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Fransen: Comparative Negligence Practice in Wyoming
**COMPARATIVE NEGLIGENCE PRACTICE
IN WYOMING**

I. INTRODUCTION

The Wyoming legislature initiated a new era in tort law in Wyoming in 1973. Statutes were enacted in that year that set up a system of comparative negligence in Wyoming.¹ The statutes set out the principle of comparative negligence and provided for a system of contribution among those found jointly liable in tort.² The effect of a settlement negotiated by one or more potentially liable parties was also defined by the new statutes.³ Dissatisfaction with the provisions relating to contribution and settlement led to substantial changes in those provisions in 1977.⁴ The basic rule of comparative negligence has, however, remained unchanged since 1973.⁵

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1. 1973 WYO. SESS. LAWS Ch. 67, § 1. For historical material relating to the 1973 enactments, see Comment, *Comparative Negligence in Wyoming*, 8 LAND & WATER L. REV. 597 (1973); Comment, *Wyoming Contribution Among Joint Tortfeasors*, 9 LAND & WATER L. REV. 589 (1974).

2. WYO. STAT. §§ 1-7.2 to -7.4 (Supp. 1975).

3. WYO. STAT. §§ 1-7.5 to -7.6 (Supp. 1975).

4. 1977 WYO. SESS. LAWS Ch. 188, § 1. The current statutes, found at WYO. STAT. §§ 1-1-110 to -113 (1977), provide:

§ 1-1-110. Right to contribution among joint tortfeasors.

(a) Except as otherwise provided in W.S. 1-1-110 through 1-1-113, where two (2) or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against any or all of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally, willfully or wantonly caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of an insured tortfeasor and has discharged in full its obligation as insurer, is subrogated to the insured tortfeasor's right of contribution to the extent of the amount it has paid in excess of the insured tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of the subrogation arising from any other relationship.

(f) W.S. 1-1-110 through 1-1-113 do not impair any right of indemnity under existing law. Where one (1) tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) W.S. 1-1-110 through 1-1-113 do not apply to breaches of trust or of other fiduciary obligation.

(h) W.S. 1-1-110 through 1-1-113 do not affect 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. The recovery of a judgment by the injured person against one (1) joint tortfeasor does not discharge the other joint tortfeasors, from liability to the injured party.

§ 1-1-111. Pro rata shares.

In determining the pro rata shares of tortfeasors in the entire liability:

(i) The relative degrees of fault of the joint tortfeasors shall be considered in determining their 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;

(ii) If equity requires, the collective liability of some as a group shall constitute a single share;

(iii) A final verdict in favor of an alleged joint tortfeasor as against the injured party shall be a conclusive determination that such successful party is not liable to make contribution to any other tortfeasor.

§ 1-1-112. Enforcement.

(a) Whether or not judgment has been entered in an action against two (2) or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two (2) or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one (1) against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution shall be commenced within one (1) year after the judgment has become final by lapse of time for appeal or the decision on appeal has become final.

(d) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either:

(i) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one (1) year after payment; or

(ii) Agreed while action is pending against him to discharge the common liability and has within one (1) year after the agreement paid the liability and commenced his action for contribution.

(e) The recovery of a judgment for an injury or wrongful death against one (1) tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(f) The judgment determining the liability of the several defendants to the claimant for an injury or wrongful death is binding as among defendants in determining their right to contribution.

§ 1-1-113. Release or covenant not to sue.

(a) When a release or a covenant not to sue or not to enforce judgment is given in good faith to one (1) of two (2) or more persons liable in tort for the same injury or wrongful death:

(i) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(ii) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

5. WYO. STAT. § 1-1-109 (1977). This section was amended in 1977 to add subsection (b)(iii) which provides for juries in comparative negligence cases to be informed of the consequences of their determinations of negligence. 1977 WYO. SESS. LAWS Ch. 188, § 1. The statute presently provides:

(a) Contributory negligence shall not bar a 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 the contributory negligence was not as great as the negligence of the person against whom recovery is sought. Any

The adoption of comparative negligence serves its most important purpose in suspending the common law rule that a plaintiff's contributory negligence, no matter how slight, completely bars any recovery based on a cause of action in tort. Under the Wyoming rule of comparative negligence the plaintiff can recover from any defendant who is more negligent than himself.⁶ In the simple one plaintiff, one defendant case the rule is easily applied and the results are straightforward. If the jury determines that both parties were negligent, the total negligence is simply assigned to each party on a percentage basis. Whether the plaintiff will recover and how much he will recover are determined by the jury's allocation of negligence. If the percentage of negligence assigned to the plaintiff is equal to or greater than the percentage assigned to the defendant, the plaintiff will recover nothing.⁷ The plaintiff will recover when his negligence is found to be less than the negligence of the defendant, but the recovery is reduced by the amount of the plaintiff's negligence. Thus, if the plaintiff is assigned 49% of the causal negligence and the defendant is assigned 51%, the plaintiff will recover only 51% of the amount of his damages.⁸ Comparative negligence in the two party case is an uncomplicated, intuitively fair scheme.

Unfortunately, many, and perhaps most, tort actions involve more than two parties. When multiple plaintiffs seek to recover from multiple defendants and counterclaims and cross-claims are filed, determining whose negligence to compare can be difficult. Further complications arise when it is necessary to

damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.

(b) The court may, and when requested by any party shall:

- (i) If a jury trial, direct the jury to find special verdicts;
- (ii) If a trial before the court without jury, make special findings of fact, determining the amount of damages and the percentage of negligence attributable to each party. The court shall then reduce the amount of such damages in proportion to the amount of negligence attributed to the person recovering;
- (iii) Inform the jury of the consequences of its determination of the percentage of negligence.

6. WYO. STAT. § 1-1-109(a) (1977) provides in pertinent part:

(a) Contributory negligence shall not bar a recovery . . . if the contributory negligence was *not as great as* the negligence of the person against whom recovery is sought

(emphasis added).

Notice that this language prohibits recovery where the plaintiff's negligence is equal to that of the defendant.

7. WYO. STAT. § 1-1-109(a) (1977).

8. *Brittain v. Booth*, 601 P.2d 532, 533 (Wyo. 1979).

determine the respective parties' rights to contribution and the effect a settlement may have on the rights of non-settling parties. As if that weren't enough, the application of the rule of comparative negligence is also affected by, and affects the validity of, such tort concepts as last clear chance, obvious danger and vicarious liability.

This comment will address problems related to multiple parties, contribution, settlement, and certain basic tort concepts, with particular reference to the law of Wyoming. In some areas, where Wyoming law is uncertain, the law of other states is looked to as a guide. Hopefully, the reader will be more enlightened than confused by this effort. The first endeavor will be to examine the workings of the basic machinery in a multiple party comparative negligence case.

II. MULTIPLE PARTIES

A. Basic Procedures

In any action involving multiple parties the initial problem which must be confronted is that of deciding whose negligence is to be compared, and upon what terms. Consider the least complex situation, in which a single plaintiff (P) sues two defendants (D_1 and D_2). Whether P may recover can be determined in two ways. The negligence of D_1 and D_2 can be combined and compared to P 's negligence⁹ or the negligence of D_1 and D_2 can be individually compared to P 's negligence. The latter method of comparison, known as the "Wisconsin Rule" has been adopted in Wyoming.¹⁰

The specific language of the Wyoming comparative negligence statute calls for a one-on-one comparison of the parties' negligence. The statute provides that recovery by "any person" is not barred so long as his contributory negligence is not as great as the negligence "of the person" against whom recovery is sought.¹¹

9. This approach is known as the "Arkansas Rule." Board of County Comm'rs v. Ridenour, 623 P.2d 1174, 1181 (Wyo. 1981), *reh'g denied*, 627 P.2d 163 (Wyo. 1981).

10. *Id.* at 1183. The first record of the application of the "Wisconsin Rule" under the Wyoming statutes appears in Global Van Lines, Inc. v. Nebeker, 541 F.2d 865, 867 (10th Cir. 1976).

11. Board of County Comm'rs v. Ridenour, 623 P.2d at 1138 (Wyo. 1981); WYO. STAT. § 1-1-109(a) (1977).

When the plaintiff's negligence is compared to that of each individual defendant, recovery is determined by the same criteria as in the two-party case discussed in the introduction. That is, the plaintiff may not recover against any individual defendant who is not more negligent than the plaintiff.¹² All defendants against whom the plaintiff is allowed to recover are jointly and severally liable for the plaintiff's damages.¹³ The amount of the plaintiff's recovery is in all cases reduced by the amount of his own negligence.¹⁴

The rule is easily illustrated by use of a hypothetical. Assume the following percentages of negligence: P -30%; D_1 -20%; D_2 -50%. The plaintiff can recover from D_2 only. D_1 incurs no liability since his negligence is less than P 's. D_2 is severally liable for P 's entire damages less 30%—the amount of P 's negligence. Notice that P 's recovery is never reduced by the amount of any other party's negligence. Rather, P 's recovery is reduced only by the amount of his own negligence.

Adding another plaintiff actually results in no significant increase in the complexity of the comparison process. The same rules apply and each plaintiff's negligence is compared to that of the other parties individually to determine if he can recover. Comparisons are made with every party against whom a claim exists.¹⁵ As before, if a plaintiff can recover, he can recover his damages decreased by the percentge of *his own* negligence. His recovery is not diminished by the negligence of any other party, plaintiff or defendant.¹⁶

Once again, a hypothetical will help illustrate the procedure. Assume the following percentages of negligence: P_1 -25%, P_2 -15%, D_1 -35%, D_2 -25%. Both plaintiffs will recover. P_1 will recover his damages, reduced by 25%, from D_1 since P_1 is less negligent than D_1 . P_1 cannot recover from D_2 because P_1

12. Board of County Comm'rs v. Ridenour, 623 P.2d at 1189 (Wyo. 1981) (quoting Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721, 727-28 (1934)).

13. *Id.*; WYO. STAT. § 1-1-110(h) (1977). It should be noted that the hypothetical posed by the court in *Ridenour* describes the operation of the "Arkansas Rule" and as such is not a statement of the law in Wyoming. 623 P.2d at 1186.

14. Board of County Comm'rs v. Ridenour, 623 P.2d at 1189 (Wyo. 1981) (quoting Walker v. Kroger Grocery & Baking Co., 252 N.W. at 727-28 (1934)); WYO. STAT. § 1-1-109(a) (1977).

15. Board of County Comm'rs v. Ridenour, 623 P.2d at 1189 (Wyo. 1981) (quoting Walker v. Kroger Grocery & Baking, 252 N.W. at 727-28 (1934)).

16. *Id.*

is not less negligent than D_2 . P_2 will recover his damages, reduced by 15%, from D_1 and D_2 since P_2 is less negligent than either of them. There is no double recovery since P_2 will have a single judgment for which D_1 and D_2 will be jointly and severally liable.

Recovery on proper cross-claims or counterclaims is determined on the same basis as the original claims in the action.¹⁷ In the hypothetical above, P_2 would have a judgment against all three of the other parties to the action of he had cross-claimed against P_1 .

The rules discussed thus far are the very basic elements of the comparative negligence system in Wyoming. However, the hypotheticals are uniquely void of any real world complications and, as the reader has probably already observed, they depend upon some implicit assumptions. Every person causally negligent was assumed to be a party, and every party was assumed to be subject to liability as a matter of law if the comparison of negligence dictated liability. All of the parties were assumed to be causally negligent and finally, each party's damages were assumed to have been the result of the same negligent acts. We are now going to leave those assumptions behind and try to impose some order upon the jumble that is thereby created.

Understanding the discussion which follows may be less difficult if the reader conceptualizes the determination of the plaintiff's right to recover as a two-step process. First, negligence is apportioned among the proper individuals; second, negligence is compared to determine whether, against whom, and how much the plaintiff may recover. The first step will be referred to as "apportionment," the second as "comparison." Two other terms deserve attention at this point. "Party" is used in a strict sense to refer only to named parties to an action. Any person who is causally connected to the occurrence giving rise to the action, but who is not a party, will be referred to as a non-party actor or NPA.¹⁸

17. See *Global Van Lines, Inc. v. Nebeker*, 541 F.2d at 866-67 (10th Cir. 1976). Logically, any party to a comparative negligence action who has been injured does well to file any reasonable cross-claim or counterclaim on the chance that some other party will be found to be more negligent than he.

18. *ABC Builders, Inc. v. Phillips*, 632 P.2d 925, 934 n.9 (Wyo. 1981).

B. Non-parties and parties not liable

A non-party actor may not be joined for any of a number of reasons. He may have settled the plaintiff's claim against him, relieving him of any liability.¹⁹ He may be out of the jurisdiction or he may be unknown.²⁰ Finally, it may simply be that none of the parties wishes to join him in the action.²¹ Whatever the reason for his absence, the question presented is what to do with his possible negligence. The answer provided by the Wyoming Supreme Court is clear. "The jury must ascertain the percentage of negligence of *all* participants to an occurrence."²²

With respect to the non-party actor, the jury is placed in the difficult position of having to assign a percentage of negligence to a person who is not a party to the action, and who is not present in court. Of course, the non-party actor is not bound by the jury's determination of his degree of fault.²³ Neither does the non-party actor's negligence have any direct influence upon any party's ability to recover in the action. No comparison is made between any party's negligence and the negligence of the non-party actor because no recovery is sought from him. The non-party actor's negligence influences the parties' rights to recover indirectly, in that the non-party actor's negligence is considered in apportioning shares of causal negligence among the persons whose negligence caused the injury for which recovery is sought.²⁴ Logically, if a non-party actor has some responsibility for the injury and his negligence is not considered, the parties will somehow be assigned a certain amount of negligence above their fair share. Therefore, the non-party actor's negligence must be considered in order to achieve a fair apportionment of negligence.

Assume *P* brings an action against *D*₁ and *D*₂, and a third likely defendant, *NPA*, cannot be found. If the jury is to assign

19. Board of County Comm'rs v. Ridenour, 623 P.2d at 1192 n.14 (Wyo. 1981).

20. The unknown actor or so called "phantom driver" has been recognized in some jurisdictions. HEFT AND HEFT, COMPARATIVE NEGLIGENCE MANUAL, Appendix II (Supp. 1982). The question has not been addressed by the Wyoming Supreme Court.

21. Harris v. Grizzle, 599 P.2d 580, 585 (Wyo. 1977). *But see* Board of County Comm'rs v. Ridenour, 623 P.2d at 1192 n.14 (Wyo. 1981).

22. Board of County Comm'rs v. Ridenour, 623 P.2d at 1188 (Wyo. 1981) (emphasis added).

23. Palmeno v. Cashen, 627 P.2d 163, 166 (Wyo. 1981).

24. Board of County Comm'rs v. Ridenour, 623 P.2d at 1189 (Wyo. 1981).

100% of the negligence causing *P*'s injury, it must consider the negligence of *P*₁, *D*₁, *D*₂, and *NPA*. Suppose that negligence is apportioned: *P*-10%, *D*₁-15%, *D*₂-15%, and *NPA*-60%. *NPA*'s negligence does not affect the relationship among the parties for purposes of comparison. *P* will have a judgment against *D*₁ and *D*₂ for 90% of his damages. *NPA* is not bound by the outcome and has no liability to any party as a result of the action.

A situation analogous to that of the non-party actor arises when one of the parties to the action cannot, as a matter of law, be liable to one or more of the other parties. That party's percentage of negligence is considered by the jury in apportioning negligence, just as is the non-party actor's.²⁵

The rule is that the causal negligence of every person involved in the occurrence giving rise to an action is considered for the purpose of apportioning negligence, whether or not he is a party to the action or is immune from liability.

C. Causal Relationships

The most difficult problems in apportioning negligence occur when all of the parties to the action do not suffer damages as a result of the same causal negligence. The classic example of this problem is the "active and passive" negligence distinction.²⁶ This distinction typically arises in cases involving automobile drivers and passengers. A passenger in an automobile may be negligent with respect to his own safety if he consents to ride with an obviously intoxicated driver. But the passenger's negligence does not have any causal connection to the injuries received by another automobile driver with whom the intoxicated driver collides.²⁷ All three persons (the two drivers and the passenger) are injured in the same event, but not all of their injuries stem from the same cause. For that reason it is improper to simply assign each a percentage of negligence and compare their negligence to determine liability.²⁸ What must be done is to sort out the different causal relationships and make a separate apportionment of negligence for each.²⁹

25. *Beard v. Brown*, 616 P.2d 726, 738 (Wyo. 1980).

26. *Board of County Comm'rs v. Ridenour*, 623 P.2d at 1192 (Wyo. 1981).

27. *Id.* at 1191 (quoting *Vroman v. Kempke*, 34 Wis. 2d 680, 150 N.W.2d 423, 425-26 (1967)).

28. *Id.*

29. *Id.*

Assume that the passenger (P_1) and the sober driver (P_2) bring an action against the intoxicated driver (D). In order to determine whether P_1 can recover it is necessary to apportion negligence among P_2 and D (the two drivers) and P_1 himself since his negligence in consenting to a ride with D may have contributed to his injury. To determine whether P_2 can recover it is only necessary to apportion negligence between P_2 and D and compare their negligence, since P_1 's actions in no way contributed to the injury P_2 suffered in the collision with D . P_1 was an uninvolved bystander with respect to P_2 's injury.

A similar situation may arise where causation and the injury event are both distinct from, but closely related to, other causes and injuries. The fact situation in *Global Van Lines, Inc. v. Nebeker*³⁰ is illustrative. A cow was struck and killed by the driver of a semi-truck. The truck stopped, blocking the road, and was hit by a second truck. Assume that the driver of the second truck (P) sues the owner of the cow (D_1) and the driver of the first truck (D_2). All three parties are causally negligent with respect to P 's injury and negligence should be apportioned among them to determine P 's right to recover. Should D_1 seek to recover the loss of his cow, P 's negligence should not be considered since P in no way contributed to the loss of the cow. P 's involvement in the mishap occurred after the cow was struck. Therefore, D_1 's right to recover should be determined on the basis of a separate apportionment and comparison of negligence between D_1 and D_2 only.

The rule is that the negligence of parties to the action is not considered for the purpose of apportioning negligence unless the particular party's negligence has a causal connection to the injury upon which a particular claim is based.

D. Special Verdicts

Because of the complex nature of the findings necessary in comparative negligence cases, jury verdicts take the form of sets of interrogatories, which ask the jury to determine causa-

³⁰ 541 F.2d 865, 866 (10th Cir. 1976). The hypothetical differs from the actual facts of the case in that the owner of the cow (Nebeker) did not claim for the loss of his animal. *Id.*

tion, assign percentages of negligence, and award damages.³¹ Comparisons of the parties' negligence and reduction of the damages awarded on the basis of the plaintiff's negligence are left to the court, and are accomplished after the jury has made its findings.³²

The most crucial consideration in drafting special verdicts is minimizing the number of apportionments of negligence which must be made while allowing separate apportionments where they are dictated by causal relationships. Separate apportionments should depend upon causal relationships and not on the various claims among the parties. Causal relationships dictate which parties and non-parties should be included in a given apportionment of negligence.³³ Claims among the parties dictate which comparisons will be made by the court in molding a judgment.

The form of verdicts used in *Global Van Lines, Inc. v. Nebeker*,³⁴ although not challenged on appeal, gives a good example of how *not* to draft special verdicts. In that case the jury

31. The step verdict is favored in Wyoming. *Distad v. Cubin*, 633 P.2d 167, 179 n.10 (Wyo. 1981). The following is an example of a step verdict of the type appropriate in comparative negligence cases:

SPECIAL VERDICT

(1) Was Defendant negligent in the operation of his vehicle?

Yes _____ No _____

(2) Was Defendant's negligence a proximate cause of Plaintiff's injury?

Yes _____ No _____

If your answer to either question No. 1 or No. 2 is "NO", do not answer any further questions on this form. Inform the bailiff of your verdict.

(3) Was Plaintiff negligent in the operation of his vehicle?

Yes _____ No _____

(4) Was Plaintiff's negligence a proximate cause of his injury?

Yes _____ No _____

If your answer to either question No. 3 or No. 4 is "NO", proceed to question No. 6. Do not answer question No. 5.

(5) Of the negligence proximately causing Plaintiff's injury, what percentage do you attribute to:

Plaintiff _____
Defendant _____
Total 100%

If the negligence you have assigned to Plaintiff is *more than* 49% do not answer question No. 6. Inform the bailiff of your verdict.

(6) What amount of money will adequately compensate Plaintiff for his injury? Do not consider the negligence of the parties in determining this amount.

\$ _____

32. *Board of County Comm'rs v. Ridenour*, 623 P.2d at 1177-78 (Wyo. 1981).

33. *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 239 N.W.2d 190, 196 (1976). That case was cited for this proposition by the Wyoming Supreme Court in the *Ridenour* decision. 623 P.2d at 1190. However, the *Ridenour* court erroneously stated that *Ferguson* involved two defendants. *Id.* In fact, *Ferguson* involved two plaintiffs and a single defendant. 239 N.W.2d at 191-92.

34. 542 F.2d at 866-67 (10th Cir. 1976).

was asked to make separate apportionments of negligence with respect to each claiming party. The jury apportioned the negligence of the parties in five separate verdicts even though all of the injuries were causally related.³⁵ The resulting problems are instructive. The verdicts were (not unexpectedly) inconsistent. More significantly, the party who appealed the trial court's decision was denied his appeal partly because disturbing the verdict on his claim would have an unknown effect upon the other four verdicts rendered, since not all of the parties to those verdicts were present in the appeal. These problems could, and should, have been avoided at trial by allowing the jury to make a single apportionment of negligence among the parties, and then molding a judgment based upon that apportionment.³⁶

The rule is that causal relationships, and not claims among the parties, should dictate the number of apportionments required when drafting special verdict forms.

E. Rules Summarized

With all of the variables to consider in the cases discussed previously, the constants are difficult to isolate. Here are a few that appear to be important.

Comparisons are always one-on-one. Recovery is only allowed when the claimant is less negligent than the party from whom recovery is sought. The claimant's recovery is reduced by the amount of his own negligence but no one else's; therefore, if a party is liable, he is liable for the whole of the claimant's damages reduced by the claimant's own negligence. Causal negligence, and no other legal relationship, defines the parties among whom negligence is apportioned. The existence of a legal claim determines which party's negligence is relevant for purposes of comparison. Finally, a non-party actor's negligence is relevant for no purpose other than the apportionment of negligence.

35. *Id.*

36. See also *Beard v. Brown*, 616 P.2d at 737-38 (Wyo. 1980) (two comparisons made where one would have been sufficient).

F. Exceptions to the Rules

If you're gonna have rules, you gotta have exceptions. Right? Right!

Although it may be only broadly termed an exception, it is well to note that the rule of one-on-one comparison to determine recovery has not displaced the agency principle of *respondeat superior*. Therefore, if two defendants are employer and employee their negligence may be considered together for purposes of determining the plaintiff's right to recover.³⁷ In the unusual case, an employee may wear more than one hat and as a result may have some negligence assigned to him which is not imputed to his employer.³⁸

Relationships other than employer-employee can result in one party's negligence being imputed to another. Two such relationships, those of joint economic adventurers and automobile driver and passenger-owner, were discussed briefly by the Wyoming Supreme Court in *Palmeno v. Cashen*.³⁹ Although the question was not directly addressed, it appears that if the common law would dictate that the negligence of one party be imputed to another in those circumstances, the parties' negligence would be considered together for the purpose of comparison in a comparative negligence case. Minnesota has held that the negligence of joint economic adventurers should be combined for the purpose of comparison.⁴⁰

In another context, Wisconsin has held, in at least two instances, that the special relationship between married plaintiffs may affect the way the rules of comparative negligence apply. In *Reber v. Hanson*,⁴¹ the negligence of a husband and wife was combined for the purpose of determining whether they could recover for the wrongful death of their infant child. The court held that "the duty to protect was joint, the oppor-

37. See *Combined Ins. Co. of Am. v. Sinclair*, 584 P.2d 1034, 1042 (Wyo. 1978); *McGowan v. Story*, 70 Wis. 2d 189, 234 N.W.2d 325, 331-32 (1975).

38. *Lametti v. Peter Lametti Constr. Co.*, 305 Minn. 72, 232 N.W.2d 435, 440 (1975). Lametti owned land upon which the construction company was doing development work. Lametti was principle shareholder and also an employee of the construction company. Part of Lametti's negligence was imputed to the construction company while some was attributed to Lametti alone as owner of the land where the injury occurred. *Id.*

39. 627 P.2d 163, 166-67 (Wyo. 1981).

40. *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 203 N.W.2d 841, 846-47 (1973).

41. 260 Wis. 682, 51 N.W.2d 505 (1952).

tunity to protect was equal, and as a matter of law neither the obligation nor the breach of it was divisible."⁴²

In *White v. Lunder*⁴³ the plaintiffs were also husband and wife. The wife was injured in a boating accident and sued to recover for her injuries. The husband sought to recover for medical expenses paid and for loss of society. The court allowed an individual comparison of the two plaintiffs' negligence with that of the defendant for purposes of determining the right to recover, but reduced the amount of the husband's recovery by the combined negligence of the husband and wife rather than by the husband's negligence alone. The court deemed this approach proper because the husband's cause of action was derivative. That is, the existence of the husband's cause of action was wholly dependent upon the existence of the wife's cause of action. The viability of this holding is doubtful, however, since there are overtones of an attempt to avoid an unfair result in the decision, and the court acknowledges confusion in the precedents cited in the case.

In sum, the most likely candidates for exceptions to the general comparative negligence rules are those cases in which agency principles dictate considering the acts of individual parties to be done by a single entity. The probability of an exception being made is increased where equity would be served by the exception.⁴⁴

III. CONTRIBUTION

The reader will recall that when a recovery is had against multiple defendants under the Wyoming comparative negligence statute, each defendant is held jointly and severally liable for the entire judgment. A single defendant may then have to satisfy the whole judgment. The contribution statutes provide a method for equitable distribution of the burden of the judgment by creating a cause of action, against his fellow tortfeasors, in favor of one who pays more than his share of the judgment.⁴⁵

42. *Id.*, 51 N.W.2d at 508.

43. 66 Wis. 563, 225 N.W.2d 442 (1975).

44. See WYO. STAT. § 1-1-111(a)(ii) (1977) (allows negligence to be combined where equity requires for purposes of contribution).

45. WYO. STAT. § 1-1-110(b) (1977).

The right exists against one who is a tortfeasor and the Wyoming Supreme Court has defined "tortfeasor" as one who is liable in tort.⁴⁶ Therefore, a defendant whose negligence is not greater than the plaintiff's is not liable, is not a tortfeasor, and he may not be held liable for contribution. Similarly, an employer or employee who cannot be held liable because of workman's compensation immunity cannot be held liable for contribution.⁴⁷

Note that although one found not liable to the injured party as a matter of law can not be held liable for contribution, the converse is not true. One need not be found liable to the injured party to be held liable for contribution. The contribution statutes provide that a defendant who satisfies a judgment will have a cause of action for contribution against non-party actors and that he may bring a separate action to recover contribution.⁴⁸ The non-party actor may be found liable for contribution in a separate action without ever incurring a legal liability to the original plaintiff in the action. A similar situation may arise where one party settles the whole of the plaintiff's claim against all of the named defendants. The issue of liability to the original plaintiff may never be tried at all in an action where he is a party.⁴⁹ This situation will be discussed in more detail in the section on settlements *infra*.

The Wyoming contribution statutes are generally comparable to the provisions of the 1955 Uniform Contribution Act,⁵⁰ with one significant exception. The section of the Wyoming Act that provides for the method of determining tortfeasors' pro rata shares for purposes of contribution adopts percentage contribution.⁵¹ The statute provides that

46. ABC Builders, Inc. v. Phillips, 632 P.2d at 934 (Wyo. 1981).

47. Shields v. Bechtel Power Corp., 439 F. Supp. 192, 194-95 (D. Wyo. 1077); Cottonwood Steel Corp. v. Hansen, 655 P.2d 1226, 1235-37 (Wyo. 1982).

48. WYO. STAT. § 1-1-112(a) (1977); Maloney Concrete Co. v. D.C. Transit Sys., Inc., 241 Md. 420, 216 A.2d 895 & 1966).

49. WYO. STAT. § 1-1-112(d) (1977). See Cottonwood Steel Corp. v. Hansen, 655 P.2d 1226 (Wyo. 1982); Lametti v. Peter Lametti Constr. Co., 232 N.W.2d 435 (1975).

50. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1975).

51. WYO. STAT. § 1-1-111(a)(1) (1977). No complicated mathematics are needed to determine the dollar amounts of the pro rata shares. Simply taking each defendant's percentage of negligence times the dollar amount of the total damages before reduction by the plaintiff's negligence gives the correct dollar amount of the defendants' liability for contribution. Assume the following apportionment of negligence: P-10%; D₁-35%; D₂-55%. Also assume P's total damages before reduction are \$23,000.

P's recovery = \$23,000 - (\$23,000 × .10) = \$20,700

each tortfeasor will be liable for contribution in an amount based upon his relative degree of negligence in causing the injuries which were sued upon in the original action.⁵² This change from the provisions of the uniform act is important in those cases where the plaintiff in an action against multiple defendants is found not negligent as a matter of law. Since the plaintiff is not negligent, comparative negligence is not at issue, but because the defendant's rights to contribution depend upon their relative degrees of fault, the jury must still apportion negligence among the defendants.⁵³ In this context negligence must be apportioned even though no comparison is necessary to determine recovery by the plaintiff.

Tortfeasors have a right to contribution only for that amount which they have actually paid out in excess of their pro rata share of the judgment.⁵⁴ The individual's liability for contribution cannot exceed his share of the judgment.⁵⁵ There is no right to contribution in favor of one who has been found to have acted willfully or wantonly in causing the plaintiff's injuries.⁵⁶ Therefore, there can be no right to contribution for punitive damages. If a separate action is brought to enforce contribution, that action must be brought within one year after the judgment in the original tort action becomes final.⁵⁷ Contribution will not apply where one defendant has a recognized right to indemnity from the other.⁵⁸

Finally, it should not be overlooked that contribution may be enforced against parties in the original action by judgment,

$$D_1\text{'s pro rata share} = \$23,000 \times .35 = \$8,050$$

$$D_2\text{'s pro rata share} = \$23,000 \times .55 = \$12,650$$

The same figures result if the defendants' pro rata shares are calculated as a fraction of the plaintiff's recovery.

$$D_1\text{'s pro rata share} = 35/90 \times \$20,700 = \$8,050$$

$$D_2\text{'s pro rata share} = 55/90 \times \$20,700 = \$12,650$$

52. WYO. STAT. § 1-1-111(a)(i) (1977).

53. Chrysler Corp. v. Todorovich, 580 P.2d 1123, 1127 (Wyo. 1978).

54. WYO. STAT. § 1-1-110(b) (1977).

55. WYO. STAT. § 1-1-110(b) (1977).

56. WYO. STAT. § 1-1-110(c) (1977).

57. WYO. STAT. § 1-1-112(c) (1977).

58. WYO. STAT. § 1-1-110(f) (1977). Indemnity is a right to reimbursement for the whole of the judgment amount which arises out of contract or some special relationship between the indemnitor and indemnitee. Contribution is a right only to a share of the judgment amount which occurs by virtue of one defendant having paid another defendant's share in the judgment. The right to contribution did not prevail at common law. PROSSER, LAW OF TORTS §§ 50, 51 (4th ed. 1971).

following motion and notice to all parties.⁵⁹ This gives the defendant, who believes he should not be solely liable to the plaintiff, a powerful incentive to join other defendants. He can then enforce his right to contribution without the expense, delay, and uncertainty of a separate action.

A hypothetical may be useful in bringing all of this into perspective. Assume that *P* sues *D*₁, *D*₂ and *D*₃. A fourth person, *NPA*, is not named as a defendant. The jury apportions negligence as follows: *P*-10%, *D*₁-5%, *D*₂-20%, *D*₃-20%, and *NPA*-45%.

Since *D*₁ is not liable to *P* as a matter of law, no other defendant can have a right of contribution against him. *D*₂ and *D*₃ should move for cross judgments in the original action, based upon their respective rights to contribution from each other. If *D*₂ satisfies the judgment, he can recover an amount equal to *D*₃'s share of the liability from *D*₃. *D*₂ must then bring a separate action against *NPA* to recover contribution from him. Since *NPA* was not a party to the original action, he is not bound by the percentage of negligence assigned him in that action. To determine *NPA*'s liability for contribution, the jury in *D*₂'s action against *NPA* will have to apportion negligence among *NPA* and the parties to the original action. *NPA* will then be liable to *D*₂ for contribution based upon the percentage of negligence assigned to *NPA* in the second action. Since *D*₂'s right to contribution is limited to the amount over his share which he has paid to satisfy the original judgment, *NPA* cannot be liable for any amount greater than that which *D*₂ has paid out above his pro rata share. *NPA* may, however, be liable for a lesser amount, since he is not bound by the outcome of the first action. The second action determines only *NPA*'s liability to *D*₂. Collateral estoppel precludes the relitigation of other issues which were determined in the original action by *P* against *D*₁, *D*₂, and *D*₃.

But, the reader may ask, "What would happen if *NPA* wasn't a party to the first action because he had settled with *P*?" That burning question is considered in the next section.

59. WYO. STAT. § 1-1-112(b) (1977).

IV. SETTLEMENT

The entire thrust of the statutes relating to settlements is to encourage settlement. Advantages to the settling party are maximized; disadvantages to the plaintiff are minimized.

The party who settles is unconditionally relieved of all liability for contribution to any other tortfeasor.⁶⁰ But, if the settlement extinguishes the liability of the other tortfeasors, the settlor retains a right to contribution from the non-settling tortfeasors.⁶¹ The release reduces the claim against the non-settling tortfeasors to the extent provided in the release or in the amount paid for it, *whichever is greater*.⁶² Therefore, if the amount paid for the settlement is greater than the judgment eventually received, the judgment will always be satisfied by the settlement. The settling party cannot be placed in the position of having satisfied the entire judgment but of having no right to contribution because he was credited only with having satisfied his pro rata share under the terms of the settlement. The settling party cannot, however, recover excessive amounts paid for the settlement.⁶³

If the judgment is satisfied by the amount paid for the settlement, i.e., reduced to zero by the amount of consideration paid for the release, the settling party must bring his action for contribution under the terms, and within the limitations, of section 1-1-112(d) of the Wyoming Statutes.⁶⁴ The action for contribution may be brought against both parties and non-parties to the original action.⁶⁵

As regards the plaintiff, the settlement will not discharge anyone other than the tortfeasor to whom it is given unless its terms so provide.⁶⁶ Proper drafting will insure that the plain-

60. WYO. STAT. § 1-1-113(a)(ii) (1977).

61. WYO. STAT. § 1-1-110(d) (1977); WYO. STAT. § 1-1-112(d) (1977). For differing views on whether satisfaction of a judgment is extinguishment of liability for purposes of section 1-1-110(d), see *Mong v. Hershberger*, 200 Pa. Super. 68, 186 A.2d 427 (1962), and *Best Sanitary Dist. Co. v. Little Food Town, Inc.*, 339 So.2d 222 (Fla. 1976). The issue has not been decided in Wyoming. However, the equitable purpose of the contribution statutes is best served if satisfaction of a judgment is considered to be the equivalent of extinguishing liability. The hypothetical used by this author to illustrate the effect of a settlement assumes this approach.

62. WYO. STAT. § 1-1-113(a)(i) (1977).

63. WYO. STAT. § 1-1-110(d) (1977).

64. WYO. STAT. § 1-1-112(d) (1977).

65. WYO. STAT. § 1-1-112(e) (1977).

66. WYO. STAT. § 1-1-113(a)(i) (1977).

tiff's claim against the other defendants in his action will never be reduced by an amount greater than that he receives for the settlement.⁶⁷ Any amount the plaintiff receives over and above what his judgment ultimately is determined to be is the plaintiff's to keep. For the plaintiff, settlement has no hidden pitfalls other than the usual unknowns and undeterminables.

Once again, a hypothetical is in order. Assume *P* brings an action against *D*₁ and *D*₂. *D*₁ settles for \$15,000. The agreement provides only that *D*₁ is released from all liability for his pro rata share of *P*'s damages. *P* pursues his action against *D*₂ where *P*'s damages are determined to be \$10,000. The judgment, reduced by the greater of *D*₁'s pro rata share or \$15,000, is reduced to zero. Since *D*₁ has satisfied the judgment he can bring an action against *D*₂ for contribution. *D*₂'s liability is limited to the lesser of his pro rata share as determined in the first action (his maximum liability for contribution) and *D*₁'s pro rata share as determined in the second action (*D*₁'s maximum right to contribution).

If the release obtained by *D*₁ had also released *D*₂, so that *P* had given up his whole cause of action, *D*₁ could still bring an action for contribution against *D*₂. The jury in that action would apportion negligence among *P*, *D*₁ and *D*₂, and *D*₂ would be liable to *D*₁ for contribution in the amount of his (*D*₂'s) pro rata share of the settlement. This may seem unfair, but in practice *D*₂ is likely to fare better in an action by *D*₁ than in an action by *P*. *D*₁ has, for practical purposes, obtained a right of subrogation to *P*'s cause of action, but the amount *D*₁ may recover is limited by the amount of the settlement. Further, *D*₂ may be better able to defend an action brought by *D*₁ than he could an action brought by the injured plaintiff. The jury is less likely to be influenced by a desire to dole out compensation when neither party has been injured by another's negligence.

67. This construction of the statute gives the plaintiff a good deal of flexibility in structuring his lawsuit. Given the right circumstances, he can, if he chooses, place the defendants in approximately the same position they would have been in under the common law. The plaintiff can maintain his action against the defendant of his choice and obtain a full recovery, while relieving other defendants of all liability through the giving of a settlement.

Although this seems to be a significant and perhaps unfair advantage for the plaintiff, in practice there is no advantage in the great majority of cases. The plaintiff can be expected to make a *bona fide* effort to recover from every defendant, except in unusual cases such as those in which a potential defendant is a member of the plaintiff's immediate family.

Finally, a note of caution is appropriate with regard to the interpretation of the Wyoming statutes on contribution and, especially, settlement. As was mentioned earlier, the contribution and settlement statutes underwent significant changes in 1977.⁶⁸ Since the 1977 amendment had no retroactive effect, cases involving causes of action that arose prior to the amendment's effective date are of little precedential value in interpreting the current statutes.⁶⁹ In fact, cases applying to the pre-amendment statutes may be misleading in some instances.⁷⁰

V. COMPARATIVE NEGLIGENCE AND TORT CONCEPTS

A. *Traditional Affirmative Defenses*

The affirmative defenses of contributory negligence and last clear chance were dispatched from Wyoming tort law in short order following the adoption of comparative negligence. The Wyoming courts had never recognized a difference between the two defenses, and since contributory negligence was replaced by comparative negligence by the terms of the statute, assumption of risk was *a fortiori* also replaced.⁷¹ The doctrine of last clear chance followed without fanfare⁷² and it appeared that affirmative defenses other than comparative negligence were to be a thing of the past in Wyoming. But the next likely candidate for interment with the other old defenses proved to have a surprisingly good grip on life.

In *Sherman v. Platte County*⁷³ the Wyoming Supreme Court held that the obvious danger rule would continue as a complete bar to the plaintiff's recovery in tort actions. The court distinguished obvious danger from assumption of risk, stating that the obvious danger rule goes only to the defendant's duty and does not concern the plaintiff's negligence.⁷⁴ The court reasoned that since obvious danger operates by

68. 1977 WYO. SESS. LAWS Ch. 188, § 1.

69. Board of County Comm'rs v. Ridenour, 623 P.2d at 1193-94 (Wyo. 1981) (Thomas, J., dissenting); Johnson v. Safeway Stores, Inc., 568 P.2d 908 (Wyo. 1977).

70. Board of County Comm'rs v. Ridenour, 623 P.2d at 1177 (Wyo. 1981), is especially confusing in this regard since the supreme court relates the trial court's interpretation of WYO. STAT. § 1-7.5 (Supp. 1975), but cites the new section WYO. STAT. § 1-1-113 (1977).

71. Barnette v. Doyle, 622 P.2d 1349, 1361 (Wyo. 1981); Brittain v. Booth, 601 P.2d at 534 (Wyo. 1979).

72. Danculovich v. Brown, 593 P.2d 187, 195 (Wyo. 1979).

73. 642 P.2d 787 (Wyo. 1982).

74. *Id.* at 789-90.

relieving the defendant of any duty (and therefore negligence) and not, as does assumption of risk, by placing fault with the plaintiff, comparative negligence does not replace the obvious danger defense. The distinction is a difficult one, and the two doctrines (obvious danger and assumption of risk) blend quite nicely at their edges.⁷⁵ A situation in which the injured party willingly encounters a known hazard might, without more, fit within either defense. As a practical matter, what distinguishes assumption of risk and obvious danger is the defendant's status in the latter case as a possessor or occupier of land. The Wyoming Supreme Court, by preserving the obvious danger rule, has simply continued the protection which that rule has traditionally afforded landowners under the common law. The availability of the defense should not be overlooked by defense counsel.⁷⁶ Presumably, obvious danger ought to be specially pleaded apart from the defense of comparative negligence, while those defenses that have been merged into comparative negligence need not be pleaded separately from comparative negligence.

B. Gross Negligence

For purposes of most tort actions, gross negligence no longer exists in Wyoming. At common law a plaintiff's contributory negligence would bar recovery when the defendant was grossly negligent.⁷⁷ Gross negligence differs only in degree, and not in kind, from ordinary negligence; therefore, it may be compared with the ordinary negligence of another party under the comparative negligence statute.⁷⁸ Since comparison is possible there is no need to distinguish gross negligence.⁷⁹

In a rather interesting extension of this reasoning the Wyoming Supreme Court has held that contract provisions limiting liability to acts constituting gross negligence are void as against public policy. In *Tate v. Mountain States Telephone*

75. RESTATEMENT (SECOND) OF TORTS §§ 343A, 463 (1965); Note, *Assumption of Risk and the Obvious Danger Rule. Primary or Secondary Assumption of Risk?* 18 LAND & WATER L. REV. 373 (1983).

76. See *Buttrey Food Stores Div. v. Coulson*, 620 P.2d 549 (Wyo. 1980) (earlier case in which the obvious danger defense might have been appropriate but was apparently not raised).

77. PROSSER, *supra* note 58, § 65.

78. *Danculovich v. Brown*, 593 P.2d at 192-93 (Wyo. 1979).

79. *Id.*

and *Telegraph Company*,⁸⁰ the court reasoned that the legislature, by enacting the comparative negligence statute, had expressed an intent to have negligence compared in all actions where contributory negligence was alleged. That intent is frustrated by contract provisions that allow comparison only when the jury finds gross negligence on the part of the defendant.⁸¹ The court construed such a provision to be an attempt to change the policy set by the legislature for determining the existence of liability, rather than an attempt to limit liability.⁸² The court did not elaborate on the basis for the distinction, although to do so would certainly have been helpful. It would seem that an attempt by a private party to set a standard for determining the existence of liability is, in fact, an attempt to limit liability. The distinction is semantic only.

The *Tate* decision will undoubtedly cause discomfiture among those who draft contracts. The holding places draftsmen in an all-or-nothing situation when attempting to limit liability for negligence. As a practical matter the alternatives will be to disclaim all liability for any negligent act, i.e. accept liability only for willful misconduct, or forego completely the attempt to limit liability. The first alternative is fraught with uncertainty with respect to its acceptance by the courts and the second yields no protection. An unnecessary burden is created on the freedom to contract. Perhaps skillful drafting can overcome the problem, at least in form. Whether the courts will then lend substance to the form is uncertain.

Gross negligence is of course alive and well, and given due recognition where the term appears in the statutes.⁸³ Since the use of the term in the statutes has the backing of legislative authority it is presumably irrelevant whether it limits liability or sets policy.

C. Willful Misconduct and Punitive Damages

Having dispensed with gross negligence, but not wishing to follow Wisconsin by also doing away with punitive damages in negligence cases, the Wyoming court determined to con-

80. 647 P.2d 58, 61 (Wyo. 1982).

81. *Id.*

82. *Id.*

83. *Danculovich v. Brown*, 593 P.2d at 192-93 n.6 (Wyo. 1979).

tinue to make punitive damages available in cases where willful and wanton misconduct was proved.⁸⁴ Willful and wanton misconduct has been preserved as a standard on the rationale that it is different in kind from ordinary or gross negligence.⁸⁵ A willful act is done intentionally (although the resulting injury might not be intended) when the act should not have been done, whereas a negligent act is done inadvertently.⁸⁶ Because of this difference in kind, damages resulting from willful misconduct are determined not to be "damages for negligence" as that term is used in the comparative negligence statute.⁸⁷ Therefore, when willful misconduct is proved, the comparative negligence statute does not apply and there is no reduction of the plaintiff's recovery on the basis of his negligence.⁸⁸

In more recent cases the court has discussed the procedure to be used when punitive damages are sought. In *Barnette v. Doyle* the court stated that the jury should first apportion negligence as is done in the usual comparative negligence case. If the defendant is determined to be more negligent than the plaintiff, the jury then determines whether the defendant's conduct was willful and wanton.⁸⁹ If that question is determined in favor of the plaintiff, he may recover punitive damages, and his compensatory damages are not reduced by his own negligence. This procedure dovetails nicely with the bifurcated punitive damages procedure prescribed in *Campen v. Stone*.⁹⁰ Under that procedure, compensatory damages are determined first and punitive damages second.

In an unusual case this procedure may work to the plaintiff's disadvantage. Apportioning negligence as the first step may bar the plaintiff's recovery even though the defendant's conduct was willful. This could happen when the defendant's willful misconduct is only remotely responsible for the plaintiff's injury. For practical purposes the plaintiff is denied a

84. *Id.* at 194 n.10. Wisconsin has since retreated from this position. *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 446 (1980).

85. *Danculovich v. Brown*, 593 P.2d at 193 (Wyo. 1979).

86. *Id.* (quoting *Mitchell v. Walters*, 55 Wyo. 317, 100 P.2d 102, 106-07 (1940)).

87. *Danculovich v. Brown*, 593 P.2d at 194 (Wyo. 1979).

88. *Id.*

89. 622 P.2d 1349, 1361-62 (Wyo. 1981).

90. 635 P.2d 1121, 1131-32 (Wyo. 1981).

recovery on the basis of a comparison between his ordinary negligence and the defendant's willful misconduct, even though such a comparison is eschewed by the courts. The better approach would be to first determine whether the defendant's conduct was willful. If it is, apportioning negligence can be avoided altogether. Determining the character of the defendant's conduct first does no harm in any case since the jury can later be allowed to apportion negligence if both parties' conduct constitutes only ordinary negligence.

Although the terms "gross negligence" and "willful misconduct" are easily distinguished, and their meanings and lineage are relatively clear, the legislature has, in at least one important context, chosen to forsake them in favor of a bastard child called "culpable negligence." Wyoming's workmen's compensation law⁹¹ provides that employees may sue fellow employees only if they are culpably negligent.

The supreme court has defined culpable negligence as "willful and serious misconduct."⁹² This would seem to make culpable negligence different in kind from ordinary negligence in the same way that willful and wanton misconduct is different in kind from ordinary negligence. Yet the court persists in using the "culpable negligence" terminology.⁹³ The nomenclature is confusing, and the issue has apparently not been raised, but it appears that culpable negligence is not negligence at all for purposes of comparative negligence. One culpably negligent should therefore be treated as one whose conduct was willful and wanton and should be liable for a plaintiff's entire damages regardless of the plaintiff's causal negligence.

D. Miscellaneous Matters

Finally, there are a few odds and ends that should be noted because they are potentially important and because completeness requires their mention. In comparative negligence actions summary judgments are not favored. However they are appropriate, as usual, where one party may be found not

91. WYO. STAT. § 27-12-103(a) (1977).

92. *Barnette v. Doyle*, 622 P.2d at 1362 (Wyo. 1981).

93. See *Meyer v. Kendig*, 641 P.2d 1235, 1238 (Wyo. 1982).

negligent or not liable as a matter of law.⁹⁴ Where one party, such as an employer protected by workmen's compensation, is granted summary judgment because he may not be held *liable*, he should nevertheless appear on the verdict form for purposes of the jury's apportionment of negligence.⁹⁵ However, a party who is granted summary judgment because he is found not *negligent* as a matter of law should not appear on the verdict form since the jury may not properly assign any negligence to him.⁹⁶

At trial, multiple defendants will, in almost all cases, have adverse interests because of the effect that shifting negligence from one to the other will have on the final outcome of the case. For this reason, each defendant should normally be entitled to a full compliment of peremptory challenges during jury selection.⁹⁷

When the case does go to the jury, the jury must be instructed as to the effect of its determinations of percentages of negligence.⁹⁸ Obviously, it would be inappropriate and perhaps futile to attempt to inform the jury of all of the consequences of its assignments of negligence in a complex lawsuit. A brief instruction explaining that a party can recover only when his negligence is less than the negligence of the party from whom recovery is sought should be sufficient to meet the instruction requirement in all cases.

On appeal, the reviewing court cannot render a decision that simply alters the apportionment of negligence between the parties. Apportionment is a basic question of fact which is properly considered only by the trial court or jury.⁹⁹ Because of the importance apportionment has upon the rights and liabilities of all of the parties in a comparative negligence case, an appellate court should consider the interests of all parties when error is alleged. An error which might be considered harmless, in that it would not change the basic outcome of the

94. *Connett v. Fremont County School Dist.*, 581 P.2d 1097, 1100 (Wyo. 1978); *Combined Ins. Co. of Am. v. Sinclair*, 584 P.2d at 1051 (Wyo. 1978).

95. *Beard v. Brown*, 616 P.2d at 738 (Wyo. 1980).

96. *ABC Builders, Inc. v. Phillips*, 632 P.2d at 933 (Wyo. 1981).

97. *Distad v. Cubin*, 633 P.2d at 171 (Wyo. 1981).

98. Wyo. STAT. § 1-1-109(b)(iii) (1977).

99. *Buttrely Food Stores Div. v. Coulson*, 620 P.2d at 553 (Wyo. 1980).

case, may nevertheless have important impacts upon the relative rights and obligations of the parties.¹⁰⁰

IV. CONCLUSION

Comparative negligence is an evolving area of the law. That evolution is presently in its early stages in this state; the process is more advanced in such states as Wisconsin and Minnesota, which have systems similar to Wyoming's. The law must, in the nature of things, evolve differently in Wyoming than in any other jurisdiction. However, the Wyoming Supreme Court has infused the law of this state with genetic material from the population of caselaw in other states, especially Wisconsin. Evolution without isolation should avoid the development of a strain of negligence law as unique and different as Australia's marsupials. Therefore, the case law of other states that have followed the Wisconsin approach to comparative negligence should continue to provide relevant background for the interpretation of Wyoming's comparative negligence law.

Wyoming's attorneys will play a vital role in the development of comparative negligence law in their state. Bad appeals make bad law. They are radioactive fallout in the process of legal evolution. The practitioners of the bar and bench in Wyoming can insure the development of a fair and responsive negligence system by being informed and able in the area of comparative negligence. It is this author's sincere hope that the foregoing paper will prove to be a positive force in the development of comparative negligence in Wyoming.

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100. COMBINED INS. CO. OF AM. v. SINCLAIR, 584 P.2D AT 1054-55 (WYO. 1978) (THOMAS, J., DISSENTING).