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Connecticut's Comparative Negligence Statute: An Analysis of Some Problems

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THE 1973 SESSION of the Connecticut General Assembly enacted a statute of general application which puts Connecticut among the growing number of states which have substituted a rule of comparative negligence for the common law rule of contributory negligence. This paper will seek to explore some of the problems which this statute may raise.

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1. Public Act No. 73-622 provides as follows:
   Section 1. (a) In causes of action based on negligence, contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages resulting from injury to persons or damage to property, if such negligence was not greater than the combined negligence of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in the proportion of the percentage of negligence attributable to the person recovering.
   (b) In any action to which this section is applicable, the instructions to the jury given by the court shall include an explanation of the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party.
   (c) The legal doctrines of last clear chance and assumption of risk in actions to which this section is applicable are abolished.

2. Section 6 of number 273 of the public acts of 1972 is repealed.

The repealed section contained similar provisions but was part of the no-fault statute and was limited in scope by the words quoted in note 2, infra.

The following are state comparative negligence statutes of general applicability:
- ARK. STAT. ANN. § 27.1730.1 (1947); GA. CODE ANN. § 105-603 (1968); HAWAII REV. STAT. § 663-31 (Supp. 1972); IDAHO CODE § 6-801 (Supp. 1973); ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1973); MASS. GEN. LAWS, ch. 231, § 85 (Supp. 1973); MINN. STAT. ANN. § 604.01 (Supp. 1973); MISS. CODE ANN. § 1454 (1942); NEB. REV. STAT. § 25-1151
To What Actions Is the Statute Applicable?

With respect to time. The comparative negligence statute will probably be held applicable only to actions concerning events occurring after its effective date\(^2\) and not to actions then pending nor to those brought thereafter for injuries caused before the statute took effect. This is not merely a procedural statute but one which changes the substantive law of torts.\(^3\) The Minnesota court has recently held that its comparative negligence statute could be given retrospective effect without offending the Constitution.\(^4\) This proposition is not altogether free from doubt.\(^5\) In any event, the doubt probably need not be resolved here. Our statute is silent about its retroactive effect and where that is the case the uniform course of decision has been to confine the application of comparative negligence statutes to events which occur after they take effect.\(^6\) By contrast, the Minnesota legisla-


3. In this respect the present statute differs from earlier statutes, which merely changed the burden of proof on the issue of contributory negligence. See Conn. Gen. Stat. Rev. § 52-114 (1972).


ture had expressly made the statute applicable to "any action the first trial of which is commenced after July 1, 1969." "

*Types of action.* The statute is expressly made applicable "[i]n causes of action based on negligence." This apparently excludes actions based on an intent to inflict injury or on reckless and wanton misconduct, and also actions based on an absolute nuisance as our supreme court has defined that term.\(^6\) Contributory negligence has not been a defense to such actions traditionally\(^0\) and the statute was probably not meant to enlarge the scope of the defense whose harshness it modifies.

An interesting question is posed by an action based on strict liability. Ordinary contributory negligence is not a defense to such an action, but contributory recklessness may be.\(^10\) Moreover, "the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense"\(^11\) in cases of strict liability. The Wisconsin comparative negligence statute (which in this respect is worded like ours) has been applied in a case of strict liability for defective products on the doctrine of ground that such an action is really based on negligence per se.\(^12\) A federal court in New Hampshire has reached a similar result on a broader ground: that the statute was meant to modify contributory negligence wherever it was a defense.\(^13\)

The comparative negligence statute probably is intended to apply to wrongful death actions where they are based on negligence. To be sure, Public Act No. 73-622 does not specifically mention death

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In *Byrnes v. City of Jackson*, 140 Miss. 656, 105 So. 861, 42 A.L.R. 254 (1925), the statute was applied to the case of a plaintiff bitten by a bear which the city kept, but the liability of the city was treated as resting on negligence.

actions, but it repeats verbatim the language of the earlier provision for comparative negligence found in the no-fault statute, viz. "in an action by any person or his legal representative to recover damages resulting from injury to persons . . ." And the no-fault statute had explicitly defined "injury" as meaning "bodily injury, sickness, or disease, including death resulting therefrom, accidentally caused and arising out of the ownership, maintenance, or use of a private passenger automobile." Presumably when the Legislature embodied the earlier language in the later statute of extended scope it meant to retain that part of the earlier definition which remained relevant. There is certainly nothing to suggest that the Legislature meant to give the later statute narrower coverage than the earlier statute had.

Causes of action against municipalities for injuries caused by highway defects are elsewhere held to be within the scope of comparative negligence statutes. This sensible result may be precluded in Connecticut because of our peculiar and almost unique rule that the defect must be the sole proximate cause of the injury. It is to be hoped

15. Id. § 1(c). CONN. GEN. STAT. REV. § 38-319(c) (1972).
17. Bartram v. Sharon, 71 Conn. 686, 43 A. 143 (1899). Massachusetts seems to be the only other state with a similar rule. 2 F. HARPER & F. JAMES, LAW OF TORTS, 1631 (1956) (hereinafter HARPER & JAMES).

Under this rule it is part of plaintiff's case to prove that neither his own nor a third person's negligence was a proximate cause of his injury, and he is not relieved of this burden by § 52-114 which puts on defendant the burden of pleading and proving contributory negligence. Burke v. West Hartford, 147 Conn. 149, 152, 157 A.2d 757 (1960); WRIGHT & FITZGERALD, 223-24. If the rule is to be followed it would presumably exclude operation of the comparative negligence statute by a parity of reasoning.

It may also be questioned whether an action against a municipality for injuries caused by a highway defect is one "based on negligence." To be sure the common law afforded no such action, and the right to recover rests on statute. But the same thing is true of an action for wrongful death. And the elements of a cause of action under either statute may include just those ingredients which constitute negligence. Thus the duty with respect to highways has been defined as a "duty to use reasonable care to make them reasonably safe." Goldstein v. Hartford, 144 Conn. 739, 740, 131 A.2d 927 (1957); WRIGHT & FITZGERALD 230. Where that is the case it is submitted that the cause of action should be found to be "based on negligence" within the meaning of the comparative negligence statute. This is distinctly a remedial statute entitled to a broad and liberal construction.
that the comparative negligence statute will provide the occasion for
taking a new look at this idiosyncrasy of Connecticut law.

The Statute's Relationship to Other Rules of Tort Law

Proximate cause. The statute applies only to contributory negligence, i.e., negligence which is a proximate cause of the injury. Negligence on plaintiff's part, which did not contribute to at least part of his injury, was no defense at all under the former law and the statute does not make it so.

The concept of proximate cause involves two aspects: to have legal consequences a party's negligence must have been a cause in fact of the injury (or part of it); beyond that it must have been a legal or proximate cause. These requirements do not appear to have been changed.

If the plaintiff was negligent but this negligence was not a cause in fact of the accident or of at least part of his injury, it will not diminish his recovery under the statute any more than it would have barred his recovery at common law. In this connection it should be noted that plaintiff's negligence which does not contribute to the accident may nevertheless enhance his injuries. In such a case contributory negligence formerly barred recovery for the extent to which it aggravated the injury. Under the statute the treatment will probably be parallel. If plaintiff's negligence was greater than defendant's, it will bar recovery for those items of damage to which it contributed. If the plaintiff's negligence was not greater than defendant's, then plaintiff's recovery for those items of damage will be diminished according to the statutory formula. Since defendant has the burden of proof on the issue of contributory negligence, he will not have the benefit of diminution unless there is evidence before the trier which justifies a finding of both the fact that plaintiff's negligence aggravated his injuries and the extent to which it did so. Thus, even if our courts should entertain the seat-belt defense as a matter of substantive law it will avail a defendant nothing unless he can sustain the bur-


den of proving the extent to which injury would have been avoided or lessened if the plaintiff had used his seat belt.21

Beyond the requirement of cause in fact lies the elusive requirement of proximate or legal cause. According to Chief Justice Maltbie’s admirable analysis in Kinderavich v. Palmer,22 this boils down largely to a requirement that the plaintiff’s conduct must have been negligent with respect to the hazard or risk that caused him injury. If it was not, then neither the common law rule of contributory negligence nor the statute modifying it would have any application. Thus, in Smithwick v. Hall & Upson,23 plaintiff’s standing on the unrailed part of a scaffold was held not to affect his recovery for injuries from the falling of the wall above him since the reason why it was negligent to stand there was the risk of his falling; it had nothing to do with the unknown weakness of the wall at that particular place. To be sure, the plaintiff in Smithwick did fall after he was struck, and defendant urged this as a reason for denying him recovery. The court answered that this would affect the amount of recovery only and would not bar the action. As Judge Fitzgerald pointed out in Uresky v. Fedora,24 this reasoning should apply to the typical seat-belt defense case, if the failure to use a belt is recognized as negligence at all.

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21. Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967); Kircher, supra note 20, at 177-78, 188-89.
22. 127 Conn. 85, 15 A.2d 83 (1940). See also sources cited supra note 18.
23. 59 Conn. 261, 21 A. 924 (1890).

A contrary argument could be fashioned out of the reasoning of the majority opinion in Mahoney v. Beatman, 110 Conn. 184, 147 A. 762 (1929). That case probably holds that a plaintiff’s negligence will not be deemed a proximate cause of his injury unless it either contributed to the original impact (collision) or intervened thereafter. See analysis in 2 HARPER & JAMES 1233. If that is the holding, it is inconsistent with the later Kinderavich decision (see note 22, supra) as well as the weight of judicial authority and commentary. PROSSER 423-24; 2 HARPER & JAMES 1233; RESTATEMENT (SECOND) OF TORTS § 465, illus. 1 (on facts of Mahoney case, opposite result given).

If Connecticut courts entertain the seat belt defense at all it seems unlikely that they will neutralize that decision by resurrecting the ghost of Mahoney v. Beatman.
**Last clear chance.** The last clear chance rule has been accepted in Connecticut and has been traditionally explained in terms of proximate cause. The plaintiff's earlier negligence has become relegated to a remote cause or condition by the defendant's later negligent failure to take his last clear chance, which is therefore the sole proximate cause of the injuries.25 This reasoning is probably specious: it has been rejected by many courts26 and commentators.27 Other courts have, however, applied it to preclude the application of a comparative negligence statute.28 It was clearly to prevent such a result and to assure application of our statute to last clear chance cases that the General Assembly expressly abolished that doctrine. This means that the plaintiff's negligence in getting into his position of peril will diminish his recovery. It would seldom bar recovery since defendant's negligence in failing to take this last clear chance would usually be at least as great as plaintiff's prior negligence in getting into peril.29

**Assumption of risk.** The statute also expressly abolishes assumption of risk in actions where it applies. This is an eminently sound provision, and it looks simple to apply, but vexing questions may lurk beneath this apparent simplicity because of the protean and elusive nature of assumption of risk.30

When a plaintiff's conduct in assuming a risk is unreasonable, then the doctrine overlaps contributory negligence31 and the principle of comparative negligence embodied in the statute should apply.32

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25. Nehring v. Connecticut Co., 86 Conn. 109, 120, 84 A. 301, 305 (1912); Wright & Fitzgerald § 45.

26. See the well-reasoned opinions in Petition of Kinsman Transit Co., 338 F.2d 708, 718-21 (2d Cir. 1964); Cushman v. Perkins, 245 A.2d 846 (Me. 1968) (repudiating former explanation of last clear chance in terms of proximate cause).

27. See Prosser 427-28; Restatement (Second) of Torts § 479, comment a; Mortensen, Arizona's Last Clear Chance Doctrine, 4 Ariz. L. Rev. 71, 73 (1962); Gozansky, Last Clear Chance Doctrine in Florida, 17 U. Miami L. Rev. 582 (1963); Comment, 18 Me. L. Rev. 65, 91 (1966); Note 29 U.K.C. L. Rev. 104 (1961); Annot. 59 A.L.R.2d 1261, 1267-73 (1959).


29. This would not necessarily be the case. It is suggested that a jury might reasonably find the trespasser's act of going to sleep drunk on a railroad track to be a graver wrong than the engineer's inadvertance in failing to see the sleeper's prone figure. Cf. Carlson v. Connecticut Co., 94 Conn. 131, 108 A. 531 (1919).


31. Restatement (Second) of Torts § 466(a) and comments c and d; id. § 496 A, comment d.

32. Id. § 496 A, comment d at 563.
this kind of situation the abolition makes sense. Here, it is meant to and will avoid a pitfall which developed under some of the earlier comparative negligence statutes. The Federal Employer's Liability Act, for example, introduced comparative negligence but said nothing about assumption of risk, and the courts ruled that negligent conduct which involved voluntary assumption of risk was a complete defense to the action. Similar rulings are to be found in Mississippi. To avoid them under the federal act, Congress expressly abolished assumption of risk in 1939. The General Assembly apparently profited by this example and took the needed step at the threshold of our venture into comparative negligence.

This probably means that the negligent assumption of a risk will be treated as contributory negligence and be subject to the rule of comparative negligence. This may well include the kind of conduct which constitutes a defense to strict liability if the statute is held applicable to such cases at all.

Assumption of risk does not always refer to negligent conduct. The term has often been used to include perfectly reasonable conduct under circumstances where defendant has no duty to protect a plaintiff from the risk. Thus the licensee on land is said to assume the risk of those latent dangers which are not actually known to the occupier. And the spectator at a baseball game is said to assume the risk of being hit by a thrown or batted ball when he sits in the unscreened portion of the bleachers. In these cases the real impediment to liability is that defendant has breached no duty to plaintiff. It seems unlikely that the statutory abolition of assumption of risk was intended to apply to this kind of case; the statute was probably not meant to raise duties on defendant's part, but simply to prevent the possibility that negligent assumption of risk might escape the opera-

34. See Note, 39 Miss. L.J. 493, 500 (1968).
36. See note 11, supra.
tion of the statute as it did under the original FELA.\(^{39}\)

Res ipsa loquitur. The question has sometimes arisen whether a comparative negligence statute applies in a case of res ipsa loquitur. As an abstract proposition an affirmative answer is clearly indicated\(^{40}\) since res ipsa represents no more than a way of proving defendant's negligence. There is, however, a complicating factor. The method of proof involved in res ipsa includes a process of elimination. Three conditions must be met before the doctrine is applicable. The first is that the accident is of a kind which does not ordinarily happen unless someone is negligent.\(^{41}\) The other two conditions seek to eliminate other sources of the possible negligence leaving the defendant as its probable author.\(^{42}\) And one of these conditions is that plaintiff must eliminate his own negligent conduct as a possible cause of the accident.\(^{43}\) Where that elimination is needed to complete the basis for an inference of defendant's negligence, neither the comparative negligence statute nor the statute saddling the defendant with the burden of proving contributory negligence should have any application.\(^{44}\) The issue is not properly one of contributory negligence as such but part of the proof of negligence. Thus if a bottle of cola explodes while plaintiff is opening it, the event indicates that someone was probably negligent, but the proof does not point an accusing finger towards the bottler unless it shows that the plaintiff (and intervening handlers) did nothing to account for the explosion.\(^{45}\)

In some contexts, of course, the plaintiff's conduct while clearly not contributory to the accident, may nevertheless have contributed to his injuries. A passenger in a derailed railroad car who was standing on the platform at the time of the derailment might furnish an example. Here contributory negligence is perfectly compatible with

\(^{39}\) Cf. notes 34, 35, supra.

See the perceptive analysis in Campbell, Ten Years of Comparative Negligence 1941 Wis. L. Rev. 289, 297-98.

\(^{40}\) Turk v. H.C. Prange Co., 18 Wis. 2d 547, 119 N.W.2d 365 (1963).

\(^{41}\) WRIGHT & FITZGERALD 58; PROSSER 211-18; 2 HARPER & JAMES § 19.6.

\(^{42}\) PROSSER 218-21; 2 HARPER & JAMES § 19.7.

\(^{43}\) WRIGHT & FITZGERALD 58; PROSSER 224-25; 2 HARPER & JAMES § 19.8.

\(^{44}\) See the trial court's charge to the jury in Jesionowski v. Boston & Maine R.R., 329 U.S. 452, 454 (1947); analysis in 2 HARPER & JAMES 1093-94.

an inference of defendant's negligence, and the comparative negligence statute should have full application.

The burden of proof. The burden of pleading and proving contributory negligence is put by statute on the defendant. These burdens are probably not changed by the comparative negligence statute even though this changes the legal consequences of contributory negligence in some cases. If the defendant does not inject contributory negligence into the case by proper pleading and proof, it should not be considered for any purpose—either as a bar or as a basis for diminution of damages. It would seem to follow that defendant has the burden of establishing not only the fact of plaintiff's negligence but also the basis for assigning to it the percentage of the total negligence which the statute calls for. This would mean that if the evidence left either of these issues in the realm of speculation and conjecture, plaintiff would be entitled to undiminished damages if defendant's causal negligence is shown.

The Statutory Comparison

What is to be compared. A perennial question under comparative negligence statutes is whether apportionment is to be made by comparing fault, or by comparing the extent to which fault contributed to the injury, or by making both comparisons. The statutory language suggests that only faults are to be compared: "damages . . . shall be diminished in the proportion of the percentage of negligence attributable to the person recovering." And Prosser says bluntly, that "once causation is found, the apportionment must be made on the basis of comparative fault, rather than comparative contribution."

47. "Under the comparative negligence law the burden of showing contributory negligence still remains upon the defendant. But contributory negligence does not now constitute a bar to recovery unless the defendant can show or unless it otherwise appears that such negligence was equal to or greater than that of the defendant. Under the comparative negligence law the burden of proving the total amount of the damages sustained is upon the plaintiff, but the burden of showing to what extent the damages sustained by the plaintiff shall be diminished on account of the negligence attributable to him is upon the defendant." McGuiggan v. Hiller Bros., 214 Wis. 388, 392-93, 253 N.W. 403, 405 (1934).
48. This is exactly the opposite of the result under the former law. Deutsch v. Connecticut Co., 98 Conn. 482, 119 A. 891 (1923).
Courts which have dealt with comparative negligence statutes have not, however, embraced the appealing simplicity of this view. The Wisconsin statute is worded very much like ours. In *Kohler v. Dumke* defendant urged a view diametrically opposite to Prosser's, that if plaintiff were found negligent "then in resolving the comparative negligence issue only the element of causation should be considered." The court disagreed, saying, "We deem it clear that the word 'negligence' in the comparative negligence statute ... means causal negligence... Therefore, in comparing the negligence of two or more persons, the jury is to consider both the elements of negligence and causation." The Mississippi statute, which is worded like the Wisconsin statute in this respect, has been construed the same way. The Maine statute, patterned after the British, is somewhat differently worded. Under both of these comparison is made both of fault and of causal contribution. Professor Fleming, with an extensive background in the law of the British Commonwealth, takes more or less the same view. The weight of authority, then, inclines heavily to this view and it seems likely that Connecticut courts will follow it.

**Mechanics of comparison.** The comparison called for by the statute, whatever it is, may lead to either of two results: a defendant's verdict or a plaintiff's verdict for diminished damages. Presumably the comparison itself is to be made in the same way and on the basis of the same factors for both purposes (although for convenience the jury may be asked to decide first the simpler question whether plaintiff's causal negligence was greater than defendant's). Several ques-

51. 13 Wis. 2d 211, 108 N.W.2d 581 (1961).
52. *Id.* at 214-16, 108 N.W.2d at 583-84.
57. *J. Fleming*, *Law of Torts* 241-42 (3d ed. 1965). But he cautions that "it is doubtful if such an interpretation corresponds invariably with what is felt to be 'just and equitable'." *Id.* at 242.
tions arise about how the comparison should be made and some of these follow:

(1) The respective functions of judge and jury in the process. The judge may seek to limit or control the jury's function through taking the case away from it by nonsuit, directed verdict, or judgment n.o.v., or by giving them rules of thumb in binding instructions.

It seems clear that a comparison of causal negligence involves many imponderably judgments and values so that it is the kind of question inappropriately appropriate for submission to the jury, which represents more or less the composite conscience of the community. The issue presented is very much like the issue of negligence itself which is traditionally one for the jury under our system. In this field, as elsewhere in the law, however, the court will probably limit to the jury's sphere. For example, it will probably declare plaintiff's causal negligence to be greater than defendant's as a matter of law in those relatively rare clear cases where the court thinks that reasonable minds could not differ. Such a determination would result in a ruling in defendant's favor (or, in some cases, a new trial).

A somewhat similar question will occasionally be presented in a case where diminution of damages is proper but the jury has transcended the limits of reasonable judgment by subtracting too much, or too little, from the plaintiff's damages. Presumably the court could cure this kind of error by a new trial conditioned, possibly, upon a suitable remittitur or additur.

A related problem is whether the courts should try to work out rules of thumb for making the requisite comparison, to be embodied in binding instructions to the jury. An attempt to do something like this seems to have enjoyed a brief currency in Wisconsin, but decisions there and in other comparative negligence states "indicate that there is no legal yardstick by which equality of fault can be

58. A thoughtful treatment may be found in Aiken, Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulation, 53 Marq. L. Rev. 293 (1970).

59. The developments in Wisconsin are described in Campbell, Ten Years of Comparative Negligence, 1941 Wis. L. Rev. 289.

60. See F. James, Civil Procedure § 7.21 (1965).

consistently determined."\(^{62}\) As the Wisconsin court has pointed out in dealing with a similar and related problem: \"[T]his court has never attempted to lay down any formula for determining 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 now to attempt to do so. This is something that had best be left to the common sense of the jury.\(^{63}\) A decision against laying down binding rules of thumb\(^ {64}\) to guide the comparison of negligence would not, of course, prevent a court from calling to a jury's attention factors which it might properly consider in assessing and comparing negligence.\(^ {65}\) Nor would it prevent the court from declaring, in a proper case, that certain conduct (e.g., breach of a safety statute) was negligence as a matter of law, leaving to the jury the further question of assigning to such negligence its proper weight for the purpose of comparison.

(2) \textit{Whose negligence is counted?} If an accident arguably resulted from the negligence of more than two persons, questions may arise as to whose negligence is to be counted for the computations which the statute calls for. The simplest case is explicitly covered by the statute. The initial comparison is to be made between plaintiff's negligence and "the combined negligence of the person or persons against whom recovery is sought." (emphasis added). This clearly includes all persons sued as defendants as long as they remain such. Just as clearly, I suggest it exclude those against whom the plaintiff has pursued no claim, either by suit, or attempted suit, or by demand for settlement. But what of persons named as defendants and not served? What of persons whose identity cannot be established in spite of more or less strenuous efforts? What of persons who have settled before action has been brought against them? And what of defendants who have settled pending action (which is then withdrawn as against them)? In a sense recovery has been sought against all of such persons; it has been successfully sought against those who have settled.\(^ {66}\)

\(^{62}\) Comment, 18 Me. L. Rev. 65, 75 (1966).

\(^{63}\) Kohler v. Dumke, 13 Wis.2d 211, 216, 108 N.W.2d 581, 584 (1961).


\(^{65}\) Thus if one of the parties is a child, it would presumably be appropriate for a court to charge the jury that they might consider his age as a factor to be weighed in assessing his negligence and comparing it with that of other parties. Cf. Kohler v. Dumke, 13 Wis.2d 211, 108 N.W.2d 581 (1961).

\(^{66}\) This is all that the literal words of the statute require. But if, in context,
Surely both the policy of the statute (to mitigate the rule that any contributory negligence bars all recovery) and the policy to encourage compromise combine to allow the plaintiff to count the negligence of defendants who have settled with him for the purpose of determining whether his negligence is greater than the combined negligence of those against whom recovery is sought. The principal argument against such a result seems to be a purely semantic one: if the statute's present tense is taken to speak as of the time of the comparison, it is not satisfied by events then past and completed; plaintiff is not then seeking recovery against persons with whom he has settled. But this technical argument should not prevail. There is no compelling reason why the present tense may not be taken more broadly to refer to events which happen at any time in the course of the proceedings.

Another argument may be advanced for counting the negligence of present parties only. The result urged in the text will require the tribunal to determine the negligence of a non-party. This presents no difficulty, however, on grounds of fairness to the non-party or due process since he will not be affected by the findings in the case at bar for two reasons: (1) he is protected by the settlement; (2) he is not bound by the judgment in an action to which he was not a party, and such findings are not admissible in evidence against him.

The issue of negligence of an absentee may present problems of proof but there is nothing new in this. Where an employer is sued for the negligence of an employee, the latter is usually not a party and is sometimes not even available, but his negligence is determined as an everyday routine matter, and under the comparative negligence statute a percentage will have to be assigned to it. In any given case, of course, where the non-party is unavailable as a witness, there may be no sufficient proof to afford the basis for making a rational de-

the language is taken to mean that recovery must be sought in the action, this requirement is also met for those who settle after they are made parties.

67. If the negligence of a settling party is excluded from consideration, this will shift the percentages in a way unfavorable to the plaintiff on both the initial comparison and the ultimate apportionment.

68. F. James, Civil Procedure § 11.26 (1965).

termination of his negligence or of its share in the total negligence. Where that is the case, the rules which usually govern when an issue is unproven will apply; the party having the production burden on the issue will lose. Since defendant has the burden of proving contributory negligence and since this burden probably extends to furnishing an evidentiary basis for making the statutory comparisons and apportionments, the defendant would have the burden of showing what the non-party's conduct was, once it appeared that it may have constituted a negligent contribution to the accident. The defendant, in other words, has the burden of showing the total negligence picture (so far as the statute makes it relevant) before he may have the benefit of contributory negligence as a defense, either total or partial.

The case of persons who cannot be identified or cannot be served is more doubtful. It is harder to include them within the statutory language and their inclusion would pose serious practical difficulties as we shall see.

If the negligence of a non-party is imputed to a party (either as imputed contributory negligence or as vicarious liability), such negligence will in all probability be counted in making the statutory comparisons. So far as imputed contributory negligence goes, this result seems required by the words of the statute since such negligence is "attributable to the person recovering." It is most unlikely that the legislature intended a different result for the sounder doctrine of vicarious liability.

(3) Apportionment where only two parties are involved. In the simplest case only plaintiff is hurt. If the jury finds both parties negligent, it must decide whether plaintiff's negligence is greater than defendant's. If so, defendant is entitled to a verdict. If not, plaintiff is entitled to a verdict but to diminished damages, and the jury should determine the amount of damages which would fully compensate plaintiff for his injury under existing rules of law, and also the percentages of causal negligence attributable to each party on the hypothesis that their combined negligence constitutes 100%. The diminution will then be a matter of arithmetic.

If both plaintiff and defendant are injured and both claims are presented in a single action or are consolidated, then each claim would be treated as described in the preceding paragraph, and where the negligences are not equal, only the party whose negligence is less

70. See note 47, supra.
will recover under that formula. If the jury finds the negligence of the parties equal, each will recover one half of his damages. The question then arises whether these awards are to be set off against each other. If both plaintiff and defendant are uninsured individuals, such a set off makes sense and creates no injustice. In the more usual case where each is insured against his legal liability, then this result will let each insurance company credit against sums which it has agreed for a consideration to pay, sums which belong to its insured personally because of his own loss. Such a result, it is submitted, is unjust. It may be avoided in either of two ways: (1) by not allowing the set off where it inures to the benefit of a liability insurance carrier, or (2) by allowing set off but holding the insurance carrier liable under its policy to reimburse its own insured for the amount which he personally has been obliged to pay (by way of canceling or reducing his personal claim against the other party).71 The first method is simpler and surer and should, I suggest, be adopted if there is no statute or rule which compels set off in these cases, and there probably is not.72

(4) Apportionment where there are multiple parties. When all the persons whose negligence is to be counted are present parties to the

71. This solution was suggested by Professor Robert A. Leflar in notes submitted to a symposium on the Arkansas comparative negligence statute. 10 Ark. L. Rev. 54 at 92-93 (1955).

72. Two statutes deal with set off. Section 52-139 provides for set-off of mutual debts but applies only where the set off is claimed "in answer to a suit on a debt." Savings Bank of New London v. Santaniello, 130 Conn. 206, 211 (1943); Peter Cascio Nursery, Inc. v. Green Acres, Inc., 3 Conn. Cir. Ct. 424 (1965). Section 52-141 provides for set off against a judgment "... in any action for a tort unaccompanied with force and when the injury is consequential" of "any debt" which defendant may have against plaintiff. Whether this statute would apply to the situation under consideration is doubtful. The terms of the statute apparently refer to the ancient distinction between trespass and case, and exclude a situation where trespass would have been the proper action. It was familiar learning under the old system that trespass was an available remedy for physical injuries caused by a vehicle collision. Leame v. Bray, 3 East 593, 102 Eng. Rep. 724 (K.B. 1803). Aside from history, the statutory language is scarcely apt to describe any situation in which both plaintiff and defendant suffer injuries.

Further, the claim set off must be a debt, and tort claims are not such until reduced to judgment. It seems unlikely that the language was meant to include a claim which does not become a debt until a judgment is rendered in the very suit in which set off is sought. Other language in the statute provides a procedure which evidently contemplates that defendant's debt pre-exist plaintiff's judgment. Moreover it speaks of the case where defendant's debt "is admitted by the plaintiff, or is evidenced by a judgment," thereby suggesting that "such debt" must be one in its own right rather than a claim which became a debt only upon being reduced to judgment.
action (or consolidated actions) before the court, a convenient starting place would be a determination of whether each party was causally negligent and, if so, what proportional part such negligence played in producing the injuries complained of stated in percentage terms with the combined negligence of all such parties taken as 100. Any party who is a claimant (by complaint, counterclaim, or cross-claim) and whose negligence is assigned a percentage of 50% or less will then be entitled to recover against those parties whose combined negligence is assigned a percentage of 50% or more (assuming claim is made against them), but recovery will be diminished in proportion to claimant’s percentage of negligence.73

Since each claimant is entitled to have his negligence compared with the combined negligence of the persons against whom recovery is sought, a plaintiff may recover from a defendant whose causal negligence is assigned a lower percentage of contribution than plaintiff’s. A plaintiff whose negligence is 50%, for example, may recover half his damages from defendants each of whose negligence is 25%. Or a plaintiff whose negligence is 15% may recover 85% of his damages from defendants whose negligence is 10% and 75% respectively. And since neither this nor any other statute nor the common law provides for apportionment of damages or contribution among joint tortfeasors,74 this means that such plaintiff may recover 85% of his

73. Where more than one party seeks recovery there will be this complicating factor; with respect to each claim only the claimant’s own negligence and the combined negligence of those against whom he seeks recovery should be counted. The negligence of other claimants should not be charged against him (except where such negligence is imputed to him under existing rules of law). This will mean that where there are several claimants, several different computations must be made and in some of them the constituent parts of 100 per cent may be made up differently.

Suppose, in a situation where no negligence is imputed, driver A and passenger B are both injured by the combined negligence of two other drivers, C and D, and that these drivers are also hurt. In an action or actions wherein each injured driver makes claims against the other two and B, A’s passenger, makes claims against all three drivers. Then: 1) in A’s claim, B’s possible negligence will not be counted; his own will be compared with the combined negligence of C and D; 2) in B’s claim his possible negligence will be counted and compared with the combined negligence of A, C, and D; 3) in C’s claim, again, B’s negligence will not be counted on either side of the equation; and 4) the same is true of D’s claim. Thus in claims 1, 3, and 4, B’s negligence will not be counted in computing 100 per cent; in claim 2 it will be counted. This will, of course, alter the percentages attributed to A, C, and D if the jury finds that the passenger, B, was negligent in any degree.

74. Kaplan v. Merberg Wrecking Corp., 152 Conn. 405, 207 A.2d 732 (1965). As this decision indicates there are rare situations where a merely passive tortfeasor
damages from a defendant whose causal negligence was only 10% of the total negligence, and that the latter will usually have no claim for contribution or indemnity against the defendant whose conduct was assessed as 75% of the negligence contributing to the injury.

Take next the case where one or more of the persons whose negligence contributed to the injury are not present parties to the action. If one such party has settled with plaintiff and if, as suggested above, his negligence is to be counted in making up the 100%, then plaintiff’s recovery will be assessed at a higher amount than it would be if the settling party’s negligence is to be excluded from the computations. But since the amount of the prior settlement must be subtracted from the amount plaintiff will actually get, undue hardship to the non-settling defendant is unlikely. Moreover, the possibility of hardship on this score will have the salutary side-effect of exerting pressure toward settlement.

Where a negligent contributor to the accident is neither sued nor settled with, hardship will arise if his negligence is counted in making up the 100% used as a basis for apportionment. Consider the case where plaintiff’s and defendant’s causal negligence is each 10% and the causal negligence of an unidentified hit and run driver is 80%. If the latter’s negligence is counted plaintiff will be entitled to recover 90% of his damages from a defendant whose negligent contribution to the injuries was no greater than his own and only 10% of the total. The presence of liability insurance might shield such defendant from individual hardship but the result would saddle insurance companies with something approximating an unsatisfied judgment scheme without legislative sanction and without the safeguards which the Legislature would probably provide.

**Procedure in Jury Trials**

The statute itself does not say whether the issues are to be left to a jury for a general verdict or whether interrogatories are to be propounded to them. It does require that instructions to the jury “shall

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75. Thus if plaintiff’s negligence is 25%, defendant’s also 25%, and the settling party’s negligence 50%, plaintiff will recover 75% of his damages if the settling party’s negligence is counted, and only 50% if it is excluded.

include an explanation of the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party," but that is quite compatible with requiring the jury to state specifically what they find those percentages to be. Perhaps this language excludes a statutory or common law special verdict since such a verdict would leave to the court on the comparative negligence issues the very questions which the statute requires the court to explain to the jury. At any rate the special verdict is cumbersome and tricky, and is seldom used.

The real question, then, is whether it will be wise in these cases to propound interrogatories to be answered along with the general verdict. Probably their use will aid the jury in performing this unfamiliar and somewhat intricate task, especially where there are multiple parties. Moreover, their use will better enable the court to see whether the jury has performed its function properly and without mistake.

On the other side is the argument that interrogatories may be so numerous that they confuse the jury and add complexity to the issues. Something like this occurred in Wisconsin where it was the practice to ask the jury about each item of negligence alleged. But this seems quite unnecessary. There is no reason for anything more than a few simple questions which have been explained to the jury in the charge. For example in a two-party case these might be the following:

1. Was defendant causally negligent in one or more of the ways alleged in the complaint?

2. Was the plaintiff causally negligent in one or more of the ways alleged in the answer?

3. If you answer 1 and 2 affirmatively, what percentage of the total causal negligence of both parties is attributable to
   (a) the defendant?
   (b) the plaintiff?

4. What is the sum which would fairly compensate plaintiff for the injuries he suffered as a result of the accident?

78. See Sunderland, Verdicts, General and Special, 29 Yale L.J. 253, 258 (1920); F. James, Civil Procedure 294 (1965).
Conclusion

Connecticut's comparative negligence statute has created problems that did not exist under the former, simpler rule that any contributory negligence barred all recovery from a defendant who negligently caused injury. These problems are soluble, however, and represent a small price for the removal of one of the glaring injustices in the law of negligence. So long as the law bases accident liability on fault, it must choose between the harshness of the old contributory negligence rule and the complications inseparable from comparative negligence. Within that framework, the legislature has made a wise choice, and in doing so has avoided at least some of the complications encountered under earlier statutes.