

While the strict liability discussion in *Dippel* is dicta, a later case, *Gies v. Nissen Corp.*, 57 Wis. 2d 371, 204 N.W. 2d 519 (1973), held products liability actions were subject to the comparative negligence rule. For the same holding, see *Hagenbuck v. Snap-On-Tools Corp.* 339 F. Supp. 676 (W.D. N.H. 1972).

101. See PROSSER, *supra* note 72, at 457.

102. See *Harris*, 328 F. Supp. at 364.

soning as well as of Wisconsin's interpretation of its statute in *McConville*, and has indicated in dicta that the doctrine will be abandoned once the new Act becomes effective.¹⁰³ Again, it should be emphasized that those elements which have constituted assumption of risk will still be considered by the jury, but in a weighing of fault rather than as an absolute bar to recovery.

C. *Res Ipsa Loquitur*

Under the doctrine of *res ipsa loquitur*, in certain circumstances the trier of fact is allowed, but not compelled, to infer that the defendant was negligent. Three conditions generally are required for the doctrine to apply: (1) The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence, (2) it must be caused by an agency or instrumentality within the "exclusive control" of the defendant and (3) it must not be caused by any voluntary act or contribution on the part of the plaintiff.¹⁰⁴

The Wisconsin court held in *Turk v. H. C. Prange Co.*¹⁰⁵ that passage of the comparative negligence statute negated the third requirement of the doctrine and that negligence by the plaintiff is considered in comparing the respective negligences rather than in applying *res ipsa loquitur*. A federal court in Mississippi,¹⁰⁶ on the other hand, took the position that *res ipsa loquitur* was not applicable in an action where the evidence indicated that the plaintiff's deceased had been contributorily negligent.

In Washington, where the primary effect of the doctrine is to protect the plaintiff from a nonsuit, the Wisconsin approach, retaining

103. See *Lyons v. Redding Construction Co.*, 83 Wn. 2d 86, 95-96, 515 P.2d 821, 826 (1973).

104. W. PROSSER, LAW OF TORTS, § 39 (3d ed. 1964); 9 J. WIGMORE, EVIDENCE § 2509 (3d ed. 1940). The Washington court, while cognizant of the pitfalls of such a formulation, has accepted the stated requirements. See, e.g., *Horner v. Northern Pac. Beneficial Ass'n. Hosp., Inc.*, 62 Wn. 2d 351, 382 P.2d 518 (1963); *Miles v. St. Regis Paper Co.*, 77 Wn. 2d 828, 467 P.2d 307 (1970).

105. 18 Wis. 2d 547, 119 N.W.2d 365 (1963). In *Turk* a mother was injured when she fell while attempting to release her son whose galosh had become caught in a department store escalator. See also Ghiardi, *Res Ipsa Loquitur in Wisconsin*, 39 MARQ. L. REV. 361 (1956). For more recent Wisconsin cases following the *Turk* decision, see *Fehrman v. Smirl*, 20 Wis. 2d 1, 121 N.W.2d 255 (1963) (medical malpractice); *Welch v. Neisius*, 35 Wis. 2d 682, 151 N.W.2d 735 (1967) (fertilizer bags fell on plaintiff).

106. *Fournier v. United States*, 220 F. Supp. 752 (S.D. Miss. 1963).

only the first two elements of the doctrine, is preferable.¹⁰⁷ Presumably, the reason for the third requirement was that little reason exists to permit a case to go to the jury on *res ipsa loquitur* if the plaintiff is barred from recovery because of his contributory negligence. With the passage of the new Act this rationale is no longer present.

D. Degrees of Negligence

It is well established in Washington that the contributory negligence of a plaintiff does not bar his recovery for “wilful or wanton” conduct by the defendant. While other jurisdictions take a contrary view,¹⁰⁸ in Washington the leading case of *Adkisson v. Seattle*¹⁰⁹ has been consistently followed. It is logical to assume, therefore, that under comparative negligence conduct which is wilful or wanton will not be subject to comparison under the Act. A defendant can scarcely seek to mitigate his own liability for striking the plaintiff by attempting to show that the plaintiff was clumsy.

On the other hand, “wilful or wanton” misconduct—which has been defined as including a mental state of intention or at least conscious awareness that injury would “likely” or “probably” result—is not the same as “gross” negligence.¹¹⁰ In Washington, gross negligence has been defined as failure to exercise “slight care.”¹¹¹

107. See *Zukowsky v. Brown*, 79 Wn. 2d 586, 488 P.2d 269 (1971). The court points out that in some instances the effect is stronger. For example, in some cases, absent exculpatory evidence presented by the defendant, the plaintiff is entitled to a directed verdict. In other cases the inference of negligence is so strong that a legal presumption arises which the defendant must overcome by a preponderance of evidence. Finally, there can be cases where the presumption is conclusive.

108. See, e.g., *Billingsly v. Westrac Co.* 365 F.2d 619 (8th Cir. 1966), interpreting Arkansas law. Judge Blackmun, writing for the court, stated that as used in Arkansas “wilful and wanton” are viewed simply as a brand of negligence and are thus subject to that state’s comparative negligence law. Judge Blackmun noted in passing that “the purpose of a comparative negligence statute is thwarted whenever there is a judicial characterization of an act as something other than negligence.” *Id.* at 623. See also the Arkansas state case of *Harkrider v. Cox*, 232 Ark. 165, 334 S.W.2d 875 (1966), quoted in *Billingsly*.

109. 42 Wn. 2d 676, 258 P.2d 461 (1953). The court distinguished wilful from wanton misconduct on the grounds that the former is characterized by an intent to do the act plus conscious awareness that it will probably cause injury while the latter is characterized by intent to do the act plus total indifference as to whether the act will cause injury.

110. The *Adkisson* court defined “wilfulness” and “wantonness” in these terms. *Id.* at 684 n.110, 258 P.2d at 466.

111. See, e.g., *Hansen v. Pauley*, 67 Wn. 2d 345, 407 P.2d 811 (1965).

The distinction between "wilful or wanton" misconduct and "gross" negligence, seemingly slight, becomes important chiefly for purposes of the Washington host-guest statute which allows a guest to recover for either "intentional" misconduct or "gross negligence."¹¹² Adoption of the new Act is likely to cause some confusion, because while "intentional" misconduct seems identical to "wilful and wanton" misconduct and thus not subject to comparison, "gross" negligence is still a form of negligence and thus should be subject to comparison.¹¹³ This distinction may require the trier of fact to specify whether the guest is allowed to recover because the host's conduct was "intentional" or because it was "grossly negligent." Only in the latter case should comparison with any negligence by the guest be made.

E. Contribution and Indemnification

Indemnification and contribution are two postjudgment methods by which a losing defendant can shift the burden of liability to another party. Indemnification shifts the entire liability imposed by a judgment onto the shoulders of the indemnifier;¹¹⁴ contribution shifts only

112. WASH. REV. CODE § 46.08.080 (1863) provides:

No person transported by the owner or operator of a motor vehicle as an invited guest or licensee, without payment for such transportation, shall have cause of action for damages against such owner or operator for injuries, death or loss, in the case of accident, unless the accident was intentional on the part of the owner or operator, or the result of said owner's or operator's gross negligence or intoxication, and unless the proof of the cause of action is corroborated by competent evidence or testimony independent of, or in addition to, the testimony of the parties to the action: Provided, That this section shall not relieve any owner or operator of a motor vehicle from liability while it is being demonstrated to a prospective purchaser.

113. See *Stevens v. Murphy*, 69 Wn. 2d 939, 947-48, 421 P.2d 668, 673 (1966), where the court stated: "Gross negligence . . . differs in kind from 'wilful misconduct': the former, by definition, is still negligence—a lack of care—although of a degree substantially greater than that which adheres in ordinary negligence." (emphasis added) *Stevens* involved an action by a child against his parent wherein the court held that in order to recover against the parent, the child must show wilful or wanton misconduct rather than simply gross negligence. There is no reason to believe, however, that the meaning of willful and wanton will differ under the host-guest statute. See, e.g., *Nist v. Tudor*, 67 Wn. 2d 322, 407 P.2d 798 (1965).

114. In Washington, when the tortfeasors who have caused injury to a third person are not *in pari delicto*, the negligence of one being primary or active while the negligence of the other is passive, if the party guilty of the passive negligence is held liable he is entitled to indemnity from the wrongdoer guilty of the primary negligence. See, e.g., *Rufener v. Scott*, 46 Wn. 2d 240, 280 P.2d 240 (1955). If on the other hand the party guilty of active negligence is held liable, he is not entitled to indemnity from the tortfeasor guilty of only passive negligence. See, e.g., *Reefer Queen Co. v. Marine Construction*, 73 Wn. 2d 783, 440 P.2d 453 (1968).

a portion of the loss. An indemnifier simply steps into the indemnified party's shoes after the negligence between the plaintiff and the indemnified party has been apportioned. Thus, the comparative statute should have no effect on indemnification.

Contribution, in those jurisdictions which permit it, shifts only a portion of the liability for a judgment. When judgment is had against only one of two or more joint tortfeasors, the party held liable is entitled to a pro rata contribution from each of the other liable parties (for example, if three parties are liable and one is forced to pay \$12,000, he is entitled to \$4,000 from each of the other two parties). This rule of pro rata contribution has been criticized for its premise, false in many instances, that all the tortfeasors were equally at fault. To prevent the anomaly of having a comparative negligence statute but a rule of contribution which imposes on each defendant a pro rata liability regardless of his degree of fault, the Wisconsin court has adopted a rule that the contribution of each should be apportioned according to the percentage of negligence attributed to each.¹¹⁵

Washington courts, however, have not accepted even the traditional pro rata rule of contribution.¹¹⁶ Unless the present rule is changed, therefore, it will be possible for a plaintiff who is five percent negligent and damaged to the extent of \$10,000 by *D-1* and *D-2* to proceed against *D-1* who is five percent negligent rather than *D-2* who is ninety percent negligent and recover \$9,500. *D-1* will be unable to seek contribution from *D-2*. The court might mitigate this obviously unjust outcome, even without permitting contribution among tortfeasors, by comparing the plaintiff's negligence only with the negligence of that defendant he has chosen to hold responsible.¹¹⁷

115. See *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

116. See, e.g., *City of Tacoma v. Bonnell*, 65 Wash. 505, 118 P. 642 (1911); *Seattle v. Peterson & Co.*, 99 Wash. 533, 170 P. 140 (1918). This rule against contribution has been criticized by PROSSER, *supra* note 72, at 307, as permitting "the entire burden of a loss, for which two defendants were equally, unintentionally responsible to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free."

117. See Note, *Comparative Negligence in Wyoming*, 8 LAND & WATER L. REV. 596 (1973) and Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289. As these articles point out, the common law rule of joint and several liability, not comparative negligence statutes, produces such an unjust result.

V. CONCLUSION

Washington's new Act initially will raise a number of issues not encountered in a state which adheres to the old rule of contributory negligence. While empirical research indicates that litigation reaching the actual trial stage is not likely to increase dramatically, important questions arise about the Act's future effect on what previously had been considered well established doctrine or practice. Fortunately, Washington's Bar and Bench will be able to draw upon the practical experience and judicial decisions of sister states which already possess substantial experience with the comparative negligence concept. The law of these foreign jurisdictions can not provide pat answers to all of the issues, of course; indeed, when these states have addressed the issues at all, they have come to varying conclusions. This note has attempted only to identify and discuss some of the ramifications of the new Act, and to provide counsel with authority and arguments on both sides of issues which soon will be litigated in Washington.

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