COMPARATIVE NEGLIGENCE: AN OPPORTUNITY FOR NEW JERSEY

The absolute defense of contributory negligence has been the subject of much criticism.[1] In response to this criticism several states[2] have either modified or abolished this defense, substituting a method of apportioning damages referred to as comparative negligence. Efforts are being made in New Jersey to adopt a comparative negligence statute.[3] This paper will comment on the various forms of comparative negligence and consider the possible effects of a pure comparative negligence statute in New Jersey.

I *Background of Comparative Negligence: The Absolute Defense of Contributory Negligence*

In 1809, in England, a patron left an inn at dusk and hurriedly rode for home. A man, who had been making repairs on his house nearby, left a pole half way across the road which adjoined his house. Although the pole was visible at a distance of one hundred yards, the rider did not see it. He rode into it, his horse fell, and he was injured. At the trial for damages the verdict was for the homeowner. On appeal, in upholding the lower court, Lord Ellenborough enunciated for the first time the defense now known as contributory negligence. He stated:

> 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 do not himself use common and ordinary caution to be in the right . . .

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1 There is ample literature on this subject. Perhaps the two best articles are Turk, *Comparative Negligence on the March*, 28 CHI. KENT L. REV. 189 (1950) and Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953) [hereinafter cited as Prosser].

2 The states are: Arkansas, Georgia, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, South Dakota, Tennessee, and Wisconsin.

3 N.J.S. 244 (1970) proposes a modified comparative negligence statute. (*See* Section IV this comment, *infra*). It was introduced into the Senate on Jan. 13, 1970 and referred to the Judiciary Committee. 93 N.J.L.J. 53 (1970).

N.J.A. 488 (1969) proposed a pure comparative negligence statute. (*See* Section III this comment, *infra*). It passed the Assembly on May 5, 1969. It did not reach a vote in the Senate before the end of the session. Assemblyman Fontanella (R. Passaic), one of the bill's sponsors, has stated that it will be reintroduced in the Assembly in 1970.

N.J.A. 103 (1956) proposed a pure approach, but was amended to provide a modified approach. The special committee of the New Jersey State Bar Association recommended retention of the present system. The bill never passed, 80 N.J.L.J. 274 (1957).

It is noteworthy that the A.B.A. House of Delegates approved comparative negligence in general and urged adoption of the modified approach by all states. 92 N.J.L.J. 545 (1969).

one person being in fault will not dispense with another's using care for himself.[4]

Contributory negligence as an absolute bar to recovery was first argued fully in New Jersey in *Moore v. Central R.R.*[5] in 1854. In barring plaintiff's recovery, Justice Ogden relied heavily on *Butterfield v. Forrester*.[6] In his concurring opinion Justice Potts stated that the defense was too well settled to be questioned at that time.[7] It is today a well established defense[8] and any degree of negligence by the plaintiff is an absolute bar to recovery[9] unless the defendant's acts constitute reckless or wanton misconduct.[10]

II *Comparative Negligence: A Synopsis*

Antedating the defense of contributory negligence was the practice of apportioning damages between the parties.[11] Commonly referred to as comparative negligence, it has more recently been adopted in various forms by several states.[12] Although there are minor variations in application, there are three major approaches to comparative negligence: slight-gross, modified, and pure.

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4 Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809).

5 24 N.J.L. 268 (Sup. Ct. 1854) *aff'd*, 24 N.J.L. 824 (Ct. Err. & App. 1854); *see also* Vandergrift v. Rediker, 22 N.J.L. 185 (Sup. Ct. 1849).

6 11 East 60, 103 Eng. Rep. 926 (K.B. 1809).

7 24 N.J.L. at 282-83.

8 Hartman v. City of Brigantine, 23 N.J. 530, 129 A.2d 876 (1957). *Cf.* New Jersey has statutory law on contributory negligence, but they are very limited in their scope. N.J. STAT. ANN. 2A:53A-6, 6:2-7, 30:4-157-2, 48:12-82, 48:12-83, 48:12-84 and 48:12-152. Only two contain definitions and they deal only with railroads, 48:12-84 and 48:12-152.

9 Maccia v. Tynes, 39 N.J. Super. 1, 120 A.2d 263 (App. Div. 1956).

10 Tabor v. O'Grady, 61 N.J. Super. 446, 161 A.2d 267 (App. Div. 1960).

11 Evidence of such a rule in admiralty law dates from the Thirteenth Century in Oleron, a small island off the West Coast of France. MARSDEN, COLLISIONS AT SEA, at 135 (8th ed. 1923). Other early examples include the 1794 PRUSSIAN CODE, the 1804 CODE OF NAPOLEON, 1881 in Switzerland and 1896 in Germany. Heft and Heft, *Comparative Negligence: Wisconsin's Answer*, 55 A.B.A.J. 127 (1969). Countries that have adopted the apportionment rule include China, Japan, Russia, Poland and the Philippine Islands. *Id.* Prosser observes that with contributory negligence no longer a bar to recovery on the European continent and in Great Britain, Canada, New Zealand and Western Australia, the United States is virtually the last stronghold of the common law rule. Prosser, *supra* note 1, at 466-67.

12 Although there is no federal common law in the United States, Erie R.R. v. Tompkins, 304 U.S. 64 (1938), there are various federal statutes which require apportionment of damages. *See, e.g.*, 35 Stat. 66, Ch. 149, § 3 (1908); 45 U.S.C.A. § 53 (1954). *See generally*, Bress, *Comparative Negligence: Let Us Hearken to the Call of Progress*, 43 A.B.A.J. at 127-28 (1957).

The slight-gross approach, used in Nebraska,[13] South Dakota,[14] and Tennessee,[15] permits the plaintiff to recover only if his own negligence was slight and the defendant's was gross by comparison. With the exception of Tennessee,[16] the courts have had difficulty in defining the term "slight" and many appeals have been taken on this issue.[17] This approach has resulted in the application of comparative negligence to only a few cases.[18]

The modified approach has been adopted in Arkansas,[19] Georgia,[20] Maine,[21] Massachusetts,[22] New Hampshire,[23] and Wisconsin.[24] In Arkansas the plaintiff is permitted to recover only if his own negligence is less than half the total negligence causing the injury. He can recover from all defendants, including those whose individual negligence is equal to his own.[25] In Georgia, Maine, New Hampshire, and Wisconsin, the plaintiff may recover only if his negligence is less than that of an individual defendant's.[26] The distinction becomes important when there are multiple defendants.[27]

The pure approach, theoretically consisting of no limits on plaintiff's negligence,[28] has been adopted only in Mississippi.[29] Only if the plaintiff is the sole proximate cause of his own injury is he barred from recovery.[30]

Once the issue of the plaintiff's negligence is determined, the application in all states having comparative negligence is basically the

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13 NEB. REV. STAT. ch. 25, § 1151 (1964).

14 S.D. COMPILED LAWS ch. 20, § 9-2 (1967).

15 Whirley v. Whiteman, 38 Tenn. 610 (1858); Nash. & Chat. R.R. v. Carroll, 53 Tenn. 284 (1871); East Tennessee U. & G. Ry. v. Hull, 88 Tenn. 33, 12 S.W. 419 (1889).

16 *See* cases cited note 15, *supra.*

17 Prosser, *supra* note 1, at 487.

18 Mansfield, *Comparative Negligence—The Developing Doctrine and the Death of Maki*, 18 DEPAUL L. REV. 203 (1968) [hereinafter referred to as Mansfield].

19 ARK. STAT. ANN., vol. 3A, title 27, §§ 1730.1, 1730.2 (1962).

20 GA. CODE ANN., title 94, § 703 (1958), and title 105, § 603 (1968).

21 ME. REV. STAT. ANN., title 14, § 156 (Supp. 1970).

22 MASS. ANN. LAWS, ch. 231, § 85 (Supp. 1969) to be effective Jan. 1, 1971.

23 N.H. REV. STAT. ANN., ch. 507, § 7-a (Supp. 1969).

24 WIS. STAT., § 895.045 (1966).

25 Walton v. Tull, 234 Ark. 882, 356 S.W. 2d 20 (1962).

26 Mansfield, *supra* note 18, at 216-19.

27 An example will serve to illustrate. Plaintiff is found 40% negligent, defendant A is 40% negligent and defendant B is 20% negligent. Under the first method plaintiff recovers from both defendants; under the second, he recovers only from defendant B.

28 Mansfield, *supra* note 18, at 212.

29 MISS. CODE ANN., vol. 2, § 1454 (1956).

30 Mansfield, *supra* note 18, at 212.

same:[31] the plaintiff's damages are reduced in proportion to his own negligence.

III *Comparative Negligence in New Jersey*

The 1969 proposed statute[32] provided a pure approach to comparative negligence similar to that of Mississippi. Because of this similarity, but primarily because this approach is in keeping with the basic reform intended by such a statute, the application of the Mississippi statute[33] will be discussed to illustrate how the concept of pure comparative negligence might be applied in New Jersey.

Affirmative Defenses. Contributory negligence is still a valid defense in Mississippi; it operates, however, to diminish recovery rather than bar it. The defense must still be pleaded and proved by the one asserting it.[34] If there is insufficient evidence to establish negligence or contributory negligence, the court will direct the jury not to consider that issue or will direct the verdict.[35] The law in New Jersey is to the same effect.[36]

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31 The form of the final verdict differs depending on the use of "lump sum" verdicts, interrogatories or special verdicts.

32 Assembly Bill A-488 read as follows:

An act abolishing the defense of contributory negligence as an absolute bar in causes of action predicated on negligence and establishing a rule of comparative negligence. Be it enacted by the Senate and General Assembly of the State of New Jersey.

1) In all actions hereafter accruing for negligence resulting in personal injury or wrongful death or injury to property, the contributory negligence of the person injured, or of the deceased or of the owner of the property, shall not bar a recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the injured person or the deceased 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 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.

   The Court shall enter judgment in accordance with such findings or special verdict.
3) All acts and parts of acts inconsistent herewith are superseded upon the effective date of this act.
4) This act shall take effect immediately.

This bill was taken almost verbatim from Prosser's model bill. Prosser, *supra* note 1, at 508.

33 MISS. CODE ANN., vol. 2, § 1454 (1956).

34 Mobile & O. R.R. v. Campbell, 114 Miss. 803, 75 So. 554 (1917).

35 Natchez & S. R.R. v. Crawford, 99 Miss. 697, 717; 55 So. 596, 599 (1911).

36 Kaufman v. Penn. R.R., 2 N.J. 318, 66 A.2d 527 (1949); *accord*, Pangborn v. Central R.R. of New Jersey, 18 N.J. 84, 112 A.2d 705 (1955).

Assumption of risk is retained as a distinct defense in Mississippi.[37] It therefore remains a complete bar to recovery in that jurisdiction.[38] The New Jersey courts have separated this common law defense into two distinct classifications.[39] The first includes those cases where there is no duty owed by the defendant, hence, no actionable negligence by him.[40] The second includes the cases where it is an affirmative defense to an established breach of duty.[41] In *Meistrich v. Casino Arena Attractions, Inc.*,[42] Chief Justice Weintraub discusses assumption of risk in the secondary sense:

> [I]f defendant is found to have been negligent, plaintiff is barred only if defendant carries the burden of proving contributory negligence, i.e., plaintiff's failure to use the care of a reasonably prudent man under all of the circumstances *either in incurring the known risk or in the manner in which he proceeded in the face of that risk.* (Emphasis added)[43]

It would seem, therefore, that a defense couched in terms of assumption of risk will be viewed by the New Jersey courts with disfavor.

> Experience, however, indicates the term "assumption of risk" is so apt to create mist that it is better banished from the scene. We hope we have heard the last of it. Henceforth let us stay with "negligence" and "contributory negligence."[44]

The third affirmative defense, "last clear chance," is not a separate defense in either jurisdiction; both consider it as being encompassed by the doctrine of contributory negligence.[45]

Instructions To The Jury. In order to gain the benefit of an instruc-

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37 Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947); *accord*, Dendy v. City of Pascaquola, 193 So. 2d 559 (Miss. 1967); Ideal Cement Co. v. Killingsworth, 198 So. 2d 248 (Miss. 1967).

38 *See* cases cited note 37 *supra*.

39 Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959). This court excluded from consideration an express contract not to sue for injury or loss or in cases where actual consent exists.

40 *Id.*; *accord*, McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A. 2d 238 (1963); Hays v. Shephard, 88 N.J. Super. 267, 212 A. 2d 37 (App. Div. 1965); *See generally* Annot., 82 A.L.R. 2d 1208 (1962) for a full discussion of the distinctions between contributory negligence and assumption of risk.

41 Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959).

42 *Id.*

43 *Id.* at 55, 155 A. 2d at 96.

44 McGrath v. American Cyanamid Co., 41 N.J. 272, 276; 196 A. 2d 238, 240-41 (1963).

45 *Compare* Brennan v. Public Service R.R., 106 N.J.L. 464, 148 A. 775 (Ct. Err. & App. 1930), *with* Fuller v. Illinois C. R.R., 100 Miss. 705, 56 So. 783 (1911). *See* Pangborn v. Central R.R. of New Jersey, 18 N.J. 84, 112 A.2d 705 (1955); Gulf Refining Co. v. Brown, 196 Miss. 131, 16 So. 2d 765 (1944).

tion to the jury on comparative negligence in Mississippi, it must be specifically requested,[46] providing, of course, that contributory negligence has been pleaded and proved.[47] However, Mississippi's Supreme Court has upheld an obviously diminished verdict in the absence of an instruction on comparative negligence. The court stated:

> We therefore hold that the appellee here was not deprived of the benefits afforded by the aforesaid [Sections] 1454-1455, even though he did not request an instruction on contributory negligence, for the reason that his pleadings and proof established negligent acts on the part of the appellant, for consideration by the jury in reaching its verdict.[48]

This situation arises because of the apparent reluctance of parties in Mississippi to plead the comparative negligence statute, believing it to be tantamount to admission of negligence. Rather, the practice has developed for the defendant to counterclaim in negligence.[49]

While the New Jersey courts have held that it is error to submit the question of contributory negligence to the jury unless the issue is raised by the pleadings,[50] it is unlikely that a specific request will be necessary to have an instruction to the jury on comparative negligence.[51] It appears that the Mississippi practice of the defendants' counterclaiming in negligence is possible in New Jersey;[52] however, the validity of an obviously diminished verdict in the absence of a comparative negligence instruction is questionable in the face of the proposed requirement of a special verdict.[53]

Counterclaims. A review of the Mississippi cases prior to 1952 reveals that a counterclaim in a tort suit was not permitted.[54] In that year the state passed a permissive counterclaim statute.[55] Only if the counter-

46 Orville v. Saliba, 246 Miss. 358, 149 So. 2d 468 (1964); Robinson v. Colotta, 199 Miss. 800, 26 So. 2d 66 (1946).

47 Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194 (1964).

48 *Id.* at 135, 161 So. 2d at 198; *accord,* Myrick v. Holifield, 240 Miss. 160, 126 So. 2d 508 (1961).

49 *Torts—Effect of Mississippi's Comparative Negligence Statute On Other Rules of Law,* 39 MISS. L. REV. 493 (1967-68).

50 Borelli v. Frollani, 98 N.J. Super. 203, 236 A. 2d 613 (App. Div. 1967).

51 Plant v. River Road Service Co., 5 N.J. Super. 290, 68 A. 2d 876 (App. Div. 1949).

52 *Cf.* Vespe v. DiMarco, 43 N.J. 430, 204 A. 2d 874 (1964), holding that a jury may rely on inference of *res ipsa loquitur* although not charged to that effect.

53 N.J.A. 488 (1969) Section II.

Mississippi does not use special verdicts or interrogatories. Its verdicts are "lump sum." Johnson v. Richardson, 234 Miss. 849, 108 So. 2d 194 (1959). *See also* Mansfield, *supra* note 18, at 212-13.

54 Moore v. Abdalla, 197 Miss. 125, 19 So. 2d 502; *see also* Annot., 10 A.L.R. 2d 1167 (1950).

55 MISS. CODE ANN., vol. 2, § 1483.5 (1956).

claim is germane to the plaintiff's cause of action is it permitted.[56] However, application of the doctrines of res judicata and collateral estoppel have had the effect of making this a compulsive counterclaim.[57] New Jersey also has a permissive counterclaim rule[58] but it allows any claim whether or not germane to the original cause of action. The general rule is that res judicata and collateral estoppel have the effect of making counterclaims on germane issues compulsive.[59] Although the approaches differ, the results are very similar.[60] Thus, the general rule in both states is that "all facets of a single dispute between parties be completely determined in one action."[61]

Set-off. Given the above application of both counterclaim statutes, the issue is raised as to what form the final judgment is to take. Mississippi incorporates a provision for a set-off within the counterclaim statute.[62] Following adoption of this statute, the issue of its irreconcilability with the comparative negligence statute[63] was raised.[64] In *Johnson v. Richardson,*[65] the jury returned a verdict only for the defendant. On appeal the plaintiff contended that despite the fact that defendant's diminished damages exceeded his own diminished damages, he was also entitled to recover. The Mississippi Supreme Court, in a unanimous opinion, held that there was no conflict between the two statutes. The opposite situation occurred when the jury returned two separate verdicts. Judgments were entered providing $3,250 for the defendant and $2,500 for the plaintiff. The Mississippi Supreme Court held that such separate judgments were in error. The proper judgment was $750 for

56 *See, e.g.,* Oxford v. Spears, 228 Miss. 433, 87 So. 2d 914 (1956).

57 *See* Gerald v. Foster, 250 Miss. 883, 168 So. 2d 518 (1964); Hardy v. O'Pry, 102 Miss. 197, 59 So. 73 (1912); Davis v. Davis, 65 Miss. 498, 4 So. 554 (1888).

58 R. 4:7-1 (1969).

59 *See* McAndrew v. Mularchuk, 38 N.J. 156, 183 A. 2d 74 (1962); Kelleher v. Lozzi, 7 N.J. 17, 80 A. 2d 196 (1951). The exception to this is where one party was not the real party in interest in the prior litigation. Reardon v. Allen, 88 N.J. Super. 560, 213 A. 2d 26 (L. Div. 1965); Ochs v. Public Service R.R., 81 N.J.L. 661, 80 A. 495 (Ct. Err. & App. 1911).

60 An exception is the application of the doctrine of collateral estoppel. *Compare* Desmond v. Kramer, 96 N.J. Super. 96, 232 A. 2d 470 (L. Div. 1967), *with* Bush Construction Co. v. Walker, 254 Miss. 266, 179 So. 2d 188 (1965).

61 Applestein v. United Board & Carbon Co., 35 N.J. 343, 356, 173 A.2d 225, 231 (1961); *accord,* Falcone v. Middlesex County Hospital, 47 N.J. 92, 219 A. 2d 505 (1966); Esper v. Manhattan Transit Co., Inc., 112 N.J.L. 186, 169 A. 823 (Sup. Ct. 1934) *aff'd without comment* 115 N.J.L. 113, 178 A. 754 (Ct. Err. & App. 1935); *see also* Johnson v. Bagby, 252 Miss. 125, 171 So. 2d 327 (1965).

62 MISS. CODE ANN., vol. 2, § 1483.5.

63 MISS. CODE ANN., vol. 2, § 1454.

64 Johnson v. Richardson, 234 Miss. 849, 108 So. 2d 194 (1959).

65 *Id.*

the defendant. The Court held that when the verdict does not properly reflect diminished damages and set-off, they will remand the case for a new trial conditioned on remittitur.[66] There is thus little doubt that in Mississippi there is to be only one judgment, i.e., the results of a set-off between the parties.

The 1969 proposed comparative negligence statute for New Jersey made no provision for set-off.[67] However, the state does have a general statutory provision for setting-off a liquidated debt.[68] The proposed statute raised the issue of the form of the final judgment. Will all parties be permitted to recover their diminished damages, or will the judgment be the product of a set-off among the parties?[69]

Multiple Parties. The problems raised by a comparative negligence statute are complicated by a multiple party suit. Unfortunately there are relatively few cases where such suits have reached the appellate courts, and the results have been confusing and unsatisfactory.[70] Dean Roscoe Pound noted that these problems are largely academic since the jury usually arrives at a practical solution.[71] Furthermore, he observes that the states that have comparative negligence report no such problems for their trial courts.[72] This comports with Dean Prosser's findings that "the real significance of these cases is not in their imperfections, but in their remarkably small number."[73]

A hypothetical case will serve to summarize and illustrate how the proposed statute might operate. A is driving his car to work. He has a passenger, B. At an intersection, A goes through a red light and is hit by C, who was driving 45 mph in a 25 mph zone. B, the passenger, has minor injuries with total damages of $500. He sues both A and C. A

66 Richmond v. Van's Moving & Storage Co., 197 So. 2d 235 (Miss. 1967).

67 *See* note 34 *supra* for the text of the 1969 proposed statute.

68 N.J. STAT. ANN., 2A: 15-48, *see also* N.J.R. 4:7-1 (1969).

69 Harper and James feel that the intent of the reform is to permit all parties to recover. 2 HARPER AND JAMES, THE LAW OF TORTS, at 1239-41 (1956).

70 Prosser, *supra* note 1, at 507.

71 Greenstone, *Address on Comparative Negligence*, 79 N.J.L.J. 217, 222 (1956).

72 *Id.*

73 Prosser, *supra* note 1, at 507.

Prosser finds that a satisfactory solution to this multiple party problem has been achieved in Canada. In that jurisdiction, all parties are joined in a single action, the damages sustained by each are determined, and each bears a proportion of the total loss according to his fault. The mathematics are worked out by the judges since the jury has virtually disappeared from tort litigation in Canada. *Id.* at 504.

Another method of solving the apportionment problem is the use of special interrogatories. The method used by the jury in reaching their verdict can thus be properly reviewed by the appellate court. Wisconsin employs interrogatories to determine the existence of negligence of each party, what the percentage such negligence bears to the entire accident, the amount of total damages sustained by each party, and the amount of the award for each party. *Id.* at 497-99.

has serious injury, total damages of $10,000. A sues C, who has only $600 damages. C counterclaims against A. The jury finds that A contributed to 70% of the accident, C contributed 30% and B nothing. B would get $500: $350 from A and $150 from C. A would get 30% of $10,000 or $3,000, diminished by the verdict of 70% of $600 or $420 for C. Thus A would get $2,580. C would get nothing because, although less negligent than A, his diminished damages were less in amount than A's. This is based on a rule permitting set-off. Without such a rule, all parties would recover: A-$3000; B-$500; and C-$420.[74]

IV *Compromise*

An alternative to the pure approach, provided by the 1969 proposed statute,[75] is the modified approach provided in the 1970 bill.[76] It has been taken verbatim from the Wisconsin comparative negligence statute[77] and is a compromise between the common law rule and pure comparative negligence.[78]

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[74] It is noteworthy that Mississippi considers that property damage and personal injury arising out of one tortious act constitute *one* cause of action. *See* Kimball v. Louisville & N.R.R., 94 Miss. 396, 48 So. 230 (1908); *accord*, Farmers v. Union Insurance Co., 146 Miss. 600, 111 So. 584 (1927); Lloyds Insurance Co. v. Vicksburg Traction Co., 106 Miss. 244, 63 So. 455 (1913). The exceptions to this rule are in cases where either (1) the full issue of contributory negligence has not been tried, *e.g.*, recovery by a passenger in plaintiff's car does not prevent defendant from denying his own negligence in the latter suit. Bush Construction Co. v. Walters, 254 Miss. 266, 179 So. 2d 188 (1965). *Accord*, Vaughn v. Bollis, 221 Miss. 589, 73 So. 2d 160 (1954); or (2) the prior suit did not include the present party as the real party in interest, *e.g.*, an unsuccessful attempt by the plaintiff's insurance company to recover on a property damage claim does not preclude plaintiff from recovering on a bodily injury claim. Lloyds Insurance Co. v. Vicksburg Traction Co., *supra*.

New Jersey holds that bodily injury and property damage are two separate and distinct causes of action. Ochs v. Public Service R. R., 81 N.J.L. 661, 80 A. 495 (Ct. Err. & App. 1911).

[75] N.J.A. 488 (1969).

[76] N.J.S. 244 (1970) reads as follows:

An Act abolishing the defense of contributory negligence as an absolute bar in causes of action predicated on negligence and establishing a rule of comparative negligence.

Be It Enacted by the Senate and General Assembly of the State of New Jersey:

1. 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 proportion to the amount of negligence attributable to the person recovering.

2. All acts and parts of acts inconsistent herewith are repealed.

3. This act shall take effect immediately.

[77] WIS. STAT. ANN., § 895.045 (1966).

[78] "It appears impossible to justify the rule on any basis except one of pure political compromise," Prosser, *supra* note 1, at 494.

The most apparent distinction, and the most glaring deficiency, between it and the pure approach is that recovery is permitted only when the negligence of the party seeking recovery is less than that of the party from whom recovery is sought. While the Wisconsin statute only requires the plaintiff to be less than fifty per cent negligent where there is only one defendant,[79] it may operate in a multiple party suit to deny plaintiff any recovery even though he is less than fifty per cent negligent.[80]

A less apparent distinction, but one of some consequence, is the form of the final verdict. Under the Mississippi approach, the jury is fully informed of the effects of the statute[81] and returns a diminished "lump sum" verdict.[82] The practice in Wisconsin is to submit special interrogatories to the jury.[83] The jury is not informed of the effect of their answers and the court makes the final apportionment of damages.[84] It has been held reversible error for the court to read the apportionment statute to the jury.[85] The wisdom of this approach was recently questioned by a prominent member of the Wisconsin Bar Association.[86]

While the modified approach to comparative negligence is an improvement of the harsh common law rule, it falls short of the true intent of the reform.[87] Critics of the modified approach recommend adoption of the pure approach.[88]

V *Conclusion*

The basic reason for the development of comparative negligence is best voiced by Dean Prosser:

> 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

79 Frei v. Frei, 263 Wis. 430, 57 N.W. 2d 731 (1953).

80 Consider a situation where the jury finds that plaintiff, defendant A and defendant B are each 33% negligent. Plaintiff's negligence is less than 50% but equal to each of defendants therefore plaintiff is barred. *See* Schwenn v. Loraine Hotel Co., 14 Wis. 2d 601, 111 N.W. 2d 495 (1961). *See generally* Annot., 8 A.L.R. 3d 722 (1966).

81 Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194 (1964).

82 Richmond v. Van's Moving & Storage, 197 So. 2d 235 (Miss. 1967).

83 WIS. STAT. ANN., § 270.27. *See also, Special Verdicts in State Courts*, 27 INS. COUNSEL J. 390, 391 (1960).

84 Prosser, *supra* note 1, at 498.

85 DeGroot v. Van Akkeren, 225 Wis. 105, 273 N.W. 725 (1937).

86 Address by James J. Murphy, Civil Procedure Section of the New Jersey State Bar Association, Nov. 21, 1969.

87 Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289.

88 *Id.* at 304; *see also* Prosser, *supra* note 1, at 497.

> injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free.[89]

Comparative negligence is based upon a principle that is deeply ingrained in the Anglo-American concept of jurisprudence: A man is responsible for his wrongful acts. To the extent that his wrongful acts cause injury to another, he ought to be liable for damages, no more and no less. Any doctrine that requires a man to bear the entire burden of injury caused in part by another has outlived whatever usefulness it may have once had. Adoption of a comparative negligence statute with some modification of the 1969 proposal is, therefore, recommended.

Critics of comparative negligence argue that it is immoral to allow a party who is at fault to recover. This is particularly true when the party is the primary cause of his own injury. The response to this argument is that comparative negligence allows recovery only for damages caused by another's negligence. It does not relieve a man from the consequences of his own acts, because his damages are reduced in proportion to his own fault. If anything is immoral, it is the continuing practice of juries in disregarding contributory negligence in some cases, but not in all. The morality of a system of justice must be questioned when it permits one man to recover, while denying recovery to another whose negligence is no greater. Adoption of a comparative negligence statute would not be a panacea. Apportionment of fault by a jury is difficult, and in a multiple party suit even more so. Yet juries are relied upon to apportion fault among joint tortfeasors and set damages for pain and suffering. These decisions are no less difficult.

Adoption of comparative negligence would be in derogation of the common law. As such, it would be subject to strict construction by the courts. For this reason the statute should be more explicit in the areas of multiple party suits, counterclaims, set-offs and affirmative defenses.

The difficulty the jury will face in a multiple party suit has been mentioned. To aid the jury in properly reaching their verdict, and the appellate courts in reviewing that verdict, the statute should include provisions for special interrogatories to the jury. Such interrogatories should request the jury to determine the percentage of each party's negligence, the amount of undiminished damages of each party, and the amount each party's damages shall be reduced because of his own negligence. In this manner, the jury would be fully informed of the effect of their findings.[90]

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89 Prosser, *supra* note 1, at 469.

90 *Compare* Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194 (1964), *with* De Groot v. Van Akkeren, 255 Wis. 105, 273 N.W. 725 (1937).

The existence of "assumption of risk" and "last clear chance" as distinct defenses is settled in New Jersey under the present law. Adoption of a comparative negligence statute raises the possibility that they could be revived because of strict interpretation of the words "contributory negligence." For this reason, the statute should specifically provide that both of these defenses are included in the term contributory negligence.

Finally, the legislature must recognize the predominance of auto negligence[91] and liability insurance and specifically provide that there shall be no set-off on a counterclaim. To leave so important an issue to chance is to invite frustration of the reform by allowing the insurance carriers to set-off against one another at the expense of the injured parties. While this may increase insurance rates, the public is the beneficiary of separate judgments and ought to support them. Whether or not the legislature deems set-offs valuable, they must make their intent clear.

The adoption of anything less than a pure approach to comparative negligence is a half way measure and a compromise with justice. If justice demands that a man be compensated for sixty per cent of his damages when he is forty per cent negligent, it also demands that he be compensated for forty per cent of his damages when he is sixty per cent negligent, and even ten per cent of his damages when he is ninety per cent negligent.

The disadvantages of a comparative negligence statute are far outweighed by the benefits to be derived from it. It is an opportunity for New Jersey to take another step toward the Utopian objective: a remedy for every wrong; a remedy which permits recovery.

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[91] Automobile negligence cases account for approximately one half the civil case filings in New Jersey, [1967-1968] ANNUAL REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE COURTS (New Jersey) at 58.