Land & Water Law Review

Volume 8 | Issue 2 Article 9

1973

# Comparative Negligence in Wyoming

Glenn E. Smith

# COMMENTS

## COMPARATIVE NEGLIGENCE IN WYOMING

The perennial debate in state legislatures across the country between the "all or nothing" rule of contributory negligence and a system of apportioning damages between two negligent parties is being resolved by an increasing number of states in favor of general comparative negligence or apportionment legislation.[1] In the last five years alone, nine states[2] have enacted some type of apportionment statute, owing largely, one may suspect, to the unwillingness of many states to accept no-fault insurance legislation.[3] This brings the total number of states that have accepted the doctrine of comparative negligence to sixteen.[4] With the passage of H.B. 94, Wyoming has become the seventeenth.[5]

Comparative negligence is not a new concept in American tort law. The principle of dividing damages between two negligent parties had its origin in this country in several nineteenth century admiralty decisions.[6] From there it was incorporated into the Federal Employers' Liability Act of 1908,[7] the Jones Act,[8] and the Death on the High Seas Act.[9]

1. Henceforth, "apportionment" legislation will be used coterminously with "comparative negligence" legislation, as used to describe the apportioning of damages between two negligent parties. Prosser has pointed out that the term "comparative negligence," when used to describe the dividing of damages, is actually a misnomer, since comparative negligence properly refers only to a comparison of fault of the plaintiff with that of the defendant, and does not necessarily result in any division of damages. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953).
2. Since 1968, Colorado, Hawaii, Idaho, Massachusetts, Minnesota, New Hampshire, Oregon, Rhode Island, and Vermont have adopted comparative negligence legislation.
3. As Chief Justice Hallows of Wisconsin stated in a dissenting opinion in Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513, 521 (1970), "What I do fear is that if the doctrine of pure comparative negligence is not adopted, the whole fault system in torts will be repudiated and a no-fault system akin to workman's compensation adopted."
4. Other states include Arkansas, Georgia, Maine, Mississippi, Nebraska, South Dakota, and Wisconsin.
5. WYO. STAT. § 1-7.2(a) (Supp. 1973).
6. The Explorer, 20 F. 135 (E.D. La. 1884); Olsen v. Flavel, 34 F. 477 (D. Or. 1888); The Mystic, 44 F. 398 (S.D.N.Y. 1890).
7. Apr. 22, 1908, ch. 149, § 3, 35 STAT. 66 (codified at 45 U.S.C. § 53 (1970)).
8. Mar. 4, 1915, ch. 153, § 20, 38 STAT. 1185 (codified at 46 U.S.C. § 688 (1970).
9. June 5, 1920, ch. 250, § 33, 41 STAT. 1007 (codified at 46 U.S.C. § 766 1970)).

About a third of the states, including Wyoming,[10] followed with some type of state "employers' liability act," generally restricted to railroad employees, and as early as 1910 the first general comparative negligence statute was adopted in Mississippi.

All of the existing statutes on comparative negligence, whether in admiralty law or at the state or federal level, share two common features: (1) they are phrased to mitigate the defense of contributory negligence by providing that, in some degree, the negligence on the part of the person seeking affirmative relief will not bar recovery; and (2) the plaintiff's recovery, if any, is diminished by the degree or percentage of contributory negligence attributable to him. But as to the percentage of contributory negligence that will defeat recovery by the plaintiff, the various apportionment statutes differ. There are three separate views.

The first, adopted at the state level by Mississippi[11] and recently Rhode Island,[12] has been called "pure" comparative negligence,[13] "pure" in that the plaintiff may recover some portion of his damages notwithstanding the percentage of his own contributory negligence, as long as the defendant is also guilty of some degree of causal negligence. Recovery is then reduced by the percentage of negligence attributable to the plaintiff. Hence, under this type of statute, which has the effect of abolishing the defense of contributory negligence, a plaintiff who is theoretically 99 percent negligent can recover 1 percent of his damages from the defendant.

A second, and totally antiquated version of comparative negligence, is the "slight-gross negligence" rule, adopted only in Nebraska[14] and South Dakota.[15] By this version, the plaintiff cannot recover at all if his negligence is more than "slight," or if the defendant's negligence is less than "gross." Otherwise, he may recover damages diminished by his slight negligence.

10. WYO. STAT. § 37-225 (1957).
11. MISS. CODE ANN. § 1454 (1956).
12. R. I. GEN. LAWS ANN. § 9-20-4 (Supp. 1972).
13. Editorial Annotation, *Comparative Negligence Cases*, 18 DEFENSE L.J. 570, 594 (1969).
14. NEB. REV. STAT. § 25-1151 (1964).
15. S.D. COMPILED LAWS ANN. § 20-9-2 (1967).

The third variety of comparative negligence, known as the "equal to or greater than" rule,[16] has recently been adopted in Wyoming. Initiated by the state of Wisconsin in 1931, its basic feature is the preclusion of recovery by a plaintiff whose negligence is "equal to or greater than" that of the defendant. If plaintiff's negligence is less than that of the defendant, he recovers a sum diminished by his own degree or percentage of negligence. This rule only modifies, rather than abolishes, the defense of contributory negligence. Variations exist in some states,[17] whereby the claimant may recover if his negligence was not greater than the defendant's, or put differently, if his fault equals that of the defendant but does not exceed 50 percent of the total. The "equal to or greater than" rule, with its variations, is definitely the most popular type of apportionment statute. Endorsed by the American Bar Association,[18] it has been adopted, exclusive of Wyoming, by twelve of the sixteen comparative negligence states.

## I. THE WYOMING ACT

### A. Derivation

The major portion of the Wyoming Act[19] is identical with the pre-1971 Wisconsin statute.[20] In 1971 Wisconsin amended its comparative negligence statute to allow a plaintiff to recover if he was equally at fault with the defendant[21]—prior to

16. *Supra* note 13, at 574.
17. New Hampshire, N.H. REV. STAT. ANN. § 507:7-a (Supp. 1971); Vermont, VT. STAT. ANN. tit. 12, § 1036 (Supp. 1972); Wisconsin, WIS. STAT. ANN. § 895.045 (Supp. 1973).
18. REPORT OF THE AMERICAN BAR ASSOCIATION COMMITTEE ON AUTOMOBILE ACCIDENT REPARATION 74-76 (1969).
19. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.
WYO. STAT. § 1-7.2(a) (Supp. 1973).
20. WIS. STAT. ANN. § 895.045 (1966).
21. The new statute reads: "Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury or property, if such negligence was not * * * *greater than* the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering." (Statute's emphasis)
— WIS. STAT. ANN. § 895.045 (Supp. 1973).

the amendment he had to be less negligent to receive a favorable verdict. While moving the allowable range of recovery up from "49 percent" to "50 percent" may seem like a token gesture on the part of the Wisconsin legislature, it can actually make a significant difference in a sizable group of cases, and is becoming increasingly popular among the states that have adopted or are considering the adoption of comparative negligence legislation.[22]

The effect of the amendment is to increase the number of negligent plaintiffs who are entitled to recover under the apportionment statute. In the 1970 Wisconsin legislative Council hearings, which led to the passage of the amendment, it was reported that, under the 49 percent statute, many Wisconsin defense attorneys were telling the unknowing jury to find the parties equally negligent because it was "the democratic thing to do."[23] Particularly was this so where finding the degree of plaintiff's negligence became a contest of credibility and conflicting liability factors. Moreover, percentages are not easily calculated when comparing different types of conduct, nor when the jury is subject to a barrage of conflicting testimony and argument of counsel in summation. The result in many cases is likely to become a "split it down the middle" attitude among a frustrated jury, especially if it has become polarized in its deliberations and a compromise is mandatory if a verdict is to be reached.[24] Although the quantity of such verdicts in the trial courts of Wisconsin has not been reported, apparently it was sufficient to compel the Wisconsin legislature to amend a statute that in all other respects had worked admirably since 1931.

It is not known whether the Wyoming legislature intentionally adopted the identical wording of the pre-1971 Wisconsin Act, or whether the rather obscure Wisconsin amendment[25] simply was not discovered. As will be seen in the pages to follow, however, the "49 percent" Wyoming Act and the "50 percent" Wisconsin amendment will lead to dia-

22. *Supra* note 17.
23. Flynn, *Comparative Negligence: The Debate*, 8 TRIAL 49, 50 (1972).
24. *Id.* at 51.
25. *Compare* notes 19 and 21. Only a careful reading discloses any difference.

metrically opposite results in a suprisingly different number of factual situations.[26]

Notwithstanding the substantive differences of the present statutes, pre-1971 Wisconsin case law nonetheless becomes an invaluable source from which to seek interpretative answers to problems that will inevitably arise in the operation of the Wyoming Act.[27] Indeed, in Wyoming, if an identical statute is adopted which has already received a known and definite construction in the courts of the state from which the statute was taken, it is presumed that Wyoming's courts will adopt the construction thus given.[28] The case authority of Wisconsin, therefore, as well as that of other applicable jurisdictions,[29] will be emphasized in this paper in attempting to anticipate and solve some of the problems most likely to be encountered by the Wyoming practitioner in his experience with the new apportionment statute. Be it noted here, however, that the interpretive problems of the new statute have by no means all been solved for the Wyoming courts by those of Wisconsin. Though Wisconsin has had over four decades of experience with its apportionment statute, resulting in an abundance of case law on a wide range of problems, Wisconsin tort concepts are significantly different from those in Wyoming.[30] At least in certain areas, then, the Wyoming courts will be plowing new ground as the problems arise.

B. Scope

The most obvious limitation on the comparative negligence doctrine is that it contemplates a finding of negligence on the part of both parties to the action. It has no application where no negligence on the part of the defendant, or no contributory negligence on the part of the plaintiff, is shown.

Generally speaking, a comparative negligence statute may be invoked by a defendant in any case in which, except for

26. *See* text *infra*, p. 603.
27. To the extent that post-1971 Wisconsin decisions do not revolve around the "49-50 percent" distinction, they will continue to represent sound precedent for Wyoming courts.
28. Mitchell v. Walters, 55 Wyo. 317, 100 P.2d 102, 103 (1940).
29. Other states with the "equal to or greater than" rule, such as Arkansas, Maine, Hawaii, Massachusetts, Minnesota, Oregon, Idaho and Colorado may all be looked to as sources of interpretation. In most of these states, however, the statutes have not been in force long enough to build up any appreciable body of case law.
30. *See* text *infra*, p. 618.

the adoption of the statute, the defense of common law contributory negligence would be available.[31] Thus, it has been held that the apportionment statutes apply in an action arising out of the negligence of a carrier causing injury to a passenger,[32] where the defendant's negligence is based on the law of attractive nuisance and the plaintiff child is guilty of contributory negligence,[33] in an action arising out of the negligent maintenance of a nuisance, or of a nuisance growing out of negligence,[34] and in an action arising out of negligent misrepresentation.[35]

But where contributory negligence is not an issue or defense, the apportionment statutes will not operate. In an action based on an intentional wrong, for example, policy reasons demand that any contributory negligence of the plaintiff be overlooked.[36] Since the law considers only the wrongdoer to be at fault under these circumstances, there is no occasion to compare the fault of both parties. The same considerations generally apply to an action based on wilful and wanton conduct of the defendant.[37]

Where the defendant is subject to the imposition of strict liability for harm inflicted on another while the defendant was engaged in an ultrahazardous activity, or for an injury caused by a dangerous instrumentality or agency in the defendant's possession or under his control,[38] the contributory negligence of the person injured is not a defense unless the plaintiff voluntarily and unreasonably subjected himself to the risk of harm presented by such instrumentality, agency, or activity.[39] Thus, where the doctrine of strict liability is recognized and the conduct of the plaintiff does not fall within this exception, the apportionment statute cannot be invoked. In Wyoming it is doubtful if strict liability in the classic *Fletcher v. Rylands* sense even exists.[40]

31. 57 AM. JUR. 2d *Negligence* § 438 (1971).
32. Roberts v. Yellow Cab Co., 240 A.2d 733 (Me. 1968).
33. Nechodomu v. Lindstrom, 273 Wis. 313, 77 N.W.2d 707 (1956).
34. Schiro v. Oriental Realty Co., 272 Wis. 537, 76 N.W.2d 355 (1956).
35. Seagroves v. ABCO Mfg. Co., 118 Ga. App. 414, 164 S.E.2d 242 (1969).
36. PROSSER, TORTS § 65, at 426 (4th ed. 1971).
37. *See* text *infra*, p. 624.
38. RESTATEMENT (SECOND) OF TORTS § 484(2) (1971).
39. RESTATEMENT (SECOND) OF TORTS § 484(2) (1971).
40. Jacoby v. Town of Gillette, 62 Wyo. 487, 174 P.2d 505 (1946). Prosser states that the *Rylands v. Fletcher* doctrine is "probably" rejected in Wyoming. PROSSER, TORTS § 78, at 509 (4th ed. 1971).

Neither has the doctrine of products liability found a permanent place in Wyoming law, probably because the appropriate case has not yet reached the appellate level.[41] Where products liability is recognized, whether contributory negligence operates as a complete defense depends to some extent on whether the action is based on negligence, warranty, or strict liability.[42] Normally only when the action is based on negligence will contributory negligence be recognized as an absolute bar. In this connection, however, it is interesting to note a recent Wisconsin case,[43] where the court adopted the rule of strict liability in tort for products liability cases, but held that contributory negligence was nonetheless available to the seller as a defense, but only to mitigate his liability. The causal contributory negligence of the buyer was then compared to the unreasonable danger of the seller's product, and the verdict entered accordingly.

## II. OPERATION OF THE WYOMING ACT

### A. Single Defendant v. Single Plaintiff

Reduced to its simplest form, the new apportionment statute prevents recovery by a plaintiff whose negligence was equal to or greater than that of the defendant. If a damaged or injured defendant counterclaims against the plaintiff, the party least negligent may recover damages reduced in proportion to his negligence.[44] The possibilities in a two-party action will be illustrated by three examples.[45]

Illustration 1.
Action —P sues D; D counterclaims against P
Damages—$10,000 to P; $1,000 to D
P—51% negligent
D—49% negligent
Result —P recovers nothing; by way of counterclaim D recovers 51% of his damages, or $510.

41. The case of Parker v. Heasler Plumbing & Heating Co., 388 P.2d 516 (Wyo. 1964) did hold that a manufacturer or seller of machinery owes a duty to those who use it to make it free from latent defects and concealed dangers.
42. PROSSER, TORTS § 102, at 670 (4th ed. 1971).
43. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
44. Paluczak v. Jones, 209 Wis. 640, 245 N.W. 655 (1932).
45. The idea received for these illustrations was taken from an excellent article, Laugesen, *Colorado Comparative Negligence*, 48 DEN. L.J. 469 (1972).

Illustration 2.
Action —P sues D; D counterclaims against P
Damages—$10,000 to P; $1,000 to D
P—49% negligent
D—51% negligent
Result —P recovers 51% of his damages or $5,100;
D recovers nothing.

Illustration 3.
Action —P sues D; D counterclaims against P
Damages—$10,000 to P; $1,000 to D
P—50% negligent
D—50% negligent
Result —Both parties suffer their own loss.

Several authorities claim that the "equal to or greater than" feature of the Wisconsin model is only a halfway measure, containing many of the vices inherent under the rule of contributory negligence itself.[46] They point to the situation illustrated above where a theoretical 1 percent of negligence can mean the difference between recovering nothing or recovering 51 percent of the damages claimed. Thus, if plaintiff alleges $10,000 in damages, he recovers $5,100 of that sum if he is found 49 percent negligent and absolutely nothing if he is found 50 percent negligent. Moreover, if the defendant counterclaims, and plaintiff is found 51 percent negligent, not only must he bear his entire loss of $10,000, but he must pay 51 percent of the defendant's damages as well. Although juries have rarely made such exact findings of negligence,[47] this serves only as an aggravated example of the

46. Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289 (1941); Flynn, *Comparative Negligence: The Debate*, 8 TRIAL 49 (1972); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Fuchsberg, *Comparing Comparative Negligence*, 1970 *Proceedings*, ABA INCL. SEC. 522.
> There is nothing just in requiring a defendant to pay 51 percent of the plaintiff's damages when the plaintiff is 49 percent at fault and allowing the defendant to go scot free when he is 49 percent at fault and the plaintiff is 51 percent at fault. What is so magic about being less than, greater than, or equally negligent, that justice may depend on it.

Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513, 520 (1970).

47. Most findings of negligence under the special verdict forms are found in percentages ending in "5" or "0". But note the findings of negligence in a Wisconsin case, Schleif v. Korass, 260 Wis. 391, 51 N.W.2d 1 (1952):

| | |
|---|---|
| Plaintiff | 15.42% |
| Defendant 1 | 14.17% |
| Defendant 2 | 47.08% |
| Defendant 3 | 23.33% |

Also, there are several reported cases where the jury has apportioned 51% of the fault to defendant and 49% to the plaintiff, obviously a result of

same problem when a jury apportions 60 percent of the fault to defendant and 40 percent to plaintiff. Generally, these critics favor a "pure" comparative negligence statute, that allows the plaintiff a recovery despite his percentage of contributory negligence.

On the other hand, it is often claimed in support of the Wisconsin model that no one should be allowed to recover when it has been shown that his greater negligence caused the harm that occurred.[48] It has also been pointed out that comparative negligence was only meant to be a "compromise amelioration of strict contributory negligence, which denied recovery to a plaintiff who was even 1 percent negligent."[49] Finally, in response to some critics, it is said that the "equal to or greater than" rule gives all potential litigants notice of the burden of proof they must overcome, and that if a "pure" type of comparative negligence were adopted, any accident where damage was suffered would result in a lawsuit, because of the chance of a recovery against a defendant regardless of his percentage of negligence or of plaintiff's contributory negligence.[50]

The controversy thus centers not around the desirability of adopting some variation of comparative negligence, but rather the form such legislation is to take and the degree of contributory negligence necessary to defeat recovery by the plaintiff.

---

wanting the plaintiff to recover, but not being able to differentiate who was responsible for the greater negligence.

48. To this ,the answer is sometimes given that, "where a certain percentage of contributory negligence deprives a claimant of any recovery whatever, it is equally unseemly that a defendant has escaped scot-free after nevertheless inflicting substantial damage." Flynn, *Comparative Negligence: The Debate*, 8 TRIAL 49, 51 (1972).

49. Laugeson, *Colorado Comparative Negligence*, 48 DEN. L.J. 469, 474 (1972).

50. Ghiandi, 10 *For the Defense*, #8 (Oct. 1969), 61, 64. A good indication of the increase in litigation, if any, resulting from the enactment of a "pure" form of comparative negligence is its effect on liability insurance rates. Arkansas, which prior to 1957 had a pure form of comparative negligence, has been the subject of recent study in this regard. It was found by one writer that once the all-or-nothing rule was eliminated in Arkansas, liability rates suffered no demonstrable rise, and the increased number of recoveries were seemingly balanced out by a reduction in the size in verdicts. It was also found that there was no significant increase in court congestion, owing to the larger number of cases being settled out of court. Note, *Comparative Negligence—A Survey of the Arkansas Experience*, 22 ARK. L. REV. 692 (1969).

B. Multiple Defendants

Some of the most difficult problems, and most glaring weaknesses, of the "equal to or greater than" rule arise in multiple defendant cases. Three recognizable problems have reached the appellate level.

1. *Joint and Several Liability*

The adoption of comparative negligence does nothing to alter the common law rule of joint and several liability.[51] As to all defendants that are more negligent than the plaintiff, the plaintiff can proceed to judgment against all as a unit, against each separately, or against only one if he so desires. As the example below shows, this can make one defendant responsible for the fault of another, more negligent defendant.

Illustration 4.
Action —Suit by P against D1 and D2
Damages—$10,000 to P
P— 5% negligent
D1—10% negligent
D2—85% negligent
Result —D1 and D2 are jointly and severally liable for $9,500 to P.

In this example P can hold D solely liable for $9,500 in damages, even though he was responsible for only 10 percent of the fault. But it is the common law rule of joint and several liability, and not the apportionment statute, that produces this seemingly unjust result. Assuming that P was not negligent, the same result would occur in a jurisdiction that has retained the rule of contributory negligence as a complete defense in an action for negligence.

In construing its apportionment statute, the Wisconsin courts have made it clear that each responsible defendant is jointly and severally liable for the full sum recoverable by the plaintiff.[52] A more just result, however, and one often suggested,[53] would occur if the negligence of any party who is not joined (D2 in the above example) were eliminated from con-

51. Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).
52. *Id.*
53. Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289 (1941).

sideration, resulting in a comparison of plaintiff's negligence only with those defendants he has chosen to hold responsible. Thus, in the above example, only D1's negligence would be compared with that of P; D1 would then be liable for $5,000 to P, as opposed to the $9,500 he would owe under the rule of joint and several liability.

2. *Contributions among Joint-tortfeasors*

If the first defendant (D1) in the illustration above were in a jurisdiction that allowed contribution among joint tortfeasors, he could compel his co-defendant to pay half the damages.[54] Alternatively, if the plaintiff elected to proceed against D2, the first defendant would have to account for one-half of the judgment, even though he was only 10 percent negligent.

A significant minority of jurisdictions do not recognize the right to contribution.[55] In these states the courts will not help the wrong-doers to distribute their loss among themselves. If the parties are in *pari delicto,* the law leaves them as it finds them.

Neither rule is well suited for a jurisdiction that has adopted comparative negligence legislation. Under the rule of contribution, a party who is primarily responsible for the harm can compel a nominally negligent party to pay half the damages, while under the no-contribution rule, the defendant whom the plaintiff chooses to proceed against must bear the entire loss, irrespective of his relative percentage of negligence. Both rules offend the basic concept of comparative negligence, that each party shall bear the burden of the loss proportionate to his percentage of fault.

The recognition of the injustice of equal contribution under the apportionment statutes has led Wisconsin to develop a unique approach to this perplexing problem. In *Bielski v. Schulze,*[56] called "one of the greatest decisions in Wisconsin jurisprudence,"[57] the court was confronted with

54. PROSSER, TORTS § 50 (4th ed. 1971).
55. *Id.*
56. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).
57. Heft & Heft, *Comparative Negligence: Wisconsin's Answer,* 55 ABA J. 127, 130 (1969).
58. *Supra* note 56, at 107.

the following situation: Defendant made a left turn across a highway, directly in front of plaintiff's oncoming car, and a collision resulted. The jury found the defendant 95 percent causally negligent and plaintiff 5 percent negligent. After a jury award of $25,000, the defendant and his insurer impleaded the insurer for plaintiff and cross-claimed for contribution of $12,500, or one-half of the award, to which they were entitled to under the then existing law of contribution between joint tort-feasors in Wisconsin. Abandoning the pro rata method of contribution as inconsistent with the concept of comparative negligence, the court awarded the defendant's insurer $1,250, or 5 percent of the judgment against it, rather than the $12,500 it had demanded. The court made it clear, however, that the plaintiff can still recover from any tort-feasor guilty of greater negligence.[58] The rule announced in *Bielski* applies only to the contribution rights of multiple defendants. In other words, the rules of joint and several liability have not been altered by this decision, only the manner in which the defendants are to share the burden of the loss once judgment has been pronounced.

With the passage of H.B. 162 in the last session of the legislature, Wyoming has joined a majority of states in adopting the right to contribution among joint tortfeasors, and has accomplished by statute what Wisconsin has achieved through the courts. In accepting the right to contribution, the legislature has wisely provided that where there is such a disproportionate degree of fault among the joint tortfeasors as to render an equal distribution of fault among the inequitable, the relative degrees of their fault are to be considered in making the final apportionment.[59] This concept of "com-

59. WYO. STAT. § 1-7.4(c) (Supp. 1973). The relevant parts of the statute are set forth below:

1-7.4 Contribution among joint tortfeasors

(a) The right of contribution exists among joint tortfeasors, but a joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.

(b) A joint tortgeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

(c) When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their

parative contribution" is a logical extension of comparative negligence legislation and avoids the result under the common law right to contribution where a nominally negligent defendant can be forced to pay a disproportionate amount of damages.

3. *Individual Comparison of Each Defendant's Fault*

When multiple defendants are joined, it is well settled in Wisconsin[60] that the plaintiff's negligence is to be compared with the negligent conduct of each defendant, and recovery is then allowed as against any defendant whose negligence exceeds that of plaintiff's. Only Arkansas[61] adheres to the opposite rule, where the negligence of the defendants is combined and considered as a unit in making the comparison of negligence with the plaintiff. The significance of the two different rules can be seen in the following example.

Illustration 5.

Action —Suit by P against D1, D2, and D3
Damages—$10,000 to P
P—21% negligent
D1—20% negligent
D2—20% negligent
D3—19% negligent
Result —all defendants dismissed.

Under the Wisconsin rule, the plaintiff recovers nothing because his negligence exceeds that of each of the defendants. But under the Arkansas position, the plaintiff can recover $7,900; the combined negligence of the three defendants exceeds his own.

Opponents of the Wisconsin rule[62] point to two decisions handed down by the Wisconsin courts as demonstrative evi-

---

pro rata shares solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law.

. . . .

1-7.5; Same; certain matters not affected
(a) Nothing in this act affects
(i) The common law liability of the several joint tortfeasors to have judgments recovered and payment made from them individually by the injured person for the whole injury. However, the recovery of a judgment by the injured person against one joint tortfeasor does not discharge the other joint tortfeasors.
(ii) Any right of indemnity under existing law.

60. Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934); Schwenn v. Loraine Hotel Co., 14 Wis. 2d 601, 111 N.W.2d 495 (1961);
61. Walton v. Tull, 234 Ark. 882, 346 S.W.2d 20 (1962).
62. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1 (1953); Flynn, *Comparative Negligence: The Debate*, 8 TRIAL 49 (1972).

dence of the unsoundness of that rule. In the first,[63] the fault of the plaintiff was found to be 50 percent, and that of each of two defendants 25 percent. The plaintiff was denied all recovery, while each defendant recovered 75 percent of his damages by way of counterclaim. In Arkansas, neither party would recover under these facts. In a second case,[64] the plaintiff and both defendants were all found equally negligent. Because the plaintiff's negligence was equal to that of the two defendants, his claim was dismissed, even though collectively the defendants were 67 percent negligent. Under the Arkansas rule the plaintiff would have recovered two-thirds of his damages.[65]

These rather harsh results have compelled several authorities[66] to advocate forcefully the Arkansas rule, which obviously is more favorable to plaintiffs as a class. But one does not have to search far to find an example that vividly shows the weakness of the Arkansas position.

Illustration 6.
Action —Suit by P against D1 and D2
Damages—$10,000 to P
P—49% negligent
D1—46% negligent
D2— 5% negligent
Result —P can recover $5,100 from either D1 or D2.

Where the negligence of the defendants is combined, and it exceeds the negligence of the plaintiff, any defendant so joined is jointly and severally liable for the damages under the Arkansas rule, regardless of his percentage of negligence. Thus, D2, who is only incidentally negligent, is potentially liable for $5,100. Although he may find partial relief in a state where an equal right to contribution exists, he remains liable for a considerable sum of money, whereas under the Wisconsin rule neither D2 nor D1 would be liable. The problem becomes particularly acute where it turns out that D1 is judgment proof, immune, or simply cannot be found (or P

63. Kirchen v. Tisler, 255 Wis. 208, 38 N.W.2d 514 (1949).
64. Becker v. City of Milwaukee, 8 Wis. 2d 456, 99 N.W.2d 804 (1959).
65. Note that under the new Wisconsin "50%" rule, *supra* note 21, one of these unsatisfactory results would be avoided. If the plaintiff's negligence is equal to that of the defendant's, he is not barred from recovery.
66. *See, e.g.*, Flynn, *Comparative Negligence: The Debate*, 8 TRIAL 49, 52 (1972).

does not want to join him in this suit).[67] For then P has no choice but to proceed against D2 to judgment if he is to recover anything; D2's right to contribution then becomes worthless.

There is no perfect solution to this problem, short of adopting a "pure" form of comparative negligence, where the problem simply does not exist. But the potential for abuse seems greatest with the Arkansas rule, for to some extent the plaintiff can manipulate the substantive outcome of the case through procedural joinder and he can compel full recovery from a defendant who is far less negligent than he. The inequities of the Wisconsin rule, though very real, seem to occur less frequently.

C. Wrongful Death Actions

Under Wyoming's Wrongful Death Statute,[68] any defense, including contributory negligence, which might have been set up against the decedent had he lived, is still available to the defendant,[69] even though the statute is said to create a separate and independent cause of action for the benefit of the designated survivors.[70] The adoption of comparative negligence does nothing to change this basic rule. Thus, not only must the negligence of the plaintiff-beneficiary, if any, be individually compared with that of the defendant under the apportionment statute,[71] but so also must any negligence of the decedent.[72] Plaintiff's recovery is diminished by the extent of the decedent's negligence in the same manner as it

67. In Wisconsin, the special verdict form requires an accounting of all causal negligence for the purposes of comparing the fault of the parties, even if a defendant cannot be properly joined, resulting in the following situation:
Action —Suit by P against D1 and D2; D3 is not joined
Damages—$10,000 to P
P—10% negligent
D1— 9% negligent
D2—11% negligent
D3—70% negligent
Result —D1 dismissed; P recovers $9,000 from D2.

68. WYO. STAT. § 1-1065 (1957).

69. Bircher v. Foster, 378 P.2d 901 (Wyo. 1963). The Wyoming Wrongful Death Statute is but a version of the original Lord Campbell's Act, which contained an express provision limiting the death action to those cases where the deceased might have recovered damages if he had lived. PROSSER, TORTS § 127, at 910 (4th ed. 1971).

70. PROSSER, TORTS § 127, at 910 (4th ed. 1971).

71. Truesdill v. Roach, 11 Wis. 2d 492, 105 N.W.2d 871 (1960).

72. Johnson v. Roberson, 88 Ga. App. 548, 77 S.E.2d 232 (1953).

would if he was himself negligent, and barred altogether if decedent's negligence exceeds that of the defendant.

Whether the negligence of both the decedent and the plaintiff-beneficiary, where both are negligent, is to be combined or compared separately with that of the defendant has been answered squarely by a recent Wisconsin case. In *Western Casualty & Surety Co. v. Dairyland Mutual Insurance Co.*,[73] it was held that a widow's negligence would have to be combined with that of the decedent in comparing her negligence with that of the defendant. The following illustration makes this point clear.

Illustration 7.

Action —Suit by P as personal representative of the deceased against D1 and D2
Damages—$10,000 to P
P— 5% negligent
Decedent—15% negligent
D1—10% negligent
D2—70% negligent
Result —P cannot recover from D1 because the combined negligence of P and the decedent exceeds that of D1. P recovers $9,500 from D2.

Where multiple plaintiffs are suing in a wrongful death action, or any action based on negligence, the damages are apportioned as to the negligence of each individual plaintiff. In *Hansberry v. Dunn*,[74] for example, where a husband and wife both sued the defendant for the wrongful death of their daughter, but which was caused partially by the wife's negligence, the court held that the husband was entitled to a full one-half of the verdict, while the wife's one-half of the verdict must be diminished by the percentage of her negligence which contributed to the child's death.

D. Making the Apportionment

1. *Basis for Making the Comparison of Fault*

The courts have generally found it preferable to refrain from stating any exact rules in the area of comparisons of negligence and subsequent apportionment. No rule of thumb

73. 273 Wis. 349, 77 N.W.2d 599 (1956).
74. 230 Wis. 626, 284 N.W. 556 (1939).

can be set forth with respect to the apportionment of negligence between the parties.[75] But while the comparison of negligence is primarily a question for the jury in this regard, the Wisconsin courts, at least, have made it clear that there are instances where the court may hold as a matter of law that plaintiff's negligence was equal to or greater than that of the defendant, although this is rarely done.[76] Generally, it must be apparent from the evidence accepted by the jury as controlling that the negligence of plaintiff and that of the defendant were so like each other in kind and character or so nearly equivalent as to be comparable as a matter of law before the judgment for plaintiff will be disturbed.[77] If the finding of the jury is supported by any credible evidence under any reasonable view, the court will generally sustain it. Especially is this so, according to one case,[78] where the negligence of each party is not of the same kind and character, such as where a drunken driver hits a pedestrian jaywalking across the street while reading a newspaper. But even if a party is found guilty of negligence as a matter of law, this does not necessarily compel a verdict for the other party. One may be found negligent as a matter of law and still be substantially less negligent than the other party.[79]

It is clear that the number of respects in which a particular party is found negligent does not control the jury's comparison of negligence and apportionment of damages. In *Van Wie v. Hull*[80] the court held that the jury could find that plaintiff was more negligent than the defendant, even though it also found defendant guilty of negligence in two respects and the plaintiff guilty in only one. The conduct of the parties as a whole should control the comparison of negligence, regardless of the number of acts or omissions that have been submitted to the jury.[81]

It is also evident from Wisconsin case law that the kind or category of the respective parties' negligence alone does

75. Kohler v. Dumke, 13 Wis. 2d 211, 108 N.W.2d 581 (1961).
76. Hustad v. Evetts, 230 Wis. 292, 282 N.W. 595 (1938).
77. Webster v. Roth, 246 Wis. 535, 18 N.W.2d 1 (1945).
78. Pruss v. Strube, 37 Wis. 2d 539, 155 N.W.2d 650 (1968).
79. De Goey v. Herman, 233 Wis. 69, 288 N.W. 770 (1939).
80. 15 Wis. 2d 98, 112 N.W.2d 168 (1961).
81. Taylor v. Western Casualty & Surety Co., 270 Wis. 408, 71 N.W.2d 363 (1955).

not govern the comparison. In *Enjen v. Pack City Transit Lines Inc.*,[82] the court found that merely because the negligence of the plaintiff and defendant was of the same character (because both were driving on the wrong side of the road), this alone did not require a finding that the negligence of the respective parties was equal as a matter of law. The quality of negligence does not determine quantity. Although the plaintiff and defendant may be guilty of negligence in the same factual respect, the jury may find plaintiff's negligence less than defendant's.[83]

It has been suggested that, while the facts of each peculiar case must ultimately govern the comparison of fault between the parties, yet there are certain types of repetitive negligent conduct that may be reduced to average percentages of fault between plaintiff and defendant. Suggested comparisons of negligence between drivers in ordinary cases, for example, have been made as follows:[84]

| Type of Accident | Defendant | Plaintiff |
|---|---|---|
| Rear end | 100% | |
| Intersection | | |
| Uncontrolled | 60% | 40% |
| Stop sign | 85% | 15% |
| Signal light | 90% | 10% |
| Left turn | | |
| Oncoming | 80% | 20% |
| Failure to yield | 70% | 30% |
| Improper passing | 75% | 25% |
| Wrong side of road | 90% | 10% |
| Improper turn | 80% | 20% |

Although under Wisconsin law it would probably be error to allow such percentages before the jury,[85] they nonetheless could serve a useful function in helping the court rule as a matter of law on the negligence of the parties. They may also be used in non-jury trials.

82. 9 Wis. 2d 153, 100 N.W.2d 580 (1960).
83. Fronczek v. Sink, 235 Wis. 398, 291 N.W. 850 (1940).
84. Heft & Heft, *Comparative Negligence: Wisconsin's Answer*, 55 ABA J. 127, 128 (1969).
85. The danger of the jury giving such evidence undue emphasis probably outweighs any probative value the evidence may have.

2. *The Special Verdict*

The Wyoming legislature has provided for the use of the special verdict in cases where the fault of the parties is to be apportioned.[86] The major features of this provision are: (1) it shall be used when requested by either party or when, in the sound discretion of the trial court, its use is deemed desirable; (2) the jury (or the court in a non-jury trial) is to make special findings of fact in determining (a) the percentage of negligence attributable to each party and (b) the amount of damages suffered by each; (3) the court, and not the jury, reduces the amount of such damages in proportion to the amount of negligence attributable to the person recovering.

With the use of the special verdict, then, the jury is not asked to return a general award for the plaintiff with an assessment of recoverable damages, but rather it is asked a series of specific questions, an example of which follows.[87]

1. In operating his automobile at the time of and immediately preceding the collision was the defendant Jones negligent with respect to the speed of the car?
2. If you answer Question 1 "yes" then answer this: Was the defendant Jone's negligence a cause of the collision?
3. In operating his automobile at the time of and immediately preceding the collision, was the plaintiff Smith negligent with respect to failure to stop before entering the intersection?
4. If you answer Question 3 "yes" then answer this: Was the plaintiff Smith's negligence a cause of the collision?
5. If you have answered all of Question 1, 2, 3, and 4 "yes" then answer this: What percentage of the total negligence was attributable to the defendant Jones? To the plaintiff Smith?
6. What is the amount of the damages plaintiff Smith has sustained? Defendant Jones?

86. WYO. STAT. § 1-7.2(b) (Supp. 1973).
87. Taken from Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 28 (1953).

With this information, the court does the mathematics, and proceeds to enter final judgment accordingly. This procedure is intended to eliminate a prejudice or desire on the part of the jury to see one party or the other win or lose, and as such constitutes a very effective device for controlling the unreliable or irresponsible jury.[88] It is thought that the special verdict, used in this manner, forces the jury to focus its attention on every major aspect of the case, to weigh the evidence and follow instructions more carefully, and to make its findings of fact without regard to how they will affect the ultimate verdict.[89] The special verdict thus purports to impose a degree of dispassion and disinterest on the jury by divorcing two of its traditional functions: making findings of fact, and making conclusions based on those findings. With the special verdict the latter function, that of making conclusions, is now a task of the trial court, and the jury ostensibly is ignorant of the final verdict until actually announced by the court. As such, anything put before the jury that informs it of the effect of its factual findings, such as reading the apportionment statute to the jurors, has been held reversible error.[90]

The procedure of vesting with the trial court the duty of reducing the total amount of damages by the negligence of the party entitled to the verdict has been questioned on two different grounds. First, it is said that it weakens the overall, common judgment of the jury as well as its ability to smooth over the "rough edges of the law."[91] Secondly, it is said to have a great potential for jury confusion.[92] In fact, the unfavorable experience with this feature of the special verdict has led the Maine legislature to amend its apportionment statute so that the responsibility of entering the final verdict

88. *See Id.* at 32: "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."
89. Sunderland, *Verdicts General and Special*, 29 YALE L.J. 253 (1920).
90. De Groot v. Van Akkeren, 225 Wis. 105, 273 N.W. 725 (1937).
91. 5 MOORE, FEDERAL PRACTICE § 49.05, at 2236 (2d ed. 1972).
92. "I suggest that most juries believe when they find a plaintiff and a defendant each 50 percent negligent that the plaintiff will get one half of his damages; but under the Wisconsin rule he will recover nothing." Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513, 520 (1970).

lies not with the trial judge, but with the jury.[93] In Maine the jury is to reduce the total damages to the extent deemed just and equitable, with the knowledge that the lesser figure is the final verdict in the case. Similar legislation has been enacted in New Hampshire[94] and Vermont.[95]

While keeping the jury in ignorance of the effect of its special findings of fact on the ultimate verdict is of dubious value,[96] there are other advantages of the special verdict that warrant its use in negligence cases tried in a comparative negligence jurisdiction. There is no way in which it can be known, for example, that the jury found that the plaintiff had been damaged $10,000, that the plaintiff himself was guilty of 25 percent of the negligence, and that the jury awarded him $7,500 for this reason. Without the special verdict, the appellate court would have a difficult time in dealing with pleas of excessiveness or inadequacy of the judgment.[97]

More importantly, perhaps, is the fact that the special verdict enables the parties, the court, and the public to see what the jury has actually done. This can eliminate the necessity of re-trying an entire case. If the defendant raises several defenses, for example, and the court erroneously in-

93. ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1972).
Problems arose in implementing the Maine statute. The first was that some judges construed it as requiring or permitting the submission of special questions to the jury as to negligent percentages, reserving to themselves the function of dollar damages reduction. Others did not, leaving to the jury the functions both of finding the amount of negligence chargeable to the respective parties and reducing or disallowing the plaintiff's damages accordingly by general verdict. The judge-deduction procedure sometimes resulted in a phenomenon described by Maine lawyers as the double deduction. Juries, in attempting to answer special questions on verdict forms, would sometimes, consciously or unconsciously, reduce the dollar amount of what was supposed to be the plaintiff's recovery without respect to his proportionate causal negligence themselves. Thereafter, the presiding judge, applying the negligence percentage found by the jury to the dollar amount written on the verdict blank, would reduce it again.
NIXON, N.H.B.J. 27 (Fall, 1969).

94. N.H. REV. STAT. ANN. § 507:7-a (Supp. 1972).

95. VT. STAT. ANN. tit. 12, § 1036 (Supp. 1972).

96. It is doubtful there is such clear demarcation of duty between judge and jury as is often thought with the special verdict. A small arithmetic computation, that of multiplying the percentage of defendant's negligence times the total damages suffered by the plaintiff, would reveal the same information to the jury that the Wisconsin courts have strived to keep from it. It cannot seriously be contended that the jury makes its special findings of fact totally ignorant of their ultimate impact on the monetary award, if any, made to the plaintiff.

97. Lipscomb, *Comparative Negligence*, 344 INS. L.J. 667, 674 (1951).

structs the jury on one of these defenses in a manner detrimental to the plaintiff, after which the jury returns a verdict for the defendant, then on appeal the court would be required to reverse the judgment without a special verdict, because it has no way of telling whether or not the verdict was based solely on the tainted defense. But if, on the other hand, the jury had been required to render a verdict on each one of the defenses, the court would know at once the grounds of the jury decision and whether or not the error in the instruction was harmless.[98]

Finally, because of its obvious tendency to favor the defendant, the special verdict is claimed to have kept the size of the verdict down in the great increase of recoverable cases brought under the new apportionment statute, thus keeping liability rates within reasonable bounds.[99]

## III. THE AFFECT OF THE WYOMING ACT ON RELATED AREAS OF TORT LAW

### A. Last Clear Chance

The jurisdictions are sharply divided on the effect of comparative negligence legislation on the doctrine of last clear chance. Nebraska[100] and South Dakota[101] have retained the last clear chance rule by judicial decree. Georgia has evidently preserved the doctrine by statute as applicable to the plaintiff and has judicially extended the rule to defendants.[102] Maine,[103] on the other hand, has expressly abolished last clear chance as inherently inconsistent with that state's apportionment statute. Arkansas[104] and Mississippi[105] have apparently done so, while in Wisconsin last clear chance has never been

98. COUND, FRIEDENTHAL & MILLER, CIVIL PROCEDURE CASES AND MATERIALS 723-24 (1968).
99. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 33 (1953).
100. Hickman v. Parks Construction Co., 162 Neb. 461, 76 N.W.2d 403 (1956).
101. Vlach v. Wyman, 78 S.D. 504, 104 N.W.2d 817 (1960); Haase v. Willers Truck Service, Inc., 72 S.D. 353, 34 N.W.2d 313 (1948).
102. *See* Comment, *The Validity of Retaining the Last Clear Chance Doctrine in a State Having a Comparative Negligence Statute*, 1 GA. ST. B.J. 500 (1965).
103. Cushman v. Perkins, 245 A.2d 846 (Me. 1968).
104. *See* Price, *Applicability of the Last Clear Chance Doctrine in Mississippi*, 29 MISS. L.J. 247 (1958).
105. *See* Rosenburg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959). *See also* Reppeto v. Raymond, 172 F. Supp. 786 (1959).

recognized,[106] either before or after the adoption of comparative negligence in that state.

With the exception of Georgia, the retention of last clear chance in the face of comparative negligence legislation has apparently never occurred at all to the various state legislatures. The absence of legislative action has resulted in the problem being cast upon the courts, whose response, as seen above, reflects anything but unanimity. Prosser has urged legislative action: "At least, in any future statutes, there should be specific provision one way or another as to last clear chance, and it should not be allowed, as in the past, to go by default."[107]

From the cases that have considered the matter, it is clear that whether last clear chance is to survive in a comparative negligence jurisdiction is made to depend on which of two explanations of the rule is accepted. The first, and most often stated, is that if the defendant has the last clear chance to avoid the harm, the plaintiff's negligence becomes antecedent, and is not a proximate cause of the harm. Since negligence that is not a proximate cause of the harm is not considered negligence at all, only one party, the defendant, is considered to be at fault. Inasmuch as the fault of the two parties is never apportioned unless the fault of each proximately caused the harm, there is said, according to this rationale, to be no conflict between last clear chance and the apportionment statutes.[108]

Many authorities, however, have criticized this explanation as being quite out of line with modern ideas of proximate cause, and insist that the real reason behind the last clear chance rule is an intense dislike for the defense of contributory negligence,[109] with the result that some courts accept

106. Switzer v. Detroit Inv. Co., 188 Wis. 330, 206 N.W. 407 (1925).
107. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 27 (1953). In a proposed draft, Prosser has specifically eliminated the doctrine of last clear chance: "In all actions hereafter accruing for negligence resulting in personal injury or wrongful death or injury to property, including those in which the defendant has had the last clear chance to avoid the injury, the contributory negligence of the person injured . . . shall not bar a recovery. . . . " *Id.* at 37.
108. For a collection of cases *see* Annot., 59 A.L.R.2d 1261 (1958).
109. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 7 (1953): "Most of the courts have talked of proximate cause, which makes no sense at all. . . . The real explanation would appear to be nothing more than a dislike for

without reasoning the conclusion that the last wrongdoer is necessarily the one that should be held accountable for the injury caused. Considered in this light, "[a]ny necessity for the last clear chance as a palliation of the hardships of contributory negligence obviously disappears when the loss can be apportioned. . . ."[110] If the rule is retained, on the other hand, the person found guilty of ultimate negligence is required to bear the entire burden of the resulting damages, and the last clear chance—comparative negligence combination becomes as harsh to the defendants as the traditional contributory negligence rule was to plaintiffs. Both are all-or-nothing rules; to prevent a shifting of the burden traditionally carried by plaintiffs under the harsh rule of contributory negligence to defendants under the doctrine of last clear chance, both should be abrogated in a comparative negligence jurisdiction. Otherwise, the result is that the system of comparative negligence breaks down in a sizable group of cases, where the injury caused by the fault of two parties is still entirely imposed upon one. The recognition of this anamolous circumstance has led Maine to abolish a once viable last clear chance doctrine after that state passed an apportionment statute. After rejecting the proximate cause rationale of last clear chance, the court in *Cushman v. Perkins* concluded:

> [T]he last clear chance rule is but a modification of the doctrine of contributory negligence. In our view when our contributory negligence rule as an absolute bar disappeared . . . through legislative action, the last clear chance rule disappeared with it and no longer exists as an absolute rule.[111]

Whether this reasoning would prevail in Wyoming is not clear. The case law in this state on the doctrine of last

---

the defense of contributory negligence." *See* Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 257-58 (1908): *see also* James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 707-08 (1938). "Certainly, if a man's negligence has put himself or his property in a position of peril, that negligence is a proximate cause of the injury which follows when the perils of the position become realized. In such case the likelihood of the danger that befell was one of the very things that made his original act negligent, and probable consequences are proximate ones". For the best judicial rejection of the proximate cause rationale, see Cushman v. Perkins, 245 A.2d 846, 849 (Me. 1968) "The theory that because the defendant had the last opportunity to avoid the harm his negligence must have been the sole proximate cause is hardly consistent with the modern concept that several acts of negligence may combine to cause proximately an accident."

110. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 27 (1953).

111. 245 A.2d 846, 850 (Me. 1968).

clear chance generally adheres to the traditional proximate cause explanation.[112] In *Borzea v. Anselmi,* the court said:

> " '[The doctrine of last clear chance characterizes] . . . the negligence of the defendant, if it intervenes between the negligence of the plaintiff or deceased, and the accident, as the sole proximate cause of the injury, and the plaintiff's antecedent negligence merely as a condition or remote cause. The antecedent negligence of the plaintiff or deceased having been thus relegated to the position of a condition or remote cause of the accident it cannot be regarded as contributory, since it is well established that negligence, in order to be contributory, must be one of the proximate causes.' "[113]

On the other hand, the theory that last clear chance was adopted to counter the harsh results of contributory negligence was recently argued before the Wyoming Supreme Court,[114] and there is language in *Borzea v. Anselmi* that supports this view.[115] But regardless of the semantics employed, the rule adopted by the Maine court, for the reasons stated above, clearly represents the better view, and in absence of legislation, the one that should be followed by the Wyoming courts should the issue arise.

B. Assumption of Risk

Still unanswered is the impact the apportionment statutes should have on the common law defense of assumption of risk. It has been said that the retention of assumption of risk defeats the basic intention of comparative negligence legislation because it continues to be an absolute bar in a very common type of negligent conduct.[116] As Prosser maintains, "[i]t can scarcely be supposed in reason that the legislature has intended to allow a partial recovery to the plaintiff who has been so negligent as not to discover his peril at

112. Johnston v. Vukelic, 67 Wyo. 1, 213 P.2d 925 (1950); Lane v. Gorman, 347 F.2d 332 (10th Cir. 1965).
113. 71 Wyo. 348, 258 P.2d 796, 803 (1952).
114. Flaim v. Berti, 503 P.2d 863, 865 (Wyo. 1972).
115. " 'The *last clear chance* doctrine is not an exception to the general doctrine of contributory negligence . . . but operates merely to relieve the negligence of a plaintiff or deceased in a particular instance, which would otherwise be regarded as contributory, from its character as such.' " 71 Wyo. 348, 258 P.2d 796, 802 (1952).
116. PROSSER, TORTS § 68, at 457 (4th ed. 1971).

all, and deny it to one who has at least exercised proper care in that respect, but has made a mistake of judgment in proceeding to encounter the danger after it is known.'"[117]

Again, with the exception of Oregon,[118] the various state legislatures have failed to make provision for the effect of comparative negligence on the doctrine of assumption of risk. The courts of Mississippi,[119] Georgia,[120] South Dakota,[121] and Arkansas,[122] have held that assumption of risk still thrives despite the enactment of apportionment legislation. Nebraska[123] and Wisconsin,[124] however, have decided that assumption of risk is no longer a complete bar to recovery when the fault of both parties is to be apportioned, and that conduct which previously constituted assumption of risk is now simply a type of contributory negligence to be considered by the jury in measuring and comparing the relative fault of the parties.

Wyoming apparently recognizes no distinction between contributory negligence and assumption of risk, although there appears to be some contradiction in the cases that have so held.[125] The best statement of the court's refusal to acknow-

117. *Id.*

118. Oregon has abolished assumption of risk statutorily by providing that "[c]ontributory negligence, including assumption of risk, shall not bar recovery in an action . . . for negligence. . . ." ORE. REV. STAT. § 18.470 (1971). For a discussion of the statute, *see* Comment, *Comparative Negligence in Oregon: A New Era in Tort Law*, 8 WILAMETTE L.J. 37 (1972).

119. Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947).

120. Roberts v. King, 102 Ga. App. 518, 116 S.E.2d 885 (1960).

121. Vee Bar Airport v. De Vries, 73 S.D. 356, 43 N.W.2d 369 (1950).

122. Bugh v. Webb, 231 Ark. 27, 328 S.W.2d 379 (1959).

123. Landrum v. Roddy, 143 Neb. 934, 12 N.W.2d 82 (1943).

124. McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

125. The *Taylor* opinion, *infra* note 126, was upheld by a federal district court in Askin v. Dalgarno, 293 F.2d 424 (10th Cir. 1961). But in a 1963 opinion, the Supreme Court of Wyoming seemed to re-create the doctrine of assumption of risk. Citing no Wyoming case law, the court held in Cross v. Foster, 378 P.2d 903, 904 (Wyo. 1963): "[A] reasonable evaluation of all that plaintiff recalled shows he voluntarily assumed the risk and hazard of riding in the automobile with full knowledge and appreciation of the danger of so doing." Four months later, with no reference at all to *Cross*, the same court remarked in another case, "Distinctions between assumption of risk and contributory negligence have not been adopted in Wyoming." Ford Motor Co. v. Arguelo, 382 P.2d 886, 891 (Wyo. 1963). These seemingly inconsistent decisions can be reconciled by concluding that the terms assumption of risk and contributory negligence are used interchangeably by the court, and that conduct which the court labels as assumption of risk is nothing but a species of contributory negligence. If so, then both defenses are simply two different methods of describing the same type of negligent conduct.

ledge assumption of risk as a separate doctrine appears in *Rocky Mountain Trucking Co. v. Taylor,* where it was said:

> [T]he defenses of assumption of risk and contributory negligence are so closely allied that courts have experienced considerable difficuty in attempting to draw a maintainable line of distinction between them. . . . We do not propose or deem it necessary to add our own concept of what distinguishes the one from the other nor do we specifically adopt as our own any one of the distinctions announced by other courts.[126]

Inasmuch as there is no difference in kind between the two defenses, one disappears with the other as a complete bar to recovery under the new apportionment statute.

There are no Wyoming decisions recognizing express or contractual assumption of risk; yet it seems fair to conclude that only implied or voluntary assumption of risk, and not its express counterpart, is affected by comparative negligence legislation. Comparative negligence contemplates only the elimination of negligent conduct on the part of the plaintiff as a bar to his recovery. It says nothing about a consensual limitation of the duty normally owed to the plaintiff by the defendant.

C. Guest Statute

Under Wyoming's Guest Statute, "No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action . . . unless such accident shall have been caused by the *gross negligence* or *willful and wanton* mis-conduct of the owner or operator of such motor vehicle. . . . " (Emphasis added)[127] Whether the adoption of comparative negligence affects the ability of the plaintiff to recover under the Guest Statute depends on whether the statute contemplates two different kinds of culpable conduct, or only one, and whether contributory negligence is a defense to such conduct.

The Wyoming Guest Statute was taken verbatim from a Michigan statute.[128] According to the Michigan courts,[129]

126. 79 Wyo. 461, 335 P.2d 448, 451 (1959).
127. WYO. STAT. § 31-233 (1957). A proposal to repeal the Guest Statute was defeated in the last session of the state legislature.
128. Mitchell v. Walters, 55 Wyo. 317, 100 P.2d 102, 104 (1940).
129. Pawlicki v. Faulkenson, 285 Mich. 141, 280 N.W. 141 (1938).

along with a number of other jurisdictions with similar statutes,[130] gross negligence as used in this context is synonymous with wilful and wanton conduct. Here there is only on type of conduct contemplated by the statute, that of wilful conduct, to which contributory negligence is not generally recognized as a defense.[131] According to this view the apportionment statutes would have no application. In other jurisdictions,[132] gross negligence is merely a species or degree of negligence that differs in kind from wilful and wanton conduct. Here there are two separate types of conduct that may bar recovery under a guest statute such as that in effect in Wyoming. When the action is based on gross negligence, as a mere degree of negligence, and to which contributory negligence is a complete defense,[133] the apportionment statute would then be invoked and the fault of both parties divided.

The Wyoming Supreme Court has refused to follow the lead of Michigan and has held that gross negligence and wilful and wanton conduct are two different concepts.[134] Gross negligence, according to one decision, may consist of a "series of acts of ordinary negligence."[135] It is "something less than willful, wanton, and reckless conduct,"[136] differing from "ordinary" negligence in "degree of inattention and in kind from willful and intentional conduct which is or should be known to have tendency to injure."[137]

From these findings the following conclusions can safely be made. Prior to the adoption of comparative negligence in this state, an injured guest who attempted to recover under the

130. Posey v. Krogh, 65 N.D. 490, 259 N.W. 757 (1934); Brown v. Roach, 67 So. 2d 201 (Fla. 1953); Keehn v. Braubach, 307 Ill. App. 339, 30 N.E.2d 156, 164 (1940).
131. PROSSER, TORTS § 65, at 426 (4th ed. 1971).
132. Alspaugh v. Diggs, 195 Va. 1, 77 S.E.2d 362, 364 (1953); Shaw v. Moore, 104 Vt. 529, 162 A. 373, 374 (1932); Altman v. Aronson, 231 Mass. 588, 121 N.E. 505, 506 (1919); Thorsness v. Woltmann, 198 Minn. 270, 269 N.W. 637 (1936).
133. *Supra* note 131.
134. Mitchell v. Walters, 55 Wyo. 317, 100 P.2d 102, 108 (1940). The court felt that if only one type of conduct had been contemplated by the legislature, it would have described only one type of conduct: "The obvious query suggests itself that as the terms 'gross negligence' and 'wilful and wanton misconduct' both appear in the statute in the disjunctive—why the legislative body should have used both phrases if the first was intended to mean the same as the last." *Id.*
135. Krahn v. LaMeres, 483 P.2d 522, 525 (Wyo. 1971), *affirmed in* Brown v. Riner, 500 P.2d 524, 528 (Wyo. 1972).
136. *Supra* note 128, at 107.
137. *Id.*

Guest Statute could be defeated in one of two ways: (1) he could fail to carry his burden of proof, that is to say, he may not be able to prove that his host was grossly negligent or guilty of wilful and wanton conduct; (2) the host, if grossly negligent, could prove him contributorily negligent. In either event, the guest recovered nothing. With the adoption of the new apportionment statute this second impediment is now removed, and contributory negligence is no longer an absolute bar when defendant is proven grossly negligent. But the apportionment statute does not operate at all if the host is guilty of wilful and wanton misconduct, and it does nothing to alter the plaintiff's burden of proof. The fault of the two parties cannot be apportioned unless the plaintiff first proves his host guilty of gross negligence.

D. Res Ipsa Loquiter

The doctrine of res ipsa loquiter, according to a recent Wyoming case,[138] is limited to situations where a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care. According to this pronouncement of the rule, if the plaintiff is found to be contributorily negligent, he cannot avail himself of res ipsa loquiter. In Wisconsin, however, where a similar statement of res ipsa loquiter prevails, the court has held that freedom from contributory negligence is no longer a requirement for the application of the rule under comparative negligence principles, and that if the defendant is found negligent, plaintiff's contributory negligence, if any, goes to the question of the comparison of negligence as between the plaintiff and defendant.[139] The doctrine will be barred only if the percentage of plaintiff's negligence is as great or greater than that of the defendant. Hence, as a result of the new apportionment statute, the elements of res ipsa loquiter in Wyoming are reduced to two: (1) the injury must be such as in the

138. Hall v. Cody Gas Co., 477 P.2d 585 (Wyo. 1970).

139. Turk v. H.C. Prange Co., 18 Wis. 2d 547, 119 N.W.2d 365, 372: "However, in view of Wisconsin's comparative negligence statute . . . it is more logical to hold that in Wisconsin contributory negligence on the part of [the plaintiff] should not be an absolute bar to her reliance on *res ipsa loquiter*."

ordinary course of things would not occur in the absence of negligence; and (2) the cause of the accident was an agency or instrumentality within the exclusive control of the defendant. The deletion of this third requirement, that plaintiff be free from fault, has found general support among the commentators.[140]

E. Pleading and Burden of Proof

In Wyoming the defendant must plead contributory negligence as an affirmative defense[141]—the burden of proof for such defense is on the one who asserts it. If not pleaded it is waived,[142] unless the plaintiff fails to object to proffered evidence,[143] or the issue is tried by the express consent of the parties.[144] The new apportionment statute has no effect on these rules of pleading. Since comparative negligence is but a statutory refinement of the affirmative defense of contributory negligence, plaintiff need not plead freedom from nor a lesser degree of negligence than defendant to state a claim. The rule remains that a claiming party need not anticipate a defense in his pleading. However, since the apportionment statute operates either to reduce the damages awarded to the plaintiff, or to preclude his recovery entirely if he is more negligent than the defendant, the defendant should plead in his answer either the preclusion or reduction of damages feature of comparative negligence in his answer.[145]

Neither will the burden of proof vary under the apportionment statute. Wisconsin has held defendant's burden of proof to be that which will convince the jury beyond a reasonable doubt by a fair preponderance of the evidence that plaintiff was negligent, and that such negligence was equal to or greater than the defendant's.[146] The plaintiff must still show the amount of damages, but the defendant must show that the plaintiff's action should be defeated or his damages diminished on account of plaintiff's negligence.

140. Ghiandi, 39 MARQUETTE L. REV. 361, 374 (1955-56).
141. WYO. R. CIV. P. 8(c).
142. WYO. R. CIV. P. 12(h) (2).
143. Porter v. Wilson, 357 P.2d 309 (Wyo. 1960).
144. WYO. R. CIV. P. 15(b).
145. Laugesen, *Colorado Comparative Negligence*, 48 DEN. L.J. 469, 487 (1972).
146. Gauthier v. Carbonneau, 226 Wis. 527, 277 N.W. 135 (1938).

## IV. CONCLUSION

The commendable efforts of the Wyoming legislature in its recent adoption of comparative negligence legislation will have a substantial impact on Wyoming tort law. The determination of liability no longer hinges on whether the plaintiff is free from all fault. Rather, liability is established by determining who is guilty of the greater negligence. If one of two negligent parties attempts to recover his losses, a comparison of their negligence is made, and if the plaintiff's negligence is not equal to or greater than the defendant's, a recovery is allowed, reduced in proportion to the plaintiff's negligence. The jury makes the comparison, by means of the special verdict, if requested, but does not know the result of its findings. The court does the mathematics and renders judgment for the reduced amount.

Since the statute prescribes only the mechanics of the rule, questions arising from its actual operation in Wyoming must necessarily await judicial resolution as they arise. Statutory silence on problems concerning multiple defendants, for example, and the affect of the statute on related doctrines of tort law, will be of particular concern to the practitioner who must now try a negligence case in a new legal environment. Although acceptance of the doctrine of comparative negligence is certainly a welcome change from the old common law rule of contributory negligence, the transition may prove to be an uncomfortable one until such time as answers are provided to these and other questions by the courts, and preferably the legislature. Hopefully, resort to the experience of other comparative negligence jurisdictions, combined with an intuitive feel for workable results, will expedite the spirit and purpose of Wyoming's new apportionment statute.

GLENN E. SMITH