

1936

Torts - Negligence - Comparative Negligence Statute

Thomas P. Whelan

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Thomas P. Whelan, *Torts - Negligence - Comparative Negligence Statute*, 20 Marq. L. Rev. 189 (1936).
Available at: <https://scholarship.law.marquette.edu/mulr/vol20/iss4/5>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

M'Culloch v. Maryland and *Collector v. Day* are such potent forces with the present Court.¹⁹

There has been some suggestion that the constitution need not be amended to permit legislatures, states and federal, to function more effectively. But Professor Corwin in his "Twilight of the Supreme Court" missed his guess. The cause, however, is not lost. The President has alluded recently to the probability that in spite of precedents the agencies of government, federal and state, may be permitted to function in expanding fields.²⁰ The general declaratory and restrictive provisions of the constitution do not necessarily preclude it. Hope for the future lies in a bench made up of men who are not only impartial, not only honest, but men who are also statesmen.

VERNON X. MILLER

TORTS—NEGLIGENCE—COMPARATIVE NEGLIGENCE STATUTE.—The Wisconsin Legislature in 1931 enacted the following legislative act: "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 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."²¹

This Act is now commonly known as the Comparative Negligence Law. However, previous to 1931 there were in Wisconsin two comparative negligence acts. It is true that they were strictly limited, but the principle of comparative negligence was applicable in both. Section 192.50 (3) of the Wisconsin Statutes (1935) still reads as follows: "In all actions hereafter brought against such railroad company, under or by virtue of any of the provisions of this section to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

Section 192.29 (6) of the Wisconsin Statutes (1935) reads as follows: "ACTION FOR DAMAGES, ORDINARY CARE. In any action brought by any person or his legal representatives against a corporation operating a railroad in this State, to recover for personal injuries or death, if it appear that the injury or death in question was caused by the negligent omission of such corporation to comply with the requirements of this section, the fact that the person injured or killed was guilty of a

¹⁹ It is not the particular choice of policy which the Court made in the *Ashton* case that is meant to be criticised. It must be conceded that the earlier cases are enlightening and ought to be considered. It is the approach to the problem that is criticized herein, the idea that decisions in earlier cases preclude an examination of an existing controversy on its merits.

²⁰ Roosevelt, "Every Member of the Legal Profession" (1936) 2 VITAL SPEECHES 579. This is the address the President delivered at the Arkansas Centennial Celebration at Little Rock, June 10, 1936.

²¹ Wis. Laws (1931) c. 242; WIS. STAT. (1935) § 331.045.

slight want of ordinary care, contributing to the injury or death, shall not bar a recovery. The burden of proof that the person injured or killed was guilty of more than a slight want of ordinary care contributing to the injury or death shall be upon the defendant."

We are now concerned primarily with a discussion of Section 331.045 of the Wisconsin Statutes (1935) which is familiarly known as the Comparative Negligence Law. We are concerned only in an indirect way with the two comparative negligence acts cited and set forth above. How far have they been superceded or have they been limited or abrogated by Section 331.045? Those points we shall discuss in the light of the cases as such appear since the enactment of the main comparative negligence law.

One of the first cases to be decided under the Comparative Negligence Law was that of *Paluczak v. Jones*.² The evidence in that case showed that both parties were negligent with respect to an automobile collision. There was a counter-claim. It was held that where both parties are negligent a dismissal of the case is not required since the comparative negligence statute applies; that under this statute, where both parties to a collision are negligent and there is a counter-claim, one of the parties may recover when there is a finding that his negligence is less than that of the other, but his recovery must be reduced in such ratio as his negligence bears to the other's. In this case it was also contended that the court should rule as a matter of law that plaintiff's negligence was equal to defendant's and reverse the case with directions to enter judgment of dismissal. The court, however, considered the question of what it termed "proportionate negligence" as a matter for the jury. It, however, indicated that exceptional cases may arise that would be a matter for the court solely.

In *McGigan v. Hiller Bros.*³ the court was confronted with the question whether as a matter of law it could say that the negligence of the plaintiff in operating his car on the wrong side of the highway was greater than that of the defendant in operating his car without the clearance lights required by section 85.06 of the Wisconsin Statutes. The court answered in the negative, stating that under the circumstances it could not say that the plaintiff's negligence as a matter of law was greater than that of the defendant because the negligent acts

² 209 Wis. 640, 245 N.W. 656 (1932).

³ 209 Wis. 402, 245 N.W. 97 (1932). Cf. *Zenner v. Chicago, St. P. M. & O. Ry. Co.*, 219 Wis. 124, 262 N.W. 581 (1935). In that case there was a finding that the defendant failed to sound the whistle or ring the bell, and that such failures were causes of the injury; that the deceased, who was a carrier of freight for hire, was guilty of a slight want of ordinary care in failing to stop before going on to the track and in failing to look and listen for the approaching train; that this negligence was a cause of the injury; that the deceased's negligence constituted 40 per cent of that involved in the collision and that the defendant's negligence constituted 60 per cent. It appeared that there really was only one default by the defendant, failure to ring the bell. Hence the appellate court pointed out that if the jury could legitimately assess the deceased's negligence at 40 per cent in comparison with two distinct violations by the defendant, there could be no rational ground for assessing his negligence at less than 50 per cent with only one default pending in the case. The court exercised its power, previously asserted, to set aside the verdict of the jury with respect to percentages for the first time since the adoption of the statute.

differed in kind and quality and that it knew of no legal yardstick by which it could classify, value and compare them. With respect to this point, the court went on to point out that in *Brown v. Haertel*⁴, which was the first case decided under the comparative negligence law, under a situation where plaintiff's negligence consisted of a failure to look before entering an intersection, and the negligence of defendant consisted of excessive speed and failure to yield the right-of-way, it was held that the question whether the negligence of the plaintiff was as great as that of the defendant was for the jury. It was, however, pointed out that under some circumstances it might be proper for a court to determine as a matter of law that the negligence of the plaintiff was as great as that of the defendant. The following example was given: "If the negligence of each consisted simply in a failure to look and they both had ample opportunity to discover each other, it might be that their negligence would have to be equal," but the court was careful to add that the instances in which a court can say as a matter of law that the negligence of the plaintiff is equal to or greater than that of the defendant will be extremely rare and will ordinarily be limited to the cases where the negligence of each is precisely of the same kind and character.

It is important to note the following language in *Paluczak v. Jones*⁵: "One of the parties may recover when there is a finding that his negligence is less than that of the other, but his recovery must be reduced in such ratio as his negligence bears to the other's."

The language "in such ratio as his negligence bears to the other's" was withdrawn by the court on a motion in a later case. In *Cameron v. Union Automobile Insurance Company*⁶ the court went on to say that instead of the language last quoted, the words "in proportion to his negligence" should have been used, that this would have brought the statement in strict accord with the language of the statute which is "but any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributed to the person recovering." It follows from this that the basis of comparison is not directly between the negligence of the plaintiff and that of the defendant. Let us assume that the negligence of the plaintiff is 30 per cent and that of the defendant 70 per cent. We are not to understand that the plaintiff would recover the difference between 40 per cent and 70 per cent, namely 30 per cent.

The facts in the *Paluczak* case disclose one party plaintiff and one party defendant, both with negligence as a matter of law. The negligence of both was found to be the proximate cause of the collision. There was a counter-claim. Under these findings the court held as we have observed above that the comparison and proportion of such negligence was solely within the province of the jury. The court went on further to state that where it is found that negligence in such circumstances of the one party is less than that of the other, the recovery of such other or the party at fault must be reduced in such ratio as his

⁴ 210 Wis. 345, 244 N.W. 630 (1932). See also *Zenner v. Chicago, St. P. M. & O. Ry. Co.*, 219 Wis. 124, 262 N.W. 581 (1935).

⁵ 209 Wis. 640, 245 N.W. 656 (1932).

⁶ 210 Wis. 659, 246 N.W. 420 (1933).

negligence bears to that of the other. Now it follows that such a statement places the basis of comparison directly between the negligence of the one and the other. Thus it would follow that if the plaintiff were found to be 20 per cent negligent and the defendant 80 per cent, the plaintiff could recover only the difference between 20 per cent and 80 per cent. Let us assume the damages amounted to \$1,000. The plaintiff would recover \$600 under this particular construction of the Act, with respect to the diminution of damages. The court, however, in *Cameron v. Union Auto Insurance Company*⁷ explicitly eliminated this basis for comparison and diminution of damages. In the *Cameron* case on a motion for re-hearing it was contended that the plaintiff's recovery was reduced by 20 per cent, whereas it should have been reduced by a fourth, or 25 per cent. This contention was of course based on the language of the *Paluczak* case. The plaintiff's husband was found by the jury to be 20 per cent negligent and the defendant was found to be 80 per cent negligent. The explicit statement runs as follows: "Under this statute, Section 331.045, where both parties to a collision are negligent, and there is a counter-claim, one of the parties may recover when there is a finding that his negligence is less than that of the other, but his recovery must be reduced in such ratio as his negligence bears to the others."

With respect to this statement the court in the *Cameron* case thus made it explicit: "The language 'in such ratio as his negligence bears to the others' was inadvertently used and is withdrawn." Instead of the language quoted, the words "in proportion to his negligence" should have been used, according to the court. This would have brought the statement in strict accord with the language of the statute, which is: "but any damages allowed shall be diminished by the jury in proportion to the amount of the negligence attributable to the person recovering." The reduction therefore of 20 per cent rather than one fourth or 25 per cent under the percentages found in the *Cameron* case was correct, and was so upheld by the court and is now the settled law on this point.

It is well to observe the implications of this rule. From the rule one reaches certain results which in rare instances seem rather inequitable. Let us assume that the negligence of the plaintiff, under certain given facts is 49 per cent and that of the defendant is 51 per cent. Let us further assume that plaintiff has been found to have suffered damages amounting to \$10,000. Under the rule in the *Cameron* case as set forth above, the plaintiff would recover exactly \$5,100, whereas under the rule of the *Paluczak* case, as set forth above, the plaintiff could recover only the sum of \$200. The rule adopted in the *Cameron* case was upheld and supported in *Engelbrecht v. Bradley*⁸ and in *Honore v. Ludwig*⁹

The question has been raised whether or not the comparative negligence law covered not only situations governed by the common law standard of ordinary care, but also such situations as were governed by ordinances and legislative enactments. The Wisconsin Supreme

⁷ 210 Wis. 659, 246 N.W. 420 (1933).

⁸ 211 Wis. 1, 247 N.W. 451 (1933).

⁹ 211 Wis. 354, 247 N.W. 335 (1933).

Court in the cases of *Morley v. Reedsburg*¹⁰ and *Mullen v. Larsen-Morgan Construction Co.*,¹¹ as also in the case of *Bent v. Jonet*,¹² held that the statute did cover such fields. In the *Mullen* case and in the *Bent* case it was found that the defendant was guilty with respect to a violation of the safe place statute. The comparative negligence law was applied in both cases. In the *Morley* case it was contended on the part of the defendant that the comparative negligence law did not apply in that since Section 331.045 was applicable only when negligence on the part of the defendant was the basis of an action and that in cases under Section 81.15, to recover damages sustained by reason of the insufficiency or want of repair of any highway, liability does not rest upon negligence. The court met this contention by showing that liability imposed by virtue of the said statute upon municipalities for damages sustained by reason of the insufficiency or want of repair of any highway, renders failure to construct in the first instance sufficient negligence as a matter of law. As a matter of fact the idea enunciated by the court is not novel, and simply means that the violation of a statute or ordinance or such enactment is negligence *in se*, or negligence as a matter of law, and hence as negligence, must be compared with the negligence of the plaintiff, and within the application of the Comparative Negligence Act.

It seems then to be well settled in Wisconsin that the Comparative Negligence Act applies not only to those situations covered by the standard of ordinary care, but also to such situations as are covered by ordinances or statutory enactments.

In the opening part of this note we refer to the fact that the Statute which is now commonly known as the Comparative Negligence Act was not the first comparative negligence statute in Wisconsin. There are the others which we have set forth above. It is true that they are of a limited nature and apply to particular situations and persons. The question has been raised as to what effect Section 331.045, the main Comparative Negligence Act, had on such prior statutes, whether or not the new act superseded and abrogated the old ones. This question came up in the case of *Hammer v. Minneapolis, St. Paul & S. Ste. Marie Railway*.¹³ In this case plaintiff's intestate, a pedestrian, was struck by a train at a street crossing. The court found as a matter of law, that the decedent was contributorily negligent. The jury found that 85 per cent of the total negligence was attributable to the defendant and 15 per cent to the decedent. Judgment was entered upon this verdict in favor of the plaintiff. The question was raised whether the comparative negligence act applied to railroad accidents of such character as this. The defendant contended that the law had no application; that such accidents were governed by Section 192.28 of the Wisconsin Statutes, which provides in the event of the negligent omission of the railroad to comply with certain safety requirements that slight want of ordinary care shall not bar recovery. Now in railroad accidents prior to the enactment of Section 331.045, more than a

¹⁰ 211 Wis. 504, 248 N.W. 431 (1933).

¹¹ 212 Wis. 52, 249 N.W. 67 (1933).

¹² 213 Wis. 635, 252 N.W. 290 (1934).

¹³ 216 Wis. 7, 255 N.W. 124 (1934).

slight want of ordinary care on the part of the plaintiff constituted a complete defense, assuming of course that the negligent act of the railroad company consisted of a violation of the safety requirements prescribed by Section 192.29. The court went on to say that Section 192.29 exhausted its purpose when, as a penalty for violation of specified safety rules, it provided that slight want of ordinary care should not constitute a defense, that when the negligence of the plaintiff is more than such the provision has no operation. The defense was complete under the law as it existed prior to the act, but, by the terms of the Comparative Negligence Law, plaintiff's negligence, even though it constituted more than a slight want of ordinary care, in fact a clear want of ordinary care, must be compared with that of the railroad company. Very evidently the Comparative Negligence Act as we observe from this case does not supersede the Limited Comparative Negligence Act, Section 192.29, but it must be determined in each case to which Section 192.29 applies, whether the plaintiff was guilty of more than a slight want of ordinary care and in case of an affirmative answer to this question, there must then be a comparison under the provisions of the Comparative Negligence Law. In the particular case the decedent was guilty of negligence as a matter of law, and his negligence as a matter of law also constituted more than a slight want of ordinary care, and the court held it proper to require the jury to compare his negligence with that of the railroad company. The case seems to be important and settles the question of the effect of the Comparative Negligence Law with respect to liability under the limited comparative negligence acts enacted in Wisconsin previous to the main act. It would appear then from this case that the rule now obtaining is that where there is a violation of Section 192.29 (6) and the plaintiff is guilty of only a slight want of ordinary care, then the old act applies, namely 192.29, but with respect to whatever negligence there may be on the part of the plaintiff, which does not come under the express provisions of that section, the Comparative Negligence Act applies, and want of ordinary care in the circumstances, or contributory negligence, is no longer a complete defense.

One of the most interesting and perhaps most intricate cases cited under the Comparative Negligence Law is the *Kroger* case.¹⁴ In that case the automobile of a certain Walker who was the host and driver collided with a truck negligently parked, or rather stopped on the highway. A certain Bashaw and one Iselin, both guests of Walker, were injured and brought action against the Kroger Grocery & Baking Company. A cross-complaint was filed by the latter against Walker for contribution. The jury found that both the defendants were negligent; that as between Walker and the Kroger Grocery & Baking Company, the causal negligence on his part was 25 per cent, as compared to 75 per cent of causal negligence on the part of the Kroger Grocery & Baking Company; that as between Iselin and the Kroger Grocery & Baking Company causal negligence on Iselin's part was 15 per cent, as compared to 85 per cent of causal negligence on the part of the Kroger Grocery & Baking Company and also Walker, and that as between Bashaw and the Kroger Grocery & Baking Company, the causal negli-

¹⁴ *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934).

gence on Bashaw's part was 10 per cent as compared to 90 per cent of causal negligence on the part of the Kroger Grocery & Baking Company and also Walker. With respect to the guests, Bashaw and Iselin, in the automobile of Walker, the supreme court held that they, knowing the danger thereof, nevertheless acquiesced to the speed at which the driver was driving and in his insufficient lookout, because of inability to see ahead such distance as is required to enable him to stop in time, and to avoid a collision while driving at such speed, assumed the risk of injury incident thereto, including the risk involved in the emergency thereby brought on when the driver was suddenly confronted with the truck stopped on the highway. It follows from this that there was no liability on the part of the driver for the resulting injuries suffered by his guests. So therefore, with respect to the host-guest relation, it would appear that assumption of risk is a complete defense and that such assumption of risk is not an aspect of contributory negligence, but is essentially distinct therefrom. Now, assuming that the guests in this case were considered in some way contributorily negligent, rather than assuming the risk, then it would follow that under the Comparative Negligence Law, the negligence of each guest would be compared with that of the host, and if the negligence of such host was found to be greater than that of the guest, then the guest could recover the total amount of his damages, diminished however, by the proportion of negligence attributed to such recovering guest. However, assumption of risk under the definition of our courts seems to employ no concept of negligence, but is merely a verbal formula for stating that there was no duty on the part of the host with respect to the guest in the circumstances under consideration. This idea has an interesting origin and evolution. It seems in Wisconsin to have been derived from such a case as *Greenfield v. Miller*,¹⁵ which involved injuries to the guest who was being entertained in a socially conservative manner at the home of a friend. The court having in mind the English case of *Southcote v. Stanley*¹⁶ held as a matter of law that there was no duty with respect to the guest in the circumstances. This concept, it appears, our court has brought over into the host-guest situation with respect to the private automobile, and in *Eisenhut v. Eisenhut*¹⁷ the court clearly enunciated that a minor of tender years who certainly could not appreciate a risk inconsistent with its safety, and voluntarily assume the same, was in no better position with respect to the enforcement of its right to recover than were the adults concerned in the same situation, on the theory that there was no duty, hence no violation thereof and no corresponding right.

In a case decided a short time after the *Kroger* case, *Scory v. La Fave*,¹⁸ the supreme court reiterated the rule of the *Kroger* case, namely that assumption of risk by the guest with respect to the negligent acts of the host was a complete defense in an action by such guest against the host. It is true, however, that there was filed in the *Scory* case, a dissenting opinion by Mr. Justice Fowler, who favored the idea

¹⁵ 175 Wis. 184, 180 N.W. 384 (1921).

¹⁶ 1 H. & N. 247, 156 Eng. Rep. 195 (1856).

¹⁷ *Eisenhut v. Eisenhut*, 212 Wis. 467, 248 N.W. 440 (1933).

¹⁸ 215 Wis. 21, 254 N.W. 643 (1934).

that assumption of risk was merely an aspect of contributory negligence and was not essentially distinct therefrom. The court, however, has thought otherwise, and the rule in the *Kroger* case now obtains as the law in Wisconsin. It does not follow, however, that the guest cannot be guilty of contributory negligence, an inference which seems to be assumed or drawn by some practitioners. It is easy to imagine a guest momentarily catching hold of a wheel when the host driver is faced with some difficulty of his own momentary and negligent creation, and thereby so increasing the danger that he is guilty of causal negligence with respect to the damages suffered by himself. It would seem that the guest under such circumstances is guilty of contributory negligence and such contributory negligence under Section 331.045 would certainly be not a complete bar to an action by such guest against the host.

A further consequence follows from the application of the doctrine of assumption of risk in such a situation as obtained in the *Kroger* case, namely that since assumption of risk is a complete defense there is no common liability with respect to Walker and the Kroger Grocery & Baking Company, and it follows from that that the rule of *Standard Accident Insurance Company v. Runquist*¹⁹ obtains, as tersely put by court: "It is clearly established in Wisconsin that in order for one joint tortfeasor to have contribution against another it must be established that they have been subjected to a common liability and that the one seeking contribution has paid more than his equitable share of the common obligation." Thus the application of the doctrine of assumption of risk in the host-guest relation and under the comparative negligence law has led to some startling results.

It would appear from an analysis of the *Kroger* case that under the Comparative Negligence Statute, Section 331.045, the causal negligence of the person seeking to recover, Iselin or Bashaw, in this case, is to be compared with the causal negligence of all of the other participants in the transaction. From this it is clear that the negligence of Iselin or Bashaw should be compared, not only with the negligence of the Kroger Grocery & Baking Company, but with the negligence of both the Kroger Grocery & Baking Company and Walker.

THOMAS P. WHELAN.

¹⁹ 209 Wis. 97, 242 N.W. 757 (1932).