SOME PROBLEMS ARISING FROM MAINE'S "COMPARATIVE NEGLIGENCE" STATUTE AS INDICATED BY EXPERIENCE IN OTHER STATES

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This paper does not concern itself with a discussion of the merits of Comparative Negligence versus the common law rule of contributory fault. Other than stating a minimum of historical background it will only describe case law in other states having a Comparative Negligence rule to the end that we may discover what course case law in Maine is likely to take.

Because of the similarity between our Statute and those in Wisconsin and Arkansas, particularly as it relates to the limitation re: equal fault emphasis will be upon case law of these two states.

Public Law, 1965, Chapter 424 was enacted by the 102nd Legislature and signed by the Governor. It became effective September 3, 1965. Although the Statute employs few words, it has the effect of sweeping away nearly a century of case law and will cause us to readjust our thinking from the common law concept that contributory fault, however slight, is a complete bar to a damaged plaintiff's recovery against a negligent defendant, to the new philosophy that loss due to accidental injury or property damage, in justice ought be apportioned and made to fall upon all participants in the bringing about of the accident to the extent their fault participated in bringing about the loss.

A brief historical review of similar statutes becomes helpful. Maritime law aside, the earliest departure from the century and a half old case of Butterfield vs Forrester, 11 East 60, 103 Eng. Rep. 926 (1809), came in 1908 with the enactment of the Federal Employers' Liability Act, 35 Stat L. (1908), now 45 U.S.C. Pgh. 51-60.

There quickly followed the Jones Act (1915), 46 U.S.C. Pgh. 688 and a series of State "employers' acts" in Colorado, Iowa, Kansas, Kentucky, Minnesota, Montana, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Virginia, Wyoming, Arizona, Florida, Oregon and Arkansas.

In 1910, Mississippi adopted a general act, Miss. Laws (1910), Ch. 312, applying apportionment to all actions for personal injuries and expanded it in 1920 to include damages to property, Miss. Code Ann., (1942) phg. 1454.

Today, acts similar to ours are to be found in Wisconsin, Wis. Statute, pgh. 331.045 (1957); Nebraska, Neb. Rev. Statutes, phg. 25-1151 (1943); South Dakota, S.D. Code, phg. 47.0304-1 (Supp. 1952); Mississippi, Miss. Code Ann., phg. 1454 (1942); Arka sas, Ark. Statute Ann., 27-1730.1 phg. 105-603 (1956). Georgia Code Annotated (See also, 17 Cornell L.Q. 333, 604.)

Maine, by virtue of the last line of our Statute, joins Arkansas and Wisconsin as the only States of those having comparative negligence Statutes, limiting plaintiffs recovery to those instances in which his causal fault is found to be less than the causal fault of the defendant. Despite the similarity of the limitations, the language employed in the three Statutes is substantially different one from the other. Some of the language differences may well be found to be meaningful as will hereafter appear. The difference in language ought to be kept much in mind when analyzing the case law of Wisconsin and Arkansas for guidance in formulating principles of law occasioned by Maine Statute. The three Statutes are set forth below in their entirety.

P.L. Me. Chap. 424

Where any person suffers death or damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that death or damage shall not be defeated by reason of the fault of ther person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Where damages are recoverable by any person by virtue of this section subject to such reduction as is mentioned, the jury shall find and record the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.
Fault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence.
If such claimant is found by the jury to be equally at fault, the claimant shall not recover.

WISCONSIN STATUTES: Section 331.045

Contributory Negligence: when bars recovery:
Contributory negligence shall not bar recovery in an action by any person, or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

ARKANSAS STATUTES: ANN. Secs. 27-1730.1-2 Supp. 1961

Contributory negligence, not a bar to recovery where less than negligence of person causing damage:
Contributory negligence shall not bar recovery of damages for any injury, property damage or death where the negligence of the person injured or killed is of less degree than the negligence of any person, firm, or corporation causing such damage.

Contributory Negligence as diminishing recovery:
In all actions hereafter accruing from negligence resulting in personal injuries or wrongful death or injury to property, contributory negligence shall not prevent a recovery where any negligence of the person so injured, damaged or killed is of less degree than any negligence of the person, firm or corporation causing such damage; provided that where such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of recovery shall be diminished in proportion to such contributory negligence.

It is noted at the outset that the Maine Statute contains this language "but the damages recoverable in respect thereto shall be reduced to such an extent as the jury thinks just and equitable having regard to the claimants share in the responsibility for the damage. (Emphasis supplied). Neither the Wisconsin nor the Arkansas Statute contains such language. It could well be reasoned the Legislature conciously intended to provide that apportionment should be at the unreviewable discretion of the jury and gave as direction only that the apportionment be "just and equitable." It could likewise be well argued the language "the claimants share in the responsibility for the damage" intends that the comparison be of the degree of causation rather than the degree of culpability.

The Wisconsin Statute declares the diminution of the damage to be "in the proportion to the amount of negligence attributable to the person recovering."

The Arkansas Statute says "The amount of recovery shall be diminished in proportion to such contributory negligence. (Emphasis supplied).

In Engebrecht vs Bradley 211 Wis 1, 247 N.W. 451 (1933) the Supreme Court of Wisconsin declared that the plaintiffs recovery must be diminished to that extent that his negligence has been "causal" or has "contributed" to his injury. To the same effect: Ponze vs Hess 249 Wis 340 24 N.W. 2d 613. Brunner vs. Minn. RR 139 Fed Supp 424 DC Wis. See also: U S vs Devane 306 F 2d 182.

It is noted however that Professor Prosser says once causation is found the apportionment must be based on comparative fault rather than comparative contribution. 51 Mich. L.R. at Pg. 481.

Of course, Prosser's observation was made with respect to Statutes not containing the language found in the Maine act.

It was also made before the Supreme Court of Wisconsin decided Schilling vs Stokel 26 Wis 2d 525 133 N.W. 2d 335 (1965). In that case the plaintiff was operating his automobile with his left arm and elbow resting on the window sill and projecting outside. He was injured when a box which had been negligently placed on defendant's truck flew off and struck him. The jury found plaintiff's negligence to be equal to that of the defendant. On appeal the majority of the Court agreed that the plaintiff had been negligent in protruding his arm but declared on grounds of public policy that his negligence should be reduced to zero because as the Court "this injury could have occurred if he had been driving non-negligably if he had been driving in an open convertible instead of negligably with his elbow protruding from the window of his sedan". It does seem clear that whatever language the Court employed to describe its rationale, what it was really saying was the plaintiff's negligence had nothing to do with bringing about his loss. In other words, that there was absence of causal relationship either in a legal or philosophical sense between the plaintiff's negligence and the happening of the accident. The result obtained makes it appear that at least in this case the Court said the comparison ought be made between the causative effect of the plaintiff's act and the causative effect of the defendant's act. There were specially concurring opinions by three justices. One Justice felt the plaintiff was not negligent as a matter of law. The other two felt the plaintiff was negligent but the defendant's negligence was greater as a matter of law and that the case ought be returned to the jury for reapportionment.

In Kohler vs Dumke 13 Wis 2d 211 108 N.W. 2d 581 (1961) the Wisconsin Court said:

> "This Court has never attempted to lay down any formula determinging how much weight is to be accorded to the element of negligence and how much to that of causation in comparing causal negligence. Neither do we think it advisable to attempt to do so. This is something to be left to the common sense of the jury."

A very carefully considered dissenting opinion is found in Hanson vs Binder 260 Wis 464 50 N.W. 2d 676 in which it is very persuasively argued that the degree of causation is the sole consideration.

In Taylor vs Western Casualty Co. 270 Wis. 408 71 N.W. 2d 363 (1955) the Wisconsin Court said:

> "The apportionment of negligence is the peculiar province of the jury. The degree of negligence attributable to a party is not to be measured by the character thereof nor by the number of respects in which he is found to have been at fault. It is the conduct of the parties considered as a whole which should control. In other words, once it has been established that each has been negligent, it is then the jury's function to weigh their respective contributions to the result which will regardless of the nature of their acts or ommissions, determine which made the larger contribution and to what extent it exceeds or is less than that of the other."

The Wisconsin Courts' observation that the issue is one which ought to be left to the common sense of the jury makes it appear the matter ought to be left to the untrammled discretion of the jury. The language of our Statute directing the juries apportionment to be "just and equitable", some might argue makes clear the Legislative intention that the problem be committed to the jury's discretion. As a practical matter, however, some guides have to be furnished a jury. We would hope that our Supreme Court would at the outset approve a charge to the jury in the language of Taylor vs Western Casualty Co. (supra) and direct a jury to make apportionment of the loss on the basis of what they find to be "the parties

respective contributions to the result regardless of the nature of their acts or ommissions"; that the jury must determine which made the larger contribution to the result and to what extent it exceeds or is less than the other.

Attention should be directed to the language in the last sentence of the Maine Statute "if such claimant is found by the jury to be equally at fault the claimant shall not recover." (Emphasis Supplied.)

"Fault" is defined in the previous paragraph to mean negligent breach of statutory duty or other act or ommission which give rise to a liability in tort or would, apart from this section give rise to the defense of contributory negligence. It is familiar law in Maine that only negligence found to be a "proximate cause" of the happening of an event will give rise to liability and only contributory fault which is found to be a "proximate cause" of harm will bar recovery under the common law. In other words in common law we do not deal with negligence in the abstract if indeed there is such a thing. Palsgraf vs Long Island RR 248 N.Y. 339 162 N.E. 99. Hatch vs Globe Laundry 132 Me. 382. Barlow vs Lowery 143 Me. 217.

It does seem that the definition of fault found in the act ought be construed to mean actionable fault or fault which is a "proximate cause." Unfortunately the Legislators saw fit to use language in the first paragraph relating to diminution in the recovery different from the language contained in the last paragraph fixing the limitation upon the occasions for recovery by the plaintiff. This is explained by the obvious fact that the last paragraph was a political compromise between those who would adopt pure comparative negligence philosophy and those who adhered to the common law philosophy of Butterfield vs Forrester (supra).

The difference in language in the two sections of the act might well occasion the Law Court to say that the language is intentionally meaningful and that diminution of damage should result from comparison of causation while the question as to whether or not plaintiff's fault was equal to or greater than the defendant's ought to be resolved on the basis of a comparison of the degree of culpability.

Unless violence be done to the language of the act to an impermissible degree by so doing, both the paragraph relating to apportionment and the paragraph limiting the right of recovery ought as a matter of common sense be construed to compel comparison between the quantum of contribution to the harm made by the defendant's actions and the quantum of contribution made to the total harm by the plaintiff's actions, both when determining apportionment and determining whether or not the plaintiff is entitled to recover at all.

Neither the Maine Statute nor any other comparative negligence statute describe objective standards for comparison.

In Evanich vs Milwaukee RR 237 Wis. 111 295 N.E. 44 (1941) and again in Langworthy vs Riedinger 249 Wis. 24 23 N.W. 2d 482 (1946) and Piesik vs Deuster 243 Wis. 598 11 N.W. 2d 358 (1943) the Supreme Court of Wisconsin attempted to formulate a rule by saying that negligence of the same kind would be treated as equal but where the parties were in fault in different respects the Court could not rule but the issue must be left to the jury. It was soon compelled to retreat from that position. Doepke vs Reiner 217 Wis. 49 258 N.W. 345.

In Grana vs Summerford 12 Wis 2d 517 107 N.W. 2d 463 (1961) the Court stated "The comparison of negligence is determined not by the kind or character or the number of respects of causal negligence but upon the degree of the contribution to the total of such negligence to the occurrence of the accident attributable to the person involved". This case was cited with approval by the United States Court of Appeals in Gilioul vs U.S. 347 F 2d 770.

Almost immediately upon enactment on the provisions limiting liability to those cases in which plaintiff's fault was less than that of the defendant the Court began to rule in certain situations that as a matter of law plaintiff's fault was equal to or greater than the defendant's. The Courts also had before them a very large number of cases in which they were asked to declare that the juries findings as to the proportion of contribution to the loss was correct. A review of these many cases fails to reveal any particular uniform basis on which the judgment of the Court was made.

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.

Bradley vs Missouri Pac. R. Co., (8th Cir. 1923). 288 F. 484; Jemel vs St. Louis S.W.R. Co., 178 Ark. 578, 11 S.W. (2d) 449 (1928); Zenner vs Chicago, St. P., M. ' O.R. Co. 219 Wis. 124, 262 N.W. 581 (1935); Missouri Pac. R. Co. vs Davis, 197 Ark. 830, 125 S.W. (2d) 785 (1939); Missouri Pac. R. Co. vs Price, 199 Ark. 346, 133 S.W. (2d) 645 (1939); Patterson vs Chicago, St. P., M. & O.R. Co.,

236 Wis. 205, 294 N.W. 63 (1940); Memphis, D & G.R. Co. vs Thompson, 138 Ark. 175, 210 S.W. 346 (1919); Powell vs Jonesboro, L.C. & E.R. Co., 166 Ark. 252, 266 S.W. 78 (1924); Huff vs Missouri Pac. R. Co., 170 Ark. 665, 280 S.W. 648 (1926); Chicago, R. I. & P. Co. vs French, 181 Ark. 777, 27 S.W. (2d) 1021 (1930); Southern R. Co. vs Wilbanks, (5th Cir. 1933) 67 F (2d) 424; Missouri Pac. R. Co. vs Brown, 187 Ark. 1163, 59 S.W. (2d) 34 (1933).

Held equal as a matter of law in Kilcoyne vs Trausch, 222 Wis. 528, 269 N.W. 276 (1936); Grasser vs Anderson, 224 Wis. 654, 273 N.W. 63 (1937); Langworthy vs Reisinger, 249 Wis. 24, 23 N.W. (2d) 482 (1946); Geyer vs Milwaukee Elec. R. & L. Co., 230 Wis. 347, 248 N.W. 1 (1939).

Held equal as a matter of law, Manitowoc Trust Co. vs Bouril, 220 Wis. 627, 265 N.W. 572 (1936) (plaintiff on running board of defendant's automobile); Schulz vs General Cas. Co., 233 Wis. 118, 288 N.W. 803 (1939) (two motorists approaching top of hill in middle of road, plaintiff reduced speed and defendant did not); Konow vs Gruenwald, 241 Wis. 453, 6 N.W. (2d) 208 (1942) (head-on collision, plaintiff on wrong side); Piesik vs Deuster, 243 Wis. 598, 11 N.W. (2d) 358 (1943) (head-on collision, both drivers over center line).

Held for jury, Hansberry vs Dunn, 230 Wis. 626, 284 N.W. 556 (1939) (both drivers on wrong side, too fast and no lookout); Atlantic Greyhound Corp. vs Loudermilk (5th Cir. 1940) 110 F (2d) 596 (turning into path of speeding bus); United States vs Fleming, (5th Cir. 1940) 115 F. (2d) 314 (unable to stop within range of vision, collision with unlighted vehicle parked on highway).

Grosser vs Anderson, 224 Wis 654, 273 N.W. 63 (left turn without signal held equal as matter of law to speeding inattentive

defendant). Drake vs Farm Insurance Co., 22 Wis. (2d) 56, 128 N.W. 41 (2d)(1964) (drivers approaching uncontrolled intersection both negligent with respect to lookout, held equal as matter of law. Schliceter vs Grady, 20 Wis. (2d) 458 (1963) (plaintiff entering arterial highway, failed to yield right-of-way to speeding defendant, held 50% or more plaintiff's negligence as matter of law. In that case the Court said:

> "In the great majority of automobile accident cases the comparison of negligence is for the jury. Vidokovic vs Campbell, (1956) 274 Wis. 168, 79 N.W. (2d) 806; Petitt vs Olsen (1960) 11 Wis. (2d) 185, 105 N.W. (2d) 280. While there are a number of cases wherein it has been determined as a matter of law that the negligence of a plaintiff equaled or exceeded that of one or more defendants, the instances in which a court can so rule will be extremely rare. Kraskey vs Johnson, (1954) 266 Wis. 201, 63 N.W. (2d) 112; Davis vs Skille, (1961) 12 Wis. (2d) 482, 107 N.W. (2d) 458. In McGuigan vs Hiller Bros., (1932) 209 Wis. 402, 245 N.W. 97, decided shortly after enactment of the comparative negligence statute it was stated that the rare instances in which a Court can say as a matter of law that the negligence of the plaintiff is equal to or greater than that of the defendant will ordinarily be limited to cases where the negligence of each is of precisely the same kind and character. Subsequently, however, we have held that in certain fact situations in which a plaintiff has been disproportionately negligent, justice requires that his negligence be held equal or exceed that of the defendant even though the negligence of each is not of the same character. Davis vs Skille,(supra); Gilson vs Drees Brothers, 19 Wis. (2d) 255, 120 N.W. (2d) 65."

In the administration of the comparative negligence law the Court will in the future, as they have in the past, be required to declare the conduct of one or the other parties negligent as a matter of law. The comparative negligence statute requires that the jury give exactly the same weight to its own findings of causal negligence as it gives to a finding of the Court that certain

conduct is negligence as a matter of law. For the Court to fail to make this point clear to the jury may well be prejudicial. In Niedbalski vs Cuchna, 13 Wis. (2nd) 308, 108 N.W. (2d) 576, the Wisconsin Court held that whether or not prejudice had resulted would depend upon examination of the entire record not merely upon comparative negligence instructions. It is suggested that this point be made clear to the jury early in the charge and that it always be repeated at the point in the charge which deals with comparative negligence.

What is the status of the doctrine of assumed risk in a comparative negligence state?

Wisconsin has clearly abandoned the doctrine because of its comparative negligence statute. See, McConville vs State Farm Mut. Auto Ins. Co., (Wis.), 113 N.W. (2d) 14 (1962). Nebraska has taken the position that in the host-guest case, assumed risk exists as a type of contributory negligence. See, Landrum vs Roddy, 143 Neb. 934, 12 N.W. (2d) 82. See also, Tite vs Omaha Coliseum Corp., 144 Neb. 22, 12 N.W. (2d) 90. In Mississippi, assumed risk still exists as a complete bar. See, Saxton vs Rose, 218 Miss., 29 So. (2d) 646. In Arkansas in host-guest cases, assumption of risk defeats recovery. See, Bugh vs Webb, (Ark. 1959), 329 S.W. (2d) 379 (1961 amendment has no effect on this decision.) Georgia holds assumed risk bars recovery. See, Roberts vs King, (Ga. 1960), 116 S.E. (2d) 858.)

There seems to be no logic in retaining the so-called doctrine of assumption of risk under the apportionment statute. It seems only reasonable to do as other States have done, i.e. treat assumption of risk as a form of contributory fault and submit the issue

to the jury as in other forms of contributory fault.

Another problem certain to arise among the early cases presented to our Law Court for appellate review is the question of status of the doctrine of last clear chance.

Last clear chance clearly applies in Nebraska. See, Wilfong vs Omaha R.R., 129 Neb. 600, 262 N.W. 537; Parsons vs Berry, 130 Neb. 264, 264 N.W. 742; South Dakota, See, Black vs Wyman, 78 S.D. 504, 104 N.W. (2d) 817 (1960); Mississippi, See, Underwood vs Illinois Central R.R., F. (2d), 61 C.C.A. 5 and Georgia, See, Lovett vs Sandersville R.R., 72 Ga. App. 692, 34 S.E. (2d) 664 (1945). The applicability of the doctrine was denounced by the Supreme Court of Florida in Loftin vs Nolin, 86 So. (2d) 161. It is to be noted that the Arkansas statute as enacted in 1955 specifically eliminated the doctrine by its language. However, in 1961 such language was deleated by amendment. For discussion of reasons why the doctrine should not have application under a comparative negligence statute, See, 16 Harvard Law Review 365; 52 Harvard Law Review 1187; 55 Harvard Law Review 1225; 47 Yale Law Journal 704; 13 N.A.C.C.A. Journal 196.

We feel that the doctrine of last clear chance has no place in any comparative negligence state. Davis vs Mann, or the "Jackass Doctrine," 10 M. & W. 546 was quite obviously the result of a revolt against the harshness of the rule in Butterfield vs Forrester (supra). It has been recognized in a series of cases in Maine typical of which is Barlow vs Lowery, 143 Me. 214. The harshness of the common law rule has already been abated by the adoption of the comparative negligence statute. The application of the doctrine in some instances is bound to bring about a result contrary to the

spirit of the comparative negligence philosophy. We feel the Maine Court should follow the lead of the Florida Court and refuse to give such doctrine application hereafter because the occasion for its use ceased upon the adoption of Public Laws of Maine, 1965, Chap. 424.

Blanchard vs Bass, 153 Me. 354 declared that contributory negligence does not bar recovery for wanton misconduct although wanton misconduct of a plaintiff will bar his recovery. The comparative negligence statute relates to actions based upon negligence. It seems clear the Statute has no application in the wanton misconduct situation and the rules set forth in Blanchard vs Bass (supra) will continue to be the law unaffected by the new Statute. Such was the conclusion of the Wisconsin Court in Wedel vs Klein, 229 Wis. 419, 282 N.W. 606 (1938).

Our Statute provides that once the plaintiff has been found to be negligent to a degree not equal to the negligence of the defendant the damages recoverable "shall be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage." This means, as we understand it, that if the jury finds the loss to be Ten Thousand Dollars ($10,000.00) and finds contribution by the defendant to the loss to be 60% and the contribution of the plaintiff to the loss 40%, the plaintiff is entitled to recover Six Thousand Dollars ($6,000.00). In Paluczak vs Jones, 209 Wis. 640, 245 N.W. 655 (1932) the Wisconsin Court declared that the claimants recovery must be reduced in such ratio as his recovery bears to that of the defendant.

In Cameron vs Union Automobile Insurance Co. 210 Wis. 659, 246 N.W. 240, 247 N.W. 453 (1933) that Court reversed its previous finding stating the language employed was inadvertent and declared the rule in that State to be that the plaintiff shall recover for full damage minus the percentage which his fault contributed to the full damage. All cases decided since 1933 have applied this rule.

We must assume this will be the rule to be announced in Maine. The problems presented by multiple party actions we anticipate will pose a considerable difficulty. In Wisconsin the case of Walker vs Kroger Grocery & Baking Co. 215 Wis. 519, 252 N.W. 721 (1934), decided that in the multi party cases the causative fault of the plaintiff ought be compared with each individual defendant not with the combined fault of all the defendants. As to those defendants whose fault is found to be greater than that of the plaintiff the Court said:

> "Section 331.045, Stats., in connection with providing that contributory negligence shal not bar a recovery in an action by any person for negligence, "if such negligence was not as great as the negligence of the person against whom recovery is sought, *****" provides that "any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributable to the person recovering." That clause as quoted is, in a measure, incomplete in that, while it specifically mentions "the amount of negligence attributable to the person recovering," as one of the terms of the proportion, it does not state what constitutes the other term of the proportion. However, inasmuch as that provision does clearly limit the one term of the proportion to "the negligence attributable to the person recovering," the language of the statute does not admit of including in that term of the proportion causal negligence which is attributable solely to some other participant, and not to the person recovering. As a result, the causal negligence of all the other participants in the transaction must be deemed to constitute the other term of the proportion.

Although it is true that that result does not admit of the diminution of damages in so far as they may also have been caused in part by the negligence of others than the person from whom recovery is sought, that consequence, in so far as that person is concerned, is, in respect to the amount of his liability, no different than the settled rule at common law that "any one of two or more joint tort-feasors or one of two or more wrong doers whose concurring acts of negligence result in injury, are each individually liable for the entire damage which resulted from their joint or concurrent acts or negligence." Kingston vs C. & N. W. Ry. Co. 191 Wis. 610, 613, 211 N.W. 913. Section 311.045, Stats., does not change the common-law rule as to the extent to which every joint tort-feasor, who is liable at all, is liable for such damage as the injured person is now entitled to recover. At common law the injured person could not recover at all, if there was some negligence on his part which contributed to his injury. But, if he was entirely free from negligence, every one of several tort-feasors, whose negligence was a cause of the injury, was liable for all of the resulting damage even though the negligence attributable to one of them may have been insignificant in proportion to the negligence of the others. Now, by virtue of section 331.045 Stats., the instances in which there is a right to recover have been increased in that, even though there was contributory negligence, recovery is not barred if such negligence was not as great as the negligence of the person against whom recovery is sought. If such contributory negligence was as great as the negligence of one of the tort-feasors against whom recovery is sought, then as to that particular tort-feasor there still is no right to recover. That tort-feasor is out of the picture as far as liability on his part to the party whose negligence was as great as his is concerned. On the other hand, from every remaining tort-feasor, whose negligence was greater than that of the person seeking to recover, there exists now, by virtue of the statute, a right to recover, subject, however, to the limitation prescribed by the statute, that the damages allowed shall be diminished in proportion to the negligence attributable to the person recovering. That is the only limitation prescribed in respect to the amount recoverable. Otherwise, there is no provision which effects any change in the common-law rule that all tort-feasors who are liable at all are liable to the injured person for the entire amount now recoverable by him."

The Arkansas case of Walton vs Tull, 346 S.W. (2d) 20 at page 25 approached the problem as follows:

> "Finally, Tull's cross appeal raises a perplexing question of first impression in Arkansas. The jury apportioned the total negligence in the ratio of 60 percent against Glenn, 20 percent against Walton, 10 percent against Brigham, and 10 percent against Tull. The trial court refused to allow Tull to recover from Brigham, because their percentage of fault was equal. On cross appeal Tull argues that the comparison should not be made between the plaintiff and a single defendant; it is contended that the plaintiff should recover if his negligence is less than that of all the defendants combined.
> The statute is open to either interpretation. It provides that contributory negligence shall not bar a recovery "where the negligence of the person injured or killed is of less degree than the negligence of any person, firm, or corporation causing such damage." Ark. Stats. Phg. 27-1730. 1. If the reference to "any person * * * causing such damage" is taken to mean each separate person the trial court's ruling was correct. But if the reference to any person is taken to include the plural as well as the singular, which by statute is a permissible interpretation, Ark. Stats. phg. 1-202, then the ruling was wrong. The few decisions elsewhere are not helpful. In Georgia it has been the law for more than a century that a plaintiff cannot recover from any tortfeasor whose negligence did not exceed that of the plaintiff. The result was reached by a judicial interpretation of two statutes having no resemblance to our comparative negligence act. Smith vs American Oil Co., 77 Ga. App. 463, 49 S.E. (2d) 90. In Wisconsin the statute is more nearly like ours, declaring that contributory negligence is not a bar to recovery "if such negligence was not as great as the negligence of the person against whom recovery is sought." Wis. Stats., Phg. 331.045. The court construes this act to mean that the plaintiff cannot recover from any tortfeasor whose negligence does not exceed the plaintiff's, even though the plaintiff's negligence is less than that of all the tortfeasors put together. Walker vs Kroger Groc. & Bakery Co., 214 Wis. 519, 252 N.W. 721, 92 A.L.R. 680. Professor Prosser has pointed out that the results reached in the Georgia and Wisconsin cases have not been very satisfactory. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 507.
> In the only published discussion of this particular question under the Arkansas Statute Dan B. Dobbs has

taken the position that in the situation now presented the plaintiff ought not to recover. It is his thought, presented without much supporting analysis, that the legislature did not intend for there to be a recovery if, for example, the plaintiff and the two defendants were each found guilty of one third of the total negligence. Dobbs, Act 296, Comparative Negligence, 11 Ark. L. Rev. 391. It seems to us that this result does not give effect to the basic legislative intention and is in fact demonstrably unjust to the person who is injured by the concurring negligence of several tortfeasors.

Our first comparative negligence statute, usually called the Prosser Act, allowed the plaintiff a proportionate recovery no matter how greatly his negligence exceeded that of the defendant. Act 191 of 1955. In the various studies of that act it was generally agreed that its basic purpose was to achieve complete abstract justice by apportioning the total damages of all the parties in the ratio of their respective degrees of fault. Hence the approved procedure was to distribute the total liability so that each party would bear his fair share, taking both his injuries and his percentage of fault into account. Dobbs, Act 191, Comparative Negligence, 9 Ark L. Rev. 88, 92 et seq. Under the Prosser Act if all three parties were equally at fault there would still have been a partial recovery by the one or two who had suffered more than a third of the total damages.

We think the basic purpose of the present statute to be essentially the same as that of the Prosser Act; it is still to distribute the total damages among those who caused them. The present act provides, however, that the plaintiff can recover only if his negligence is of less degree than that of any person, firm, or corporation causing his damage. We are not convinced that the legislature meant to go any farther than to deny a recovery to a plaintiff whose own negligence was at least 50 percent of the cause of his damage. To refuse redress to an injured person whose negligence was only 10 percent of the total would be almost a return to the common law doctrine of contributory negligence.

We realize that where some of the tort-feasors are insolvent or unavailable our conclusion may require a single defendant to pay the entire judgment, even though his negligence was comparatively slight. (The Uniform Act leaves open the matter of equitable contribution when not all the tortfeasors are solvent. Commissioners' note to phg. 2 of the 1939 Uniform Contribution Among Tortfeasors Act, 9 U.L.C. 235) But this possibility of disproportionate liability always exists when some of the wrongdoers cannot be

made to pay their fair share. At common law if the plaintiff was free from contributory negligence he could recover his entire damages from any defendant whose negligence, however slight, was a concurring proximate cause of his injuries. We cannot adopt a narrow construction of our comparative negligence statute in the vain hope of avoiding inequitable situations due to insolvency. Obviously either the plaintiff or the solvent defendant must suffer, and the loss has traditionally fallen upon the wrongdoer.

We have said that the rule contended for by Brigham in this case is demonstrably unjust. Suppose that a plaintiff fails to stop his car at a through street and is hit by a drunken driver traveling at an excessive speed. If the jury attributes 33 1/3 percent of the negligence to the plaintiff for having run the stop sign and 66 2/3 percent to the defendant the plaintiff recovers the greater part of his damages. This is fair.

But now suppose that upon the same facts it develops that a third person had been negligent in lending his car to the drunken driver. The owner of the car becomes a joint tortfeasor. The plaintiff may still be found guilty of 33 1/3 percent of the total negligence, for his conduct has not been changed. But no matter how the jury apportions the other 66 2/3 percent the plaintiff's recovery, under Brigham's theory, is reduced. In fact, if the jury should divide the remaining negligence equally between the owner of the car and the drunken driver the plaintiff could recover nothing at all!. We should be hard put to explain to a layman why it is that a person hit by a drunken driver can recover if the wrongdoer was driving his own car but cannot recover if some third person had also been at fault in lending the car. The plaintiff's conduct is so plainly identical in both instances that it is only common sense for it to have the same effect upon his recovery. We accordingly hold that Tull is entitled to judgment against Brigham."

It is noted that there were two dissenting opinions, one by Chief Justice Harris and the other by Justice McFaddin. The Harris dissent cites Walker vs Kroger Grocery & Bakery Co. (supra) with approval and its rationale appears to be the persuasive. Walker vs Kroger Grocery & Bakery Co. has been used since 1933 in Wisconsin without serious objection being made to it.

It should be remembered that the common law rule has always been that where two or more defendants are found liable as joint tort-feasors judgment may be had for the full amount of the plaintiff's damage against each though there can be but one recovery. The comparative negligence statute requires that the plaintiff's verdict be reduced to the extent the jury thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage. The position of the multi-defendants then is no different under the comparative negligence law than it was prior thereto.

If there are multi-parties the defendants contribution to the whole damage is the same regardless of the percentage of total contribution of each of the other parties. It must be kept in mind at all times that we are concerned in the multi-party cases with two questions. First, what defendants, if any, are liable, and secondly, if any are liable, to what extent should the recovery be diminished. Obviously the first question must be answered by comparing the causative fault of the plaintiff with the causative fault of each defendant separately. Those defendants, if any, whose fault is found to be less than or equal to the causative fault of the plaintiff are dropped in the case, leaving in the case only those defendants whose fault is found to be greater than the fault of the plaintiff.

Professor Campbell, in his excellent paper on Comparative Negligence delivered at the Law School at the University of Maine Law School on October 29, 1965, is critical of the holding in Walker vs Kroger Grocery & Bakery Co. (supra) As he points out in that paper that in those cases where the defendant is free from liability to the plaintiff by reason of some rule of law the other defendant must

bear the entire loss without contribution rights. This is so, he explains, because under Wisconsin law a defendant would have no contribution rights unless the other party is liable in law to the plaintiff. But the criticism is not valid in the light of Maine Law. In Bedell vs Reagan, 159 Me. 292, in an opinion by Mr. Justice Sullivan, the Court said:

> "The element of common liability of both tortfeasors to the injured person" has been suffered to become a fetish in the ration decidendi stated just above. "The element should not be a controlling condition or factor when one joint tortfeasor unintentionally and negligently has wrought harm which he is dispensed from righting because of his matrimonial union with the victim but which the other joint tortfeasor not in the marital relation must redress in full to the injured spouse without any equitable right of contribution from the joint tortfeasor spouse. Law is only sensibly formalistic. It is a practical science. It is of the very proper object of equity to prevent the application of a universal legal principle in an eventuality where unconscinable and unjustifiable hardship must otherwise ensue."

For an interesting discussion of Bedell vs Reagan (supra) and its implications see article by Richard Hewes, Esq. of the Cumberland Bar titled "Contribution Between Tort Feasors" 40 B.U. Law Review 80.

While Bedell vs Reagan (supra) had reference only to the marital disability a reasonable rationale appears to make the rule applicable to all situations in which a plaintiff is debarred from recovering judgment against a defendant such as the disability arising under the Workmen's Compensation Act. In other words our Court seems to have clearly rejected the element of common liability as a basis of contribution. It is to be borne in mind that the disability existing in Walker vs Kroger Grocery & Bakery Co. was an assumption of risk. An assumption of risk was recognized in

Wisconsin until 1962 when it was struck down by judicial fiat in McConville vs State Farm Mutual Insurance Co. (supra). We see no reason why the multi-party case should not be handled in Maine exactly as it was handled by the Supreme Court of Wisconsin. In fact, we see no other way it could be handled consistently with the language of our statute.

The language of our statute requires that the jury shall find and record the total damages which would be recoverable if the claimant had not been at fault and the extent to which the damages are to be reduced. The practice as developed in Wisconsin of having the jury make special findings. No general verdict is returned. Instead the jury is asked a series of specific questions.

Rule 49 of the Rules of Civil Procedure of Maine makes specific provision for special verdicts. It seems to us the only sensible procedure to be adopted is to use special verdicts either with or without a general verdict. Using a general verdict in addition to special verdicts only makes the work of the jury more perplexing. Professor Prosser, in his paper on Comparative Negligence, 51 Mich. L. Rev. page 497 sets forth recommended specific questions for a typical case. They are 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's negligence a cause of the collision? Yes.

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

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

If it is determined to use these or similar questions I would suggest Question 5 could be improved upon if some language other than "total negligence" could be used. I predict the Superior Court will adopt the practice of using special verdicts in cases brought under the comparative negligence statute.

At some point our Law Court must decide the question, is the comparative negligence statute to be given prospective or retrospective effect? There seems to be little room for doubt that it should be considered prospective. The Supreme Court of Arkansas so held with respect to its original act, Redell vs Norton, 285 S.W.(2d) 328(Ark.) and with regard to a later amendment. Chism vs Philps, 311 S.W. (2d) 297 (Ark).

The attached appendix contains a list of Law Review articles and a list of cases which I have used in the preparation of this paper. The list does not purport to include all cases in Wisconsin and Arkansas, the Federal Courts, etc. but are selected as being illustrative of the manner in which the Courts have handled the various problems that have arisen.

In addition to the above sources, I attended a lecture given by Professor Richard Campbell of the University of Wisconsin Law School. Whenever in this paper I have referred to observations he made during the course of that lecture, I did so on the basis of notes I

took at the time the paper was read. The printed text of his paper is not available at this time. If I have at any time misstated his views the misstatement may be attributed to my inability to take notes rapidly.

LAW REVIEWS

1. "Comparative negligence" in Arkansas. M. Rosenberg, N.Y. S.B. ✓ J36:457 Dec. '64.
2. "Comparative Negligence Statute" Vand. Law Review 18: 327, Dec.'64.
3. "Validity of retaining last clear chance doctrine in state having Comparative Negligence Statute" Georgia S.B.J. 1:500, May '65.
4. Comparative negligence as applied to contribution the new doctrine of comparative contribution (Bielski vs Schulze (Wis. 114 N.W. (2d) 105) S.W. L.J. 17:155, March '63.)
5. "Assumption of risk and contributory negligence abolition as defense" (McConville vs State Farm Mutual Auto Insurance Co. (Wis.) 113 N.W. (2d) 14), Mich. L.R. 60:819, April '62.
6. "Contribution determined by percentage of causal negligence" (Bielski vs Schulze (Wis.) 114 N.W. (2d) 105). Syracuse L. Rev. 14:140, Fall '62.
7. "Comparative Negligence, a symposium." Ark. L.W. 10:54, Winter '55 - '56.
8. "Comparative Negligence." Prosser 51 Mich. L. Review 465 (1953)
9. "Comparative Negligence, 17 Cornell Law Quarterly, 333-604.

APPENDIX

1. Karis vs Kroger Co. 26 Wis. (2d) 277, 132 N.W. (2d) 595 (1965) (Customer struck by door in supermarket. Comparative negligence for jury.)
2. Raszeja vs Brozek Corp. 25 Wis (2d) 337, 130 N.W. (2d) 855 (1964) (Plaintiff with bad arm unloading crates. Jury found 60 percent plaintiff negligence, 40 percent defendant negligence. Held: for jury.)
3. Drake vs Farmers Mutual Insurance Co. 22 Wis (2d) 56, 128 N.W. 41 (1964) (Drivers approaching uncontrolled intersection, both negligent with respect to lookout. Held: equal as matter of law.)
4. Pierringer vs Hoger, et als, 21 Wis (2d) 182, 124 N.W. (2d) 106 (1963) Release of one joint tort feasor. Procedure for determining non-party percent of negligence. See also: State Farm Mutual Auto Co. vs Continental Casualty Co. 264 Wis 493, 59 N.W. (2d) 425 (1953). Important in settling any case.
   See Also: Hardware Mutual Co. vs Harry Crow & Sons, 6 Wis. (2d) 396. 94 N.W. (2d) 577.
5. Sell vs Milwaukee Auto Ins. Co. 17 Wis (2d) 510, 117 N.W. (2d) 719 (1962) Defendant pushing his car unlighted after dark to start it. Plaintiff passing a car struck defendant. Held: Jury apportionment 70 percent to defendant, 30 percent to plaintiff reasonable.
6. Schwenn vs Loraine Hotel Co., 14 Wis (2d) 601, 111 N.W. (2d) 495 (1961) Multiple defendants: Comparison of negligence to be between plaintiff and individual defendants. See also: Walker vs Kroger Baking Co. 214 Wis 519, 252 N.W. 721, 92 A.L.R. 680.
7. But see: Walton vs Tull 356 S.W. (2d) 20(Ark.)

8. Von Wie vs Hill 15 Wis (2d) 98, 112 N.W. (2d) 168 (1961). Collision at intersection. Jury found defendant's negligence 51 percent, plaintiff 49 percent. Held: Proper.

9. Mous vs Cook, 15 Wis (2d) 203, 112 N.W. (2d) 589 (1961) Plaintiff signalled left turn, then continued on without turning. Defendant attempted to pass on right and collided. Held: Defendant negligent 60 percent, plaintiff 40 percent. Proper.

10. Strupp vs Farmers Mutual Ins. Co. 14 Wis (2d) 158, 109 N.W. (2d) 660 (1961). Interesting because of procedure for handling special verdicts.

11. Kohler vs Dumke 13 Wis. (2d) 211, 108 N.W. (2d) 580 (1961). Negligence means Causal negligence.

12. Pagel vs Holewinski, 11 Wis (2d) 634, 106 N.W. (2d) 425 (1961). "The mere fact that each driver is guilty of the same category or catagories of negligence does not require that the jury apportion the negligence equally between them. Evjen vs Packer Transit Line, 9 Wis (2d) 153, 100 N.W. (2d) 580."

13. Pettit vs Olsen, 11 Wis (2d) 185, 105 N.W. (2d) 280. Plaintiff collides with defendant's unlighted stopped truck at night on highway. Held: Not equal as matter of law.

14. Kornetzke vs Calumet County, 8 Wis. (2d) 363, 99 N.W. (2d) 125 (1959). Speeding plaintiff struck negligently placed tree. Held: Equal as law.

15. Easley vs Inglis, 346 S.W. (2d) 206 (Ark. 1961) 50 percent negligence of both defendants found. Two vehicles in collision struck plaintiff's building.

16. Sherman vs Missouri R.R. Co. (Ark.) 383 S.W. (2d) 881 (1964). Plaintiff's intestate drove unto railroad track and was struck

by train. Plaintiff's driver view was not obscured. Evidence that defendant tried to stop after seeing plaintiff conflicting. Held: Jury justified in finding plaintiff's negligence less than defendant. See strong dissenting opinion citing Mo. Pac. R.R. Co. vs Davis, 197 Ark. 830, 125 S.W. (2d) 785, Mo. Pac. R.R. Co. vs. Price 199 Ark. 346, 133 S.W. (2d) 645.

17. Smith vs Tipton (Ark 374 S.W.(2d) 176 (1964). Assumption of risk applicable under comparative negligence statute. Interesting also on procedural point.

18. Wagnon vs. Barker (Ark. 364 S.W. (2d) 314 (1963). Plaintiff 50 percent negligent as matter of law. Defendant making U turn struck speeding plaintiff.

19. Giessell et al. vs Columbia County, et al. (1947) 240 Wis. 260, 26 N.W. (2d) 650. Fifteen year old boy after warning off by and without knowledge of driver jumped on running board of truck about to start, thrown. No causal negligence of driver, or at least equal.

20. Langworthy vs Reisinger et al. (1946) 249 Wis. 24-29, 23 N.W.(2d) 482-485 (2 cases) Pedestrian vs Auto. Neither saw other, 50 percent negligent as law.

21. Crawley vs Hill et al. (1948) 253 Wis. 294, 34 N.W. (2d) 123. Pedestrian vs Auto. Pedestrian crossing open road did not yield to auto, driver failed to see pedestrian till too late. Degrees of required care equal. Pedestrian equally negligent at least, as law.

22. Kloss vs American Indemnity Co. et al. (1948) 253 Wis. 476, 34 N.W. (2d) 816. Plaintiff's motorcycle, defendant's auto, intersection. Plaintiff entering from defendant's right. Neither saw

other until too late. Defendant entered first. Held: Negligence equal as law.

23. Dinger vs McCoy Transp. Co. et al (1949) 254 Wis 447, 37 N.W. (2d) 26. Plaintiff turned left in front of oncoming defendant after signal. Plaintiff did not wait but cut corner. Defendant did not see signal. Plaintiff negligent as law 50 percent. Strong dissent (3).

24. Ninneman vs Schwede et al. (1951) 258 Wis 408, 46 N.W. (2d) 230. Pedestrian crossing in front of auto, did not yield to auto per statute and saw auto approaching. Negligent 50 percent as law.

25. Quady vs Sickl et al. (1952) 260 Wis. 348,) 51 N.W. (2d) 3. Plaintiff blinded by undimmed lights of defendant, did not slow down or stop in 4 block distance colliding with parked truck at least equally negligent with defendant. 50 percent as law. (Complex multi-party case).

26. Reber et al vs Hanson et al (1952) 260 Wis. 632, 51 N.W. (2d)505. Negligence of parents of 20 month child not divisible into equal shares (joint and several). Equal to that of milk truck driver in plaintiff's yard. 50 percent as law.

27. Hephner et al vs Wolf et al. (1952) 261 Wis 191, 52 N.W. (2d) 390. Overtaking plaintiff struck truck stopped behind defendant parked for flat tire, visibility 1000 feet. Plaintiff did not see truck until 200 or 300 feet and thought it moving. Plaintiff more negligent than defendant: as of law.

28. Lepak vs Farmers Mutual Auto Insurance Co. et al (1952) 262 Wis. 1, 53 N.W. (2d) 710. Plaintiff passenger in unloading dump truck thrown off balance in getting out and fell under rear wheels when truck jerked load free. As plaintiff was aware.

50 percent plus by law.

29. Kraskey vs Johnson et al (1954) 266 Wis 201, 63 N.W. (2d) 112. No rule of thumb.

30. Klein vs Montgomery Ward & Co. (1953) 263 Wis. 317, 57 N.W. (2d) 188. Plaintiff customer stepped across wire unrolled in store for measure while other passage available. Negligence equal as law.

31. Plog vs Zolpli 1 Wis (2d) 517, 85 N.W. (2d) 492. Intersection collision. Held: 50 percent negligent as law.

32. Hulls vs City of Wauwatosa 275 Wis 445, 82 N.W. (2d) 301. Plaintiff stepped into hole in city sidewalk. Statute declared City's liability absolute. Held: Comparative negligence applies 50 percent as law.

33. Jeffuss vs Bus Co. 274 W. 594, 80 N.W. 2d 785 (1957) Number of acts of negligence does not control.

34. Kornetzke vs Calumet County, 8 Wis. (2d) 363, 99 N.W. (2d) 125. Held: Negligence equal as law.

35. Vandenach vs Crosby, 6 Wis (2d) 292, 94 N.W. (2d) 621 (1959). Defendant pulling car from ditch with wrecker partially obstructing highway, plaintiff collides. Held: 50 percent negligent as law.

36. Becker vs Milwaukee, 8 Wis (2d) 456, 99 N.W. (2d) 804. Plaintiff injured when bus he was driving struck hole in street. Held: 50 percent negligent as law.

37. Schuerty vs Winter, 272 Wis. 303, 75 N.W. (2d) 447 (1956). Plaintiff making left turn at intersection struck by defendant oncoming. Held: 50 percent negligent as law.

38. Rosenow vs Schmidt, 232 Wis 1, 285 N.W. 755. Held: Number of respects parties negligent not controlling.

39. Piesik vs Deuster, 243 Wis. 598, 11 N.W. (2d) 358. Acts of same kind and character.