In these days the ordinary legislature is likely to find on its calendar a bill, sometimes approved and sponsored by the state bar association, which does away with contributory negligence as a complete defense in any negligence action, and substitutes instead something commonly miscalled "comparative negligence," which involves some method of dividing the damages between the parties. Such a bill is of course no novelty, as the ample literature on the subject indicates. Similar bills began to multiply in the legislatures during the decade before the last war, when the pressure of the

1 "We understand that legislation of this type was introduced this year (1951) in the following 16 states: Arizona, Arkansas, California, Colorado, Kansas, Massachusetts, Michigan, Missouri, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah and Washington." Lipscomb, Comparative Negligence, 344 Ind. L. J. 667, 674 (1951).

2 "Comparative negligence" properly refers only to a comparison of the fault of the plaintiff with that of the defendant. It does not necessarily result in any division of the damages, but may permit full recovery by the plaintiff notwithstanding his contributory negligence. Traditionally, because of the origin of the term and its early history in Illinois (infra, text at notes 110-119), it has been associated with the idea of degrees of negligence, and a comparison of "light," "ordinary," and "gross." In the interest of clarity the term should be avoided, and the statutes here in question should be called "damage apportionment" or "comparative damages" acts. See Note, 12 Cornell L. Q. 113 (1926). "Comparative negligence" is, however, in much too general use to permit much hope of its elimination.

3 The classic article on the subject is Mole and Wilson, A Study of Comparative Negligence, 17 Cornell L. Q. 333, 604 (1932). Two recent discussions, both excellent and exhaustive, are Turk, Comparative Negligence on the March, 28 Chi.-Kent Rev. 189, 304 (1950), and Philbrick, Loss Apportionment in Negligence Cases, 99 U. of Pa. L. Rev. 572, 766 (1951). A very thorough study, going into all the complications, especially of the multiple-party problem, is the book by Gregory, Legislative Loss Distribution in Negligence Actions (1936). See also Gregory, Loss Distribution by Comparative Negligence, 21 Minn. L. Rev. 1 (1936); Berg, Comparative Negligence—A Substitute for the Rule of Contributory Negligence, 9 So. Dak. B. J. 200 (1941); Comment, 22 So. Calif. L. Rev. 276 (1949). Numerous other articles bearing on particular statutes are cited in the succeeding notes.

increasing automobile accident rule compelled consideration of the problem of the uncompensated victim. It led even to proposals for an automobile accident compensation plan, analogous to the workmen's compensation acts and to be administered by some board or commission. In at least one instance a "comparative negligence" act was adopted under threat of such a compensation plan, and after a bill establishing it had passed one house of the legislature at the preceding session. During the war, when gasoline rationing reduced the accident rate, the agitation fell off; but with the slaughter on the highways resumed and accelerated, it has been revived in full vigor. A conservative prophet would have no difficulty in predicting the adoption of damage apportionment acts in several additional states within the next few years.

The United States is virtually the last stronghold of contributory negligence. The last vestiges of the complete defense disappeared long since from all of continental Europe, which divides the damages. Great Britain, all of the Canadian provinces, New Zealand and Western Australia now have come to the same result, so that very little of the British Empire is left with the common law rule. Even in the United States there is far more in the way of division of damages than is generally realized. There are some forty statutes on the books, and apparently in successful operation; and it is a fair estimate that there are about twelve hundred cases in which they have been applied. Almost nothing has been written about these decisions;

5 Such a compensation plan is now in effect in Saskatchewan. Sask. Stats. c.15 (1947).
6 Yet that very theory prevailed in Wisconsin when the legislature passed our comparative negligence law in 1931, which followed the introduction into our 1929 legislature of a bill placing the entire field of compensation for accidents under the jurisdiction of a commission, which bill passed the Wisconsin senate but did not reach the house for action before the termination of the legislature. It has been fairly stated, I believe, that were it not for the comparative negligence doctrine, adopted by the Wisconsin legislature in 1931, there is little question but that serious effort would have been made in the succeeding legislature of 1933 to put the entire field of damages, arising as the result of an accident, under the jurisdiction of a commission, and it was aptly said by the author of Wisconsin's comparative negligence law that: 'With comparative negligence as the rule applicable to automobile litigation in Wisconsin, there was no immediate need, if any, for the adoption of any commission form of administration of automobile legislation.' Hayes, Rule of Comparative Negligence and Its Operation in Wisconsin, 23 Ohio St. B. Ass'n R. 233, 234 (1950).
7 The European history is well reviewed in Turk, supra note 3 at 238-244.
8 Law Reform Act, 1945, 8 & 9 Geo. VI, c. 28. See Williams, Joint Torts and Contributory Negligence 533-535, and c.13 (1951); Williams, The Law Reform (Contributory Negligence) Act, 1945, 9 Mon. L. Rev. 105 (1945).
12 The Report of the Casualty Committee in 18 Ins. Counsel J. 374 (1951), which contains a useful review of the law of the various states on contributory negligence and contribution, omits any reference to a number of these statutes.
but they represent a body of law of considerable importance, in which a
procedure over which there has been much theoretical dispute has been
put into practice. It is the purpose of this article to inquire, so far as
possible, into the actual operation of the damage apportionment statutes,
and to offer some conclusions as to the most desirable form of act for any
legislature about to set forth upon these relatively uncharted seas.

The State of the Common Law

The defense of contributory negligence originated in 1809 with the
case of *Butterfield v. Forrester.* The defendant, who was repairing his
house, had left a pole projecting across part of the highway; and the plain-
tiff, riding home from a public house in the dusk, did not see the pole, rode
into it, and was thrown from his horse and injured. Lord Ellenborough
disposed of the matter very briefly with the statement that "A party is not
to cast himself upon an obstruction which has been made by the fault of
another, and avail himself of it, if he did not himself use common and
ordinary caution to be in the right." There has been much speculation as to why the rule thus declared
found such ready acceptance in later decisions, both in England and in the
United States. The explanations given by the courts themselves never
have carried much conviction. Most of the decisions have talked about
"proximate cause," saying that the plaintiff's negligence is an intervening,
insulating cause between the defendant's negligence and the injury. But
this cannot be supported unless a meaning is assigned to proximate cause
which is found nowhere else. If two automobiles collide and injure a by-
) ...on the part of the plaintiff." *Id.* at 61, 103 Eng. Rep. at 927
(1809).

Continuing: "In cases of persons riding upon what is considered to be the wrong side
of the road, that would not authorize another purposely to ride up against them. One person
being in fault will not dispense with another's using ordinary care for himself. Two things must
concur to support this action: an obstruction in the road by the fault of the defendant, and
no want of ordinary care to avoid it on the part of the plaintiff." *Id.* at 61, 103 Eng. Rep. at 927
(1809).

See Bohlen, *Contributory Negligence,* 21 Harv. L. Rev. 233 (1908); Lowndes, *Contribu-
tory Negligence,* 22 Geo. L. J. 674 (1934); Green, *Contributory Negligence and Proximate
Cause,* 5 N.C.L. Rev. 3 (1927).

Bowen, L. J., in Thomas v. Quartermaine, 18 Q.B.D. 685, 697 (1897); Gilman v. Central
Vermont R. R., 93 Vt. 340, 107 Atl. 122 (1919); Ware v. Saufley, 194 Ky. 53, 237 S.W.
1060 (1922); Exum v. Atlantic Coast Line R. Co., 154 N.C. 408, 70 S.E. 845 (1911); Ches-
apeake & Ohio R. Co. v. Wills, 111 Va. 32, 68 S.E. 395 (1910).


Owen, C. J., in Davis v. Guarnieri, 45 Ohio St. 470, 15 N.E. 350 (1887).
has been said that the rule is intended to discourage accidents, by denying recovery to those who fail to use proper care for their own safety; but the assumption that the speeding motorist is, or should be, meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant. Probably the true explanation lies merely in the highly individualistic attitude of the common law of the early nineteenth century. The period of development of contributory negligence was that of the industrial revolution, and there is reason to think that the courts found in this defense, along with the concepts of duty and proximate cause, a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds.  

Criticism of the denial of all recovery was not slow in coming, and it has been with us for more than a century. The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free. No one ever has succeeded in justifying that as a policy, and no one ever will. Its outrageousness became especially apparent in the cases of injuries to employees, where a momentary lapse of caution after a lifetime of care in the face of the employer's negligence might wreck a man's life and leave him uncompensated as a charge upon society; and the demand for some modification of the rule became an integral part of the movement which finally led to the workmen's compensation acts. To some limited extent the remedy has been in the hands of the jury. Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff's fault. But the process is at best a haphazard and most unsatisfactory one. There are still juries which understand and respect the court's instructions on contributory negligence, just as there are other juries which throw them out of the window and refuse even to reduce the recovery by so much as a dime. Above all there are many directed verdict cases where the plaintiff's negligence, however slight it may be in comparison with that of the defendant, is still clear beyond dispute, and the court has no choice but to declare it as a matter of law. A striking illustration is the Minnesota case in which a motorist entering an intersection failed to yield the right of way.  

\[\text{\small 10} \text{Malone, } \textit{The Formative Era of Contributory Negligence}, 41 \text{ ILL. L. REV. 151} (1946); Malone, \textit{Comparative Negligence—Louisiana's Forgotten Heritage}, 6 \text{LA. L. REV. 125} (1945).\]

\[\text{\small 20} \text{One of the best statements of the attack on contributory negligence is found in Green, } \textit{Illinois Negligence Law}, 39 \text{ILL. L. REV. 36}, 116, 197 (1944).\]

\[\text{\small 21} \text{"We but blind our eyes to obvious reality to the extent that we ignore the fact that in many cases juries apply it (apportionment) in spite of us." Holt, J., in Haeg v. Sprague, Warner & Co., 202 Minn. 425, 430, 281 N.W. 261, 263 (1938). See also } \textit{Ullman, A Judge Takes the Stand} \text{ 30-34 (1933).} \]
for him, and the supreme court uttered an almost pathetic appeal to a legislature, which still remains indifferent, to relieve it of the necessity of such decisions by adopting a "comparative negligence" act.\textsuperscript{22} Although the courts almost from the beginning have displayed an uneasy consciousness that something is wrong, they have been slow to move. In only three respects have the rigors of the ordinary rule of contributory negligence been modified at common law. The defense was one to a negligence action only, and it never applied to intentional torts such as assault and battery;\textsuperscript{23} and from this there developed the first exception, that mere contributory negligence is no defense where the defendant's conduct is so aggravated that it approaches intent, and can be characterized as "wilful," "wanton," or "reckless."\textsuperscript{24} In such a case the plaintiff is barred from recovery only when his own conduct is similarly aggravated, and can be described in the same terms.\textsuperscript{25} There is here, of course, a rough balancing of one fault against the other, but the difference is declared to be one of kind rather than of degree. Except in two or three states such as Minnesota,\textsuperscript{26} which have misdefined "wilful negligence" to include any negligence whatever after discovery of the peril of another, the exception has applied to relatively few cases, and has had only limited importance.

A second exception, of comparatively recent origin, eliminates the defense of contributory negligence where the action is founded upon the defendant's violation of a statute, such as a child labor act,\textsuperscript{27} which is construed as intended to place the entire responsibility upon the defendant,
and to protect the plaintiff even against the consequences of his own fault.\textsuperscript{28} The reason given is the obvious one, that otherwise the intent of the legislature would be defeated. Such acts are, however, few in number and clearly of a special character; and as to the violation of all other statutes, contributory negligence remains effective as a complete defense.\textsuperscript{29}

The most important common law modification is that which bears the name of the last clear chance.\textsuperscript{30} It originated in 1842 in the case of Davies v. Mann.\textsuperscript{31} where the plaintiff left his ass fettered in the highway and the defendant drove into it. The doctrine found ready acceptance in the United States;\textsuperscript{32} but from its origin it has acquired forever the name of the "jack-ass doctrine," with whatever implications that may carry. In its original form, it was stated to be that where the defendant had the last, and therefore the better, opportunity to avoid the accident, his negligence superseded that of the plaintiff, and contributory negligence was no defense. As in the case

\textsuperscript{28} Prohibiting the sale of dangerous articles to minors: Pizzo v. Wiemann, 149 Wis. 235, 134 N.W. 899 (1912); McMillen v. Steele, 275 Pa. 584, 119 Atl. 721 (1923).


\textsuperscript{29} See Schofield, Davies v. Mann: Theory of Contributory Negligence, 3 Harv. L. Rev. 263 (1890); Bohlen, supra note 15; Smith, Last Clear Chance, 82 Cent. L. J. 425, 55 Am. L. Rev. 897 (1916); Lowndes, supra note 15; James, Last Clear Chance: A Transitional Doctrine, 47 Yale L. J. 704 (1938); MacIntyre, The Rationale of Last Clear Chance, 53 Harv. L. Rev. 1225 (1940).

\textsuperscript{30} Cf. Mayes v. Byers, 214 Minn. 54, 7 N.W.2d 403 (1943) (requiring stairways in "on sale" liquor establishments to be well lighted).

\textsuperscript{31} 10 M. & W. 546, 152 Eng. Rep. 588 (1842).

\textsuperscript{32} "The groans, ineffably and mournfully sad, of Davies' dying donkey, have resounded around the earth. The last lingering gaze from the soft, mild eyes of this docile animal, like the last parting sunbeams of the softest day in spring, has appealed to and touched the hearts of men. There has girdled the globe a band of sympathy for Davies' immortal "critter." Its ghost, like Banquo's ghost, will not down at the behest of the people who are charged with inflicting injuries, nor can its groanings be silenced by the rantings and excoriations of carping critics. The law as enunciated in that case has come to stay." McLean, J., in Fuller v. Illinois Central Ry., 100 Miss. 705, 717, 56 So. 783, 786 (1911).
of contributory negligence itself, the explanations given are not at all convincing. It is sometimes said\(^3\) that the later negligence of the defendant must necessarily be the greater negligence, and that it is a rule of comparative fault which is being applied. This may be true in some instances where the defendant discovers the plaintiff's helpless situation and his conduct displays reckless disregard of it; but it can scarcely account for many others in which the negligence consists merely of failure to discover the situation at all,\(^4\) or of slowness, clumsiness, inadvertence or an error in judgment in dealing with it.\(^5\) Most of the courts have talked of proximate cause, which makes no sense at all. If the negligence of the two parties injures a third, as where a collision injures a bystander, it never has been held that the party whose fault is prior in point of time is relieved of responsibility by the mere fact that the negligence of the other is later;\(^6\) and no one ever has offered any reason for a different result where the action is between the negligent parties.

The real explanation would appear to be nothing more than a dislike for the defense of contributory negligence, and a rebellion against its application in a group of cases where its hardship is most apparent. The last clear chance has been called a “transitional doctrine,”\(^7\) a way station on the road to apportionment of damages; but its effect has been to freeze the transition rather than to speed it. Actually the last clear chance cases present one of the worst tangles known to the law. In some jurisdictions the application of the rule has been limited to cases where the plaintiff is helpless and the defendant has in fact discovered the situation;\(^8\) in others it is extended to cases where the defendant might have discovered it by the exercise of reasonable care.\(^9\) In still others it is applied to situations where the plaintiff is not helpless at all and continues to be negligent, but is unaware of his danger, while the defendant has discovered it.\(^10\) In still others it is applied to cases where the defendant's antecedent negligence, as in

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\(^3\) Wilson v. Southern Traction Co., 111 Tex. 361, 234 S.W. 663 (1921); Rawitzer v. St. Paul City Ry., 93 Minn. 84, 100 N.W. 564 (1904); Moreno v. Los Angeles Transfer Co., 44 Cal. App. 551, 186 Pac. 800 (1920); Dildine v. Flynn, 116 Kan. 563, 227 Pac. 340 (1924).


\(^5\) As, for example, in Smith v. Connecticut R. & L. Co., 80 Com. 268, 67 Atl. 888 (1907); Clark v. Wilmington & W. Ry., 109 N.C. 430, 14 S.E. 43 (1891).


\(^7\) James, supra note 30.

\(^8\) Storr v. New York Central Ry., 261 N.Y. 348, 185 N.E. 407 (1933); Cleveland Ry. v. Masterson, 126 Ohio St. 42, 183 N.E. 373 (1932); St. Louis S.W. Ry. v. Watts, 110 Tex. 106, 216 S.W. 391 (1919).

\(^9\) See cases cited supra note 34.

driving a car with defective brakes, has rendered him unable to take advantage of the "last clear chance" he would otherwise have had.41

Intermingled with these rules there is so much in the way of disagreement over the effect to be given to circumstantial evidence, and whether "ought to have seen" is equivalent to "saw," that there are almost literally forty-eight sets of rules in as many states. There is often the greatest confusion in a single state;42 and in many jurisdictions, as the defendant's negligence increases the less his liability will be—the man who looks and discovers the danger but is slow in applying his brakes may be liable, where the man who never looks at all or who has no brakes to apply is not. Missouri has developed a fearful and wonderful "humanitarian doctrine," which seems to be comprehensible only in Missouri, if there;43 and three or four states, such as Illinois, Minnesota and South Carolina,44 repudiate the whole "last clear chance" by name, and then proceed to apply it in cases of discovered peril by miscalling it "wilful negligence," or "proximate cause." It is really a most amazing picture, which could be the work of no one but lawyers.

Quite apart from all this confusion, the real objection to the last clear chance is that it seeks to alleviate the hardships of contributory negligence by shifting the entire loss due to the fault of both parties from the plaintiff to the defendant. It is still no more reasonable to charge the defendant with the plaintiff's share of the consequences of his fault than to charge the plaintiff with the defendant's; and it is no better policy to relieve the negligent plaintiff of all responsibility for his injury than it is to relieve the negligent defendant. The whole floundering, haphazard, makeshift device operates in favor of some plaintiffs by inflicting obvious injustice upon some defendants; but it leaves untouched the greater number of contributory negligence cases in which the necessary time interval or element of discovery does not appear and the last clear chance cannot apply.

When actuaries sit down to calculate liability insurance rates for automobile drivers and other defendants, they must, under the existing state of the law, take into account the certainty that in many cases the insured who negligently injures another will escape all liability; that in others, juries, in partial defiance of the court's instructions, will diminish the damages by some uncertain amount and to that extent divide the loss between the parties; and that in still others, where the last clear chance applies or the instructions are jettisoned completely, the entire loss resulting from the fault of both parties will fall upon the insured. From an actuarial point of view

these possibilities undoubtedly, in some unknown degree, balance one another; but as a pattern for the operation of courts and the administration of justice they leave much to be desired.

Apart from the inevitable self-interest of defendants who find an advantage in the present state of the law, proposals for division of the damages meet with two objections. One is that it is impossible to compare fault with fault, and that any apportionment of loss on the basis of such a comparison can be nothing more than the wildest guess. Obviously any estimate that 40 per cent of the total fault rests with the pedestrian who walks out into the street in the path of an automobile, and 60 per cent with the driver who is not looking and runs him down, represents nothing resembling accuracy based on demonstrable fact. The estimate might quite as well be anywhere between 25-75 and 75-25. Yet it is equally clear that a division of the plaintiff's damages on any such basis is at least more accurate than one based on the arbitrary conclusion that 100 per cent of the responsibility rests with the plaintiff and none whatever with the defendant, or, if the last clear chance is applicable, 100 per cent with the defendant and none with the plaintiff—both of which are demonstrably wrong. Nor is such an estimate in itself any more foolish, or more difficult, than the one which assigns $2,000 as fair value and compensation for the pain of a broken leg, or the humiliation of a disfigured nose, to say nothing of estimates based on a prognosis of speed of recovery, future earnings or permanent disability. At least the host of cases show that the estimate is being made in practice every day.

The other objection has more substance. It is that juries can not be trusted to follow an instruction to divide the damages according to fault; that their well-known sympathy for the man on crutches in the courtroom and their proverbial bias against corporations and insurance companies lead them now to ignore convincing evidence of contributory negligence and return a full verdict for the plaintiff, and they will continue to do the same under any apportionment law; and that the proposed change merely robs the defendant of all possibility of a directed verdict without any guarantee that the apportionment will in fact be made. This uneasy distrust of the twelve men, and now women, in the box has bulked large in American negligence law; and it is significant that damage apportionment developed first, and has succeeded best, in courts where there is no jury to contend with. What validity the objection has, and what may be done to meet it, remains to be considered.

**Apportionment by the Jury**

The simplest possible method of apportionment, and the oldest,\(^4^6\) is to divide the damages equally between the negligent parties. This is the method developed, around 1700, by the English admiralty courts,\(^5\) which

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\(^4^6\) Early admiralty cases, around 1614, divided the loss evenly where only the defendant's ship was at fault. Marsden, *A Treatise on the Law of Collisions at Sea* 135 (8th ed. 1923).

of course had no jury, and were strongly influenced by international rules derived from the civil law. It is still followed by the American courts of admiralty in collision cases. Crude as it is, it probably results, in most instances, in a closer approximation of substantial justice than a denial of all recovery. England continued to adhere to the same rule until 1911, when it conformed to the Brussels Maritime Convention of 1909 by adopting a statute providing for a division of the damages "in proportion to the degree in which each vessel was at fault."

There has been an undercurrent of dissatisfaction with the arbitrary American rule, and several of the lower federal courts have uttered complaints about it where the fault of the two parties was out of all proportion. It has been proposed from time to time that the United States should adopt the English rule, and in 1937 the proposal received a favorable report from the Senate Committee on Foreign Relations, but World War II prevented any action. One important development in the admiralty courts, however, was that when the question arose in cases which did not involve collisions, but negligent injuries to maritime employees, the rule


50 The English Maritime Conventions Act of 1911, 1 & 2 Geo. V, c. 57, § 1 provides that: "(1) Where by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was at fault: Provided that (a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and (b) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed . . . ."

51 We reach this conclusion with regret. The (libellant's) fault was far more egregious. This is a case where the Continental rule of comparative negligence would produce a more just result.” Luckenbach S. S. Co. v. United States, 157 F.2d 250, 252 (2d Cir. 1946). See also The City of Chattanooga, 79 F.2d 23, 23 (2d Cir. 1935); The Margaret, 30 F.2d 923, 928 (3d Cir. 1929); Postal S. S. Corp. v. Southern Pac. Co., 112 F. 2d 297, 298 (2d Cir. 1940).

52 The American delegation to the Convention signed the final draft. The President and the Secretary of State proposed legislation, but discontinued their efforts when many protests were raised. In 1922 the Maritime Law Association of the United States apparently favored adoption of the English statute, but reversed its stand in 1927. In 1925 the Committee on Admiralty of the American Bar Association approved the change; but in 1929 the Executive Committee of the Association reported that, as the existing law had operated satisfactorily for so many years, no change should be made. The history is well reviewed in short space in Turk, supra note 3 at 234-236.


54 6 Benedict, op. cit. supra note 49 at 4, 49, 262.

55 The apportionment rule was not limited to collision cases. The Max Morris, 137 U.S. 1 (1890); The Scandinavia, 156 Fed. 403 (D. Me. 1907).
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of equal division was not applied, and the libellant's recovery was reduced in proportion to his estimated fault.66 These admiralty decisions played a significant part in the labor agitation which finally led to legislation.

Apart from admiralty there was little change in the common law rule before 1908. Illinois57 and Kansas58 tried, and abandoned, experiments with "degrees" of negligence. Tennessee59 and Georgia60 worked out the general idea of apportionment of damages, subject to restrictions later to be considered, and Florida61 copied the railroad liability section of the Georgia code. Maryland62 made the apportionment rule applicable to cases of miners and clay workers employed in two counties in the state. Louisiana had a provision in its code,63 enacted in 1825 by lawyers at least familiar with the civil law, which appeared clearly to call for apportionment in cases of property damage, and might well have led to a general apportionment rule; but the Louisiana courts, under the pressure of expanding industry, as well as the persuasive authority of cases from adjoining jurisdictions and a desire for uniformity, ignored the provision or construed it away,64 and it has remained a dead letter on the books.

The apportionment of damages was first brought home to most of the country in 1908 by the Federal Employers' Liability Act,65 which applied to all negligence actions, in the federal or state courts, for injuries to railroad employees engaged in interstate commerce.66 It was, of course, an outcome of the prolonged labor agitation, and it preceded by only a few years the wave of workmen's compensation acts. It contained the following provision:

66 The Explorer, 20 Fed. 135 (E.D. La. 1884); Olson v. Flavel, 34 Fed. 477 (D. Or. 1888); The Mystic, 44 Fed. 398 (S. D. N.Y. 1890); Cricket S. S. Co. v. Parry, 263 Fed. 523 (C.C.A. 2d Cir. 1920).
67 See infra, text at notes 110-119.
68 See infra, text at notes 120-121.
69 See infra, text at notes 124, 139-190.
70 See infra, text at notes 146-151, 191-192.
73 Now LA. Civ. Code, art. 2323 (Dart 1945): "The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the things has exposed it imprudently."
76 The first statute passed, in 1906, was held unconstitutional because it included railroad employees engaged in intrastate commerce. Employers' Liability Cases, 207 U.S. 463 (1908). With the change made, the second statute was held constitutional in the Second Employers' Liability Cases, 223 U.S. 1 (1912).
In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

The example of the Federal Employers' Liability Act set off a flood of labor legislation of the same general kind. The apportionment provision was incorporated by reference into the Jones Act and the Merchant Marine Act, enacted in 1915 and 1920, and applicable to injuries to maritime employees. The provision was repeated in substance in a series of state "employers' liability acts," covering railroad employees engaged in intrastate commerce, which were adopted in Colorado, Iowa, Kansas, Kentucky, Minnesota, Montana, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Virginia, and Wyoming.}

75 Mont. Rev. Laws §§ 72-649 (1947). Applied in Great Northern Ry. v. Wojtala, 112 F.2d 609 (9th Cir. 1940); see also Palmer v. Great Northern Ry., 119 Mont. 68, 170 P.2d 768 (1946). The statute is limited to the railroad's negligent handling of cars or defects in cars or other equipment.
79 S. D. Code § 52.0945 (1939).
statutes of the same kind were made applicable to employees engaged in certain specified occupations, usually hazardous, such as mining or lumbering, in Arizona, Florida, Iowa, and Oregon, and to all employees of intrastate corporations in Arkansas.

The legislation soon spread beyond the labor field. The apportionment provision was repeated in a 1920 federal statute covering any death on the high seas. In Florida and Iowa the provision was made applicable to any injury inflicted by a railroad. In Virginia it has been applied to accidents at crossings arising out of the railroad’s failure to give the required signals; and an old Tennessee statute has been given the same effect by construction. Several other states have enacted apportionment provisions which apply to labor or to railroad cases with limitations as to the extent of the plaintiff’s negligence, to be considered below. Finally, Mississippi adopted in 1910 a general act applying apportionment to all actions for

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84 Fla. Stat. § 769.03 (1941). Applied in Tampa Electric Co. v. Limpus, 83 Fla. 537, 91 So. 559 (1922); Tampa Electric Ry. v. Bryant, 101 Fla. 204, 133 So. 887 (1931); Key West Electric Co. v. Higgs, 118 Fla. 11, 136 So. 639 (1931).
93 See infra, text at notes 108-173.
94 Miss. Laws 1910, c.135. Held not applicable to property damage in Krebs v. Pascagoula St. Ry. & P. Co., 117 Miss. 771, 78 So. 753 (1918).
personal injuries, and expanded it in 1920 to include damages to property. It thus became the first, and is still the only, state to establish apportionment as a general rule. A similar general act is now in force in the Canal Zone.

Except where the statute itself provides some limitation, these acts are held to require apportionment of the damages even though the plaintiff's negligence is equal to or greater than that of the defendant, and even though the one is considered "gross" and the other "slight." The apportionment must be made if negligence of both parties is found, and it is error not to instruct the jury to make it. Although there is a great deal of rather casual and careless language to the effect that the plaintiff's recovery must be diminished to the extent that his negligence has been "causal," or has "con-

\[\text{Note:}\]

85 Miss. Laws 1920, c.312. The amended act is now Miss. Code Ann. § 1454 (1942), reading as follows: "In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property." Applied in Natchez & S. Ry. v. Crawford, 99 Miss. 697, 55 So. 566 (1911); Yazoo & M. V. Ry. v. Carroll, 103 Miss. 830, 60 So. 1013 (1913); Yazoo & M. V. Ry. v. Williams, 114 Miss. 236, 74 So. 835 (1917); Talaheal Lumber Co. v. Holliman, 126 Miss. 302, 87 So. 661 (1921); Seifferman v. Leach, 161 Miss. 853, 138 So. 563 (1932); Illinois Cent. Ry. v. Humphreys, 174 Miss. 459, 164 So. 22 (1935).

86 CANAL ZONE CIV. CODE § 977 (1934). Applied in Panama Ry. v. Davis, 82 F.2d 123 (5th Cir. 1936).


In cases of this character, where the evidence justifies a finding that both defendant and plaintiff were guilty of negligence contributing to the accident, the jury should be carefully instructed concerning the rule of comparative negligence established by the federal statute. It is the duty of the jury first to determine whether or not the defendant was guilty of causal negligence; for, if that issue is determined against the plaintiff, there can be no recovery. If the issue of the defendant's negligence is determined in favor of the plaintiff, then the jury should consider whether or not he, too, was guilty of negligence directly contributing to the happening of the accident; and, if they decide that issue against the plaintiff, then, looking at the combined negligence of the plaintiff and defendant as a whole, and using their best judgment based on the evidence before them, the next material subject for the jury to consider is in what ratio should this combined negligence be distributed between the parties to the accident; in other words, how much, or what proportion, of the whole blame, or fault, should be attributable to each. After this problem is solved, the jury must determine the amount of the damages suffered through the combined negligence, and deduct therefrom a proportion corresponding with the share of negligence charged by them against the plaintiff, to be awarded as damages to the plaintiff. We do not mean to say that the method just outlined is the only way in which a jury may proceed to reach its conclusions in the trial of cases involving comparative negligence, but rather simply to indicate an orderly manner for considering and determining such cases. Waina v. Pennsylvania Ry., 251 Pa. 213, 221, 96 Atl. 461, 464 (1915).

This is the best statement of the instruction to the jury the writer has found.
tributed" to his injury, there seems to be little doubt that, once causation is found, the apportionment must be made on the basis of comparative fault rather than comparative contribution. It is generally agreed, except for two decisions that obviously blundered, that the recoverable damages must be reduced in the proportion which the plaintiff's fault, or the extent of his departure from the required standard of conduct, bears to the total fault of plaintiff and defendant; and not in the proportion which the one bears to the other, or to the extent of the difference between them. Thus where the plaintiff's estimated negligence is found to be 20% of the total, and the defendant's 80%, the plaintiff must recover 80% of his damages, and not 75% or 60%.

When one seeks to discover from the appellate decisions some clue as to what juries actually do under the instruction to divide the damages, the information to be gleaned is disappointingly meagre. The cases are rather dismal reading. Normally there are a number of assignments of error, and the one relating to apportionment complains of some alleged vice in the instruction, which is corrected, or found not to exist, or not to be prejudicial. Where the amount of the award is challenged directly, the court often decides that contributory negligence was not so clearly established that it can say as a matter of law that the jury was wrong in failing to apportion at all; or that the figure found is not so clearly the maximum justified by the evidence of damages as to indicate that the jury did not follow the instruction. In these cases it is quite clear that the court simply does not:

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Footnotes:

99 See for example Waterford Lumber Co. v. Jacobs, 132 Miss. 638, 97 So. 187 (1923); Solomon v. Continental Baking Co., 172 Miss. 388, 160 So. 732 (1933); Avent v. Tucker, 188 Miss. 207, 194 So. 596 (1940); Engebricht v. Bradley, 211 Wis. 1, 247 N.W. 451 (1933).

100 See cases cited infra, note 112.

101 In Paluczak v. Jones, 209 Wis. 640, 643, 245 N.W. 655, 656 (1932), it was said that the plaintiff's damages must be diminished "in such ratio as his negligence bears to the other's." In Cameron v. Union Automobile Ins. Co., 210 Wis. 659, 246 N.W. 420, 247 N.W. 453 (1933), this statement was withdrawn, and it was made clear that the reduction must be in proportion to the combined negligence of the plaintiff and defendant. Engebricht v. Bradley, supra note 99.

In Patterson v. Kerr, 127 Neb. 73, 254 N.W. 704 (1934), where the ratio was found to be 1 to 6, it was said that the damages must be reduced by one-sixth. The case is out of line with Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N.W. 158 (1920), and Sgroi v. Yellow Cab & Baggage Co., 124 Neb. 525, 247 N.W. 355 (1933), which make it clear that the reduction must be by one-seventh.


know what the jury did, and in some instances it has said so frankly.\textsuperscript{105}

There are, however, a good many cases in which the contributory negligence has been clear as a matter of law, and the sum awarded so definitely equal to the maximum which the evidence would justify that there could be no doubt that the jury did not make the apportionment. Occasionally a new trial has been ordered;\textsuperscript{106} more commonly a remittitur.\textsuperscript{107} It is difficult to escape the impression that the number of these cases is disproportionately large, and greatly exceeds what is normally to be expected on the issue of damages alone. They appear to lend a great deal of support to the assertion that the jury is not always to be trusted, with an injured man before it, to follow instructions and divide the damages, even where the plaintiff is undoubtedly at fault. They suggest that there must be many more cases in which the apportionment should have been made but was not in fact made, and the court is powerless to interfere because it does not know or cannot prove what has happened. At least the confessed ignorance, in so many cases, of what the jury has done gives a great deal of color to that claim.

The fear of such misbehavior of the jury has played a considerable part in the limitation which a number of the states have placed upon the application of their apportionment acts. They are all more or less obvious compromises between contesting groups in the legislature, which go part of the way along the road to apportionment, but endeavor to stop short at some point where the distrust of the jury becomes acute, or where agreement can be reached. They are, in other words, political in character; and like

\textsuperscript{105} See for example New York Central & H. R. Ry. v. Banker, 224 Fed. 351 (2d Cir. 1915); Katilla v. Baltimore & Ohio Ry., supra note 104.

\textsuperscript{106} Atlantic Coast Line Ry. v. Hobbs, 71 Fla. 109, 70 So. 939 (1916); Seifferman v. Leach, supra note 95. See also Norfolk & W. Ry. v. Hardy, supra note 91, where there was testimony of jurymen that they did not apportion.

\textsuperscript{107} See for example, among many cases, Cain v. Southern Ry., 199 Fed. 211 (E.D. Tenn. 1911); Atlantic Coast Line Ry. v. Weir, 63 Fla. 69, 58 So. 641 (1912); Pyles v. Atchison, T. & S. F. Ry., 97 Kan. 455, 155 Pac. 788 (1916); Yazoo & M. V. Ry. v. Williams, supra note 95; Florida East Coast Ry. v. Meacham, 77 Fla. 701, 82 So. 232 (1919); Atlantic Coast Line Ry. v. Conant, 79 Fla. 668, 84 So. 688 (1920); Tallahala Lumber Co. v. Holliman, supra note 95; Louisville & N. Ry. v. Harrison, 84 Fla. 497, 94 So. 382 (1922); Tampa Electric Co. v. Lumpus, supra note 84; Johnson v. Union Pac. Ry., 111 Neb. 196, 116 N.W. 140 (1923); Edward Hines Yellow Pine Trustees v. Holley, 142 Miss. 241, 106 So. 822 (1926); Tampa Electric Co. v. Knowles, 91 Fla. 1032, 109 So. 219 (1926); Atlantic Coast Line Ry. v. Watkins, 97 Fla. 350, 121 So. 95 (1929); Seaboard Air Line Ry. v. Watson, 103 Fla. 477, 137 So. 719 (1931); Key West Electric Co. v. Higgs, supra note 84; Tampa Electric Co. v. Bryant, supra note 84; Florida East Coast Ry. v. Townsend, 104 Fla. 362, 140 So. 96, on rehearing, 104 Fla. 371, 142 So. 909 (1932); Atlantic Coast Line Ry. v. Fogleman, 117 Fla. 334, 158 So. 108 (1934); Gulf & S. I. Ry. v. Bond, 181 Miss. 354, 179 So. 355, 181 So. 741 (1938); E. L. Bruce Co. v. Bramlett, 188 So. 532 (Miss. 1939); Louisville & N. Ry. v. Grizzard, 235 Ala. 49, 189 So. 203 (1939); Fegan v. Lykes Bros. S.S. Co., 198 La. 312, 3 So. 2d 632 (1941); Missouri Pac. Ry. v. Haigler, 203 Ark. 804, 158 S.W. 2d 703 (1944); Gulf Refinry Co. v. Brown, 196 Miss. 131, 16 So. 2d 765 (1944); Missouri Pac. Ry. v. Yandell, 209 Ark. 569, 191 S.W. 2d 592 (1946); Atlantic Coast Line Ry. v. Mangum, 250 Ala. 431, 34 So. 2d 848 (1948).
most political compromises, they are remarkable neither for soundness in principle nor success in operation.

"Slight" and "Gross" Negligence

The oldest of these restrictions is that the damages shall be divided only where the negligence of the plaintiff is found to be "slight," and that of the defendant greater in comparison. The limitation traces back to the old idea that there are "degrees" of negligence, which developed in England in the law of bailments, and still is applied in bailment cases by a number of American courts. Shortly after the middle of the nineteenth century the Supreme Court of Illinois extended this idea to a case of personal injury at the hands of a railroad, and from that decision developed the doctrine that the negligence of the plaintiff would not bar his recovery if it was "slight," in the sense of "a degree of negligence less than a failure to exercise ordinary care," while the negligence of the defendant was "gross" in comparison. No attempt was made to divide the damages under this "comparative negligence" rule, and where it was applied the effect was full recovery by the plaintiff.

The result was that for some thirty years the courts of Illinois were filled with cases which fought out the issue of "slight" and "gross," in the midst of a turmoil of confusion. As a mere matter of definition the distinction proved to be unworkable, and it broke down under the sheer weight of the difficulty of applying the bailment rule to the complications of other negligence cases, the multitudinous appeals, and the high pro-

111 Wabash, St. L. & P. Ry. v. Moran, 13 Ill. App. 22, 76 (1883). Recovery was denied if the plaintiff had failed to exercise "ordinary care," Chicago v. Stearns, 105 Ill. 554 (1883); Schmidt v. Chicago & N. W. Ry., 83 Ill. 405 (1876); Hund v. Grier, 72 Ill. 393 (1874); Grand Tower M. & T. Co. v. Hawkins, 72 Ill. 386 (1874); St. Louis & S. E. Ry. v. Britz, 72 Ill. 256 (1874).
112 Recovery was also denied if the plaintiff's negligence was found to equal that of the defendant. Indianapolis & St. L. Ry. v. Evans, 88 Ill. 63 (1878).
113 See, among many other cases, St. Louis A. & T. H. Ry. v. Todd, 36 Ill. 409 (1865); Chicago, B. & Q. Ry. v. Payne, 59 Ill. 534 (1871); Illinois Cent. Ry. v. Cragin, 71 Ill. 177 (1875); Illinois Cent. Ry. v. Hall, 72 Ill. 222 (1874); Chicago & A. Ry. v. Mock, 72 Ill. 141 (1874); Illinois Cent. Ry. v. Hamner, 72 Ill. 347 (1874); Illinois Cent. Ry. v. Goddard, 72 Ill. 567 (1874); Schmidt v. Chicago & N. W. Ry., supra note 111; Illinois Cent. Ry. v. Hamner, 83 Ill. 526 (1877); Wabash Ry. v. Henks, 91 Ill. 406 (1879).
115 Green, supra note 20 at 51, suggests the further reason that the great increase in cases of injuries to employees would have resulted in heavier liability on employers than the courts were willing to impose. Elliott, supra note 108 at 136, suggests also the very hostile reception of the Illinois doctrine at the hands of other courts and text writers. There is an excellent review of the whole history in Malone, The Formative Era of Contributory Negligence, 41 Ill. L. Rev. 151 (1946).
portion of reversals because of some error of the trial court. Finally the Illinois court lost all patience, and proceeded to whittle away the doctrine, and at last to do away with it entirely. No trace of it remains in that state. Kansas, in the eighties, followed exactly the same path, attempting the same experiment with "slight" and "gross" negligence, and repudiating it in the same way. Early ventures in the same direction in Oregon, Wisconsin, and Tennessee died more or less by default. Nevertheless, when proposals for the apportionment of damages reached the legislatures, the memory of these old common law fiascoes remained to suggest a possible basis for compromise. As a result the railroad employers' liability acts of the District of Columbia, Nebraska, and Ohio as well as broader labor acts in Alaska, California and

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110 An extended, but incomplete, list of such reversals is found in Calumet Iron & Steel Co. v. Martin, 115 Ill 358, 3 N.E. 456 (1885).
114 Sawyer v. Sauer, 10 Kan 466 (1872); Pacific Ry. v. Houts, 12 Kan 328 (1873); Union Pac. Ry. v. Henry, 36 Kan 565, 14 Pac. 1 (1883); Wichita & W. Ry. v. Davis, 37 Kan 743, 16 Pac. 78 (1887).
116 Bequette v. People's Transp. Co., 2 Ore 200 (1867); Holstine v. Oregon and Cal. Ry., 8 Ore 163 (1879). But in Hamerlynck v. Banfield, 36 Ore 436, 59 Pac. 712 (1900), without reference to the earlier cases, the court stated the common law contributory negligence rule, which has been followed ever since.
117 In Stucke v. Milwaukee & Miss. Ry., 9 Wis 202 (1859); Dreher v. Town of Fitchburg, 22 Wis 643 (1866); Hammond v. Town of Mukwa, 40 Wis 35 (1876); Griffin v. Town of Willow, 43 Wis 709 (1878); and Dithener v. Chicago, M. & St. P. Ry., 47 Wis 138, 2 N.W. 69 (1879), it was said that slight negligence, defined as want of extraordinary care, would not bar the plaintiff's recovery. But in Potter v. Chicago, M. & N.W. Ry., 21 Wis 377, 94 Am. Dec. 548 (1897); and Cunningham v. Lyness, 22 Wis 336 (1867), it was held that any way of ordinary care, however slight, would be a bar; and in Bolin v. Chicago, St. P. M. & O. Ry., 108 Wis 333, 84 N.W. 446 (1900); the court, after reviewing the cases, rejected the whole idea of comparative negligence.
118 Whirley v. White, 38 Tenn. (1 Head) 610, 623 (1858); East Tenn. Ry. v. Fain, 80 Tenn. (12 Lea) 35, 40 (1883); East Tenn. Ry. v. Gurlay, 80 Tenn (12 Lea) 46, 55 (1883). In East Tenn., V. & G. Ry. Co. v. Hull, 88 Tenn 33, 12 S.W. 419 (1889), the court expressly repudiated the idea of comparative negligence, and explained that it had been talking about "remote" negligence and proximate cause. See text infra at notes 189-192.
Ohio,\textsuperscript{130} carry provisions for apportionment only if the plaintiff's negligence is found to be "slight," so that the defendant's is "gross" in comparison. The same was true of a Wisconsin statute,\textsuperscript{131} now repealed,\textsuperscript{132} which covered injuries inflicted by a railroad. In 1913 Nebraska\textsuperscript{133} extended this to divide the damages, subject to the same limitation, in all actions for personal injuries or damage to property; and in 1941 the Nebraska act was copied in South Dakota.\textsuperscript{134}

The result of the limitation has been to a considerable extent a repetition of the Illinois experience. Appeals have multiplied, in which the court is asked to decide whether particular conduct of the plaintiff is, under the circumstances, more than "slight" negligence. "Slight" is the key word, since it is agreed that if the plaintiff's fault does not meet that qualification, the greater negligence of the defendant still will not permit any recovery.\textsuperscript{135}

The Nebraska court has refused to define the term, saying that "any one of common sense knows that slight negligence actually means small or

\textsuperscript{128} \textit{Alaska Comp. Laws Ann.} § 43-2-52 (1949), applicable to certain hazardous occupations.


\textsuperscript{132} In 1951, as in conflict with Wisconsin's broader apportionment act (\textit{infra}, text at note 156). See Lipscomb, \textit{Comparative Negligence in Nebraska}, supra note 1. It has been held that the railroad act was superseded by the broader statute where the negligence of the plaintiff was more than slight. Hammer v. Minneapolis, St. P. & S. S. M. Ry., 216 Wis. 7, 255 N.W. 124 (1934).

\textsuperscript{133} \textit{Neb. Rev. Stat.} § 25-1151 (1943): "In all actions brought to recover damages to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of the contributory negligence attributable to the plaintiff."


\textsuperscript{134} S.D. Laws c. 160, p. 184 (1941).

\textsuperscript{135} Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N.W. 158 (1920); Mitchell v. Missouri Pac. Ry., 114 Neb. 72, 206 N.W. 12 (1925); McDonald v. Wright, 125 Neb. 871, 252 N.W. 411 (1934); Krepckl v. Interstate Transit Lines, 152 Neb. 39, 40 N.W. 2d 252 (1949); \textit{affirmed}, 153 Neb. 98, 43 N.W. 2d 590 (1950); Friese v. Gulbranson, 69 S.D. 179, 8 N.W. 2d 438 (1943); Roberts v. Brown, 72 S.D. 479, 36 N.W. 2d 665 (1949); Will v. Marquette, 40 N.W. 2d 396 (S.D. 1949). Once the plaintiff's negligence is found to be slight, the defendant's negligence need not be "gross" in itself, but only greater in comparison with that of the plaintiff. Roby v. Auker, 151 Neb. 421, 37 N.W. 2d 799 (1949).

The Nebraska act has been held to apply where the defendant's negligence was "gross" within the automobile guest statute. Landrum v. Roddy, 143 Neb. 934, 12 N.W. 2d 82 (1943), overruling Sheehy v. Abboud, 126 Neb. 554, 253 N.W. 683 (1934).
little negligence, and gross negligence means just what it indicates, gross or great negligence;"136 and South Dakota has done little better, saying that slight negligence means merely "ordinary negligence, small in quantum."137

Counsel have not been slow to accept this invitation to argue the issue. The great majority of the appeals have resulted in a decision that the contributory negligence was more than "slight," and all recovery was barred even though the defendant's negligence was the greater of the two; so that the limitation has had the effect of restricting apportionment to a relatively small number of cases. Recovery has been denied, for example, where the plaintiff has failed to stop, look and listen at a railroad crossing,138 or to look or to stop or to see what was visible at an intersection139 or to drive at a reasonable speed,140 or at such a speed that he could stop within his range of vision,141 or to reduce his speed at the appearance of a visible danger,142 or to avoid a vehicle when crossing the street,143 as well as in many

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137 Friese v. Gulbranson, 69 S.D. 179, 8 N.W.2d 438 (1943).

The issue was held to be for the jury in Traphagen v. Lincoln Traction Co., 110 Neb. 855, 195 N.W. 472 (1923); Baker v. Omaha & C. B. St. Ry., 110 Neb. 246, 193 N.W. 341 (1923); Gordon v. Illinois Cent. Ry., 168 Wis. 244, 109 N.W. 570 (1918); Clark v. Chicago, M. & St. P. Ry., 214 Wis. 295, 252 N.W. 683 (1934).

The issue was held to be for the jury in Anderbery v. Katz, 142 Neb. 872, 8 N.W. 2d 207 (1943); Szroli v. Yellow Cab & Baggage Co., 124 Neb. 525, 247 N.W. 355 (1933), Miscalculation of the speed of an approaching vehicle was held to be for the jury in Burton v. Lincoln Traction Co., 106 Neb. 521, 184 N.W. 73 (1921); Coburn v. Loetscher, 123 Neb. 407, 245 N.W. 127 (1932).
140 Anderson v. Altschuler, 125 Neb. 853, 252 N.W. 310 (1934). In Patterson v. Kerr, 127 Neb. 73, 254 N.W. 704 (1934), the issue was held to be for the jury.
141 Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N.W. 2d 539 (1945). The issue was held to be for the jury in Day v. Metropolitan Utilities District, 115 Neb. 711, 214 N.W. 647 (1927); Monasmith v. Cosden Oil Co., 124 Neb. 327, 246 N.W. 623 (1933). In Pierson v. Jensen, 148 Neb. 649, 29 N.W. 2d 625 (1947), the court at first held this to be more than slight as a matter of law, but on rehearing, in 150 Neb. 86, 33 N.W. 2d 462 (1948), vacated the decision and left the issue to the jury. In Giles v. Welch, 122 Neb. 164, 239 N.W. 813 (1931), and Audiss v. Peter Kiewit Sons Co., 190 F.2d 238 (8th Cir. 1951), failure to see an object in the highway not too clearly visible was held to be for the jury.
142 Stocker v. Roux, 140 Neb. 461, 300 N.W. 627 (1941); Chana v. Mannlein, 141 Neb. 312, 3 N.W. 2d 572 (1942); Donald v. Heller, 143 Neb. 600, 10 N.W. 2d 447 (1943); Doane v. Hoppe, 132 Neb. 641, 222 N.W. 763 (1937); Radwelski v. Omaha & C. B. St. Ry., 137 Neb. 681, 290 N.W. 904 (1940).
other instances of rather ordinary negligence. At the same time it is clear that "slight" is a matter of all the circumstances of the particular case, so that there can be no definite rules; and there are other cases in which conduct of the same kind is held to present a question for the jury. It is, of course, not at all surprising that the appeals continue.

The Nebraska system does not inspire confidence in a stranger to the state. It seems quite apparent that it leads to confusion, and to excessive appeals; and that it results in apportionment in only a relatively small fraction of the cases in which it should be made.

**Plaintiff's Negligence "Less" than Defendant's**

A second type of limitation is that there can be apportionment only when the plaintiff's negligence is found to be "less" than that of the defendant, and that if it is equal or greater all recovery is barred. This first appeared in Georgia. After some early language at common law looking in the direction of apportionment, the Georgia Code of 1860-62 introduced a provision, applicable only to personal injuries or damage to property inflicted by a railroad, which required division of the damages. By a rather remarkable process of construction, not justified by anything ap-

(1943); Halliday v. Raymond, 147 Neb. 179, 22 N.W. 2d 614 (1946); cf. Chew v. Coffin, 144 Neb. 170, 12 N.W. 2d 839 (1944) (pedestrian on sidewalk oblivious of car backing out of driveway).

The issue was held to be for the jury in Francis v. Lincoln Traction Co., 106 Neb. 243, 183 N.W. 293 (1921); Belville v. Bondesson, 130 Neb. 926, 266 N.W. 901 (1936); Thomison v. Buehler, 147 Neb. 811, 25 N.W. 2d 391 (1946).


The following were held to be for the jury: La Fleur v. Poesch, 126 Neb. 263, 252 N.W. 902 (1934) (standing in front of stalled truck on highway without required red light); Dishier v. Chicago, R. I. & P. Ry., 93 Neb. 224, 140 N.W. 135 (1913) (attempting to remove handcar from track in path of train); MaCarthy v. Village of Ravenna, 99 Neb. 674, 157 N.W. 629 (1916) (using short handled brush around machinery in motion).

See cases cited in notes 146-152.


147 Ga. Code Ann. § 94-703 (1936): "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him."
pearing in the provision itself, it was first of all extended to actions against other defendants than railroads, and then limited to cases where the plaintiff's negligence was "less." One looks in vain for any explanation of the limitation, and it appears to have arisen from nothing more than timidity in the application of the statute.

Half a century of Georgia history suggested this compromise too to other legislatures, and it was adopted in the railroad employers' liability acts of Arkansas, Michigan and Wisconsin, in which "slight" negligence does not even go to reduce the damages; and in an apportionment act in Arkansas which covers all personal injuries inflicted by a railroad. In 1913 Wisconsin carried the limitation over into its general statute providing for apportionment in all cases of negligent personal injury or property damage.

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248 When Florida copied the Georgia act, it refused to accept the limitation. Florida, C. & P. Ry. v. Foxworth, 41 Fla. 1, 25 So. 338 (1899).


251 The limitation appears to have originated in Central Ry. & B. Co. v. Newman, 94 Ga. 560, 21 S.E. 219 (1894), where the facts were stated, and the court reversed without an opinion. This case was relied on, and the rule first stated, in Southern Ry. v. Watson, 104 Ga. 243, 151 3d 757 (1915). It was adopted in Kansas, Idaho, Utah, Ohio, and Delaware. It was also adopted in California, where the rule was established. Both cases were followed, with no better explanation, in Brunswick Ry. v. Wiggins, 113 Ga. 842, 39 S.E. 501 (1901).


256 Wis. Stat. § 331.045 (1949): "Contributionary 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 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."

See Padway, Comparative Negligence, 16 Marq. L. Rev. 3 (1931); Campbell, Wisconsin's Comparative Negligence Law, 7 Wis. L. Rev. 222 (1932); Whelan, Comparative Negligence Statute, 20 Marq. L. Rev. 189 (1936); Whelan, Comparative Negligence, [1938] Wis. L. Rev. 465; Campbell, Ten Years of Comparative Negligence, [1941] Wis. L. Rev. 289; Hayes, supra note 6; Grubb, Observations on Comparative Negligence, 23 Ohio St. B. Ass'n R. 237 (1950).
The practical effect has been very similar to that of "slight" and "gross" negligence. Again appeals have multiplied, in which the court is asked to determine whether the particular conduct of the plaintiff is fault at least "equal" to that of the defendant. Since this must depend not only upon all the circumstances of the case as they affect the conduct of both parties, but upon a comparison of one with the other, it is obvious that each decision must be upon the individual facts, and that either the losing defendant or the losing plaintiff has ample encouragement to raise the issue. It is not surprising that there is no semblance of consistency to be discerned in cases of the same general type. In about half of the cases in which the plaintiff has driven onto a railroad crossing without stopping, looking, listening, reducing speed or seeing a visible train, his negligence has been held at least equal as a matter of law to that of the railroad in failing to give proper warning. In about as many cases it has been held that the jury may find that the plaintiff's negligence is the lesser of the two. The same kind of variation is found in cases of a pedestrian walking into the path of a train, or a vehicle whose driver has failed in his duty as to speed, warning or lookout; a trespasser on the right of way struck by a train;

157 Bradley v. Missouri Pac. Ry., 288 Fed. 484 (8th Cir. 1923); Jemell v. St. Louis S. W. Ry., 178 Ark. 376, 11 S.W.2d 449 (1928); Zonner v. Chicago, St. P. M. & O. Ry., 219 Wis. 124, 262 N.W. 581 (1935); Missouri Pac. Ry. v. Davis, 197 Ark. 320, 125 S.W.2d 785 (1939); Missouri Pac. Ry. v. Price, 199 Ark. 346, 133 S.W.2d 645 (1939); Patterson v. Chicago, St. P. M. & O. Ry., 236 Wis. 205, 294 N.W. 63 (1940); Evanich v. Milwaukee Elec. Ry. & L. Co., 237 Wis. 111, 295 N.W. 44 (1941); McClothin v. Thompson, 347 Mo. 708, 148 S.W.2d 558 (1941) (reviewing the confusion in the Arkansas cases); Missouri Pac. R. Co. v. Carruthers, 204 Ark. 419, 162 S.W.2d 912 (1942); Missouri Pac. Ry. v. Howard, 204 Ark. 253, 161 S.W.2d 759 (1942); Missouri Pac. Ry. v. Dennis, 205 Ark. 28, 166 S.W.2d 886 (1942); Missouri Pac. Ry. v. Dawson, 205 Ark. 404, 168 S.W.2d 1105 (1943); Lloyd v. St. Louis S. W. R. Co., 207 Ark. 154, 179 S.W.2d 651 (1944); Snyder v. Missouri Pac. Ry., 183 Tenn. 471, 192 S.W.2d 1008 (1946); Tepel v. Thompson, 359 Mo. 1, 220 S.W.2d 23 (1949).


160 Held equal as a matter of law in Burant v. Studzinski, 230 Wis. 455, 282 N.W. 3 (1938); Hustad v. Evetts, 230 Wis. 292, 282 N.W. 595 (1938); Nayes v. Milwaukee Elec. Ry. & L. Co., 237 Wis. 141, 294 N.W. 812 (1940); Post v. Thomas, 240 Wis. 519, 3 N.W.2d 344 (1942); Crawley v. Hill, 253 Wis. 294, 34 N.W.2d 123 (1948); Ninneman v. Schwede, 258 Wis. 408, 46 N.W.2d 230 (1951).

Held for the jury in De Goey v. Hermens, 233 Wis. 69, 288 N.W. 770 (1939); Wilson v. Pollard, 62 Ga. App. 781, 10 S.E.2d 407 (1940); Doeple v. Rehmer, 217 Wis. 49, 258 N.W. 345 (1935); Schwandt v. Milwaukee Elec. Ry., 244 Wis. 251, 12 N.W.2d 18 (1943); Kleher v.
the various kinds of negligence of drivers colliding at intersections;\textsuperscript{102} and miscellaneous other situations.\textsuperscript{103} The Georgia courts have displayed a remarkable tendency to leave the issue to the jury in all cases,\textsuperscript{104} and in effect have nullified the limitation except as an element of the instructions.

Wisconsin at one time attempted to state some kind of rule by saying that negligence of the same kind, as where both parties failed to keep a proper lookout, would be treated as equal,\textsuperscript{105} but that where the parties were at fault in different respects, as where failure to look out must be balanced against excessive speed, the court could not rule and the issue must be left to the jury.\textsuperscript{106} It has been compelled to retreat from that position, and to recognize not only that juries may find that negligence of the same kind differs in degree,\textsuperscript{107} but also that the plaintiff's negligence of a different kind may be as a matter of law at least equal to that of the de-

\textsuperscript{102}As, for example, in Lewis v. Powell, 51 Ga. App. 129, 179 S.E. 865 (1935), where the plaintiff drove into the side of a train.

\textsuperscript{103}Hansberry v. Dunne, 230 Wis. 626, 284 N.W. 556 (1939) (both drivers on wrong side, too fast and no lookout); Atlantic Greyhound Corp. v. Loudermilk, 110 F.2d 596 (5th Cir. 1940) (turning into path of speeding bus); United States v. Fleming, 115 F.2d 314 (5th Cir. 1940) (unable to stop within range of vision, collision with unlighted vehicle parked on highway); McDowell Transport, Inc. v. Gault, 80 Ga. App. 445, 56 S.E.2d 161 (1949) (same); Engbrecht v. Bradley, 211 Wis. 1, 247 N.W. 451 (1933) (same).

\textsuperscript{104}Hansberry v. Dunn, 230 Wis. 626, 284 N.W. 556 (1939); Fronczek v. Sink, 235 Wis. 398, 291 N.W. 850, 293 N.W. 153 (1940).
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fendant. Likewise where the plaintiff has been negligent in one respect and the defendant in two or three, it has been held that the fault is at least equal, and where the plaintiff has failed in two or three respects and the defendant in one the jury has been permitted to find that the plaintiff is still less at fault.

It is obvious that a slight difference in the proportionate fault may permit a recovery; and there has been much quite justified criticism of a rule under which a plaintiff who is charged with 49 per cent of the total negligence recovers 51 per cent of his damages, while one who is charged with 50 per cent recovers nothing at all. Actually, of course, juries almost never indulge in such refined hair-splitting, and the criticism really goes to the directed verdict. It has been said that the restriction is necessary to prevent the jury from giving the plaintiff something in every case, even where the defendant may not be negligent at all, or is at fault to the extent of only 1% of the total. But this ignores the fact that the court still has control over an unjustified apportionment, and that a 1% recovery will be insignificant, and less than the nuisance value of the suit. Actually the writer has found no such cases. It appears impossible to justify the rule on any basis except one of pure political compromise. It is difficult to be happy about the Wisconsin cases, or to escape the conclusion that at the cost of many appeals they have succeeded merely in denying apportionment in many cases where it should have been made.

Proximate Cause

"Proximate cause" has been something of a problem under the apportionment statutes. The Federal Employers' Liability Act, when it was first enacted, said nothing about assumption of risk, and it was held that that

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170 Schmidt v. Leary, 213 Wis. 587, 252 N.W. 151 (1934); Kirchen v. Tisler, 255 Wis. 208, 38 N.W.2d 514 (1949). But the fact that plaintiff has been negligent in more respects than defendant has been held to require the conclusion that his fault was at least equal. Kilcoyne v. Trausch, 222 Wis. 528, 269 N.W. 276 (1936); Burant v. Studzinski, 230 Wis. 455, 282 N.W. 3, 128 (1938); Konow v. Gruenwald, 241 Wis. 453, 6 N.W.2d 208 (1943).
171 In Head v. Georgia Power Co., 70 Ga. App. 32, 27 S.E.2d 339 (1943), and Hunt v. Western & A. R. R., 49 Ga. App. 33, 174 S.E. 222 (1934), it was said that a slight difference in fault would justify recovery of "a small amount"; and in Evans v. Central of Georgia Ry., 38 Ga. App. 146, 142 S.E. 909 (1928), a verdict for 12 cents was upheld on this basis. The Georgia courts evidently were following some unstated theory of allowing the plaintiff the difference between the proportions of fault.
172 See in particular the articles cited in note 156.
173 In special verdict cases the juries, with rare exceptions, have found percentages of fault in even multiples of 5 or 10, or else in simple fractions, such as 1/2 or the like.
defense remained available to the defendant as a complete bar to recovery,¹⁷⁶ until the act was amended in 1939 to eliminate it entirely.¹⁷⁷ Quite apart from this, the Supreme Court quite unexpectedly held¹⁷⁸ in 1916 that a railroad employee who had violated a company rule or order was charged with the "primary duty," and could not recover, on the ground that his own negligence was the "sole proximate cause" of his injury, so that the negligence of the defendant was not to be regarded as contributing at all. The result was a series of decisions refusing to apportion the damages in the case of such violations. In one of them the plaintiff had himself ordered the negligent conduct of a fellow servant for which he was seeking to recover,¹⁷⁹ but in others he had merely failed to perform a specific duty of his own,¹⁸⁰ or to obey a specific order.¹⁸¹

In 1943 the Supreme Court, quite as unexpectedly, declared¹⁸² that the "primary duty" rule was in reality a form of assumption of risk, which it never had been called before, and that the 1939 amendment had eliminated it. A subsequent decision of the Sixth Circuit,¹⁸³ to which certiorari was denied, has confirmed this conclusion, although there are still decisions which refuse to accept it. It is idle to comment on such intellectual gymnastics; but the whole thing is likely to prove something of a puzzle to future historians, since the rule itself would appear to be neither required

¹⁷⁷ "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier; and no employee shall be held to have as-
sumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 33 Stat. 1404 (1939); 45 U.S.C. § 54 (1946). First applied in Tiller v. Atlantic Coast Line Ry., 318 U.S. 54 (1943).
¹⁷⁸ Great Northern Ry. v. Wiles, 240 U.S. 444 (1916).
¹⁷⁹ Unadilla Valley Ry. v. Cal dine, 275 U.S. 139 (1928).
¹⁸¹ Davis v. Kennedy, 266 U.S. 147 (1924); Southern Ry. v. Youngblood, 286 U.S. 313 (1932); St. Louis S. W. Ry. v. Simpson, 286 U.S. 346 (1932); Bradley v. Northwestern Pac. Ry., 44 F.2d 683 (9th Cir. 1930); Van Dermeer v. Delaware, L. & W. Ry., 84 F.2d 979 (2d Cir. 1936); Southern Ry. v. Hylton, 37 F.2d 543 (6th Cir. 1930), aff'd sub nom., Hylton v. Southern Ry. 87 F.2d 393 (6th Cir. 1937); Paster v. Pennsylvania R. R., 43 F.2d 908 (2d Cir. 1930).
¹⁸² "One of these [problems] was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk. Unadilla Valley Ry. v. Cal dine, supra note 178; Davis v. Kennedy, supra note 180. ... It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called." Mr. Justice Black, in Tiller v. Atlantic Coast Line Ry., supra note 176, at 63-64.
nor justified by anything in the original statute, and its abolition equally uncalled for by the amendment.

The very questionable "proximate cause" explanation of the last clear chance has resulted in the survival of that doctrine under the apportionment acts, on the theory that its effect is that the plaintiff's negligence has not contributed "proximately" at all. This has been true under the Federal Employers' Liability Act, the various state statutes where the question has been considered, and most of the Canadian apportionment acts. The decisions may perhaps be justified, on the ground that the statutes all are silent on the last clear chance, and the common law stands until it is clearly changed. But the very probable reason for the silence is that the question simply never occurred to the legislatures at all, and the result is that the system of apportionment breaks down in an important group of cases, where a loss from the fault of two parties still is visited entirely upon one. Any necessity for the last clear chance as a palliation of the hardships of contributory negligence obviously disappears when the loss can be apportioned; and the statute becomes juggled in favor of the plaintiff, allowing the cases of injustice to the defendant to stand. This windfall to the plaintiff must inevitably be reflected in liability insurance rates. At least, in any future statutes, there should be specific provision one way or the other as to the last clear chance, and it should not be allowed, as in the past, to go by default.

Tennessee has developed, at common law, a peculiar rule under which negligence of the plaintiff which contributes concurrently, or "proximately"

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183 See supra, text at note 36.
184 See supra, text at note 36.
186 This windfall to the plaintiff must inevitably be reflected in liability insurance rates. At least, in any future statutes, there should be specific provision one way or the other as to the last clear chance, and it should not be allowed, as in the past, to go by default.
187 Tennessee has developed, at common law, a peculiar rule under which negligence of the plaintiff which contributes concurrently, or "proximately"
or "directly" to his injury will bar all recovery, but if his negligence is "remote" the damages will be reduced in proportion to it. In its practical operation this has resulted in apportionment only in cases where the defendant has the last clear chance. Georgia has a statute providing that "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover;" and under the Georgia apportionment rule this has resulted in a reverse application of the last clear chance, to the plaintiff instead of the defendant.

Special Verdicts

All of these limitations merely cut down the scope of apportionment, without going at all to the root of the difficulty, the unreliable and irresponsible jury. A more realistic approach to that basic problem is the procedure which requires a special verdict, or answers to special interrogatories, bearing on the apportionment of damages. As this procedure is applied to the apportionment issue in Wisconsin, for example, the jury is not asked to return a general verdict for the plaintiff with assessment of the recoverable damages, or for the defendant, but is asked instead a series of specific questions, which, with their answers, might run in a typical case as follows:

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

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

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

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

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189 Bejach v. Colby, 141 Tenn. 686, 214 S.W. 869 (1919); Anderson v. Carter, 22 Tenn. App. 118, 118 S.W.2d 891 (1938); Grigsby & Co. v. Bratton, 128 Tenn. 597, 163 S.W. 804 (1913); Memphis Street Ry. v. Haynes, 112 Tenn. 712, 81 S.W. 374 (1904); Hansard v. Ferguson, 23 Tenn. App. 306, 132 S.W.2d 221 (1939). There is, however, a special rule apportioning the damages under the statute requiring certain precautions of railroads. See supra, note 92.

192 Dush v. Fitzhugh, 70 Tenn. (2 Lea) 307, 309 (1879); East Tenn. Ry. v. Fain, 80 Tenn. (12 Lea) 35, 40 (1883); McClard v. Reid, 190 Tenn. 337, 229 S.W.2d 505 (1950); Bejach v. Colby, 141 Tenn. 686, 214 S.W. 869 (1919); Anderson v. Carter, 22 Tenn. App. 118, 118 S.W.2d 891 (1938).

193 Technically a special verdict requires answers to specific questions only on the issues, without any general verdict for plaintiff or defendant. Special interrogatories are asked in addition to the instruction to return a general verdict, and as a check upon the jury's conclusions. Either may be appropriate to the apportionment of damages.
5. If you answer all of Questions 1, 2, 3 and 4 "Yes," then answer this: What percentage of the total negligence was attributable to the defendant Smith? 60%. To the plaintiff Jones? 40%.

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

With the information thus given, the court is in a position to make the apportionment itself, and proceeds to enter judgment for the plaintiff Jones in the amount of 60% of the damages found, or $6,000. The jury are not told the effect of the answers, although they may well understand what it will be; and it has been held to be error to permit counsel to read the apportionment statute to the jury in order to let them know.194

Such is the Wisconsin procedure, which calls for a special verdict, with the court making the final entry. Obviously, however, the same questions would serve equally well as special interrogatories, put, along with full instructions as to the law, as a check upon the jury's conclusions under the ordinary general verdict. And if, as has often been the case in jurisdictions where all this is entirely unfamiliar, new and alarming, even these few and simple questions appear unduly complicated and confusing, they might be made even simpler still. For special interrogatories on the issue of division of damages, Questions 5 and 6 above are all that are really needed. Or the whole matter might be reduced to the lowest possible terms, as follows:

Q. What is the full amount of damages sustained by the plaintiff?  
A. $10,000.

Q. What is the amount of plaintiff's damages as diminished by reason of any negligence attributable to him?  
A. $6,000.195

Both special verdicts and special interrogatories have long been authorized and permissible, either by statute or under the common law, in nearly all of our jurisdictions.196 They have been discretionary with the trial

194 De Groot v. Akkeren, 225 Wis. 105, 273 N.W. 725 (1937). General instructions are not given where the special verdict is used, and instructions on the special issues are limited to those necessary or appropriate to enable the jury to understand the questions. Connellee v. Nees, 266 S.W. 502 (Tex. Civ. App. 1924); Robertson & Mueller v. Holden, 1 S.W.2d 570 (Tex. Comm. App. 1928); Tidall Western Oil Co. v. Blair, 39 S.W.2d 1103 (Tex. Civ. App. 1931); Texas Pipe Line Co. v. Bridges, 39 S.W.2d 1109 (Tex. Civ. App. 1931); Byington v. City of Merrill, 112 Wis. 211, 88 N.W. 26 (1901); Banderob v. Wisconsin Cent. Ry., 133 Wis. 249, 113 N.W. 738 (1907); Gendler v. Cleveland Cent. Ry., 18 Ohio App. 48 (1924).

195 This was done under the Wisconsin statute in Honore v. Ludwig, 211 Wis. 354, 247 N.W. 335 (1933), and was held to be proper. Padway, supra note 156, at 16-17, 23-24, gives this form of verdict and objects to percentages under the Wisconsin act; but as the case cited indicates, percentage questions are used almost universally in Wisconsin.

196 See generally, as to special verdicts and special interrogatories, Sunderland, Verdicts, General and Special, 29 YALE L. J. 253 (1920); Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 YALE L. J. 575 (1923); Wicker, Special Interrogatories to Juries in Civil Cases, 35 YALE L. J. 296 (1926); Green, A New Development in Jury Trial, 13 A.B. J. 715 (1927); Staton, The Special Verdict as an Aid to the Jury, 13 J. AM. JUD. SOC'Y 176 (1930); Note, 34 TEx. L. REV. 96 (1939); Lipscomb, Special Verdicts Under the Federal Rules, 25 WASH. U. L. Q. 185 (1940); Dooley, The Use of Special Issues Under the New State and Federal Rules, 20 TEXAS L. REV. 32 (1941); Nordbye, Use of Special Verdicts Under Rules of Civil Procedure, 2 F.R.D. 138 (1943); McCormick, Jury Verdicts Upon Special Questions in Civil Cases, 2 F.R.D. 176 (1943); Hyde, Fact Finding by Special Verdict, 24 J. AM. JUD. SOC'Y 144 (1941); Rossman, The Judge-Jury Relationship in the State Courts, 3 F.R.D. 98 (1944); Frank, The Case for the Special Verdict, 32 J. AM. JUD. SOC'Y 142 (1949).
court, and actually they have been little used—seldom requested by counsel, and more seldom given when asked. One reason has been the traditional inertia of the bar toward any innovation in procedure. Another was the unfortunate holding, in a few early cases of special verdicts, that all controverted facts not found specifically must be taken to be found against the party having the burden of proof.197 Because of this, counsel, out of an excess of caution, began to swamp the jury with detailed questions; and the special verdict became so unwieldy, confusing and unworkable that complaints were voiced by the courts.188 There were instances189 of appeals on a record where thirty to fifty questions had been asked in a single case. It was only when it was provided190 or held that facts not found specifically must be deemed to support the judgment if there was any evidence to sustain it, that simplicity was restored and the special verdict gave satisfaction. Statutes in a few states now provide that the court must submit special verdicts or special interrogatories at the request of either party. In Wisconsin, North Carolina and Texas the special issue has become standard practice; and there is a history of more than twenty years of its application to the Wisconsin general apportionment act.204 When the apportionment provision of the Federal Employers’ Liability Act first reached the courts, some of them strongly recommended that the

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190 As in Wis. Stat., § 270.28 (1949); Tex. Rev. Stat., art. 2190 (Vernon 1936); Fed. R. Civ. P. 49(a).

201 OREG. GEN. CODE ANN., § 11460 (Page, 1926); R. I. GEN. LAWS, c.534, § 2 (1938); TEX. REV. STAT., art. 2189 (Vernon 1936); Wis. Stat., § 70.27 (1949).

202 ILL. REV. STAT., c. 110, § 79 (Smith-Hurd 1923); IND. ANN. STAT., § 372 (Burns 1914); IOWA CODE, § 7255 (1919); KAN. REV. STAT., c.60, § 2918 (1923); MICH. COMP. LAWS, § 2611 (1915); OREG. GEN. CODE ANN., § 11463 (Page 1926); R. I. GEN. LAWS, § 4983 (1923).

203 The Texas procedure still has the reputation of creating confusion because of the tendency of Texas attorneys to put complicated questions on over-refined niceties. See Dooley, supra note 196; McCormick, supra note 196 at 150; Rossman, supra note 196 at 109. McCormick says (at 179) that in North Carolina “simplicity and directness in the submission by questions to the jury is the key to the success of the method,” and that in Wisconsin the questions, although more numerous than in North Carolina, “are apparently held within reasonable limits.”

204 See, for example, Schulz v. General Cas. Co., 233 Wis. 118, 288 N.W. 803 (1939); Tomany v. CanoZZi, 238 Wis. 611, 300 N.W. 508 (1941); Horn v. Snow–White Laundry & Dry Cleaning Co., 240 Wis. 312, 3 N.W.2d 380 (1942); Campanelli v. Milwaukee Elec. Ry. & T. Co., 242 Wis. 505, 8 N.W.2d 390 (1943); Webster v. Roth, 246 Wis. 535, 18 N.W.2d 1 (1945).

issue of the division of damages be put specially to the jury, as a control upon the verdict and a remedy for the court's ignorance of what the jury might do. In a few instances this was done;\textsuperscript{200} but it remained discretionary with the trial court,\textsuperscript{201} and for no discernible reason other than pure inertia the practice never became popular. When the Federal Rules of Civil Procedure provided for both special verdicts\textsuperscript{202} and special interrogatories,\textsuperscript{203} they were still left to the discretion of the judge, and they have had no apparent effect upon cases arising under the Act.\textsuperscript{210} In 1948 Judge Frank, in a characteristic opinion,\textsuperscript{211} copiously ornamented with footnotes, urged vigorously and at length the use of the special issue in all such cases; but there is as yet no indication that he has made many converts. There has been no written opposition whatever to the procedure under the Federal


\textsuperscript{201} Refusal to put the special issue was held not to be error in Fried v. New York, N. H. & H. Ry., 183 App. Div. 115, 170 N.Y.S. 697 (3d Dep't 1918), aff'd, 230 N.Y. 619, 130 N.E. 917 (1921); Wolf v. Baltimore & Ohio Ry., supra note 305; Dallas Ry. & Term. Co. v. Sullivan, 108 F.2d 581 (5th Cir. 1940); Goodman v. Chicago, B. & Q. Ry., 289 Ill. App. 320, 7 N.E.2d 393 (1937). In the last named case the refusal was justified on the remarkable ground that the special answer could not control the general verdict.

\textsuperscript{202} Rule 49(a): "Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

\textsuperscript{203} Rule 49(h): "General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to return a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and the answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

\textsuperscript{210} The special interrogatory procedure was used and upheld in Bolen v. Lehigh Valley Ry., 167 F.2d 934 (2d Cir. 1948). Refusal to put the special issue was held not to be error in Skidmore v. Baltimore & Ohio Ry., 167 F.2d 54 (2d Cir. 1948).

\textsuperscript{211} Ibid. Judge Learned Hand concurred briefly, as to the desirability of putting the special issue.
Rules, and the failure of the federal courts to make use of it in apportionment cases remains something of a mystery.

The advantages claimed for the special issue are many. So far as they are pertinent to the apportionment of damages, the most important is of course that the jury is no longer given a free hand in a cloak of secrecy, and the court is informed as to what it has done. If the instructions have been thrown out of the window, if they have been misunderstood, if there has been error in applying them, even in arithmetic, it may be corrected rather than allowed to stand. The court is told whether the jury has found contributory negligence at all, whether it has divided the damages, and if so, in what proportion. If the process or the result is wrong a remittitur may save a complete new trial. Beyond this, the jury is forced to give detailed consideration to the issue, rather than to jump at a general conclusion without paying any attention to it. A jury which on general principles would return a large verdict in favor of apretty woman and against a railroad company may the well hesitate to return special findings which it knows to be against the evidence. Finally, the special verdict may, in many cases, avoid the necessity of long and complicated instructions, incomprehensible to anyone but a lawyer, and in themselves a fertile source of error.

All of these advantages clearly operate in favor of the defendant in the majority of apportionment cases, and the proposal for compulsory special verdicts or special interrogatories has met with no enthusiasm at all on the part of the plaintiffs' attorneys who usually introduce the apportionment bills into the legislatures. Yet the report of the Wisconsin lawyers, for both plaintiffs and defendants, in response to inquiries from drafting commit-

213 See Sunderland, supra note 196; Wicker, supra note 196; Staton, supra note 196; Frank, supra note 196; Skidmore v. Baltimore & Ohio Ry., supra note 210.
214 Staton, supra note 196 at 181, gives the following horrible example, which was one of several involved instructions given in Payne v. Healey, 139 Md. 86, 114 Atl. 693 (1921): "The defendant prays the court to instruct the jury that it was the duty of the plaintiff to look and listen for approaching trains, as he approached the tracks of the defendant on the occasion of the injuries complained of and to continue to look and listen until the said tracks were reached and to further instruct the jury that if they shall find from the evidence that the view of plaintiff of said tracks, as he then and there approached the same, was in either direction in any way obstructed, then it was the duty of the plaintiff to stop, look and listen for the approaching train or trains before attempting to cross the said tracks; and to further instruct the jury that if they shall further find that the plaintiff did not so look and listen, or did not stop, look and listen, if they shall find that the view of the plaintiff of said tracks was in either direction obstructed and shall further find that his failure to so look and listen or to so stop, look and listen, directly contributed to the collision between the engine of the defendant and the automobile which the plaintiff was then and there driving, then the plaintiff is not entitled to recover, unless the jury shall further find from the evidence that the defendant, its agents or employees, in charge of the engine and train which collided with the automobile of the plaintiff could have by the exercise of reasonable care and caution on his or their part, after he or they or any of them became aware of the peril, the plaintiff had by his negligence, if the jury shall so find, placed himself, avoided the consequences of the plaintiff's said negligence and prevented the injuries complained of or unless they further find that the engineer in charge of said engine could by the exercise of reasonable care have discovered the position or peril of the plaintiff while the plaintiff was upon the Antietam street crossing and that the said engineer could by the exercise of reasonable care have avoided injury to the plaintiff or his property after he ought to have discovered the peril of the plaintiff if the jury so find."
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tees,\textsuperscript{215} has been for many years that the combination of the special issue procedure and the apportionment act has worked very well in Wisconsin, that they regard the one as indispensable to the successful operation of the other, and that they would not like to see a return to the common law. In particular, their report has been that the increase in the number of recoveries which must inevitably result from the abrogation of the complete defense has been to a considerable extent balanced and compensated by a reduction in the size of verdicts, as juries apportion the damages instead of refusing to find contributory negligence at all; and that liability insurance rates have remained within reasonable bounds. Of the various possible compromises, this seems to be the only one which is both reasonable and effective.

Multiple Parties

Complications arise when apportionment involves multiple parties. Where, for example, the automobiles of two negligent drivers collide and injure the plaintiff, who is a bystander or a passenger in one of the cars, it is obvious that no complete and substantial justice can be done to the situation by any division of the damages between the plaintiff and one driver alone, in an action to which only those two are parties. There remain the problems of evaluation of the contributing fault of one who is not a party to the action, of the second suit against him in which the first is not res adjudicata and a new jury may come to a very different conclusion, and finally of contribution between the joint tortfeasors. The only completely satisfactory method of dealing with the situation is to bring all the parties into court in a single action, to determine the damages sustained by each, and to require that each bear a proportion of the total loss according to his fault.

The English\textsuperscript{216} and some of the Canadian\textsuperscript{217} acts have proceeded on this

\textsuperscript{215} The writer has seen some sixty such letters, in connection with the work of drafting committees in Minnesota in 1939, and California in 1951.

\textsuperscript{216} Another difficulty in the practical operation of the statute in Mississippi is that we do not have special verdicts, but general lump-sum verdicts only. There is no way in which it can be known, for instance, that the jury found that the plaintiff had been damaged $1,000, that the plaintiff himself was guilty of 25 per cent of the negligence, and that the jury awarded $750 for this reason. Thus, the appellate court has a most difficult time in dealing with pleas of excessiveness or inadequacy.

\textsuperscript{217} An automobile damage suit is usually a swearing contest. The appellate court has no way of knowing whether the jury believed or disbelieved the testimony offered to establish that the plaintiff was guilty of negligence. If the verdict seems to be unusually large the court may assume that the jury did not believe that the plaintiff was guilty of contributory negligence where that fact is in dispute when, as a matter of fact, the jury might not have considered the comparative negligence statute at all in arriving at the verdict. We have not had much experience with special verdicts, because there never has been any provision for them in this state, but in our humble opinion a provision for special verdicts should go along with a comparative negligence statute as one of the Siamese twins goes along with the other.\textsuperscript{218} Lipscomb, supra note 1, at 673.


\textsuperscript{219} In particular the statutes of Ontario, Alberta, British Columbia, Manitoba and Saskatchewan, supra note 9.
basis. With liberal procedure for joinder of parties at the instance of either plaintiff or defendant, as well as for counterclaims and cross-complaints, they have provided for apportionment of all damages among all parties in proportion to their respective faults, including contribution between defendants. Professor Gregory, in a very able book,\(^{218}\) has argued convincingly the superiority of these statutes over any other existing acts. There can be no doubt that, from the point of view of pure theory and abstract justice, they achieve a more satisfactory result in cases of multiple parties than ever has been accomplished in the United States.

Practical operation is, however, a very different thing from pure theory; and it may well be questioned whether the very complex Canadian procedure is capable of being adapted to the American jury. The jury has virtually disappeared from tort litigation both in England and in Canada,\(^{219}\) and the success of the Canadian method has been due in no small part to its administration by very intelligent judges. The cases of multiple parties can, and do, become extremely involved, as is indicated by the very condensed statements of two of them given by Professor Gregory:\(^{220}\)

1. Collision between \textit{I}'s automobile and \textit{M}'s truck, the truck being parked on a highway at night with rear light on. \textit{I} and \textit{I}, Jr. suffer damage of $283.10 and $200, respectively, and \textit{M}'s damage was $35.75. \textit{I} and \textit{I}, Jr. sued \textit{M}, who apparently counterclaimed against \textit{I}. \textit{I} was found 25 per cent and \textit{M} 75 per cent negligent. Appeal by \textit{I} and cross-appeal by \textit{M} from judgment of trial court dismissed. Court said damages were added, totaling $518.85, of which \textit{I} must bear 25 per cent and \textit{M} 75 per cent negligent. \textit{M} pays \textit{I}, Jr. $200, and the balance of his share $189.13 to \textit{I}, \textit{I} paying nothing to \textit{M}. The court apparently figured that \textit{M}'s share was \(\frac{3}{4}\) of $200, plus \(\frac{1}{4}\) of $283.10 plus \(\frac{1}{4}\) of $35.75, and \textit{I}'s share \(\frac{1}{4}\) of this total, in proportion to their negligence, and that \textit{I}, Jr.'s recovery should not be affected because he was not negligent at all.\(^{221}\)

2. Collision of automobiles driven by \textit{GH} and \textit{JW}, belonging to \textit{HH} and \textit{LW}, respectively, accident occurring at a road crossing. \textit{HH} and \textit{LW}, as owners, were responsible vicariously under the Motor Vehicles Act for the negligence of their bailees. \textit{GH} and \textit{JW} alone were negligent, being \(\frac{1}{3}\) and \(\frac{2}{3}\) negligent, respectively.

\(\textit{FH}'s\) and \(\textit{SH}'s\) damages were $648 and $750 each, for which they got judgment against \textit{LW}. \textit{HH} suffered $300 damages, which she claimed by counterclaim against \textit{LW}, she being entitled to \(\frac{2}{3}\) thereof, since the negligence of \textit{GH} is attributed to her as contributory negligence and as a basis of liability for damages.

\(^{218}\) Gregory, Legislative Loss Distribution in Negligence Actions (1936). See also Gregory, Loss Distribution by Comparative Negligence, 21 Minn. L. Rev. 1 (1936).

\(^{219}\) "In 1935, of some 1400 actions tried in the King's Bench in London, it is said that about 300 were tried before juries. I have no Canadian statistics, but it is easy to believe that the percentage of jury trials is even lower in Canada." O'Halloran, Problems in the Modern Appeal in Civil Cases, 27 Can. B. Rev. 259, 263 (1949).

\(^{220}\) Gregory, Legislative Loss Distribution in Negligence Actions 181, 186 (1936).

\(^{221}\) The case of Steele v. Ferguson, [1931] Ont. L. Rep. 427.
LW, under the statute, suffered $1,000 damages for loss of services of his deceased wife and, in his personal capacity, $291.80. The court held that inasmuch as the damages were for LW himself, they were to be reduced by 3/5 because of his responsibility for JW's negligence, under the Motor Vehicles Act, both as contributory negligence and as a basis of liability for damages. LW was also entitled to contribution from HH and GH of 1/3 of anything he paid to FH and SH.

It appeared that HH had added JW as a third party and filed a cross-complaint for damages to her car. On this she was entitled to judgment for 3/5 of her damages, just as she was on her contribution against LW. GH and HH neglected to ask for contribution from JW to anything they might have to pay to LW.

Net result:

- FH against LW—$648.
- SH against LW—$750.
- HH against LW and JW—$200.
- LW against HH and GH—$861.20.
- LW against HH and GH—$466 as contribution (1/3 of $648 plus $750).

If they had requested it, HH and GH might have had, as contribution from JW, $574.66, although (says Professor Gregory) this is doubtful in view of the close domestic relationship involved.²²³

It is one thing to say that a capable Canadian judge, with ample time in chambers and a transcript of the record before him, can work all this out and do what the law requires. It is quite another to say that it can be done in a limited time, and from memory, by the twelve housewives, baker's helpers and unemployed individuals who make up the kind of jury we get today in the United States. Even more terrifying is the prospect of the instructions which must be given, under pressure of time, before the jury retires, covering in detail all of the complications and replete with the possibility of reversible error. Even if special issues are to be used, they must run to a number and complexity which may well break the whole process down under its own weight. It has been the writer's experience that the mere attempt to explain to a committee of a legislature, or even a bar association, just how the Canadian method operates in cases of multiple parties results in something approaching migraine, and a general exodus for restoratives. It is not surprising that, even with enthusiastic reports of complete success in Canada for more than a quarter of a century, no American legislature has looked with favor upon such a system.²²³

An additional reason for hesitation here is the history of the Uniform Contribution Among Tortfeasors Act. Since its promulgation by the Commissioners on Uniform Laws in 1939, it has been adopted in only nine jurisdictions;²²⁴ and so much opposition to it has developed that the Commis-

²²³ The case is Haines v. Williams, 47 Brit. Col. Rep. 69 (1933).
²²⁴ The only serious attempt to persuade an American legislature to adopt the Canadian system was made in Minnesota in 1940. See Proc. Minn. St. B. Ass'n, 1940, 12-17.
²²⁴ Arkansas, Delaware, Hawaii, Maryland, Michigan, New Mexico, Pennsylvania, Rhode Island and South Dakota. Maryland and Pennsylvania modified or eliminated the procedure provided by the Act for joinder of third parties. Delaware, almost immediately after adoption of the Act, amended it limiting its application to joint judgment defendants.
sioners now have withdrawn it for further study and possible redrafting. The chief difficulty has been that of the release of one tortfeasor, which under the terms of the Act leaves him still liable for contribution to the other, but credits him with a pro rata share of his settlement. The defendants complain, with apparent justice, that this makes it impossible ever to settle a case, take a release, and close the file. Whatever the fate of the Act may be, it is at least a warning that contribution among tortfeasors introduces problems of its own, and that the attempt to combine it with "comparative negligence" may well be the kiss of death to the whole bill.

Actually there are astonishingly few cases in which the question of multiple parties has reached the appellate courts under any "comparative negligence" act. The writer has found only ten, all of them arising in Georgia and Wisconsin, where apportionment is restricted to cases in which the negligence of the plaintiff is "less" than that of the defendant. In none of these cases has the result been very satisfactory. In four of them it was held that the statute did not affect contribution between joint tortfeasors, which under the Wisconsin common law rule must be on a basis of equality rather than in proportion to fault. In four others it was held that the plaintiff could recover nothing against one defendant whose fault was no greater than his own; and that his recovery against the other defendant must be reduced in the proportion that the plaintiff's negligence bore to the total of all three, rather than as between the two. In the ninth case, where the plaintiff's negligence was found to be 5%, that of one defendant 20%, and that of the other 75%, it was held that the plaintiff could recover 95% of his damages against both defendants, with no apportionment between the two. In the tenth, where the fault of the plaintiff was found to be 50%, and that of each of two defendants 25%, the plaintiff was denied all recovery, but each defendant recovered 75% of his damages on his counterclaim.

It may be observed in passing that, however these results might be improved, they are at least no worse than the common law would have accomplished without the statute, by denying all recovery and leaving the entire loss with the plaintiff. But the real significance of these cases is not in their imperfections, but in their remarkably small number. The explanation does not lie entirely in the fact that apportionment acts covering railroads and employers usually leave only one possible defendant, since in Mississippi, Nebraska, South Dakota, Georgia and Wisconsin the apportionment ap-


226 Brown v. Haertel, 210 Wis. 354, 244 N.W. 633 (1932); Zurn v. Whatley, 213 Wis. 365, 251 N.W. 435 (1933); Homerding v. Poseychalla, 228 Wis. 606, 280 N.W. 409 (1938); Wedel v. Klein, 229 Wis. 419, 282 N.W. 606 (1938).


229 Kirchen v. Tisel, 255 Wis. 208, 38 N.W.2d 514 (1949).
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plies to automobile accidents and other negligence cases. Nor does it lie in
the absence of procedure for joinder of parties, which is available in all
these jurisdictions. The fact appears to be that the cases of multiple parties
are sufficiently few in number, or are disposed of with so little difficulty in
the trial courts, that they have not been a major problem on appeal.

Conclusion

No effort has been made in these pages to argue the desirability of the
division of damages in contributory negligence cases. It speaks for itself,
and the question always has been one of feasibility rather than of justice.
It is too late, in the light of the long history, the many statutes, and the
multitude of cases, to contend that the thing cannot be done at all. The chief
problem is one of some protection for the defendants, and some restraint
upon the irresponsible jury, which will keep it within bounds and insure that
the apportionment will in fact be made.

If the writer were to attempt to draw an act for a legislature, he would
avoid "slight" and "gross" negligence, and the "lesser" negligence of the
plaintiff, as the pestilence. They do not strike at the root of the difficulty;
they leave the damages undivided in too many cases where the division
should be made; and they lead inevitably to many difficult appeals abounding
in confusion. He would leave the multiple party apportionment, perfect
as it may be, to the Canadians until the American jury is eliminated or at
least improved, for the reason that the game is not worth the candle. He
would rely upon the Wisconsin special issue procedure, or something like
it, to keep the jury under control.

The following draft, which follows closely a bill approved by the Cali-
ifornia State Bar Association at its annual meeting in September, 1952, is
consistent with these conclusions:

1. 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 contribu-
tory negligence of the person injured, or of the deceased, or of the owner
of the property, or of the person having control over the property, shall
not bar a recovery, but the damages awarded shall be diminished in propor-
tion to the amount of negligence attributable to the injured person or to the
deceded or to the owner of the property or to the person having control
over the property.

2. In any action to which section 1 of this Act applies, the court shall
make findings of fact or the jury shall return a special verdict which shall
state:

(a) the amount of the damages which would have been recoverable
if there had been no contributory negligence; and

(b) the extent to which such damages are diminished by reason of
such contributory negligence.