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William F. Russell

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Comparative Negligence As Applied To Contribution: The New Doctrine of "Comparative Contribution"

Plaintiff sued Defendant and Defendant's insurer to recover damages for personal injuries sustained when the car driven by Plaintiff's husband, in which Plaintiff was a passenger, collided with the car driven by Defendant. Defendant and his insurer impleaded the husband's insurer and counterclaimed for contribution. The jury found that although the Defendant was not grossly negligent, he was negligent¹ when he failed to yield the right of way. The jury also found the Plaintiff's husband negligent because of his excessive speed, and apportioned ninety-five per cent of the total negligence to Defendant and five per cent to the husband.² The trial court awarded Plaintiff a judgment for 25,000 dollars. Defendant's insurer obtained a judgment for contribution against the husband's insurer for one-half of that amount. The husband's insurer appealed. *Held, reversed*: (1) Tortfeasors sustaining a common liability by reason of negligence are now held responsible for contribution in proportion to the percentage of negligence attributable to each. (2) However, a plaintiff can recover from any of the joint tortfeasors the total amount of damage to which he is entitled without regard to the percentage of negligence attributable to such tortfeasor. (3) "Gross" negligence is abolished; conduct previously characterized as gross negligence will be treated as ordinary negligence for purposes of comparison and contribution and for all other purposes. *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

I. THE DOCTRINE OF COMPARATIVE NEGLIGENCE

The doctrine of comparative negligence is designed to avoid the severities of the doctrine of contributory negligence.³ Under the theory of contributory negligence, a plaintiff is barred from any recovery when his careless conduct contributes as a legal cause to the harm he suffers.⁴ However, in similar instances he is allowed some recovery under the doctrine of comparative negligence,⁵ because

¹ The term "negligence" is employed hereafter to indicate only that negligence which operates as a legal or proximate cause of the injuries in issue. *Illinois Cent. Ry. v. Porter*, 207 Fed. 311 (6th Cir. 1913); Prosser, Torts § 47 (2d ed. 1955).

² Wisconsin adopted a comparative negligence statute in 1931. The act is now found in Wis. Stat. Ann. § 331.045 (1958).

³ Prosser, Torts § 53 (2d ed. 1955).

⁴ *Looney v. Metropolitan R.R.*, 200 U.S. 480 (1906); Restatement, Torts § 463 (1934); Prosser, Torts § 51 (2d ed. 1955).

⁵ *Missouri Pac. R.R. v. Kennedy*, 153 Ark. 77, 239 S.W. 376 (1922); 38 Am. Jur. Negligence § 231 (1941).

damages are apportioned between the plaintiff and the defendant according to the amount of negligence attributable to each.⁶ In other words, a plaintiff is compensated for his total injury less an amount that corresponds to the proportion which his negligence bears to the combined negligence of both parties. A defendant, consequently, is liable in the proportion that his negligence bears to the combined negligence of both parties. The degree of negligence attributable to a party is not to be measured by the character of the negligent acts nor by the number of respects in which he is found to have been at fault; rather, the conduct of the parties considered as a whole controls.⁷

When the plaintiff's negligence is determined to be of a greater degree than that of the defendant, a majority of those jurisdictions which have some type of comparative negligence provision⁸ allow the plaintiff to recover irrespective of the amount of his negligence.⁹ However, in some jurisdictions, he can recover only when his negligence is slight and the defendant's negligence is gross in comparison;¹⁰ in others, the plaintiff is denied recovery only if he is found grossly negligent.¹¹ Two jurisdictions permit recovery only

⁶ *Whatley v. Henry*, 16 S.E.2d 214 (1941); Prosser, *Torts* § 54 (2d ed. 1955); 38 Am. Jur. *Negligence* § 231 (1941).

⁷ *Taylor v. Western Cas. & Sur. Co.*, 270 Wis. 408, 71 N.W.2d 363 (1955). Frank, *Collisions at Sea*, 12 L.Q. Rev. 260 (1896), in his discussion of comparative negligence in maritime law, states: "The system, then, is not an attempt to convert a collision case into a mathematical problem, where every act shall be given its numerical value and the total number of marks obtained by each side added up and compared at the end. It is not a question of algebra, but of common sense." *Id.* at 264.

⁸ For a list of jurisdictions with comparative negligence statutes of general application see note 17 *infra*. See the next textual paragraph for a discussion of the various applications of the doctrine.

⁹ Arizona: *Grasty v. Sabin*, 32 Ariz. 463, 259 Pac. 1049 (1927); Arkansas: *Goodwin v. Boyd-Sicard Coal Co.*, 197 Ark. 175, 122 S.W.2d 548 (1938) (applying state employers' liability act); Florida: *Cline v. Powell*, 141 Fla. 119, 192 So. 628 (1939); Kansas: *Rockhold v. Chicago, R.I. & Pac. Ry.*, 97 Kan. 715, 156 Pac. 775 (1916); Minnesota: *Stritzke v. Chicago, Great W. Ry.*, 190 Minn. 323, 251 N.W. 532 (1933); Mississippi: *Yazoo & Miss. Valley R.R. v. Williams*, 114 Miss. 236, 74 So. 835 (1917); North Carolina: *Hines v. Atlantic Line Ry.*, 185 N.C. 72, 116 S.E. 175 (1923); North Dakota: *Bauer v. Great No. Ry.*, 40 N.D. 542, 169 N.W. 84 (1918); Oregon: *Straub v. Oregon Elec. Ry.*, 163 Ore. 93, 94 Pac. 2d 681 (1939); South Carolina: *Boyleston v. Southern Ry.*, 211 S.C. 232, 44 S.E.2d 537 (1947); Texas: *Cameron & Co. v. Thompson*, 175 S.W.2d 307 (Tex. Civ. App. 1943) *error ref.*; Virginia: *Chesapeake & Ohio Ry. v. Mizelle*, 136 Va. 237, 118 S.E. 241 (1923); and Wyoming: *Hines v. Sweeney*, 28 Wyo. 57, 201 Pac. 165 (1921).

¹⁰ District of Columbia: *Powell v. Wisconsin Cent. Ry.*, 159 Fed. 864 (8th Cir. 1908); Nebraska: *Fairchild v. Sorenson*, 165 Neb. 667, 87 N.W.2d 235 (1957); Nevada: (no case was found); Ohio: *Standard Steel Tube Co. v. Prusakiewicz*, 87 Ohio St. 472, 102 N.E. 1131 (Sup. Ct. 1912); South Dakota: *Stevenson v. Douros*, 58 S.D. 268, 235 N.W. 707 (1931).

¹¹ Georgia: *Charleston & W.C.R.R. v. Brown*, 40 Ga. 760, 79 S.E. 932 (1913); Iowa: *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa 245, 157 N.W. 145 (1916); Michigan:

when the plaintiff's negligence is not as great as that of the defendant.¹²

Comparative negligence is applied in a number of situations. The Federal Employer's Liability Act¹³ recognizes the doctrine in actions involving interstate railroad employees. The Supreme Court in *Lindgren v. United States*¹⁴ held that the provisions of the FELA applied to the Merchant Marine Act of 1920¹⁵ and thereby extended the comparative negligence doctrine to federal maritime law. A number of states have enacted employer's liability statutes which contain comparative negligence provisions.¹⁶ However, only five states have comparative negligence statutes of general application.¹⁷

The effect of gross negligence varies under the Federal Employer's Liability Act, the state employer's liability acts, and the five jurisdictions with statutes of general application. Under the federal Act¹⁸ and in one state,¹⁹ it has been held that the doctrine of comparative negligence applies to all forms of negligence, including gross negligence. Two states²⁰ apply gross negligence in a comparative sense, *i.e.*, slight negligence on the part of the plaintiff does not defeat recovery if by comparison the negligence of the defendant is gross.²¹ The fourth state²² requires that in order for a plaintiff to recover damages his negligence must be less than the negligence of the de-

Lydman v. DeHaas, 185 Mich. 128, 151 N.W. 718 (1915); *Montana: Nicholson v. Roundup Coal Mining Co.*, 79 Mont. 358, 257 Pac. 270 (1927).

¹² *Arkansas: Sunday v. Burk*, 172 F. Supp. 722 (W.D. Ark. 1959); *Wisconsin: Garthier v. Carbonneau*, 226 Wis. 527, 277 N.W. 135 (1938).

¹³ 35 Stat. 66 (1908), 45 U.S.C. § 53 (1959).

¹⁴ 281 U.S. 38 (1930).

¹⁵ 41 Stat. 988 (1920), 46 U.S.C. § 861 (1959).

¹⁶ *Arizona: Ariz. Rev. Stat. Ann. § 23-806 (1956); Arkansas: Ark. Stat. Ann. § 81-1202 (1960); District of Columbia: D.C. Code Ann. § 44-402 (Supp. 1961); Florida: Fla. Stat. Ann. § 768.06 (1944); Georgia: Ga. Code Ann. § 66-402 (1937); Iowa: Iowa Code § 85.15 (1958); Kansas: Kan. Gen. Stat. Ann. § 66-238 (1949); Michigan: Mich. Stat. Ann. § 17.141 (1960); Minnesota: Minn. Stat. Ann. § 219.79 (1947); Montana: Mont. Rev. Codes Ann. § 92-201 (1949); Nevada: Nev. Rev. Stat. § 41.150 (1957); North Carolina: N.C. Gen. Stat. § 60-67 (1960); North Dakota: N.D. Cent. Code § 49-16-03 (1960); Ohio: Ohio Rev. Code Ann. § 4113.07 (Page 1954); Oregon: Ore. Rev. Stat. § 764.220 (1953); South Carolina: S.C. Code § 58-1232 (1952); South Dakota: S.D. Code §§ 33.04A01-10 (Supp. 1945); Texas: Tex. Rev. Civ. Stat. Ann. art. 6440 (1926); Virginia: Va. Code Ann. § 8-642 (1950); Wyoming: Wyo. Stat. Ann. § 37-225 (1959).*

¹⁷ *Arkansas: Ark. Stat. Ann. § 81-1202 (1960); Mississippi: Miss. Code Ann. § 1454 (1942); Nebraska: Neb. Rev. Stat. § 25-1151 (1956); South Dakota: S.D. Code §§ 33.04A01-10 (Supp. 1945); Wisconsin: Wis. Stat. Ann. § 331.045 (1958).*

¹⁸ *Pennsylvania Co. v. Cole*, 214 Fed. 948 (6th Cir. 1914).

¹⁹ *Mississippi: Yazoo & Miss. Valley R.R. v. Williams*, 114 Miss. 236, 74 So. 835 (1917).

²⁰ *Nebraska: Fairchild v. Sorenson*, 165 Neb. 667, 87 N.W.2d 235 (1957); *South Dakota: Stevenson v. Dovros*, 58 S.D. 268, 235 N.W. 707 (1931).

²¹ *Fairchild v. Sorenson*, *supra* note 20. In *Ruby v. Auker*, 151 Neb. 121, 37 N.W.2d 799, 800 (1949), the court stated: "[T]he negligence of the parties is to be compared one with the other in determining slight and gross negligence."

²² *Arkansas: Sunday v. Burk*, 172 F. Supp. 722 (W.D. Ark. 1959) (applying general comparative negligence statute).

defendant. The fifth state, Wisconsin, until March of 1962, treated gross negligence as different from ordinary negligence in kind and not degree,²³ and thus a plaintiff's gross negligence barred the application of the comparative negligence statute.²⁴ However, in the principal case Wisconsin abolished the concept of gross negligence, and what was formerly treated as gross negligence is now considered as a high degree of ordinary negligence for purposes of comparison and contribution.²⁵

II. CONTRIBUTION AMONG JOINT TORTFEASORS

The concept of contribution among joint tortfeasors is an equitable doctrine²⁶ based on natural justice.²⁷ Contribution determines the distribution of a loss between two or more parties who are jointly liable for having committed a tort against a third party.²⁸ Before its application to the field of torts, the doctrine was well recognized in suretyship²⁹ and maritime law.³⁰ However, in the field of torts contribution has been limited to actions based upon negligence and strict liability³¹ ever since the leading case of *Merryweather v. Nixon*.³² There the King's Bench promulgated the "no-contribution" rule, holding that joint tortfeasors who are intentional wrongdoers are not deserving of the aid of the courts in achieving equal or proportional distribution of the common burden. Although the *Merryweather* rule is uniformly followed in connection with intentional

²³ *Bentson v. Brown*, 186 Wis. 629, 203 N.W. 380 (1925). Gross negligence was defined as conduct of such a reckless and wanton type as to be equivalent to an intention to inflict injury. *Ibid.* Hence, under this concept of gross negligence, the plaintiff was allowed to recover punitive damages which were over and above any actual damages he may have suffered. *Grace v. McArthur*, 76 Wis. 641, 45 N.W. 518 (1890); *cf.* *Florida E. Coast Ry. v. McRoberts*, 111 Fla. 278, 149 So. 631 (1933); *Miller v. Rambo*, 74 N.J.L. 213, 64 Atl. 1053 (Ct. Err. & App. 1906). The additional damages punished the wrongdoer and discouraged others from engaging in the same conduct. *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105, 113, (1962); *cf.* *Monongahela Nav. Co. v. United States*, 148 U.S. 312 (1893); *Neal v. Newburger Co.*, 154 Miss. 591, 123 So. 861 (1929); *Norel v. Grochowski*, 51 R.I. 376, 155 Atl. 357 (1931); *Restatement, Torts* § 908 (1939).

²⁴ *Gauthier v. Carbonneau*, 226 Wis. 527, 277 N.W. 135 (1938).

²⁵ 114 N.W.2d at 113.

²⁶ *Drummond v. Drummond*, 232 Ala. 401, 168 So. 428 (1936); *Taylor v. Joiner*, 180 Ark. 869, 24 S.W.2d 326 (1930); *Hunt v. Starks*, 256 Ky. 120, 75 S.W.2d 787 (1934).

²⁷ *Exchange Elevator Co. v. Marshall*, 147 Neb. 48, 22 N.W.2d 403 (1946).

²⁸ *Wait v. Pierce*, 191 Wis. 202, 209 N.W. 475 (1926); 13 Am. Jur. *Contributions* § 2 (1938). According to one court, "the object of contribution is to spread the loss among all parties responsible for the damage, thereby preventing the unjust enrichment of one tortfeasor at the expense of another." *State Farm Mut. Auto. Ins. Co. v. Continental Cas. Co.*, 264 Wis. 493, 59 N.W.2d 425, 429 (1953).

²⁹ *Schindel v. Danzer*, 161 Md. 384, 157 Atl. 283 (1931); *Houston v. Bain*, 170 Va. 378, 196 S.E. 657 (1938).

³⁰ *The North Star*, 106 U.S. 17 (1882); *The Atlas*, 93 U.S. 302 (1876); *The Schooner Catherine*, 58 U.S. 170 (1855).

³¹ 52 Am. Jur. *Torts* § 123 (1944).

³² 1 Camp. 345, 101 Eng. Rep. 1337 (K.B. 1799).

torts,³³ in the case of negligent torts, seven jurisdictions³⁴ have allowed contribution in one form or another by court decision. Twenty states³⁵ by legislation have adopted the concept of contribution for general application to negligence cases.

In the states which allow contribution, two different rules are applied for the purpose of determining the number of contributing tortfeasors: the "common law" rule and the "equity" rule. The "common law" rule provides that the *number* of persons commonly liable automatically determines the pro rata share of each in the contribution proceedings.³⁶ Under the "equity" rule, the pro rata shares are determined on the basis of the number of tortfeasors commonly liable who are available within the jurisdiction of the forum and who are financially solvent.³⁷ The "equity" rule, or a slight modification thereof, prevails in most jurisdictions that allow contribution between joint tortfeasors.³⁸

The 1939 version of the Uniform Contribution Among Tortfeasors Act,³⁹ which has been adopted in eight states,⁴⁰ defines joint tortfeasors as "two or more persons jointly or severally liable

³³ Prosser, *Torts* § 46 (2d ed. 1955). An exception to the application of the *Merryweather* rule to intentional torts was the first Uniform Contribution Among Tortfeasors Act (1939). See text accompanying note 39 *infra*. But the 1939 Act was withdrawn in favor of the Revised Uniform Contribution Among Tortfeasors Act (1955) which in § 1(c) does exclude intentional wrongdoers.

³⁴ District of Columbia: *Knell v. Feltman*, 174 F.2d 662 (D.C. Cir. 1949); Iowa: *Hathaway v. Sioux City*, 244 Iowa 508, 57 N.W.2d 228 (1953); Louisiana: *Quatray v. Wicker*, 178 La. 289, 151 So. 208 (1933); Maine: *Hobbs v. Hurley*, 117 Me. 449, 104 Atl. 815 (1918); Minnesota: *Underwriters at Lloyds v. Smith*, 166 Minn. 388, 208 N.W. 13 (1926); Tennessee: *Davis v. Broad St. Garage*, 191 Tenn. 320, 232 S.W.2d 355 (1950); Wisconsin: *Ellis v. Chicago & N.W. Ry.*, 167 Wis. 392, 167 N.W. 1048 (1918).

³⁵ Arkansas: Ark. Stat. Ann. §§ 34-1001 to -1009 (1962); Delaware: Del. Code Ann. tit. 10, §§ 6301-08 (1953); Georgia: Ga. Code Ann. § 105-2012 (Supp. 1960); Hawaii: Hawaii Rev. Laws § 246-11 (1955); Kansas: Kan. Gen. Stat. Ann. § 60-3437 (1949); Kentucky: Ky. Rev. Stat. § 412-030 (1960); Maryland: Md. Ann. Code art. 50, §§ 16-24 (1957); Michigan: Mich. Stat. Ann. § 27.1683(4) (1954); Mississippi: Miss. Code Ann. § 334 (1957); Missouri: Mo. Ann. Stat. § 337.060 (1953); New Jersey: N.J. Rev. Stat. § 2A:53A-2 (1952); New Mexico: N.M. Stat. Ann. §§ 24-1-11 to -18 (1953); North Carolina: N.C. Gen. Stat. § 1-240 (1945); North Dakota: N.D. Cent. Code § 32-38-01 (1960); Pennsylvania: Pa. Stat. Ann. tit. 12, § 808 (1953); Rhode Island: R.I. Gen. Laws Ann. §§ 10-6-2 to -11 (1956); South Dakota: S.D. Code §§ 33.04A01-10 (Supp. 1945); Texas: Tex. Rev. Civ. Stat. Ann. art. 2212 (1950); Virginia: Va. Code Ann. § 8-627 (1950); West Virginia: W. Va. Code Ann. § 5482 (Supp. 1961).

³⁶ 1939 Uniform Contribution Among Tortfeasors Act § 2, Comm'r's Note (1), 9 Unif. Laws Ann. 235 (1957).

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Hereafter referred to as the 1939 Uniform Act.

⁴⁰ Arkansas: Ark. Stat. Ann. §§ 34-1001 to -1009 (1947); Delaware: Del. Code Ann. tit. 10, §§ 6301-08 (1953); Hawaii: Hawaii Rev. Laws § 246-11 (1955); Maryland: Md. Ann. Code art. 50, §§ 16-24 (1957); New Mexico: N.M. Stat. Ann. §§ 24-1-11 to -18 (1953); Pennsylvania: Pa. Stat. Ann. tit. 12, § 808 (1953); Rhode Island: R.I. Gen. Laws Ann. §§ 10-6-2 to -11 (1956); South Dakota: S.D. Code §§ 33.04A01-10 (Supp. 1945). All of these statutes were in effect at the date of this writing.

in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them."⁴¹ Under this Act, one joint tortfeasor has a right to contribution only after he has either discharged the common liability or has paid more than his pro rata share.⁴² Intentional, willful, and wanton actors are not excluded.⁴³ The 1939 Uniform Act applies the "common law" rule to determine the pro rata share among the joint tortfeasors.⁴⁴ With respect to the application of the doctrine of comparative negligence to the right to contribution ("comparative contribution"),⁴⁵ an optional provision⁴⁶ included in the 1939 Uniform Act provides for a consideration of the relative degrees of fault of the joint tortfeasors in determining their shares. Of the eight states⁴⁷ which adopted the 1939 Uniform Act, only four⁴⁸ adopted the optional provision.

The 1955 Revised Uniform Contribution Among Tortfeasors Act,⁴⁹ which applies the "equity" rule,⁵⁰ has been adopted in one jurisdiction.⁵¹ The 1955 Revised Uniform Act deletes the optional section and provides that relative degrees of fault *shall not* be considered.⁵² The Commissioners state⁵³ that the better argument in favor of the comparative contribution section disappeared when intentional, willful, and wanton actors were denied the right to contribution under the Revised Uniform Act.⁵⁴

As indicated above, under the Revised Uniform Act an intentional or grossly negligent tortfeasor is denied the right of contribution. This seems to be the general rule among the states that have a "com-

⁴¹ 1939 Uniform Act § 1.

⁴² 1939 Uniform Act § 2(2).

⁴³ 1939 Uniform Act § 2, Comm'r's Note (1), 9 Unif. Laws Ann. 235 (1957); see also note 33 *supra*.

⁴⁴ 1939 Uniform Act § 2; see text accompanying note 36 *supra*.

⁴⁵ This concept or doctrine is hereafter referred to as the "comparative contribution" doctrine.

⁴⁶ The 1939 Uniform Act § 2(4) states: "When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares." Obviously, the Commissioners do not use the term "pro rata" to mean "equal" shares. See Black, Law Dictionary 1364 (4th ed. 1957).

⁴⁷ See note 40 *supra*.

⁴⁸ Arkansas: Ark. Stat. Ann. § 34-1002(4) (1947) (See Louisiana-Nevada Transit Co. v. Ozan Lumber Co., ___ Ark. ___, 360 S.W.2d 120 (1962), for a recent example of the application of the section.); Delaware: Del. Code Ann. tit. 10, § 6302(d) (1953); Hawaii: Hawaii Rev. Laws § 246-11 (1955); South Dakota: S.D. Code § 33.04A01 (Supp. 1945).

⁴⁹ 9 Unif. Laws Ann. 68 (Supp. 1961), hereafter referred to as the Revised Uniform Act.

⁵⁰ Revised Uniform Act § 2(c); see text accompanying note 37 *supra*.

⁵¹ North Dakota: N.D. Cent. Code § 32-38-01 (1960).

⁵² Revised Uniform Act § 2(a).

⁵³ Revised Uniform Act § 1, Comm'r's Note, 9 Unif. Laws Ann. 69 (Supp. 1961).

⁵⁴ Revised Uniform Act § 1(c).

mon law" pro rata contribution statute.⁵⁵ There is still common liability, but because of the actual or constructive intent to injure, the *Merryweather* rule of "no-contribution" is applied. However, where one tortfeasor who is only ordinarily negligent has paid more than his pro rata share, he may recover by way of contribution *only* a pro rata share from the grossly negligent tortfeasor.⁵⁶

III. THE PRINCIPAL CASE—"COMPARATIVE CONTRIBUTION"

A. *Wisconsin History Of Contribution*

The Wisconsin Constitution⁵⁷ adopted the common law in force in Wisconsin at the time of statehood and provided that such common law could be altered or suspended only by the legislature. However, in 1864 the Wisconsin Supreme Court in *Coburn v. Harvey* stated that only that part of the common law which had been adopted in the territory at the time of the American Revolution became part of the common law of Wisconsin.⁵⁸ In 1918 Wisconsin recognized the equitable doctrine of contribution by judicial decision in *Ellis v. Chicago & N.W. Ry.*,⁵⁹ and, consequently, that doctrine was subject to change by the courts without legislative action. In the *Ellis* case, the court stated that a plaintiff could recover the total amount of the judgment from either of two joint tortfeasors, and the paying tortfeasor was then entitled to recover a pro rata share from the remaining tortfeasor, provided the tort did not involve moral turpitude or a willful or conscious wrong. It was decided a few years later that such intentional wrongs (the intent involved being either actual or constructive) included cases where there was a finding of gross negligence.⁶⁰ Thus, a tortfeasor found guilty of gross negligence had no right to contribution from a joint tortfeasor who was only ordinarily negligent.⁶¹ Conversely, it would appear that a tortfeasor guilty of ordinary negligence could recover only a pro rata share or up to one-half of the loss from one guilty of gross negligence, even though the latter's wrong obviously con-

⁵⁵ Prosser, Torts § 46, at 249 (2d ed. 1955).

⁵⁶ *Wedel v. Klein*, 229 Wis. 419, 282 N.W. 606 (1938).

⁵⁷ Art. XIV, § 13.

⁵⁸ 18 Wis. 147 (1864). This view was followed in *Cawker v. Dreutzer*, 197 Wis. 98, 221 N.W. 401 (1928), where the court refused to be bound by an English decision of 1809 on the ground that it was not a part of the common law of the state.

⁵⁹ 167 Wis. 392, 167 N.W. 1048 (1918). See text accompanying notes 36, 37 *supra* for the distinction between "equitable" and "common law" doctrines of contribution.

⁶⁰ *Bentson v. Brown*, 186 Wis. 629, 203 N.W. 380 (1925); see text accompanying note 23 *supra*.

⁶¹ *Zurn v. Whatly*, 213 Wis. 365, 251 N.W. 435 (1933).

tributed substantially more to the loss.⁶² However, the question has never been decided.⁶³

B. *The New "Comparative Contribution" Rule*

The instant case changed the 1918 doctrine of contribution. Tortfeasors sustaining a common liability by reason of negligence are now held responsible for contribution in proportion to the percentage of negligence attributable to each. Hence, the number of tortfeasors is no longer relevant. However, this refinement of the rule of contribution does not change the plaintiff's right to recover the total amount of his damage from any one defendant-tortfeasor. In arriving at the new doctrine of contribution, the court pointed out that the comparative negligence statute, governing the relative rights of a plaintiff vis-a-vis a defendant, had no application to the doctrine of contribution.⁶⁴ Therefore, the comparative contribution rule was not restricted by those words in the comparative negligence statute which stated that a plaintiff could recover from a defendant only if the plaintiff's negligence was not as great as the negligence of the defendant. Also, the court held that under the new comparative contribution rule, the right of one tortfeasor to contribution was not barred even though his negligence be equal to or greater than the negligence of his co-tortfeasor.⁶⁵

C. *Implementation And Effects Of The New Rule*

The Wisconsin courts possess devices of procedure and practice which make the adoption of the new comparative contribution rule feasible as well as just for all future litigants. There is wide use of the special verdict,⁶⁶ a means by which the jury finds the facts only and leaves the judgment to the court.⁶⁷ By the use of this procedure the jury can separate a general question into separate and distinct issues and thereby avoid confusion in determining the relative degrees of fault of the two or more parties. Special verdicts (or issues) are especially helpful when several party-defendants are involved.

⁶² *Ayala v. Farmers Mut. Auto. Ins. Co.*, 272 Wis. 629, 76 N.W.2d 563 (1956).

⁶³ *Jacobs v. General Acc. Fire & Life Assur. Corp.*, 14 Wis. 2d 1, 109 N.W.2d 462 (1961).

⁶⁴ 114 N.W.2d at 107. The comparative negligence statute is found at Wis. Stat. Ann. § 331.045 (1958).

⁶⁵ 114 N.W.2d at 108.

⁶⁶ Wis. Stat. Ann. § 270.27 (Supp. 1961).

⁶⁷ *Andrews v. Chicago, M. & St. P. Ry.*, 96 Wis. 348, 71 N.W. 372 (1897). The "special verdicts" used in Wisconsin are basically the same as "special issues" in other jurisdictions, e.g., *Texas. Compare Ex parte Fisher*, 146 Tex. 328, 206 S.W.2d 1000 (1947), with *Bigelow v. Danielson*, 102 Wis. 407, 78 N.W. 599 (1889).

Another practice in Wisconsin, that of allowing automobile liability insurers to be impleaded for contribution or indemnification in some actions,⁶⁸ will also be helpful in applying the new rule. Moreover, the application of the comparative negligence statute⁶⁹ provides helpful precedent.

The use of releases⁷⁰ and covenants not to sue⁷¹ will still be applicable under the comparative contribution doctrine.⁷² However, "in order for a plaintiff to give a release or covenant which will protect the settling tortfeasor from a claim of contribution, the plaintiff must agree to satisfy such percentage" of the other tortfeasor's judgment against the settling tortfeasor which represents the settling tortfeasor's negligence.⁷³ The court is apparently saying that a plaintiff will have to be satisfied with recovering from the non-settling tortfeasor only the amount of damages which represents the non-settling tortfeasor's percentage of the total negligence.

D. *Effects Of Abolishing The Concept Of Gross Negligence*

In the principal case, the court abolished the concept of gross negligence.⁷⁴ This will have little effect upon the comparative negligence statute, *i.e.*, plaintiff vis-a-vis defendant. A plaintiff will still recover only if his contributory negligence is less than the negligence of the defendant.⁷⁵ Now, however, if the plaintiff's conduct is what would have been termed "grossly negligent," he can recover if the defendant is what formerly was termed "more grossly negligent." If the defendant is guilty of reckless, willful, or wanton conduct, by treating this conduct as a very high degree of ordinary negligence,

⁶⁸ Wis. Stat. Ann. § 260.11 (1957) states:

In any action for damages caused by the negligent operation, management or control of a motor vehicle, any insurer of motor vehicles, which has an interest in the outcome of such controversy adverse to the plaintiff or any of the parties to such controversy, or which by its policy of insurance assumes or reserves the right to control the prosecution, defense or settlement of the claim or action, or which by its policy agrees to prosecute or defend the action brought by the plaintiff or any of the parties to such action, or agrees to engage counsel to prosecute or defend said action, or agrees to pay the cost of such litigation, is by this section made a proper party defendant in any action brought by plaintiff on account of any claim against the insured.

See *Ritterbusch v. Sexmith*, 256 Wis. 507, 41 N.W.2d 611 (1950).

⁶⁹ Wis. Stat. Ann. § 331.045 (1958).

⁷⁰ Wis. Stat. Ann. § 113.04 (1957).

⁷¹ See *State Farm Mut. Auto. Ins. Co. v. Continental Cas. Co.*, 264 Wis. 493, 59 N.W.2d 425, 428 (1953), where the court stated that "a release of one joint tortfeasor reserving rights against the other joint tortfeasor . . . under § 113.04 is synonymous with covenants not to sue."

⁷² 114 N.W.2d at 111.

⁷³ *Ibid.*

⁷⁴ *Id.* at 113.

⁷⁵ *Id.* at 107.

the difference between the two rules in the dollar recovery by an ordinarily negligent plaintiff would be very small. Under the comparative contribution rule, however, the result will at times be significant. Under the "common law" rule, a grossly negligent defendant could recover one half of the judgment from an ordinarily negligent co-tortfeasor, even though the former's negligence may have been ninety-five per cent of the total negligence. Similarly, a joint tortfeasor guilty of ordinary negligence could recover only one-half from a grossly negligent co-tortfeasor. By abolishing the concept of gross negligence, and by making it different only in degree and not in kind, the joint tortfeasors will be entitled to a comparison of the degrees of fault and an apportionment of the damages on that basis. As a result, if a joint tortfeasor were responsible for ninety-five per cent of the total negligence, he would also be responsible for ninety-five per cent of the damages as against only fifty per cent under the pro rata rule. Only by abolishing the willful and wanton concept of gross negligence and by considering such conduct as a high degree of ordinary negligence on a comparative basis can an equitable and fair result be reached in all cases. Admittedly, the result under the new rule is more just in distributing the loss in proportion to the degree of negligence or fault which caused it rather than distributing the loss on a pro rata basis.

Two other aspects of the abolition of the doctrine of gross negligence should be considered. First, in negligence cases the new practice will do away with the basis for punitive damages,⁷⁶ which prior to this time had to be based on a finding of willfulness, wantonness, and recklessness, *i.e.*, gross negligence. However, since the primary purpose of punitive damages was not to compensate the plaintiff for his injuries but to punish and deter the wrongdoer,⁷⁷ the void left by the absence of a provision for exemplary damages could be satisfactorily filled by the criminal laws of the state, according to the court in the instant case.⁷⁸ The court also stated that it was doubtful (1) if potential tortfeasors were aware of the possibility of punitive damages, and (2) if they were aware, whether they reflected upon such a possibility or whether their conduct was deterred or altered by it,⁷⁹ especially since some liability insurance policies provide for payment of punitive damages.

⁷⁶ *Id.* at 113.

⁷⁷ Prosser, *Torts* § 2, at 9 (2d ed. 1955).

⁷⁸ 114 N.W.2d at 113; see Wis. Stat. Ann. § 940.06 (dealing with homicide by reckless conduct), and § 941.20 (reckless use of weapons) (1958); see also Tex. Pen. Code Ann. § 802 (driving while intoxicated), § 1149 (assault with a motor vehicle), and § 1231 (negligent homicide) (1961).

⁷⁹ 114 N.W.2d at 113.

A second significant aspect of the abolition of the doctrine of gross negligence arises under section 17 of the Bankruptcy Act.⁸⁰ Although most judgments, including those rendered in cases involving ordinary negligence, can be discharged in bankruptcy, decrees finding liability for willful and malicious injury to the person or property of another cannot be so discharged.⁸¹ Now, because of the abolition of "gross" negligence, debts arising from any degree of negligence will be dischargeable. However, the court felt that the benefits derived from abolishing the doctrine of gross negligence outweighed the possible inequity that would result from the relatively few cases involving an uninsured, insolvent tortfeasor found to be grossly negligent.⁸²

IV. TEXAS

A. Comparative Negligence

Texas has no comparative negligence statute.⁸³ Legislation to that effect has been introduced in the Texas House of Representatives on five separate occasions,⁸⁴ but each time the bill has been defeated. Consequently, in the absence of comparative negligence, contributory negligence on the part of the plaintiff is an absolute defense in Texas unless the defendant is found guilty of gross negligence.⁸⁵ However, the suggestion that juries often allow recovery in cases when the plaintiff is contributorily negligent and the defendant not grossly negligent is not an incredible one.⁸⁶ The jury simply finds that the plaintiff is not negligent but reduces his recovery.⁸⁷

Although Texas does not have a comparative negligence statute of general application, it has enacted an employer's liability statute⁸⁸—applicable to railroad employees—which abolishes contributory negligence as an absolute defense and allows apportionment of damages.⁸⁹

⁸⁰ 30 Stat. 550 (1898), 11 U.S.C. § 35 (Supp. II, 1961).

⁸¹ 30 Stat. 550 (1898), 11 U.S.C. § 35(a) (2) (Supp. II, 1961).

⁸² 114 N.W.2d at 114.

⁸³ *Alexander v. Appell Drilling Co.*, 290 S.W.2d 377 (Tex. Civ. App. 1956) *error ref. n.r.e.*

⁸⁴ H.B. 122 (1959); H.B. 228 (1957); H.B. 101 (1953); H.B. 390 (1951); H.B. 462 (1941).

⁸⁵ *Brown & Root v. Duncan*, 40 S.W.2d 244 (Tex. Civ. App. 1931). In *Gulf, C. & S.F. Ry. Co. v. Hamilton*, 57 S.W.2d 309, 312 (Tex. Civ. App. 1933), *error dismiss. w.o.j.*, 126 Tex. 542, 89 S.W.2d 208 (1936), the court stated: Gross negligence is "the exercise of so slight a degree of care as to justify the belief that there was an indifference to the interest and welfare of others."

⁸⁶ "We but blind our eyes to the 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).

⁸⁷ *Ibid.*

⁸⁸ Tex. Rev. Civ. Stat. Ann. art. 6440 (1926).

⁸⁹ *Pope v. St. Louis Sw. Ry.*, 106 Tex. 52, 155 S.W. 1175 (1913).

Also, it is interesting to note that in March of 1961 a suit⁹⁰ was brought in a Texas district court under the Texas Wrongful Death Statute,⁹¹ the Survival Statute,⁹² and under general maritime law to recover damages for the death of a longshoreman. The Texas Supreme Court held that in an action under the Wrongful Death Statute, if the general maritime law doctrine of comparative negligence would have applied in favor of the decedent had he lived, then this doctrine would apply in favor of his dependants, and contributory negligence of the decedent could be considered only in mitigation of damages.⁹³ The court was faced with a question of first impression in Texas, and since the relevant federal cases⁹⁴ were evenly divided, it could easily have refused to permit the utilization of comparative negligence. However, it did not, and this use of the doctrine stands as the only instance, outside of the employer's liability act, in which Texas courts have applied comparative negligence.⁹⁵

B. Contribution

Texas has a contribution statute⁹⁶ which provides for distribution of damages among joint tortfeasors on a pro rata basis.⁹⁷ The "equity" rule is applied in determining the pro rata shares.⁹⁸ If the plaintiff brings suit against only one of the wrongdoers, the defendant may implead the other wrongdoer and seek contribution.⁹⁹ The plaintiff may recover from either or both of the joint tortfeasors, *i.e.*, they are jointly and severally liable.¹⁰⁰ However, for example, where one of three joint tortfeasors pays the plaintiff, the paying tortfeasor is not entitled to recover from any one of the other two co-tortfeasors two-thirds of the amount paid by him, rather, he may recover from

⁹⁰ *Vassallo v. Nederl-Amerik Stoomv Maats Holland*, 162 Tex. 52, 344 S.W.2d 421 (1961), noted, 16 Sw. L.J. 675 (1962).

⁹¹ Tex. Rev. Civ. Stat. Ann. art. 4671 (1940).

⁹² Tex. Rev. Civ. Stat. Ann. art. 5525 (1958).

⁹³ *Vassallo v. Nederl-Amerik Stoomv Maats Holland*, 162 Tex. 52, 344 S.W.2d 421 (1961). For a complete treatment of the case, see 16 Sw. L.J. 675 (1962).

⁹⁴ The court declined to follow the construction of recovery under the Wrongful Death Act accepted by the Fifth Circuit in *Truelson v. Whitney & Bodden Shipping Co.*, 10 F.2d 412 (5th Cir. 1926). Instead, it quoted portions of a 1959 opinion of the Fourth Circuit in *Holley v. The Manfred Stansfield*, 269 F.2d 317 (4th Cir. 1959). The court there stated: "This statute was intended . . . to grant recovery in all instances where a decedent would have recovered. The statute appears not to concern itself with which law, local or maritime, would have supported the recovery, but only whether there would have been a recovery." *Id.* at 321.

⁹⁵ See *Flaiz v. Moore*, ___ Tex. ___, 359 S.W.2d 872 (1962), which cites the *Vassallo* case.

⁹⁶ Tex. Rev. Civ. Stat. Ann. art. 2212 (1950).

⁹⁷ *Wheeler v. Glazer*, 137 Tex. 341, 153 S.W.2d 449 (1941).

⁹⁸ See text accompanying note 37 *supra*.

⁹⁹ *Lottman v. Cuilla*, 288 S.W. 123 (Tex. Comm. App. 1926).

¹⁰⁰ *Bentley v. Halliburton Oil Well Cementing Co.*, 174 F.2d 788 (5th Cir. 1949).

each of the other tortfeasors only one-third of the total amount.¹⁰¹ In one case the Texas Supreme Court stated in dictum that contribution did not apply if there was a difference between the character of the wrong and the quality of the conduct of the parties.¹⁰²

By using a covenant not to sue, a plaintiff may preclude recovery from one of several tortfeasors without barring his action against the remaining tortfeasors, provided the amount paid for the covenant is not in full satisfaction of his damages.¹⁰³ The settling tortfeasor may then proceed against the non-settling tortfeasor or tortfeasors for contribution or indemnification. In such an action, the amount already paid the plaintiff under the settlement is deducted from the total amount of damages if it is equal to or greater than one-half of such damages. If the amount paid under the settlement is less than one-half the amount of the total damages, the plaintiff may recover from the non-settling tortfeasor only up to one-half of the total amount set as damages, because the plaintiff has accepted the settlement in satisfaction of the settling tortfeasor's liability for one-half.¹⁰⁴

C. *The Concept Of Gross Negligence*

The abolition of the concept of gross negligence in Texas would have a definite effect upon two areas of negligence: (1) contributory negligence; and (2) the guest statute. As noted, the principles of gross negligence have been applied to relieve the inherent harshness of the doctrine of contributory negligence.¹⁰⁵ Without gross negligence, a plaintiff who was only slightly negligent would be completely barred from recovery against a defendant who was grossly negligent. This result could in no way be considered just. Therefore, Texas allows a plaintiff who is guilty of contributory negligence to recover from a defendant who is grossly negligent.¹⁰⁶

Texas also has a guest statute¹⁰⁷ which prohibits an automobile passenger who is found to be a guest from recovering damages from the operator of the automobile unless the operator causes injury to

¹⁰¹ *Maresh v. Jennings*, 38 S.W.2d 406 (Tex. Civ. App. 1931) *error ref.*

¹⁰² *Wheeler v. Glazer*, 137 Tex. 341, 153 S.W.2d 449, 451 (1941): "While the law does not seem to take note of the *quantity* of the negligence of the different tortfeasors as a reason for authorizing the one least negligent to have contribution from the other, the authorities do recognize a distinction in the *quality* of their negligence." (Emphasis added.) The court then cited *Gregg v. City of Wilmington*, 155 N.C. 18, 70 S.E. 1070 (1911); *Zulkee v. Wing*, 20 Wis. 408 (1866); 18 C.J.S. *Contribution* § 11 (1938); 10 Tex. Jur. *Contribution* 554 (1936). No other cases were found on this point.

¹⁰³ *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 84 S.W.2d 703 (1935).

¹⁰⁴ *Gattegno v. The Parisian*, 53 S.W.2d 1005 (Tex. Comm. App. 1932).

¹⁰⁵ *Prosser*, Torts § 51 (2d ed. 1955).

¹⁰⁶ See cases cited note 85 *supra*.

¹⁰⁷ Tex. Rev. Civ. Stat. Ann. art. 6701b (1953).

the passenger by his heedlessness or reckless disregard for the rights of others.¹⁰⁸ The abolition of the concept of gross negligence would require an amendment of the present guest statute. Such abolition would have either one of two possible results: (1) it would completely bar a passenger from recovering damages from the operator of the vehicle no matter how gross his negligence might have been; or (2) it would eliminate any bar to a suit between a passenger and an operator. However, considering the purpose and intent of the present guest statute, the latter alternative would seem to be unlikely.

D. Comparative Contribution

Is it feasible to adopt the comparative contribution doctrine in a jurisdiction such as Texas which does not already employ a general comparative negligence doctrine? Although Texas does not have a general comparative negligence doctrine as between plaintiff and defendant, the apportionment of damages according to the degrees of fault is already applied in two instances: (1) under federal¹⁰⁹ and state¹¹⁰ employer's liability statutes; and (2) under general maritime law.¹¹¹ Moreover, Texas has special issues or special verdicts¹¹² similar to those in Wisconsin,¹¹³ and these would aid in the practical application of the comparative contribution rule by eliminating possible confusion of the jury, especially in a multi-party suit. Therefore, it is feasible to adopt by statute¹¹⁴ the new comparative contribution doctrine in Texas, and such legislation is recommended. Contribution based solely upon the number of tortfeasors with no regard for the relative degrees of fault of the wrongdoers is unjust. Just as liability for negligence is based upon actual causation, a joint tortfeasor should be held liable only for that portion of the total damages which he causes. Comparative contribution is pragmatically sound. It is a workable doctrine which, by employing certain procedural devices, will normally result in an equitable division of damages. It is true that the adoption of such a doctrine would tend to disrupt a well established rule. However, this argument assumes that what is right. As Mr. Justice Holmes once stated: "It is revolting to have no better reason for a rule of law than that so it was laid down

¹⁰⁸ Wood v. Orts, 182 S.W.2d 139 (Tex. Civ. App. 1944).

¹⁰⁹ 35 Stat. 66 (1908), 45 U.S.C. § 53 (1959).

¹¹⁰ Tex. Rev. Civ. Stat. Ann. art. 6440 (1926).

¹¹¹ See text accompanying note 95 *supra*.

¹¹² Tex. R. Civ. P. 290.

¹¹³ See text accompanying note 67 *supra*.

¹¹⁴ The present Texas contribution doctrine is based upon statute, Tex. Rev. Civ. Stat. Ann. art. 2212 (1950), and therefore legislative action would be necessary.

in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."¹¹⁵

William F. Russell

¹¹⁵ Holmes, *The Path of the Law*, in *Collected Legal Papers* 167, 187 (1920), quoted in the principal case at 114 N.W.2d 109.