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Change of the Wisconsin Comparative Negligence Statute in Multi-Defendant Suits: May v. Skelley Oil Co.

John A. Rothstein

COMMENT

CHANGE OF THE WISCONSIN COMPARATIVE NEGLIGENCE STATUTE IN MULTI-DEFENDANT SUITS: *May v. Skelly Oil Co.*

I. INTRODUCTION

Since 1931 Wisconsin has utilized the tort doctrine of comparative negligence in determining the initial liability, and ultimate recovery, of negligently injured individuals against defendant parties. At that time most jurisdictions continued to adhere to the common-law doctrine of contributory negligence, thus making the Wisconsin approach somewhat unique. Subsequently, nearly two-thirds of the states, as well as the federal government, acted to ameliorate the harshness of the contributory negligence doctrine. The two most common forms of comparative negligence are known as pure comparative negligence and modified comparative negligence. Pure comparative negligence abrogates completely all vestiges of contributory negligence and allows a plaintiff to recover irrespective of the degree of his fault. Modified comparative negligence, on the other hand, only partially abrogates the doctrine of contributory negligence and permits recoveries in a more limited number of cases. Depending upon the exact formulation of the rule, a plaintiff is not barred by his contributory fault unless his fault is equal to, or exceeds that of the opposing party. Beyond this point the doctrine of contributory negligence is triggered and acts as a complete bar to any recovery by the claimant, although his actions may not have been the sole and exclusive cause of the damages. Since its initiation to comparative negligence, Wisconsin has always had a modified form. Because of Wisconsin's adherence to the modified approach, problems have arisen which under a pure comparative negligence system, would have been avoided or rendered moot. One such problem in the application of the modified rule is the case in which there are multiple defendants and the defendants' negligence exceeds that of the plaintiff, yet individually each is less negligent than the plaintiff. As an example, if a driver of one car in a three car collision sues the other drivers, and the jury apportions the parties' respective negligence as 34% for the plaintiff, and 33% for each defendant, the first legal issue to be

resolved before the final outcome of the suit can be determined, is whether the plaintiff's negligence is to be compared individually against each defendant's or whether the plaintiff's negligence is to be compared against the aggregate negligence of the defendants.

In past years the Wisconsin Supreme Court has required an individual comparison with the result that in the above example the plaintiff would be barred from recovery. However, the supreme court has now indicated its intent to alter this rule and adopt a combined comparison approach. In *May v. Skelly Oil Co.*,[1] the court stated:

> This case is one of many cases which have come before this court involving multiple party tortfeasors. May urges the Court to re-examine its interpretation of the comparative negligence statute. The majority of the court has become convinced that comparing the negligence of the individual plaintiff to that of each individual tortfeasor — rather than comparing the negligence of the individual plaintiff to that of the combined negligence of the several tortfeasors who have collectively contributed to plaintiff's injuries — leads to harsh and unfair results; the majority has further concluded that this rule of comparative negligence, a court-made doctrine, can be changed by court decision. However, in view of our holding that Indian Head is not negligent, the majority does not believe that the case at bar is the appropriate one in which to structure a change in the rule of comparative negligence in cases involving multiple defendants.[2]

The purpose of this comment is to analyze the propriety of this decision and to outline the more immediate and important effects of the rule's adoption.

II. Propriety of the Court's Actions

On June 15, 1931, the Wisconsin Legislature adopted chapter 242 of the Laws of 1931.[3] Until this time the doctrine of strict contributory negligence was operative in the State of

1. 83 Wis. 2d 30, 264 N.W.2d 574 (1978).
2. *Id.* at 38-39, 264 N.W.2d at 578 (footnote omitted).
3. 1931 Wis. Laws ch. 242:
Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or 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 by the jury in the proportion to the amount of negligence attributable to the person recovering.

Wisconsin and acted to completely bar claimants from recovering in every instance wherein their negligence contributed to their injuries.[4] It was thus on the initiative of the Wisconsin Legislature that Wisconsin adopted the doctrine of comparative negligence.

Shortly after the passage of the bill, its author published an article which attempted to explain the effect and operation of the new law.[5] Mr. Padway's comments dealt specifically with the various aspects of the new law and in particular with the application of the statute to instances wherein multiple tortfeasors were involved. To more clearly explain the operation of the rule, Padway first applied it to a simple two party situation and then went on to juxtapose that example to a multiple party suit. According to the author:

> When two [defendants] are sued and contribution is sought the method [of determining their liability] is as follows:
>
> If "A" sues "B" and "C," he recover [sic] against both only in the event each is more negligent than he is. If "C" is less negligent than "A," then "A" would recover only against "B." In the event of a claim for contribution between "B" and "C," there will be *equal contribution* between these two in the event it is found each is more negligent than "A." If only one defendant is more negligent than "A," the other is absolved from liability. The reason for this is that the party most negligent cannot obtain contribution from a person against whom the jury found no liability in favor of the claimant.[6]

Although the framer of section 331.045 clearly indicated what he felt was the proper application of the rule in multiple defendant suits, it was not until sometime later that Professor Richard Campbell, writing in the 1932 issue of the *Wisconsin Law Review,* provided Wisconsin practitioners with some rationale of why section 331.045 dictated an individual rather than a combined comparison.[7]

4. Buchman v. Jeffery, 135 Wis. 448, 115 N.W. 372 (1908); Goldman v. Milwaukee Elec. Ry. & Light, 123 Wis. 168, 101 N.W. 384 (1904); Matteson v. Jackman, 32 Wis. 182 (1873); Chamberlain v. Milwaukee & M.R.R., 7 Wis. 367 (1858).

5. Padway, *Comparative Negligence,* 16 MARQ. L. REV. 3 (1931) [hereinafter cited as Padway].

6. *Id.* at 17-18 (emphasis in original).

7. Campbell, *Wisconsin's Comparative Negligence Law,* 7 WIS. L. REV. 222 (1932) [hereinafter cited as Campbell].

> The general spirit of the 1931 act is opposed to construing the word "person" to mean "persons." One of the fundamental characteristics of the statute is its retention of enough of the individualistic spirit of the common law to deny relief to a claimant whose negligence is equal to or greater than that of a person whom he is seeking to hold responsible. This principle would be disregarded in many cases if the defendants are treated as a unit for the purpose of determining liability. For example, if the claimant was guilty of 45% negligence, two defendants of 25% each and one defendant of 5%, the claimant would recover against all of them.[8]

Thus the individual comparison rule was a product of deliberate legislative choice. Use of the singular term "person" was therefore not an oversight, but rather, an intentional and conscious decision. Professor Campbell therefore dismissed the possibility of using section 370.01(2) of the 1931 statutes to construe the singular term as extending to several persons.[9] Section 370.01 at that time was a legislative rule for the construction of statutes which permitted in proper cases the singular to import the plural and the plural to import the singular.[10] By using section 370.01(2), the comparative negligence statute's term "person" could arguably be read as including a collection of people or persons. However, because neither the history nor the nature of the act indicated that the plural was intended,[11] Campbell concluded that the individual compari-

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8. *Id.* at 244.

9. *Id.*

10. WIS. STAT. § 370.01 (1931):

Construction of statutes; rules for. In the construction of the statutes of this state the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the legislature; that is to say:

. . .

(2) SINGULAR AND PLURAL NUMBERS; MALES AND FEMALES. Every word importing the singular number only may extend and be applied to several persons or things as well as to one person or thing; and every word importing the plural number only may extend and be applied to one person or thing as well as to several persons or things, and every word importing the masculine gender only may extend and be applied to females as well as to males.

11. The Wisconsin comparative negligence statute was originally adopted as Senate Bill no. 55S. To this bill were proposed two substitute amendments. Each amendment specifically dealt with the issues arising in multi-defendant suits. According to the amendments,

> (4) When there are more than two parties in controversy over negligence, the one least negligent shall recover his damages from those more negligent, but his damages shall be decreased by the percentage of his own negligence. The liability of each party more negligent shall be for his percentage of negligence.

son rule was the only appropriate reading and interpretation of section 331.045.[12]

An additional reason mentioned by Campbell which indirectly supported Padway's construction of section 331.045 was the fact that the comparative negligence act was in derogation of the common-law.[13] Being in derogation of the common law, the act was to be given a strict construction. The rule of combined comparison being essentially a form of pure comparative negligence[14] was at greater odds with the common-law doctrine of contributory negligence, and thus, could not be accepted as the proper interpretation of the new statute in the absence of clear and unequivocal language.

Two years after the passage of section 331.045, and with the benefit of both the Padway and Campbell articles, the Wisconsin Supreme Court accepted an appeal dealing with the issue of multiple defendants in a comparative negligence action. In *Walker v. Kroger Grocery & Baking Co.*,[15] the court, without express mention of the Padway or Campbell articles, adopted Padway's construction of section 331.045 and interpreted the statute as dictating an individual comparison when determining the initial liability of each party defendant. According to the court,

> By virtue of section 331.045, Stats., the instances in which there is a right to recover have been increased in that, even though there was contributory negligence, recovery is not barred if such negligence was not as great as the negligence of the person against whom recovery is sought. If such contributory negligence was as great as the negligence of one of the

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(5) When there are more than two parties in controversy over negligence and there are two or more least negligent in the same degree, each of the least negligent parties shall recover from each of those more negligent and in each such case the liability of each party more negligent shall be for his percentage of negligence.

Senate Bill 55S, Sub. Amends. 1s & 2s (1931).

Although neither of the amendments ultimately passed, it is interesting to note that of the three formulations of this statute, not one included language indicating a combined comparison approach. In point of fact, two of the bills expressly prohibited such a result. Thus it cannot be said that at the time of passage, the legislature was ignorant of the problem posed by the comparative negligence law to multi-defendant suits. Evidence from the bills indicates that when the legislature considered the problem, its response was limited to an individual comparison approach.

12. Campbell, *supra* note 7, at 244.

13. *Id.* at 226.

14. Handbook of the Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Comparative Fault Act 343 (Annual Conf. 1977) (prefatory note).

15. 214 Wis. 519, 252 N.W. 721 (1934).

> tortfeasors against whom recovery is sought, then as to that particular tortfeasor there still is no right to recover. That tortfeasor is out of the picture as far as liability on his part to the party whose negligence was as great as his is concerned. On the other hand, from every remaining tortfeasor, whose negligence was greater than that of the person seeking to recover, there exists now, by virtue of the statute, a right to recover, subject, however, to the limitation prescribed by the statute, that the damages allowed shall be diminished in proportion to the negligence attributable to the person recovering.[16]

Though the above language was dicta it nevertheless clearly indicated the court's position on the issue. As can be seen, the language above comports in all respects to the results which the statute's author and Professor Campbell thought should have occurred under the wording of the statute. However, like the statute's author, the court failed to state on what basis its construction of the statute rested. Presumably the court relied upon the fact that the statute employed the singular term "person" instead of the plural "persons."

In several subsequent cases the supreme court reaffirmed its *Walker* interpretation, among which was *Schwenn v. Loraine Hotel Co.*[17] *Schwenn* was a slip and fall case in which the plaintiff jointly sued a cab company and a hotel enterprise for injuries sustained when the plaintiff fell on the hotel's driveway while attempting to catch a cab. The supreme court ruled that the defendants did not owe a common or joint duty to maintain the driveway and, therefore, the trial court's aggregation of the defendants' negligence to determine their initial liability was erroneous. According to the court, the general rule was that "the comparison of negligence in a multiple defendant case is required to be between the plaintiff and the individual defendants."[18] Although this general rule was excepted when the defendants owed a joint duty to the plaintiff, this exception was found inapplicable to the case at bar. Thus the court held that the general rule applied and unless each defendant's negligence exceeded that of the plaintiff, the plaintiff would be barred from recovery. The court cited *Walker* as authority for its ruling and implied that a contrary construction would be

16. *Id.* at 536, 252 N.W. at 727-28.
17. 14 Wis. 2d 601, 111 N.W.2d 495 (1961).
18. *Id.* at 609-10, 111 N.W.2d at 500.

improper[19] because it would permit a plaintiff to recover from a defendant less negligent.[20] The court went on to say that it disbelieved that the legislature could have intended such a result.[21] The *Schwenn* court also gave some indication of the source of the individual comparison rule saying that it was "under" section 331.045, which required that the comparison be made on an individual basis. Being "under" section 331.045, the individual comparison rule arose out of the comparative negligence statute and must have been construed by the court as intended by the legislature.

The next pertinent development in the history of the comparative negligence statute was its amendment on June 23, 1971.[22] By virtue of that amendment, section 895.045[23] was altered to read that an injured party is not barred by his contributory negligence so long as his negligence does not *exceed* that of the person against whom recovery is sought. At the time of the amendment, the legislature neglected to make any change in the individual comparison rule. Such a change could have been implemented by the simple addition of the words "person or *persons* against whom recovery is sought," in place of the phrase "person against whom recovery is sought." The legislature chose not to do so however and its refusal cannot be explained or defended on the basis that the legislature was ignorant of the rule or of its operation. The individual comparison rule had been in continuous operation for more than thirty-seven years, and it is unlikely that the legislature was not cognizant of its existence or application. Furthermore, the fact that the legislature took it upon itself to revamp and update the comparative negligence statute militates against such a conclusion. Thus, there is a strong support for the proposition that the legislature sanctioned the supreme court's interpretation of the comparative negligence statute as announced in *Walker*.

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19. *Id.* at 610, 111 N.W.2d at 500.
20. *Id.*
21. *Id.*
22. 1971 Wis. Laws ch. 47.
23. WIS. STAT. § 895.045 (1971) (emphasis added) reads as follows:
Contributory negligence. 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 greater than* the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

Following *Schwenn* and the 1971 amendment, the court decided the case of *Gross v. Denow.*[24] Although the majority opinion in *Gross* did not discuss the desirability or effects of the individual comparison rule, both the concurring and dissenting opinions had occasion to raise and discuss the issue. In his concurrence Justice Wilkie pleaded that the rule was unfair and asked the legislature to again amend the statute so as to correct this inequity.[25] In calling upon the legislature, Wilkie remarked that the individual comparison rule was provided for by the language of the comparative negligence statute. Thus, according to Wilkie, the individual comparison rule was rooted in, and arose from, the comparative negligence statute. Wilkie also made special note of the fact that the legislature had amended the statute in 1971 and had refrained from altering the individual comparison rule. Justice Beilfuss joined Justice Wilkie in this explanation and analysis of section 895.045.

Justice Hallows, on the other hand, dissented from both the majority ruling and from Wilkie's concurrence.[26] Justice Hallows split sharply with Wilkie on the origin of the individual comparison rule. According to Hallows, the individual comparison rule was not so much dictated by the language of section 895.045 as it was by stare decisis, and what Hallows argued was the erroneous construction of the statute in *Walker.* In his view, *Walker* and its progeny were erroneous because these cases failed to consider the effect of section 990.001(1) or its predecessor on the proper construction of section 895.045. Section 990.001[27] is the successor of section 370.01(2)[28] and provides that in construing statutory language the singular imports the plural and vice versa. Thus, Hallows would read the singular term "person" in section 895.045 as "the *persons* against whom recovery is sought" by power of section 990.001(1). By doing so a combined comparison approach would result. Hallows also pointed out that Arkansas, Connecticut, Nevada and Texas all provided for a combined comparison rule under their comparative negligence statutes.

The introductory sentence to section 990.001 reads:

24. 61 Wis. 2d 40, 212 N.W.2d 2 (1973).
25. *Id.* at 53, 212 N.W.2d at 9-10 (Wilkie, J., concurring).
26. *Id.* at 54-55, 212 N.W.2d at 10-11 (Hallows, C.J., dissenting).
27. WIS. STAT. § 990.001(1) (1973).
28. *See* text accompanying note 10 *supra.*

> In construing Wisconsin laws the following rules shall be observed unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature:
>
> (1) SINGULAR AND PLURAL. The singular includes the plural, and the plural includes the singular.[29]

As pointed out by both Justice Wilkie in his concurring opinion in *Gross,* and by the majority opinion in *Schwenn,* it specifically was the intent of the legislature to use the singular rather than the plural. A reading of the Padway article also makes clear that it was the intent of the framer that section 331.045 be read as limited to an individual comparison.[30] Being an intentional choice of words, section 990.001(1) would therefore, according to its own directives, be inapplicable. Moreover, Hallows' observation that neither *Schwenn* nor *Walker* considered the application of 990.001(1) when construing section 331.045 is undermined by the existence of the Campbell article which disposed of the very same argument some forty years earlier. Recall that the Campbell article was written just two years prior to *Walker.* Thus, the argument concerning section 990.001 and its predecessor section was in the air when that seminal case was decided. Instead of explaining the absence of any reference to the statutory construction rules as an unintended oversight by the court, it is much more likely that the court, aware of the argument, decided not to devote space to the argument reasoning that it did not warrant comment. There is one final fact which operates to render inapplicable section 990.001 to the individual comparison rule. The supreme court had on at least one occasion, already construed the intent of section 895.045 as providing for an individual comparison. Legislative intent, a historical fact, is unchanging. Once authoritatively construed, it is beyond alteration or reconstruction by the court.[31] Therefore, since the court had construed section 895.045 as intending an individual comparison, section 990.001 could no longer be raised.

Justice Hallows also relied upon the combined comparison

29. WIS. STAT. § 990.001(1) (1973).

30. Padway, *supra* note 5, at 17-18.

31. Klinger v. Baird, 56 Wis. 2d 460, 202 N.W.2d 31 (1972); Meyer v. Industrial Comm'n, 13 Wis. 2d 377, 108 N.W.2d 556 (1961). *See also* Zimmerman v. Wisconsin Elec. Power Co., 38 Wis. 2d 626, 157 N.W.2d 648 (1968); La Follette v. Circuit Court, 37 Wis. 2d 329, 155 N.W.2d 141 (1967); City of Sun Prairie v. Public Serv. Comm'n, 37 Wis. 2d 96, 154 N.W.2d 360 (1967).

rules applicable in the states of Arkansas, Connecticut, Nevada and Texas as a basis for his argument. His reliance, however, is misplaced for several reasons. Connecticut, Nevada and Texas provide for the combined comparison rule by express statutory language.[32] Obviously then, the rules in these states are dissimilar from the Wisconsin statute and likewise irrelevant to the Wisconsin construction thereof. Arkansas also provides for a combined comparison rule by statute,[33] but the rule was originally adopted by the Arkansas Supreme Court in the case of *Walton v. Tull.*[34] *Walton* however is readily distinguishable from Wisconsin law in two respects. First and foremost, the circumstances under which *Walton* was decided differed from the circumstances facing the Wisconsin court. Arkansas

32. CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1978):

(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.

NEV. REV. STAT. § 41.141 (1977):

1. In any action to recover damages for injury to persons or property in which contributory negligence may be asserted as a defense, the contributory negligence of the plaintiff shall not bar a recovery if the negligence of the person seeking recovery was not greater than the negligence or gross negligence of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person seeking recovery.

2. In such cases, the judge may, and when requested by any party shall instruct the jury that:

(a) The plaintiff may not recover if his contributory negligence has contributed more to the injury than the negligence of the defendant or the (combined negligence of multiple defendants).

TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978):

Section 1. Contributory negligence shall not bar recovery in an action by any person or party to recover damages for negilgence resulting in death or injury to persons or property if such negligence is not greater than the (negligence of the person or party or persons or parties) against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.

33. ARK. STAT. ANN. § 27-1765 (Supp. 1977):

If the fault chargeable to a party claiming damages is of less degree than the fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is entitled to recover the amount of his damages after they have been diminished in proportion to the degree of his own fault. If the fault chargeable to a party claiming damages is equal to or greater in degree than (any fault chargeable to the party or parties) from whom the claiming party seeks to recover damages, then the claiming party is not entitled.

34. 234 Ark. 882, 356 S.W.2d 20 (1962).

had adopted a pure comparative negligence statute which prevented a plaintiff from ever being barred from recovery simply because his negligence exceeded that of the defendant.[35] In 1961 this pure comparative negligence statute was repealed and a more restrictive doctrine of comparative negligence replaced it.[36] The statute applicable at the time the accident occurred in *Walton* provided that the plaintiff was barred from recovery by his contributory negligence unless it was less than that of the person, firm or corporation causing the damages.[37] Thus, when the Arkansas court was forced to decide the issue of whether the legislature intended an individual comparison or a combined comparison, the court had to bear in mind that the statute in question was a restricted version of an earlier pure comparative negligence statute. The court based its decision to implement a combined rule upon its disbelief that the legislature, in amending and repealing the earlier statute, "meant to go any [further] than to deny a recovery to a plaintiff whose own negligence was at least 50 percent of the cause of his damage."[38] In view of the history of the Arkansas comparative negligence law, such a ruling was both reasonable and justified. The court was simply adhering to the rule of construction permitting the history and development of a law to be considered in interpreting a successor statute.[39] Because Wisconsin's comparative negligence statute has had an entirely different history, reliance upon *Walton* is misplaced. The factual background which validates the *Walton* rule is completely absent in Wisconsin.

It must also be noted that *Walton* presented an issue of first impression.[40] Unlike Wisconsin, the Arkansas court did not have the assistance of, nor was it bound by, prior decisions on the proper interpretation of the statute. Wisconsin differs in that, not only has there been a definitive declaration of the legislative intent and interpretation of section 895.045, but that decision has been reaffirmed on numerous occasions over a period of thirty-four years.

Justice Hallows later reiterated his dislike of the individual

35. 1955 Ark. Acts 191.

36. ARK. STAT. ANN. § 27-1730.1 (1962).

37. *Id.*

38. 234 Ark. at ___, 356 S.W.2d at 26.

39. Peterson Produce Co. v. Cheney, 237 Ark. 600, 374 S.W.2d 809 (1964); 73 AM. JUR. 2d *Statutes* § 192 (1974).

40. 234 Ark. at ___, 356 S.W.2d at 20, 25.

comparison rule in the leading case of *Vincent v. Pabst Brewing Co.*[41] *Vincent* involved the issues of whether Wisconsin should adopt pure comparative negligence and whether the supreme court had the power to effectuate such a change. Once again although the majority opinion did not raise or discuss the issue of the individual versus combined comparison, Justice Hallows addressed the matter in his dissenting opinion. In a broadside attack on Wisconsin's modified approach to comparative negligence, Hallows pointed to the individual comparison rule as a particularly poignant reason why the supreme court should judicially adopt a form of pure comparative negligence.

> The Wisconsin rule is not just a 50-50 deal because the plaintiff's negligence must be compared with the negligence of each defendant separately. If there are two defendants, the plaintiff cannot recover if all parties are all equally negligent. . . . If it were a four-car collision, the plaintiff could not recover if he was 25 percent guilty of negligence and all the rest were equally negligent. Where is the justice in denying all recovery to a person 25 percent negligent when the other persons causing it are 75 percent negligent in the aggregate? The plaintiff's chance of recovery ought not to depend upon the fortuitous number of persons responsible for the loss.[42]

Despite this language, the individual comparison rule was again reaffirmed in the 1975 case of *Mariuzza v. Kenower.*[43] Citing *Schwenn*, the court stated that the "general rule in this state is that the comparison of negligence in a multiple-defendant case is required to be between the plaintiff and individual defendants."[44] *Mariuzza* dealt with the sole exception to this general rule which operates when there is a joint duty on the part of the defendants, who have an equal opportunity to protect the plaintiff, and as a matter of law neither the obligation nor the breach thereof are divisible. In *Mariuzza* the plaintiff was suing for personal injuries sustained during a fall on a patch of ice, located on a flight of stairs owned by one defendant and rented by another. Because the duties of the defendants and the opportunities to correct the situation were unequal, the supreme court refused to permit the aggregation of

41. 47 Wis. 2d 120, 177 N.W.2d 513 (1970).
42. *Id.* at 136, 177 N.W.2d at 520 (footnote and citations omitted).
43. 68 Wis. 2d 321, 228 N.W.2d 702 (1975).
44. *Id.* at 325, 228 N.W.2d at 704.

the defendants' negligence. The court also based its refusal to permit aggregation of the defendants' negligence on the fact that the plaintiff's counsel failed to request an instruction on the matter thus making the request on appeal untimely. Although *Mariuzza* was a run of the mill case, it illustrated the complete and unquestioned acceptance of the individual comparison rule as law in Wisconsin.

The most recent decision dealing with the proper construction of section 895.045 is the case of *Soczka v. Rechner*.[45] In this 1976 case, the court squarely faced the issue of whether a plaintiff should be entitled to recover in instances where his negligence is less than 50 percent of the total negligence, but is more than any one of the individual defendants. The court also faced the collateral issue of the propriety and power of the court to effectuate such a change. The central facts in *Soczka* involved a three vehicle collision wherein the jury apportioned the casual negligence of the parties as 45% for the plaintiff, 30% for the first defendant and 25% for the second. After rejecting plaintiff's attempt to combine the negligence of the defendants on an agency theory, the supreme court addressed the combined comparison issue. It is interesting to note that the court, by its own admission, could have avoided this matter since plaintiff's counsel failed to raise the issue in the lower court.[46] Nevertheless, the court ignored the acknowledged procedural defect and proceeded to decide the issue on its merits. In the strongest language possible the court declared that it had "repeatedly *interpreted* the comparative negligence statute as *clearly* providing that the comparison of negligence between the plaintiff and multiple tortfeasors [involves] a separate comparison between the plaintiff and each of the defendants."[47] Thus, the court rejected the plaintiff's plea to overthrow the rule. The court also declared that if any such change was to be forthcoming, the legislature was the proper governmental body to undertake it. The court noted that as late as 1971 the comparative negligence statute had been amended and the legislature had not seen fit at that time to adopt a change with regard to multiple tortfeasor cases. Thus, in deference to the legislature, "any change in the statute created by

45. 73 Wis. 2d 157, 242 N.W.2d 910 (1976).
46. *Id.* at 164, 242 N.W.2d at 914.
47. *Id.* (emphasis added).

gence statute so as to permit recovery. This would entail either adopting a pure comparative negligence approach or at least increasing the applicable percentage at which a plaintiff would be barred. Relying upon *Vincent,* the *Lupie* court reaffirmed its inherent common-law power to alter the comparative negligence statute, but again refused to take that step since, according to the court, the legislature was better equipped to alter this law. The issue in *Lupie* was strictly limited to the power of the court to adopt pure comparative negligence or at least some system more liberal than the then existing 49% plan. The issue of individual versus combined comparison was not argued in *Lupie,* nor could it have been, since *Lupie* involved only a single defendant. Moreover, the *Vincent* case on which *Lupie* relied, and where the inherent power language first appeared, also dealt exclusively with the ability of the court to adopt a pure comparative negligence approach. Thus, because of the plaintiff's threefold attack in the *Soczka* case, and the court's reliance upon *Lupie,* the inherent power language in *Soczka* must be construed as referring to only the pure comparative negligence arguments of the plaintiff.

A second reason which supports the conclusion that the inherent power language refers only to the judicial adoption of pure comparative negligence lies in the functions of the court vis-a-vis interpretation of statutes versus the court's prerogatives over the common law. It is hornbook law that the judicial branch of government must defer to any constitutionally sound legislative pronouncement.[51] The motivation prompting the enactment of otherwise valid legislation is subject neither to judicial review nor to the court's approval or condemnation.[52] Decisions as to the propriety or wisdom of a statute are beyond the power of the court.[53]

Assuming a statute can pass constitutional muster, the role of the court thereafter is limited to the proper construction, interpretation and application of the statute. To be construed in the first instance, a statute must contain some ambiguity.

51. Wisconsin Solid Waste Recycling Auth. v. Earl, 70 Wis. 2d 464, 235 N.W.2d 648 (1975); Chart v. Gutmann, 44 Wis. 2d 421, 171 N.W.2d 331 (1969); Bisenius v. Karns, 42 Wis. 2d 42, 165 N.W.2d 377 (1969); Fort Howard Paper Co. v. Wisconsin Lake Dist. Bd. of Review, 38 Wis. 2d 626, 157 N.W.2d 648 (1968).

52. Harvey v. Morgan, 30 Wis. 2d 1, 139 N.W.2d 585 (1966).

53. Bisenius v. Karns, 42 Wis. 2d 42, 165 N.W.2d 377 (1969); City of West Allis v. Milwaukee County, 39 Wis. 2d 356, 159 N.W.2d 36 (1968), *cert. denied,* 393 U.S. 1064 (1969); Associated Indem. Corp. v. Mortensen, 224 Wis. 398, 272 N.W. 457 (1937).

Where a statute is plain and unambiguous, any interpretation thereof is both unnecessary and improper.[54] The primary purpose of all statutory construction is to discover and implement the legislative intent.[55] Legislative intent is determined by examining the statutory language in relation to its scope, history, content, subject matter and the object to be accomplished.[56] Courts may not, under the guise of construing statutes, rewrite them[57] nor may the canons of statutory construction be used to defeat the obvious legislative intent.[58]

Once a statutory construction has been conclusively established, it becomes as much a part of the statute as if embodied therein by plain and unmistakable language;[59] thereafter, only the legislature can change the judicial construction.[60] Legislative acquiescence in the court's construction is not an equivocal act.[61] The legislature is presumed to know that unless the statute is amended it will continue to be applied as originally interpreted.[62] Consequently the failure to amend a statute to alter the court's construction is viewed as an acknowledgement by the legislature that the court's interpretation of the legislative intent was correct.[63] For this reason the court is constrained

54. Young v. Board of Educ., 74 Wis. 2d 144, 246 N.W.2d 230 (1976); Milwaukee County v. Wisconsin Council on Crim. Justice, 73 Wis. 2d 237, 243 N.W.2d 485 (1976); Weather-Tite Co. v. Leeper, 25 Wis. 2d 70, 130 N.W.2d 198 (1964).

55. *In re* Estate of Walker, 75 Wis. 2d 93, 248 N.W.2d 410 (1977); Heidersdorf v. State, 5 Wis. 2d 120, 92 N.W.2d 217 (1958); Safe Way Motor Coach Co. v. City of Two Rivers, 256 Wis. 35, 39 N.W.2d 847 (1949).

56. Aero Auto Parts, Inc. v. State Dept. of Transp., 78 Wis. 2d 235, 253 N.W.2d 896 (1977); Czaicki v. Czaicki, 73 Wis. 2d 9, 242 N.W.2d 214 (1976); Perry Creek Cranberry Corp. v. Hopkins Agr. Chem. Co., 29 Wis. 2d 429, 139 N.W.2d 96 (1966).

57. Sinclair v. Department of Health & Social Servs., 77 Wis. 2d 322, 253 N.W.2d 245 (1977).

58. Lewis Realty, Inc. v. Wisconsin Real Estate Brokers' Bd., 6 Wis. 2d 99, 94 N.W.2d 238 (1959).

59. *See* note 31 *supra.*

60. Lampada v. State Sand & Gravel Co., 58 Wis. 2d 315, 206 N.W.2d 138 (1973); Kramer v. City of Hayward, 57 Wis. 2d 302, 203 N.W.2d 871 (1973); Zimmerman v. Wisconsin Elec. Power Co., 38 Wis. 2d 626, 157 N.W.2d 648 (1968); Meyer v. Industrial Comm'n, 13 Wis. 2d 377, 108 N.W.2d 556 (1961).

61. Zimmerman v. Wisconsin Elec. Power Co., 38 Wis. 2d 626, 157 N.W.2d 648 (1968). *See also* Lampada v. State Sand & Gravel Co., 58 Wis. 2d 315, 206 N.W.2d 138 (1973); Klinger v. Baird, 56 Wis. 2d 460, 202 N.W.2d 31 (1972); Estate of Pamanet, 46 Wis. 2d 514, 175 N.W.2d 234 (1970); Salerno v. John Oster Mfg. Co., 37 Wis. 2d 433, 155 N.W.2d 66 (1967).

62. Zimmerman v. Wisconsin Elec. Power Co., 38 Wis. 2d 626, 157 N.W.2d 648 (1968).

63. Klinger v. Baird, 56 Wis. 2d 460, 202 N.W.2d 31 (1972); Zimmerman v. Wisconsin Elec. Power Co., 38 Wis. 2d 626, 157 N.W.2d 648 (1968); Briggs & Stratton Corp.

from subsequently altering its construction.[64] These rules were highlighted in the case of *Chart v. Gutmann*:[65]

> "Where a law passed by the legislature has been construed by the courts, legislative acquiescence in or refusal to pass a measure that would defeat the courts' construction is not an equivocal act. The legislature is presumed to know that in absence of its changing the law, the construction put upon it by the courts will remain unchanged; for the principle of the courts' decision—legislative intent—is a historical fact and, hence, unchanging. Thus, when the legislature acquiesces or refuses to change the law, it has acknowledged that the courts' interpretation of legislative intent is correct. This being so, however, the courts are henceforth constrained not to alter their construction; having correctly determined legislative intent, they have fulfilled their function."[66]

Unlike statutory constructions, rules of common law are subject to change by the court. Common law, being a creature of the judiciary, is subject to alteration and abolition by the judiciary.[67] The issue then, of whether the court has the power to change the individual comparison rule depends upon whether the rule is a creature of the common law or an interpretative adjunct of section 895.045. A similar issue was presented in the case of *Zimmerman v. Wisconsin Electric Power Co.*[68] The defendant in *Zimmerman* petitioned the court to exercise its common law prerogative to alter the Wisconsin law permitting suits against co-employees under the worker's compensation statutes. The supreme court denied the defendant's request and held that the rule was a matter of statutory origin and thus beyond the power of the court.

> The court has thus construed secs. 102.16(3) and 102.29(1) Stats., against the interest of the appellant. It has often been

v. Department of Taxation, 248 Wis. 160, 21 N.W.2d 441 (1946); State Cent. Comm. of Progressive Party v. Board of Election Comm'rs, 240 Wis. 204, 3 N.W.2d 123 (1942); Milwaukee County v. City of Milwaukee, 210 Wis. 335, 246 N.W. 447 (1933).

64. *See* notes 59-63 *supra.*

65. 44 Wis. 2d 421, 171 N.W.2d 331 (1969).

66. *Id.* at 431, 171 N.W.2d at 336 (quoting Zimmerman v. Wisconsin Elec. Power Co., 38 Wis. 2d 626, 633-34, 157 N.W.2d 648, 651 (1968)).

67. Davison v. St. Paul Fire & Marine Ins. Co., 75 Wis. 2d 190, 248 N.W.2d 433 (1977). *See, e.g.,* Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) (judicial abolition of common-law governmental immunity); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962) (judicial abolition of common-law pro rata contribution among joint tortfeasors and adoption of pure comparative contribution).

68. 38 Wis. 2d 626, 157 N.W.2d 648 (1968).

> said that once a construction has been given to a statute, the construction becomes a part of the statute; and it is within the province of the legislature alone to change the law. . . .
>
> Anticipating, perhaps, the application of the rule that the legislature alone can change the law after its construction by the court, appellant calls attention to the court's abrogation of governmental and parental immunities. In *Holytz v. City of Milwaukee*, . . . where governmental immunity from suit was abolished, and in *Goller v. White*, . . . abolishing parental immunity in negligence cases with two exceptions, the court declared that it had a responsibility to change a court-made rule of the law when the interests of justice so demand even though the legislature refused to make the change. These cases have no application because the rule here was not court-made. The decisions of the court holding that a fellow employee is not immune from a third-party action are not a product of the court's ideas of what justice demands but are attempts to determine what the legislature intended when in the exercise of its power it amended the law. . . . [H]aving correctly determined legislative intent, they have fulfilled their function.[69]

Similarly, the decision of the supreme court to determine liability on a one-to-one basis in negligence actions is also not a product of the court's ideas of what justice demands, but rather is an interpretation of the legislative intent underlying section 895.045. *Walker* and all of its progeny clearly document the fact that the individual comparison rule is a product of section 895.045 and the language contained therein. Therefore, the supreme court's inherent power to alter the common law has no application to the individual comparison issue. This rule is of statutory origin.

While the individual comparison rule has never had unanimous support from the Wisconsin court, nevertheless, it has been a well-settled and accepted construction of section 895.045. Thus, it is surprising that the court in *May v. Skelly Oil* "concluded that this rule, a court-made doctrine, can be changed by court decision."[70] Unfortunately for both the bench and bar, the court neglected to cite any authority for this proposition. In defense of the court it should be noted that citation of authority was unnecessary since the language of the court

69. *Id.* at 633-34, 157 N.W.2d at 651 (footnote and citations omitted).
70. 83 Wis. 2d at 38-39, 264 N.W.2d at 578.

was technically no more than obiter dicta.[71] Presumably the court was relying upon *Vincent* to support its action. Detailed analysis of this case, however, along with its progeny, especially *Soczka*, manifest that such reliance is ill-placed. According to the clear language of *Soczka*, the individual comparison rule is not a court made doctrine in its classical sense.[72] Rather, it is a product of statutory interpretation. In the court's words it is an interpretive rule "clearly provided" by section 895.045. Thus, in order to effectuate the change indicated in *May*, it would be necessary for the rule to be altered within the framework of the rules applicable to statutory construction.

The court could accomplish its stated desire without exceeding the bounds of the judicial role by adopting pure comparative negligence. Such a move would make the issue of combined versus individual comparison moot. Ever since *Vincent* the supreme court has reserved the power to alter the comparative negligence rule from that of the present modified form of comparative negligence to one of pure comparative negligence. Although there are serious and possibly insurmountable problems with the judicial adoption of pure comparative negligence, where a statute provides for a modified approach, at least the court would have the benefit of some prior judicial precedent. The court has no such precedent for the change envisioned in *May*. Paradoxically, there is more precedent for the court adopting pure comparative negligence than there is for the court adopting the *May* language.

In conclusion, analysis of pre-*May* cases indicate that the Wisconsin Supreme Court is both without precedent or authority to alter the individual comparison rule. Section 895.045 of the Wisconsin Statutes, according to past supreme court decisons, clearly provides for a comparison on a one-to-one basis. Continued court adherence to the rule as well as acquiescence by the legislature indicate that the court's original interpretation of the legislative intent was correct. Although the supreme court's desire to change the rule is commendable, the plain fact remains that the court is without constitutional power to effec-

71. The Supreme Court in *May v. Skelly Oil* dismissed one of the two defendants against whom recovery was sought. Because this left only one defendant, the issue of combined versus individual comparison became moot. Despite the absence of a contested issue, Justices Abrahamson, Day and Callow, stated that they believed this case was an opportune time for the court to change the rule.

72. *See* text accompanying notes 45-47 *supra*.

tuate the change. The power of the judiciary is a limited one and does not extend to legislating what the court perceives to be more fair or more equitable.

Nevertheless, the supreme court has clearly indicated its intent to alter the rule. Though it is still possible for the court to alter its course, to do so would necessitate losing face. This is one of the principal problems which results when a court gratuitously predicts a major shift in a rule of law in a case wherein the change cannot be effected. If the supreme court does carry out its intention, the ramifications for traditional negligence law will be tremendous. The remainder of this comment will attempt to elucidate some of the more immediate effects of the new rule. Specifically, the issues of the extent of liability, joint and several liability, comparative contribution, releases, countersuits, cross-claims and worker's compensation will all be discussed.

III. *May v. Skelly Oil* AND CHANGES IN EXISTING WISCONSIN LAW

A. Extent of Liability

Before one can ascertain the effects which *May v. Skelly Oil* will have on the liability of defendants, the precise parameters of the *May* decision must be restated. *May,* according to the words of the supreme court, is limited to multiple defendant suits wherein the combined negligence of the defendants exceeds or equals that of the plaintiff. *May* does not apply if there is only one defendant or if the combined negligence of the multiple defendants falls below that of the plaintiff.

Given the circumstances under which *May* would thus be applicable, the decision would have two primary effects on the liability of defendants. First, and of utmost importance to the supreme court, the decision would allow claimants to recover in instances where previously they would have been barred by the Wisconsin comparative negligence statute. As an inverse corollary, the decision would also impose liability on defendants less negligent than the plaintiff whereas prior to *May* they would have been freed from responsibility. This much seems perfectly clear from the decision. To illustrate the application of this new rule perhaps a brief examination of *May's* factual setting would be appropriate.

The facts giving rise to *May* occurred in 1970 when the driver of a petroleum truck slipped and fell at a loading ter-

minal owned by the defendants. After bringing suit against the operators of the terminal, defendants impleaded the plaintiff's employer seeking indemnification.[73] Upon submission of the case to the jury, the plaintiff was found 45% causally negligent, the operators of the terminal 45%, and the employer 10%.[74] Because the statute in effect at the time of the accident barred recovery unless the plaintiff's negligence was less than that of the defendant's,[75] the plaintiff was completely barred from any award. However, had the combined comparison rule been in effect, the results would have been different. The percentages then would have been plaintiff 45%, versus 55% for the defendants. In this situation the plaintiff's negligence would obviously have been less than that of the defendants' and the plaintiff would have been entitled to a recovery. It is precisely this result that the supreme court now intends.

Although the intention of the supreme court is clear when the above rule is applied to a factual situation such as that presented in *May*, the court's intention is less clear when applied to other situations. Suppose that instead of the above situation, one defendant is found more negligent than the plaintiff, and thus under traditional constructions of the comparative negligence statute, plaintiff would be entitled to recover his damages from that tortfeasor. For example, if a plaintiff was found to be 33% causally negligent, defendant *A* 34%, defendant *B* 30%, and defendant *C* 3%, defendant *A* would be liable to the plaintiff under the traditional rules and defendants *B* and *C* would be exonerated from liability.[76] However,

73. Indemnification in this case was based on a contractual agreement between the employer and the defendant. Thus the exclusive remedy provisions of the worker's compensation statute were inapplicable. 83 Wis. 2d at 39, 264 N.W.2d at 578.

74. *Id.* at 32, 264 N.W.2d at 575.

75. WIS. STAT. § 895.045 (1969) (emphasis added):

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

76. *See, e.g.*, Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 536, 252 N.W. 721, 727-28 (1934).

> If such contributory negligence [of the plaintiff] was [greater than] the negligence of one of the tortfeasors against whom recovery is sought, then as to that particular tortfeasor there still is no right to recover. That tortfeasor is out of the picture as far as liability on his part to the party whose negligence was [greater than] . . . his is concerned.

the results which would occur subsequent to *May* would not be so obvious.

The court's rationale in *May* for abandoning the individual comparison interpretation was nominally that the individual comparison rule led to "harsh and unfair results." The court thought it unfair and inequitable that a plaintiff who was responsible for less than 51% of the total negligence could be barred from any recovery. However, in the above described situation, this rationale does not attach since plaintiff is already provided with an opportunity to recover from a legally liable defendant. Thus, since the court's *May* reasoning does not seem to apply, there is some question whether the court would apply the *May* ruling to such a case.

Texas, which has statutorily adopted a combined comparison approach[77] would utilize the approach regardless of whether any of the defendants would be held liable on an individual basis.[78] If the Wisconsin court adopts a combined comparison rule, this result seems most appropriate since the liability of defendants, less negligent than the plaintiff, should not turn on whether one or more of the remaining defendants is individually more negligent than the plaintiff. Moreover, if the court adopted the position that the *May* rule would not attach to instances described above, an inequity would immediately result between defendants in actions where each defendant was less negligent than the plaintiff, and defendants in actions where one defendant was more negligent than the plaintiff. For instance, suppose that instead of defendant *A* in the above example being found 34% negligent, he was found 32% with the reduced 2% being credited to defendant *C*. The percentages would then be: plaintiff 33%, defendant *A* 32%, defendant *B* 30%, and defendant *C* 5%. Defendants *B* and *C* would now be liable whereas formerly the reverse would have been true. Surely it is unfair to defendants that their liability should rest upon the chance that one defendant is at least as negligent as the plaintiff or that each is less negligent than the plaintiff.[79]

77. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978). Other states have also adopted combined comparison rules. *See* ARK. STAT. ANN. § 27-1764 (Supp. 1977); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1978); KAN. STAT. § 60-258a (1976); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1978); NEV. REV. STAT. § 41-141 (1977); OR. REV. STAT. § 18.470 (1977); PA. STAT. ANN. tit. 17, § 2101 (Purdon Supp. 1978).

78. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978) (by implication).

79. Justice Hallows saw the same inequality only applied in the reverse situation.

After all, defendants cannot control whether another co-defendant will be held more or less culpable than the plaintiff.

The issue would be academic however, if a strict construction were given to the rule suggested in *May*. Read literally, the decision simply states that in determining the liability of the parties, the negligence of the plaintiff is to be compared with the combined negligence of the defendants. No qualification is made that the rule is applicable only in cases where the negligence of each defendant is less than that of the plaintiff. Thus, it would seem that the Wisconsin court would adopt the Texas approach and apply *May* to all multiple defendant suits irrespective of whether one or more of the defendants were liable on an individual basis.

Under a combined comparison approach an analogous inequality would also arise between defendants to multiple party suits and defendants to single party suits. As to the latter type, if the single party defendant is found less negligent than the plaintiff, then that defendant is free from liability. This is true despite the fact that the negligence of the defendant may very nearly approach that attributable to the plaintiff. Take for instance the case where plaintiff is found 51% causally negligent while the sole defendant is found 49%. In contrast suppose that there are two defendants and the jury apportions 49% to defendant *A*, 1% to defendant *B*, and the balance to the plaintiff. Defendant *A*, who like the defendant in the first case, is 49% causally negligent, and is less negligent than the plaintiff, has only one distinguishing feature. That is, he is liable whereas the other is not. Once again the liability of the defendant less negligent than the plaintiff is being determined on the fortuitous event of whether the plaintiff was injured by one defendant or two.

These examples point out some of the inherent problems of *May*. While the decision is both simple and apparently fair when confined to its facts, this "fairness" seems to be somewhat limited. The supreme court intimated as much when it stated that the rule was designed to adjust the inequities suffered by plaintiffs. What the court failed to consider was the possible interests of defendants when fashioning the *May* rule.

According to Justice Hallows, the plaintiff's chances of recovery under the individual comparison rule ultimately rests upon the fortuitous number of defendants. Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 136, 177 N.W.2d 513, 520 (1970), (Hallows, J., dissenting).

These then are the two primary effects which *May* will have on the liability of multiple defendants. In reality, the decision neither expands nor contracts the liability of defendants who previously would have been held liable to the plaintiff. Rather, what *May* accomplishes is an expansion of the number of parties who may now be forced to respond in damages. Because *May* increases the number of defendants subject to liability, the decision will also affect those rules and doctrines which are related or depend upon a finding of liability. For instance, joint and several liability, releases, setoffs and contribution will all be affected by *May,* since each is determined in part, or in whole, by the parties' respective liabilities.

B. Joint and Several Liability

The present rule in Wisconsin regarding joint tortfeasors[80] dictates that, upon a finding of common liability, each defendant is individually liable for the full amount of the plaintiff's damages reduced only by the percentage of causal negligence attributable to the plaintiff.[81] The recent case of *Chart v. General Motors Corp.*,[82] illustrates the full effect of this rule. In *Chart* the pertinent jury finding showed that a passenger-plaintiff was 3% causally negligent while defendants' negligence was determined to be as follows: General Motors 12%, Vilas County 5%, two county employees 5% and the driver of the plaintiff's car 75%.[83] The driver of the car, to whom the bulk of the causal negligence was attributed, was insolvent and the damages of the plaintiff were roughly $777,000. In this particular case, General Motors, which was only 12% causally negligent, was forced to pay 87% of the plaintiff's award. The 13% which the defendant did not pay, represented the negligence of the plaintiff plus the negligence of a settling defendant and the negligence of the two county employees dismissed from the suit by the Wisconsin Supreme Court.

The rationale for joint and several liabilty is, of course, that each defendant is responsible for the entire loss of the plaintiff,

80. Joint tortfeasors include any defendant whose tortious conduct has contributed to causing a single, indivisible injury to the plaintiff. Johnson v. Heintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976).

81. Caldwell v. Piggly Wiggly Madison Co., 32 Wis. 2d 447, 145 N.W.2d 745 (1966); Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934). *See also* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1 (1956).

82. 80 Wis. 2d 91, 258 N.W.2d 680 (1977).

83. *Id.* at 99, 258 N.W.2d at 683.

so that each can rightfully be called upon to pay the full amount of plaintiff's damages.[84] An even more fundamental rationale is the desire to place the cost of insolvent defendants upon the shoulders of remaining tortfeasors rather than upon innocent injured parties. Naturally, the plaintiff is entitled to but one satisfaction and thus, upon full payment, cannot seek additional compensation from defendants never executed upon.[85] Moreover, a defendant who pays in excess of his assigned degree of fault is able to seek contribution from those commonly liable tortfeasors up to the amount of their respective percentages of causal negligence.

The *May* decision does not necessarily spell a change in this common law rule. All *May* necessarily effects is a change in the number of parties who may now be held jointly and severally liable.[86] Whereas prior to *May*, defendants who were less negligent than the plaintiff in multi-defendant suits could avoid the effects of joint and several liability, subsequent to *May* these defendants will be forced, with the full rigors of joint and several liability, to compensate the plaintiff.

The problem with this proposition is that a defendant less negligent than the plaintiff can now be held liable for the full amount of the loss occasioned by all of the defendants' negligence. For instance, if the plaintiff is found 50% negligent and defendant *A* 5%, while defendant *B* is 45%, then defendant *A* could, under *May*'s dictum, be forced to pay 50% of the plaintiff's damages. The inequity of this situation is clear.[87] Defendant *A*, responsible for only 5% of the plaintiff's injuries, and who is far less negligent than the plaintiff, must assume 50% of the damages. Moreover, if defendant *B* is immune[88] or insolvent, defendant *A* is without remedy to shift the loss to some

84. *See generally* 74 AM. JUR. 2d *Torts* § 62 (1974).

85. Anstine v. Pennsylvania R.R., 352 Pa. 547, 43 A.2d 109 (1945); Morse v. Modern Woodmen of America, 166 Wis. 194, 164 N.W. 829 (1917).

86. In Arkansas for instance the judicial adoption of the combined comparison rule did not alter the rule of joint and several liability. Thus in Arkansas if plaintiff was 20% and defendants 10%, 20% and 50%, plaintiff could recover from any of the defendants — even those whose negligence was less than that of the plaintiff. Walton v. Tull, 234 Ark. 884, 356 S.W.2d 20 (1962).

87. The concept of joint and several liability may of course produce some unfairness to particular defendants if the aggregate approach is used. A defendant with a small portion of negligence may become liable for a large portion of the damages.

V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.7, at 260 (1974).

88. *See* text accompanying note 110-113 *infra*.

other more culpable party. Such a result as above would occur if the combined comparison approach were adopted without altering the rules of joint and several liability.

Other jurisdictions considering this problem have acted to ameliorate these results. Oregon, for instance, provides by statute for a combined comparison rule in multiple defendant suits.[89] However, only those defendants *more* causally negligent than the plaintiff on a *one-to-one* comparison are jointly and severally liable.[90] Defendants less negligent than the plaintiff are liable only to the extent of their respective percentage of causal negligence.[91]

It is not certain that the Wisconsin Supreme Court will adopt an Oregon approach. In *Fitzgerald v. Badger State Mutual Casualty Co.*,[92] the court ruled that the "doctrine of comparative negligence [should] not be extended so that a co-tortfeasor could not be held liable for more than the sum which represented his percentage of causal negligence."[93] The court immediately recognized that to do so would abrogate the rule of joint and several liability. In *Fitzgerald* damages were found to be $50,000 while the plaintiff and two defendants were found to be 5%, 30%, and 65% causally negligent. Since the second defendant was judgment proof, the first defendant, when faced with the possibility that he might have to satisfy the entire award, argued that his total liability should be limited to $15,000 or 30% of the judgment. The court, relying on *Chille v. Howell*[94] and *Walker*,[95] reiterated the rule that the comparative negligence statute did not alter the rules of joint and several liability. That rule as stated by the *Walker* court is as follows:

> [T]here is no provision [in the comparative negligence statute] which effects any change in the common-law rule that all tortfeasors who are liable at all are liable to the injured person for the entire amount now recoverable by him.[96]

Thus, because the adoption of the comparative negligence statute did not alter the common-law rule of joint and several

89. OR. REV. STAT. § 18.470 (1977).
90. *Id.* § 18.485.
91. *Id.*
92. 67 Wis. 2d 321, 227 N.W.2d 444 (1975).
93. *Id.* at 331, 227 N.W.2d at 449.
94. 34 Wis. 2d 491, 149 N.W.2d 600 (1967).
95. 214 Wis. 519, 252 N.W. 721 (1934).
96. *Id.* at 536, 252 N.W. 727.

liability, there is little reason for the supreme court's new reinterpretation of the statute to make that change. Technically, there is nothing to bar the operation of joint and several liability on less negligent defendants if the defendants' combined negligence exceeds that of the plaintiff. Aside from technical considerations, however, there are the matters of equity and justice. As indicated above,[97] fairness may dictate that several liability be limited to those defendants whose negligence is greater or equal to that of the plaintiff. After all, *May* was prompted by what the court thought to be harsh and unfair results. Thus it seems only proper that the court alter the collateral rules of comparative negligence so that both plaintiffs and defendants receive an even-handed result. Moreover, the rule of joint and several liability, being judge-made[98] permits the court to make judicial alterations. Whether it does so is a matter of speculation.

C. *Contribution*

By virtue of the operation of joint and several liability a defendant may be required to pay an amount of damages greater than the percentage of causal negligence attributable to his conduct.[99] This inequity is rectified by permitting the defendant to seek contribution from other commonly liable defendants. In order to recover on a claim of contribution, the defendant must show that both parties are jointly negligent, that they have common liability because of such negligence and that one party has borne an unequal portion of the common burden.[100]

The rule of combined comparison affects the law of contribution by altering the second element, that of common liability. Insofar as *May* exposes a new class of defendants to liability, it also necessarily exposes those same defendants to claims of contribution. The difference between the pre-*May* application of the contribution rule and the post-*May* application could be striking when viewed in the context of an actual case. For instance, if a plaintiff is found 30% causally negligent while defendant *A* is found 20% and defendant *B* 50%,[101] under tradi-

97. *See* text accompanying note 87 *supra*.

98. Johnson v. Heintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976) (by implication).

99. *See* text accompanying notes 81-85 *supra*.

100. Wurtzinger v. Jacobs, 33 Wis. 2d 703, 148 N.W.2d 86 (1967); Farmers Mut. Auto. Ins. Co. v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 512, 99 N.W.2d 746 (1959).

101. For a similar hypothetical situation, *see* Vincent v. Pabst Brewing Co., 47 Wis.

tional interpretations of the comparative negligence statute, defendant *A* would be exonerated from all liability while defendant *B* would be responsible for the full 70%. More importantly, defendant *B* would be unable to seek contribution from defendant *A* because commonality of liability would be lacking. Although the rule of comparative contribution allows a defendant to recover from a less negligent co-defendant, (*i.e.* contribution in Wisconsin is pure comparative contribution)[102] the rule only takes effect once the contributing defendant can be found to be liable in the first instance. Under past constructions of the comparative negligence statute, this meant that the individual defendant's negligence had to be equal to or greater than that of the plaintiff. Under a combined comparison rule the result would be entirely different. Since each defendant would be liable to the plaintiff under the combined comparison approach, the element of common liabilty, absent under the old rule, would be present and thus permit contribution. Now, the second defendant would be able to shift 20% of the plaintiff's loss to defendant *A*. The combined comparison approach therefore has the inadvertant effect of mitigating the inequality that previously existed when defendants liable under the rules of joint and several liability were forced without remedy to pick up that portion of damages attributable to the less negligent defendants.

As the *raison d'etre* of comparative negligence is to apportion the amount of liability according to the degree of fault, this result seems best. It is desirable in that legally liable defendants should not be left without recourse to recover those damages which they have paid and which were in fact occasioned by the acts of less negligent defendants. Although a less negligent defendant may have only caused 20% of a plaintiff's damages, while at the same time plaintiff was responsible for 30%, this still presents no cogent reason for the remaining defendant to pay an additional 20%.

D. Settlements

The ramifications of *May* discussed in the preceding section are similarly applicable to settlements. Before discussing these ramifications, however, it should be noted that *May* will probably have the effect of increasing or encouraging settlements in

2d 120, 135, 177 N.W.2d 513, 520 (1970) (Hallows, J., dissenting).

102. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

multi-defendant suits. Since *May* increases the number of potentially liable tortfeasors it is reasonable to assume that the number of settlements will likewise increase. Previously, where a defendant felt his negligence was insignificant when compared with that of the plaintiff, he may have been willing to undergo the risks of a trial and a finding of negligence greater or equal to that of the plaintiff. This must have been true especially in the multi-defendant suit where the defendant was reasonably sure that the bulk of the negligence would be attributed to the plaintiff and the other co-defendants. In view of the *May* rule, however, a defendant who is less negligent than the plaintiff may now be held liable. Because the risk of liability increases, the desirability of a settlement grows.[103]

If a defendant settles, however, he does not by doing so recapture the precise position he would have occupied under an individual comparison approach. To give an example, suppose in a simple negligence action a jury apportions the causal negligence among the several parties as such: plaintiff 33%, defendant *A* 30%, and defendant *B* 37%. Suppose in addition that plaintiff's total damages are $10,000 and defendant *A* settles for $5,000 taking a *Pierringer* release.[104] Under the individual comparison rule defendant *A* would not be liable to the plaintiff as his negligence is less than that of the plaintiff. More importantly, defendant *A* could seek to recover the cost of his settlement from the remaining defendant on the basis of either subrogation[105] or indemnity.[106] Thus if defendant *B* is solvent

103. In all fairness it should be pointed out that an equally respectable prediction could be made that the combined comparision rule will inhibit settlements. Although *defendants* may have an increased incentive to enter into expedient settlements, such is not necessarily the case for claimants. An extreme example which best demonstrates this point is one where the plaintiff is negotiating with a defendant who represents the greatest pool of financial resources yet also represents the party least likely to be held more negligent than the plaintiff. Under the individual comparison rule, in view of the improbability of a judgment being lodged against this defendant, a plaintiff would be well advised to accept an even relatively modest offer. Contrariwise, it would be foolhardy for a plaintiff under a combined comparison approach to agree to any release absent a rather sizeable and substantial agreement. Thus instead of encouraging settlements, the new rule could have the effect of forcing claimants to be less compromising.

104. Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

105. Northwestern Nat'l Cas. Co. v. State Auto. & Cas. Underwriters, 35 Wis. 2d 237, 151 N.W.2d 104 (1967); Perkins v. Worzala, 31 Wis. 2d 634, 143 N.W.2d 516 (1966).

106. Perkins v. Worzala, 31 Wis. 2d 634, 143 N.W.2d 516 (1966). In *Perkins* the court said the proper cause of action was one in subrogation but admitted that it arose under the principles of indemnity. *See also* Defense Research Institute, Comparative

and not immune from liability, defendant *A* could recover the cost of his entire settlement and avoid any loss whatsoever. The recovery of course, would be based on the fact that defendant *A* was not found liable to the plantiff. However, were defendant *A* to be held liable, he would of course be prevented from seeking indemnification. Rather his settlement would go to satisfy that percentage of negligence attributable to his conduct, or as in this case, the dollar amount of the award. This result would follow from the interplay between the *Pierringer* release and the finding that the defendant was liable. In this latter case, defendant *A* would only be able to recover $2,000 on a claim for contribution.[107] In the former case he would have been entitled to recover the full $5,000.

This difference in results illustrates the effect of changing from an individual comparison rule to a combined comparison rule. As argued in the section on contribution, this result, though unintended by the supreme court, is far more fair and equitable than was the past practice.[108] Under a combined comparison rule, defendants who are more negligent than the plaintiff will not be forced to suffer the loss from the negligence of parties who have settled and were found less negligent. Thus in the area of settlements, *May* renders a just and fair result.

E. Counterclaims

The effect of *May* on counterclaims likewise flows from the change in the rules of liability. Since recovery may now be had in more cases against more parties the number of successful counterclaims will undoubtedly increase. The combined comparison rule would naturally operate for all claimants whether they be deemed plaintiffs, counterclaiming defendants, cross-claimants or third party claimants. Although the supreme court focused only on plaintiffs in discussing its intention to change the individual comparison rule, any other construction would be subject to immediate constitutional attack. In short, recovery cannot depend upon which party wins the race to the

Negligence Primer 28 (Oct. 1975); C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 1.340 (1971).

107. A settling party is not always barred from seeking contribution simply because he has entered into a settlement with the plaintiff. Farmers Mut. Auto. Ins. Co. v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 512, 99 N.W.2d 746 (1959). *See also* Defense Research Institute, Comparative Negligence Primer 34 n.268 (Oct. 1975).

108. This example can be found in V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 19.2, at 321 (1974).

courthouse. Thus one effect of *May* will undoubtedly be to increase the number of counterclaiming parties. It is only reasonable to assume that as the chances for success on counterclaims increase so too will the number of counterclaims brought.

F. Set-Offs

Set-offs under *May* will be both more likely and more complex since the new rule increases the number of parties to be calculated in determining the appropriate set-offs and balances. For example, suppose that after a three-vehicle collision, driver *A* brings suit against drivers *B* and *C*, and then *C* counterclaims against *A* and crosscomplains against *B* for his damages. Upon a jury trial, a verdict is returned finding *A* 10% at fault, *B* 60% and *C* 30%. Moreover, *A*'s damages are assessed at $10,000 while those of *C* are $5,000. Driver *B* is insolvent and uninsured.

Under the individual comparison rule, *A* could collect 90% of his damages from *C* who would in turn be barred from recovery since his negligence exceeded that of *A*. There would then be no need for a set-off, since *A* would simply collect $9,000 from *C*.

However, under *May*, *A* would only collect $5,500 as a result of a set-off. The combined comparison rule would permit *C* to combine *A*'s negligence with that of *B* so that the percentages would be 30% for the counterclaimant and 70% in the aggregate for the defendants. Moreover 70% of *C*'s damages would be $3,500. Thus *C* could collect $3,500 from *A*. Upon a set-off ($9,000-$3,500), the figure of $5,500 would be determined as the final figure to be received by *A*.[109] The combined comparison rule necessitates a set-off in this situation, where previously there would have been no need for one. By extrapolating from this simple situation to more complex suits, one can readily appreciate the aggravation *May* will present to the already existing problems surrounding the practice of set-offs.

G. Immune Co-Defendants

The Wisconsin court has consistently held that all parties to an accident, whether or not they are joined in the action,

109. Ross v. Koberstein, 220 Wis. 73, 264 N.W. 642 (1936). In *Ross* the court said it was error to instruct the jury to compare the plaintiff's negligence with that of the only in-court defendant when another driver was also causally negligent. *See also* Heldt v. Nicholson Mfg. Co., 72 Wis. 2d 110, 240 N.W.2d 154 (1976); Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

must be considered when the jury apportions the causal negligence of the parties.[110] This is done so that a more accurate and representative apportionment can be made as to all parties already joined. Even parties who are legally immune from liability must be considered in the jury's determination.

The problem which *May* poses here is best exemplified in the situation where an employer is primarily responsible for an employee's injury. In a typical case of this sort an employee is injured during the course of his employment while using a product manufactured by a third party. The employee receives worker's compensation and begins suit against the manufacturer of the product.[111] The third party action is based on products liability and the employer is included in the special verdict so that its negligence may be considered by the jury. Under the individual comparison rule, if the manufacturer's negligence is found to be less than that of the plaintiff, the manufacturer is exonerated from all liability. This is because the comparative negligence statute allows a recovery only where the plaintiff's negligence does not exceed that of the party against whom recovery is sought. In any event, the employer would be dismissed because, as between the employer and employee, worker's compensation is the sole and exclusive remedy.[112]

Under a combined comparison rule, if a jury returns a verdict which reads: plaintiff 10%, employer 85% and manufacturer 5%, the plaintiff would be able to combine the negligence of the employer with the negligence of the manufacturer to establish the manufacturer's liability. Once liability was so established, plaintiff could then rely on joint and several liabilty to recover the full 90% of his damages. This, of course, seems grossly unfair to the manufacturer. To add salt to the wounds, the manufacturer would be unable to seek contribution from the employer[113] and might in fact have to reimburse the employer for any worker's compensation benefits already paid or payable to the plaintiff. A combined comparison rule, applied in the absence of changes in the rules of joint and several liability, would allow the burden of the negligent em-

110. WIS. STAT. § 102.29 (1975) specifically provides for third party actions by employees.

111. WIS. STAT. § 102.03(2) (1975).

112. Wisconsin Power & Light Co. v. Dean, 275 Wis. 236, 81 N.W.2d 486 (1957).

113. Such a problem exists where the manufacturer's negligence exceeds that of the employee but remains less than that of the employer.

ployer to be cast upon a party less negligent than the plaintiff. Although a form of this problem predated *May*, this example best exemplifies the heightened unfairness of the *May* rule which was nominally adopted to prevent "harsh and unfair results." This unfairness could be recitifed by altering the rules of joint and several liability as previously discussed. Namely, if the manufacturer were liable for only that percentage of causal negligence attributed to it, it would lack any grounds for complaint. In essence the manufacturer would only be liable for the damage it in fact caused. Such a result is in accord with the underpinnings of comparative negligence.

IV. Conclusion

As discussed in section III, the adoption of a combined comparison rule would not only affect the simple situation envisioned in *May*, but would also have ramifications throughout the entire body of tort-related law. In order to assure the most consistent and equitable results possible under a combined comparison rule, significant changes would need to be made in related areas. The necessity of these changes is an additional argument for adoption of a combined comparison rule by the legislature rather than the court since the legislature could at the same time develop a consistent statutory scheme affecting these related areas. This advantage of legislative as opposed to court adoption of such a rule, together with the constitutional problems regarding judicial adoption raised in section II, strongly support forbearance by the court in implementing the change in the rule of individual comparison envisioned in *May*.

John A. Rothstein