

1931

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Joseph A. Padway

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### Repository Citation

Joseph A. Padway, *Comparative Negligence*, 16 Marq. L. Rev. 3 (1931).  
Available at: <https://scholarship.law.marquette.edu/mulr/vol16/iss1/1>

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# MARQUETTE LAW REVIEW



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VOLUME XVI

NOVEMBER, 1931

NO. ONE

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## COMPARATIVE NEGLIGENCE

JOSEPH A. PADWAY\*

CHAPTER 242 of the laws of 1931 enacts the doctrine of comparative negligence for general application. Two bills were prepared and submitted by the writer. The first is the one enacted into law. It is similar to the one prepared and submitted by this writer in 1925 when he was a member of the Legislature.

The second bill was in the nature of a substitute amendment for the original bill. It was adopted by the Senate but rejected by the Assembly. We mention the two bills because the rejection of the substitute is significant. Both were heard several times before the Judiciary Committees of both houses, and were very thoroughly debated. The original bill, which is now the law, is a general enactment of the doctrine of comparative negligence. The substitute bill sought to provide specific rules for the judicial handling of the law. When the substitute came to the Assembly Judiciary Committee, that committee decided that the doctrine should be adopted, but that the court should supervise its application. It is, therefore, up to the courts to so administer the law as to effectively apply the doctrine of comparative negligence in all negligence cases.

It is appreciated that this will involve thought and study, but lawyers and judges have solved many legal problems in the past, and the writer is certain that if the judges take to the doctrine wholeheartedly as they should, before long it will be working smoothly, and with infinitely more justice than the present law of negligence.

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\*Member of Milwaukee Bar; Formerly Judge of Civil Court, Milwaukee County; Member of 1925 Legislature.

WITH THE ADVENT OF MACHINERY AND RAPID TRANSPORTATION, OLD RULES OF LAW AS TO NEGLIGENCE MUST GIVE WAY TO OTHER PRINCIPLES.

In drafting the law, now Chapter 242, the writer has framed it on the principle of the Federal and Wisconsin railroad comparative negligence acts, which acts are the same in principle as most of the comparative negligence acts of state which have such a law. Two reasons prompted him to do this. First, because the principle is sound; second, there are a number of decisions construing the act and outlining the method of application. The writer has devoted much of his professional career to the law of negligence. Many years ago he became convinced of the injustice of the application of the contributory negligence rule whereby one guilty of ordinary negligence, however slight, is defeated in his claim against another guilty of ordinary negligence, however great. The rule may have been less unjust before the advent of machinery, when negligence and contributory negligence involved simple acts. The negligence of the parties was on a more equal basis, but since the advent of machinery, when human beings are pitted against complex machines driven by steam, electricity, etc., the disparity is too great to test these comparative acts by the old rule.

Many writers have acknowledged the injustice of the old rule, but courts have done nothing towards changing it. Legislatures have in several states changed the rule in a limited degree, chiefly with respect to railroads and railroad employes. One state, Mississippi, has wiped out the old rule and adopted comparative negligence in general.

The last discussion on this phase of the subject which this writer has been able to find, is in *Blashfield, Cyclopedia of Automobile Law*, Vol. 2, 1927 Ed., Page 1008. Referring to the doctrine of contributory negligence he says:

"In some of its aspects it offends every instinct of good sportsmanship. . . . the doctrine has been uncertain and unsatisfactory, and not infrequently has been productive of serious injustice.

"Like the defense of alibi in criminal cases, the defense of contributory negligence is frequently set up merely to raise a cloud of dust under cover of which to escape the penalty for a grave error.

". . . The doctrine of comparative negligence which at one time was almost obsolete, has been restored to favor in many jurisdictions. . . . There are particular reasons for modifying the doctrine in its application to the relation of motorist and pedestrian. . . . The scales will hang more evenly between these two classes of travelers if the doctrine of contributory negligence, if not entirely abolished, shall be restricted in its application to the pedestrian. . . ."

#### THE ACT AS ADOPTED BY THE 1931 LEGISLATURE:

Chapter 242, Laws of 1931. An act to create Section 331.045 of the Statutes, relating to personal injury actions.

"Section 1. A new section is added to the statutes to be numbered and to read: 331.045 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."

"Section 2. This act shall take effect upon passage and publication."

(The act became effective June 16, 1931.)

#### THE ACT IS FRAMED ON THE BASIS OF THE FEDERAL LAW.

The law is almost identical with the Federal law, and with Section 192.55 of Wisconsin Statutes. The Federal law and Section 192.55 of the Wisconsin Statutes, and the greater number of comparative negligence laws of other states relate to railroads and employes of railroads. The Federal law reads as follows:

"United States—Code of Laws, 1926, p. 1442, Sec. 53.

#### *Comparative Negligence:*

In all actions brought against railroads to recover damages for personal injuries to an employe, or where such injuries have resulted in death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. Provided that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such railroad of any statute enacted for the safety of employes contributed to the injury or death of such employe.

#### THE FEATURE OF THE ACT ALLOWING RECOVERY BY ONE WHOSE NEGLIGENCE IS NOT AS GREAT AS THE OTHERS IS BASED ON EXISTING WISCONSIN RAILROAD STATUTES.

Section 192.55 of the Wisconsin Statutes of 1927 reads as follows:

"192.55. Personal injury liability; employes, negligence, risk injury.

(2) When such injury shall have been sustained by any officer, agent, servant or employe of such company, while engaged in the line of his duty as such and which such injury shall have been caused in whole or in greater part by the negligence of any other officer, agent,

servant or employe of such company, in the discharge of, or by reason of the failure to discharge his duties as such.

(3) 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 employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. Provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such railroad company of any statutes enacted for the safety of employes contributed to the injury or death of such employe. Provided, further, that in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or death of, any of its employes such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statutes enacted for the safety of employes contributed to the injury or death of such employe."

(For some unaccountable reason this section is omitted from the 1929 statutes. It will be found in the 1927 statutes. It has never been repealed and is still the law in Wisconsin).

#### THE ACT IS CONSTITUTIONAL:

The first question to be asked is: "Is the law constitutional?" It is.

*Mondou vs. N. Y., N. H. & H. R. Co.*, 223 U. S. 1, 32 S. C. R., 169, 56 L. Ed. 327.

*Chicago, B. & Q. R. Co. vs. McGuire*, 219 U. S. 549, 31 S. C. R., 259, 55 L. Ed. 328.

*Missouri P. R. Co. vs. Castle*, 224 U. S. 541, 32 S. C. R. 606, 56 L. Ed. 875.

*Kiley vs. Chi., M. & St. P. Ry. Co.*, 138 Wis. 215.

The Federal cases cited above as to the constitutionality are applicable to Chapter 242 of the Wisconsin laws, for as already stated, the Wisconsin act is identical in principle with the Federal act.

#### THE ACT SHOULD BE APPLIED IN THE SAME MANNER AS THE FEDERAL ACT IS APPLIED.

Instead, however, of applying the principle to one class of persons as the Federal act does, Chapter 242 of the Laws of 1931 is applicable to all classes. Because of this general application, it was necessary to change slightly the wording as used in the Federal act, substituting

for the subjects "Railroads" and "Employee," the party or parties greater negligent, and the party or parties lesser negligent.

It is not necessary to think of plaintiffs or defendants. Just think of parties making claim and parties claimed against; then bear in mind this principle: That under Chapter 242, Laws of 1931, the party or parties most negligent are in the same position as the railway company is under the Federal act and the party less negligent under Chapter 242 is in the same position as the employe under the Federal act.

Do not lose sight of the foregoing, for it will help one to readily understand the working of the act.

There is just one difference between the Federal act and Chapter 242, not a difference in principle, but a difference in wording, so as to make the principle applicable generally, instead of to the one class of railroad and railroad employes. The difference is merely this: That under the Federal act no inquiry is made as to whose negligence is greater, whereas that inquiry must always be made under Chapter 242. Under the Federal act, the inquiry is as to whether the railway company is at all negligent. If it is, it must pay the employe his damage, but it is reduced by an amount which is equivalent to the employe's own negligence. If the railroad company is found to be in any degree negligent, liability is immediately fixed upon it. Under Chapter 242, inquiry must be made to ascertain who is most negligent in order to fix liability on him. After it is so fixed, he stands in the position of the railway company under the federal act, while the party least negligent stands in the position of the employe under the act.

It may be put in another way: The reason for adopting the theory of who is most negligent and who is least negligent is to find who will stand in the position of the railway company, and who in the position of the employe. The most negligent, under Chapter 242 is in the position of the railway company under the Federal act. The least negligent, under Chapter 242, is in the position of the employe under the Federal act. Just as in the Federal act, liability is immediately imposed upon the railway company to pay the damage of the employe when it has been negligent, so under Chapter 242, liability is immediately imposed upon the person judged most negligent to pay the damage of the one found least negligent. And just as under the Federal act, the railway company's liability is diminished in proportion to the negligence attributable to the employe. So under Chapter 242, the liability of the one most negligent is diminished in proportion to the negligence attributable to the party least negligent.

## DEVELOPMENT OF COMPARATIVE NEGLIGENCE LAW IN WISCONSIN.

An examination of the Wisconsin statutes discloses that with respect to negligence of fellow servants the law provides that there shall be an ascertainment of who is most negligent in order to determine recovery. Chapter 254, Laws of 1907 (Section 1816, subsections 2, 3 and 4) reads as follows:

*Fellow employe's negligence.* (2) When such injury . . . shall have been sustained by an officer, agent, servant, or employe of such company, while engaged in the line of his duty as such and if such injury shall have been caused in whole or in greater part by the . . . negligence of any other officer, agent, servant or employe of such company, in the discharge of, or . . . by reason of failure to discharge his duties as such . . .

*Court's questions to jury.* (3) In every action to recover for such injury the court shall submit to the jury the following questions: First, whether the company, or any officer, agent, servant or employe other than the person injured was guilty of negligence directly contributing to the injury; second, if that question is answered in the affirmative, whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company, or any officer, agent, servant or employe other than the person so injured; and such other questions as may be necessary.

*Comparative Negligence.* (4) In all cases where the jury shall find that the negligence of the company, or any officer, agent or employe of such company, was greater than the negligence of the employe so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover, and the negligence, if any, of the employe so injured shall be no bar to such recovery.

Therefore Wisconsin cases construing the above law are applicable to Chapter 242, Laws of 1931.

Observe that under the foregoing law, when the company was found more negligent than the employe, the latter recovered his full assessment of damage. There was no offset nor was his damage diminished in proportion to his own negligence. In 1913, however, Chapter 644 was enacted which virtually repealed subdivisions 3 and 4 of the 1907 laws and created a new subsection (3) which reads as follows:

(3) 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 EMPLOYE, OR WHERE SUCH INJURIES HAVE RESULTED IN HIS DEATH, THE FACT THAT THE EMPLOYE MAY HAVE BEEN GUILTY OF CONTRIBUTORY NEGLIGENCE SHALL NOT BAR A RECOVERY, BUT THE DAMAGES SHALL BE DIMINISHED BY THE JURY IN PROPORTION TO THE

## AMOUNT OF NEGLIGENCE ATTRIBUTABLE TO SUCH EMPLOYEE.

It is well at this point to set forth the foregoing laws as amended from time to time as they are now in force. The 1907 act and 1913 act became Section 1816. Section 1816 and its subsections are now 192.55, last published in the 1927 edition of the Revised Statutes. The following is still in force:

(1) WHEN SUCH INJURY IS CAUSED BY A DEFECT OR INSUFFICIENCY IN ANY LOCOMOTIVE, ENGINE, CAR, RAIL, TRACK, ROADBED, MACHINERY OR APPLIANCE USED BY ITS EMPLOYEES IN AND ABOUT THE BUSINESS OF THEIR EMPLOYMENT.

(2) WHEN SUCH INJURY SHALL HAVE BEEN SUSTAINED BY ANY OFFICER, AGENT, SERVANT OR EMPLOYEE OF SUCH COMPANY, WHILE ENGAGED IN THE LINE OF HIS DUTY AS SUCH, AND WHICH SUCH INJURY SHALL HAVE BEEN CAUSED IN WHOLE OR IN GREATER PART BY THE NEGLIGENCE OF ANY OTHER OFFICER, AGENT, SERVANT OR EMPLOYEE OF SUCH COMPANY, IN THE DISCHARGE OF, OR BY REASON OF THE FAILURE TO DISCHARGE HIS DUTIES AS SUCH.

(3) 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 A RECOVERY, BUT THE DAMAGES SHALL BE DIMINISHED BY THE JURY IN PROPORTION TO THE AMOUNT OF NEGLIGENCE ATTRIBUTABLE TO SUCH EMPLOYEE. PROVIDED, THAT NO SUCH EMPLOYEE WHO MAY BE INJURED OR KILLED SHALL BE HELD TO HAVE BEEN GUILTY OF CONTRIBUTORY NEGLIGENCE IN ANY CASE WHERE THE VIOLATION BY SUCH RAILROAD COMPANY OF ANY STATUTES ENACTED FOR THE SAFETY OF EMPLOYEES CONTRIBUTED TO THE INJURY OR DEATH OF SUCH EMPLOYEE. PROVIDED, FURTHER, THAT IN ANY ACTION BROUGHT AGAINST ANY COMMON CARRIER UNDER OR BY VIRTUE OF ANY OF THE PROVISIONS OF THIS ACT TO RECOVER DAMAGES FOR INJURIES TO, OR DEATH OF, ANY OF ITS EMPLOYEES SUCH EMPLOYEE SHALL NOT BE HELD TO HAVE ASSUMED THE RISK OF HIS EMPLOYMENT IN ANY CASE WHERE THE VIOLATION BY SUCH COMMON CARRIER OF ANY STATUTES ENACTED FOR THE SAFETY OF EMPLOYEES CONTRIBUTED TO THE INJURY OR DEATH OF SUCH EMPLOYEE.



It will be observed from the foregoing that Section 2, with respect to the fellow servant rule, still requires the ascertainment of the fact as to who is the greater negligent and Section 3 provides for diminishing the damages in proportion to the amount of negligence attributable to the employe seeking recovery. In the foregoing statutes we have therefore the two elements present in Chapter 242, Laws of 1931, namely: ascertainment of the fact who is greater negligent, and the diminishing of damages in proportion to the amount of negligence attributable to the person recovering.

#### CONSTRUCTION OF 192.55 WIS. STAT. 1927.

Therefore cases construing the Wisconsin statute afore-quoted are important. A reading of the following cases will be helpful:

*Kunza vs. Chicago & N. W. Ry Co.* 140 Wis. 440.

"Should the jury answer these questions in the plaintiff's favor the fact would thereby be established that the plaintiff was a servant 'engaged in the line of his duty as such' at the time of his injury within the meaning of Subdivision 2, Section 1816, Statutes 1898, as amended by ch. 254, Laws of 1907, and the jury would then be required to determine whether the plaintiff was guilty of contributory negligence in riding in the engine as he did, instead of in the caboose as he might have done on the evening in question, and, if so, whether such negligence was slighter or greater than the negligence of the telegraph operator who failed to deliver or transmit the train order."

*Schendel vs. Chi. & N. W. Ry. Co.*, 147 Wis. 441.

This case is of interest as bearing on the feature of who is greater or lesser negligent. The court suggests as an appropriate question in the special verdict;

"Was the negligence of the defendant greater as a contributing cause to the injury than that of the plaintiff?"

(We digress to call attention to a statement of Justice Marshall in a dissent:)

"The comparative negligence law should be administered in its spirit, rather than in its letter, otherwise what was intended to be a beneficial change in our system might prove to be the very reverse."

*Zeratsky vs. Chi. N. & St. P. Ry. Co.* 141 Wis. 423.

This case illustrates the working of the 1907 law.

"2. Under Section 1816, Statutes. (Laws of 1907, ch. 254), in an action against a railway company for injuries sustained by an em-

ploye, it is for the court to determine whether the evidence tends to show negligence attributable to the company and whether it tends to show contributory negligence of the injured person. If the evidence does so tend, it is for the jury to determine therefrom whether or not there was in fact such negligence or contributory negligence. If it is found that the negligence of both parties concurred to produce the injury, the jury is then to determine whether the negligence of the injured person was slighter or greater as a contributing cause to the injury than that attributable to the company, unless the evidence permits of but one inference, in which case the question is to be decided by the court as a matter of law." (Syllabus.)

The case is also authority for the proposition that the burden of establishing contributory negligence is not changed by the law and is on the defendant. The case also states that the court may, as a matter of law, determine whether there is any evidence tending to show negligence or contributory negligence and if there is evidence so tending it is for the jury to determine whether negligence or contributory negligence does exist. This case holds that the provision to determine whose negligence is greater is within the proper power of the legislature to enact and that once it is determined that the negligence of both parties contributed to produce the injury it becomes a question for the jury to determine whether the injured party's negligence was slighter or greater than that of the company. The determination is not to be made by "slight," "ordinary" or "gross" comparisons. The defendant must still establish that plaintiff was contributorily negligent and that such negligence was greater than defendant's.

*Jensen vs. Wisconsin Cent. Ry. Co.* 145 Wis. 326. Of special interest in this case is the decision in respect to the form of special verdict. It holds that the statutory language is unnecessary, but that the old forms of verdicts submitting questions of negligence and contributory negligence are not changed.

*Tidmarsh vs. Chi. M. & St. P. Ry. Co.* 149 Wis. 590. This case again calls attention to the special verdict and the necessity for so framing the same that the elements of the statute are properly covered. The lower court was reversed for failing to submit to the jury the question "as to whose negligence contributed in a greater degree to produce the injury." The question submitted when answered found that defendant's negligence was greater than plaintiff's. This was held not equivalent to a finding that such negligence contributed in a greater degree.

The foregoing, however, was based on the requirement in the railroad act to find that negligence "contributed in a greater degree." The wording of Chapter 242 is different in this respect in that it permits a party to recover if his "negligence was not as great as the negligence of the person against whom recovery is sought."

*Kalashian vs. Hines*, 171 Wis. 420. In this case the court adopted the method of submitting the question of contributory negligence on a percentage basis. The jury found that the plaintiff's negligence contributed to the extent of 40 per cent to his injury as compared to the total negligence of both company and employe. Sixty per cent of the damages found was allowed to plaintiff.

The writer is of the opinion that the submission of the question of percentages is out of line with the prevalent procedure in the Federal courts and in those states administering the comparative negligence law and that Chapter 242 contemplates that the amount written in by the jury as damages shall be for the diminished amount, for the law reads, "but any damages allowed shall be diminished by the jury . . ."

· *Richter vs. Chi. M. & St. P. Ry. Co.* 176 Wis. 188. Here again the submission was on percentages.

*Kiley vs. Chi M. & St. P. Ry. Co.* 138 Wis. 215. This case should be read by anyone interested in the subject for it discusses in detail the constitutionality of the act. It holds the law to be a safety measure and is an interesting discussion as to legislative attempt to hold all facts to be jury questions. The court holds that the section giving the jury alone the right to pass on the facts constituting negligence and contributory negligence must be so construed as not to deprive the court of the right to say whether the facts constitute issues warranting submission of the same to the jury.

See also *Ewig vs. Chi. M. & St. P. R. Co.* 167 Wis. 597.

*Boucher vs. Wisconsin Cent. Ry. Co.* 141 Wis. 160. Discusses the special verdict and the method of submitting the same.

*Panoff vs. Chi. M. & St. P. Ry. Co.* 155 Wis. 99. This case approves the trial court's submission of the question as to whose negligence is greater in the following form:

"If you find that mutual fault of the defendant and the plaintiff was the proximate cause of the injury was the fault of the defendant greater?"

The writer calls attention to a situation involving a counterclaim. The foregoing question would not be suitable since an answer of "no" would not indicate whether the negligence of the plaintiff was equal or less. If the defendant's negligence was equal to that of the plaintiff the defendant could not recover while if it was less the defendant could recover on his counterclaim.

(Examine question in the verdict at the close of this article.)

*Dohr vs. Wisconsin Cent. Ry. Co.* 144 Wis. 545. Trial judges and appellate courts will often disagree with the jury and be prompted to

determine as a matter of law whose negligence is the greater. That this should be rarely done is illustrated by the above case. In this case a section foreman was killed in a collision between his handcar and a train, both operating on the same track on a foggy day. The majority opinion held as a matter of law that the negligence of the parties causing the injury was not greater than that of the party injured and said that there was no question therefore to be submitted to the jury.

The point which the writer makes—that trial judges and appellate courts should be most reluctant to determine who is most negligent as a matter of law is illustrated by the dissent and the able opinion in support of it in this case. Justice Winslow, with whom Justice Siebecker concurred, said the following:

“As I see this case duty compels me to dissent.

“When two persons are negligent and injury to one proximately results from the combined negligence of both, it must often be a very delicate and difficult question to decide whether the negligence of one was greater than that of the other and contributed in a greater degree to produce the injury. There is no yardstick with which to measure the two acts of negligence, nor scales with which to weigh them. However, the legislature has determined that in certain classes of cases this delicate question shall be decided and that upon its decision shall depend liability, and this court has sustained and applied that law. It is not inherently more difficult to decide than many another question which courts and juries are daily compelled to decide. It is said in the opinion of the court that these questions must ordinarily be questions for the jury, and that they ‘can only be taken from the jury where there is total lack of evidence to support a finding that the negligence of the plaintiff was slighter, or a total lack of evidence to support a finding that the negligence of the other person contributed in greater degree to the injury.’

“With this proposition I entirely agree, but I do not regard it as a complete statement of the legal principles which bear upon the questions in this case.

“Negligence ‘is not a fact to be testified to, but can only be inferred from the *res gestae*—from the facts given in evidence. Hence it may, in general, be said to be a conclusion of fact to be drawn by the jury under proper instructions from the court. It is always so where the facts, or rather the conclusion, is fairly debatable or rests in doubt.’ *Langhoff vs. M. & P. du C. Ry. Co.* 19 Wis. 489.

“To draw this inference of fact from all the circumstances in evidence has been frequently said by this court to be ‘peculiarly the function of the jury.’ *Bohan vs. M., L. S. & W. Ry. Co.* 58 Wis. 30, 15 N. W. 801; *Fitts vs. Cream City Ry. Co.* 59 Wis. 323, 18 N. W. 186. It has been also called a mixed question of law and fact, which is never taken from the jury except in very clear cases. *Pool vs. C., M. & St. P. Ry. Co.* 56 Wis. 227, 14 N. W. 46.

“The question whether the negligence, if any, is the proximate cause of the injury complained of is also an inference of fact, which is under

all ordinary circumstances properly an inference to be drawn by the jury. *Atkinson vs. Goodrich T. Co.* 60 Wis. 141, 18 N. W. 764. If the inferences to be submitted to the jury, it seems to me to follow necessarily that the inferences as to the QUANTUM or extent of the negligence on each side and the degree to which it proximately contributed to bring about the injury must fall within the same rule. They cannot be properly taken from the jury except in very clear cases WHERE UNPREJUDICED AND REASONABLE MINDS CAN COME TO BUT ONE CONCLUSION. In all cases where the facts are numerous, the evidence contradictory or involved, and the conclusions in any degree doubtful, the proper inferences on all of these propositions must be for the jury.

"In the present case it seems to me there are unquestionably facts from which REASONABLE MINDS might draw different conclusions both as to the QUANTUM of negligence on each side and as to the degree in which such negligence proximately contributed to cause the injury."

It will be observed that the majority opinion is based purely on fact and the foregoing dissent is based purely on a construction of the fact—not of law. When such able and reasonable men as Mr. Justice Timlin, Mr. Justice Barnes, and other members differed on facts with Justice Winslow and Justice Siebecker, then it is quite manifest that the facts were such that reasonable minds could draw different inferences and come to different conclusions on the same. The jury therefore was the proper tribunal to have decided the case. It bears out what this writer and others have previously stated that on construction of law the court does not meet with as much difficulty as it does with construction of fact and in the latter respect the minds of judges operate no differently than the minds of jurors. Facts therefore should be left to be determined by that department of the tribunal of justice to which it constitutionally belongs—the jury.

#### FEDERAL CASES CONSTRUING THE ACT AND APPLYING THE RULE.

Since the Federal law involves the same principle as Chapter 242 it will be of interest to read several United States cases and we submit the following as to the method of applying the rule:

Norfolk & W. R. Co. vs. Earnest, 229 U. S. 114, 57 L. Ed. 1096, 33 S. C. R. 654.

Seaboard Air Line Ry. vs. Tilghman, 237 U. S. 499, 59 L. Ed. 1069, 39 S. C. R. 653.

Illinois Central Railroad Co. vs. Skaggs, 240 U. S. 66, 36 S. C. R. 249.

Dahlen vs. Hines, 275 Fed. 817 (Wis., 1921).

Grand Trunk Western Ry. Co. vs. Lindsay, 201 Fed. 836 (Illinois, 1912).

- Illinois Central Ry. Co. vs. Nelson, 203 Fed. 956 (Iowa 1913).  
 Louisville & N. R. Co. vs. Wene, F., 202 Fed. 887 (Indiana, 1913).  
 Illinois Central Ry. Co. vs. Porter, 207 Fed. 311 (Tennessee, 1913).  
 San Pedro, L. A. & S. L. Ry. Co. vs. Brown, 258 Fed. 806 (California, 1919).  
 Lehigh Valley Ry. Co. vs Scanlon, 259 Fed. 137, 144 (New York, 1919).  
 Pittsburgh C., C. & Ct. L. Ry. vs. Cole, 260 Fed. 357 Ohio, 1919).  
 Atlantic Coast Line R. Co. vs. Shouse, 91 So. 90 (Florida, 1922).  
 Central of Georgia Ry. Co. vs. Larsen 91 S. E. 517 Georgia, 1917).  
 Brant vs Chicago & A. R. Co., 128 N. E. 732 (Illinois, 1920).  
 Chapman vs. United States Express Co., 158 N. W. 309 (Michigan, 1916).  
 Hall vs. Northern Pacific Ry. Co., 186 Pacific 340 (Montana, 1919).  
 Hicks vs. Southern Ry. Co., 127 S. E. 552 (North Carolina, 1925).

There is a note on the comparative negligence rule under the Federal Employee's Act in 72 A. L. R. 1345. An examination of the cases, however, does not throw much light on the subject to which our attention is directed. Likewise the note in 12 A. L. R. is not of any material aid.

The Federal rule has been stated by the Wisconsin Supreme Court as follows:

"There was, of course, ample evidence to justify a finding that Ewig was guilty of contributory negligence, but contributory negligence does not defeat the action under the federal law, but simply requires that the proportion of such negligence be ascertained and the damages diminished to that extent. See act as printed in Second Employers' Liability Cases, 223 U. S. 1, 6, 32 Sup. Ct. 169."

Ewig vs. Chicago, M. & St. P. R. Co., 167 Wis. 597.

"Now under the federal statute the contributory negligence of a plaintiff so proximately contributing to his injury, there being also negligence by the defendant also so contributing, has not other effect than to diminish proportionately the amount of plaintiff's recovery. So long as the situation disclosed negligence on the part of both the plaintiff and defendant, each of which contributes in some degree as a proximate cause of the injury, it is a question only of the apportionment of the damages rather than a bar to the plaintiff's right of recovery. Norfolk & W. R. Co. vs Earnest, 229 U. S. 114, 122, 33 Sup. Ct. 654; Grand Trunk W. R. Co. vs. Lindsay, 233 U. S. 42, 49, 34 Sup. Ct. 581; Seaboard A. L. Ry. vs. Tilghman, 237 U. S. 499, 501, 35 Sup. Ct. 653; Illinois Central Ry. Co vs. Skaggs, 240 U. S. 66, 70, 36 Sup. Ct. 249; N. Y. C. & St. L. R. Co. vs. Niebel, 214 Fed. 952; Lehigh Valley R. Co. vs. Scandon, 259 Fed. 137; Ewig vs. C. M. & St. P. Ry. Co. 167 Wis. 597, 060, 167 N. W. 442, 169 N. W. 429."

Kalashian vs. Hines, 171 Wis. 429.

"The decision of the question whether the employment was within the federal act is necessary, since under that act, if the negligence of

plaintiff and defendant proximately concur in causing the injury, contributory negligence on the part of plaintiff is not a complete defense: It is only a question of apportionment of damages. *Kalashian vs. Hines*, 171 Wis. 429 (177 N. W. 602) and cases cited on p. 439."

*Richter vs. Chicago, M. & St. P. Ry. Co.* 176 Wis. 188.

The foregoing cases indicate that the act does not create a "law of majorities," or "differences," or even "percentages." It merely abrogates the common law which completely exonerated the person against whom claim was made from liability to the claimant if the latter was guilty of negligence—the law now exonerates the party most negligent of a proportion of the damage sustained by the party least negligent, and the proportion is arrived at by diminishing the damage to the extent of negligence chargeable to the party least negligent, and the jury finds the diminished amount. This is well stated by Mr. Justice Van Devanter in the case of *Norfolk & W. Ry. Co. vs. Earnest*, 229 U. S. 114, 33 S. C. R. 654, 57 L. Ed. 1096.

The purpose is:

"To abrogate the common law rule completely exonerating the carrier from liability in such a case and substituting a new rule confining the exoneration to the proportionate part of the damage corresponding to the amount of negligence attributable to the employe."

PERCENTAGES OUGHT NOT TO BE USED, JURY SHOULD BE INSTRUCTED AS TO RULE AND MAKE DEDUCTIONS BEFORE FINALLY FINDING DAMAGES, THEN TO MAKE AWARD.

The law is not administered by mathematics and percentages. The method is to charge the person most negligent with all the damage suffered by the party least negligent, and to give credit to the party most negligent for an amount in money equivalent to the proportion of negligence chargeable to the party least negligent.

"The court by its instruction held that the evidence showed that the defendant was guilty of negligence, which made it liable for damages to the next of kin for causing decedent's death. In this the jury concurred. It also held, the jury concurring, that decedent was guilty of contributory negligence, and the court thereupon held that, to the degree in which such contributory negligence contributed to the injury, the liability of defendant should be abated. Thus the amount of damages to the next of kin, for which defendant should be held in the first instance, and the amount thereof which should be abated by reason of decedent's contributory negligence were the only matters left for the jury to pass upon. The question as submitted was not as to the proximate cause, but as to the degree of negligence of the respective parties. Manifestly, to give effect to the act, it is essential that the relative

amounts of damages caused by the negligence of the respective parties should be declared, and we know of no fairer method than that followed by the trial judge in this case."

(Grand Trunk Western Ry. Co. vs. Lindsay, 201 Fed. 836 followed.) "The construction of this act asked for by defendant, viz., that, if the jury should find from the evidence that the negligence of plaintiff equaled or exceeded that of defendant, then they could assess no damages against the defendant, is not deemed by us to be the proper construction of the act . . . The jury having found that plaintiff was guilty of contributory negligence, were at liberty within the evidence, to find that the contributory negligence contributed any proportion of the damages, even to substantially all thereof, if justified by the evidence. In the present case they rendered a verdict for \$2,500 less than the maximum statutory amount, and that action may well imply that they made due allowance for any offset defendant was entitled to by reason of decedent's contributory negligence."

Louisville & N. R. Co. vs. Wene, 202 Fed. 891 (Jan. 7, 1913, Circuit Ct. of Appeals, 7th Circuit).

It will be seen from the foregoing that under the Federal act even if the employe is more negligent than the railroad he nevertheless recovers. Under Chapter 242 of the Laws of 1931, of Wisconsin, if the negligence of the claimant exceeded or equaled that of the person claimed against, recovery cannot be had by claimant. This is on account of the wording which permits recovery only to the one least negligent.

### A SIMPLE CASE

To correctly understand the submission of the question to the jury in any case, it is necessary to understand the rule in connection with the simplest case, namely, two parties, one of whom is claimant, the other counterclaimant, and the case submitted on a general verdict. If that is once understood, the apparent difficulty in submitting the subject when there are more than two parties to the controversy with counterclaims and cross-complaints, and by special verdict, will soon disappear.

When "A" sues "B" he recovers only in the event his negligence is less than "B's." If it is greater, he loses. If "B" has interposed a counterclaim, he recovers on it if his negligence is less than "A's." The amount of recovery is the full damage sustained by the one less negligent reduced, by the jury, by the amount of negligence attributable to him as translated into money.

### TWO SUED AND CONTRIBUTION SOUGHT:

When two are sued or contribution is sought the method is as follows:

If "A" sues "B" and "C," he recover 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. Now let us assume "A" sues "B" alone and obtains a judgment. After paying it, "B" starts an independent action against "C" for contribution; it will be necessary to ascertain whether "C's" negligence was more than "A's" (even though "A" is not a party to this action). If it is, "B" will have *contribution of half*. If "C's" negligence is less than "A's," "B" will not be entitled to contribution. If counter-claims are interposed, the method of submission should be on the basis of the rule that the one who is most negligent pays the one who is least negligent. There ought to be no difficulty in applying the rule as to counterclaims.

#### IS ACT SUSCEPTIBLE OF A DIFFERENT CONSTRUCTION THAN THAT PRO- NOUNCED IN FEDERAL AND WISCONSIN CASES?

The law may be susceptible of two constructions. One is to compare the negligence of the claimant, with the combined negligence of himself and the party complained against. Then the party most negligent is liable to the party least negligent for all of the latter's damage except the same is diminished in proportion to the amount of negligence attributable to him. Under this construction the one least negligent will always be entitled to more than fifty per cent of his damage since the negligence of the party greater negligent will always exceed fifty per cent. For the purpose of illustration we resort to percentage: "A" sues "B." "B" is found to be sixty per cent negligent and "A" forty per cent negligent. "A's" damage is \$1,000. This sum is to be diminished by forty per cent or \$400 and the jury will award "A" \$600. This is the rule laid down by the Federal courts and the Wisconsin courts construing the Federal act. (See *Kalashian v. Hines*, 171 Wis. 429 and *Richter v. Chi., M. & St. P. R. Co.*, 176 Wis. 188.) In other words the damages are to be diminished in proportion to the amount of negligence attributable to the party least negligent as compared with the combined negligence of him and the party most negligent.

Now another question arises—can the following construction be put upon the act? Consider the negligence of each party as a separate unit. For the purposes of illustration we shall again resort to percentages. "A" sues "B" and "B" is considered most negligent. He is

then charged with an entire unit of imperfection or one hundred per cent of negligence. "A" is found to be guilty of ninety per cent imperfection or ninety per cent of negligence as compared with his own unit. The damage being \$1,000 he would be entitled to but \$100 of his \$1,000 of damage.

Although the writer was of the opinion that the act is susceptible of the latter construction, he frankly confesses that the adjudicated cases are against it and that the first method is the one adopted by the courts in construing that language of Chapter 242 which is almost identical with the Federal act: "but any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributable to the person recovering" (Chapter 242); "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe," (Federal act.) The first method, therefore, is the correct one.

PARTY OBTAINING JUDGMENT AGAINST SEVERAL TORT FEASORS MAY RECOVER FROM ONE OR ALL. LIKEWISE RULE AS TO EQUALITY OF CONTRIBUTION BETWEEN JOINT FEASORS IS NOT CHANGED BY THE ACT.

Under the first method above referred to there should not be any difficulty when the claim is against more than one person, and contribution is involved. For instance, "A" sues "B" and "C." The jury finds that "A" is least negligent and that "B" and "C" are both more negligent than he is. Again using percentages merely for the purpose of illustration "A" is found twenty per cent negligent and the remaining eighty per cent is the combined negligence of "B" and "C." If "A's" damage is \$1,000 such damages are reduced by his negligence or by \$200 and he recovers the balance of \$800 from "B" and "C." The fact that "B" and "C" may not be equally negligent does not affect "A." He can recover his damages from "B" or "C," or both. The rule that an injured party may recover his damages from one joint tortfeasor or both is not changed by Chapter 242. Likewise under Chapter 242, the rule as to contribution between joint tortfeasors is not changed. They are liable each to the other for one-half of the judgment, irrespective of who is more or less negligent as between these tortfeasors, each of whose negligence is greater than the claimant's.

GROSS NEGLIGENCE.

The question will arise as to whether one guilty of ordinary negligence is to have his damages diminished when he is entitled to recover against one guilty of gross negligence. Mississippi holds that the com-

parative negligence law virtually wipes out degrees of negligence and creates merely "negligence." It holds that the party guilty of what would, without the statute, be gross negligence is entitled to have the damages diminished even though the negligence of the party recovering is within the field of what would, without the statute, constitute ordinary negligence. See *YAZOO & R. CO. v. CARROLL*, 103 Miss. 830, 60 So. 1013, which in effect says:

"This statute does not deal with, and was not intended to introduce into our jurisprudence, degrees of contributory negligence, but it deals with contributory negligence of every character.

In discussing this subject with judges and members of the bar at the recent convention at Superior, some suggested that since the statute merely bars contributory negligence as a defense it can only apply to those cases where it was a defense before the statute; they were of the opinion that it cannot apply to situations of gross and ordinary negligence involved in the same accident. They contend since ordinary negligence was not a bar to recovery where gross negligence was found on the part of other party, Chapter 242 does not apply. Although the writer leaned in favor of the construction permitting a reduction under the circumstances of gross and ordinary negligence he does not wish to be understood at this time that he has come to any conclusion or that he expresses an opinion. He does, however, lean towards the view that degrees of negligence if not entirely abolished are of less consequence since the passage of this act.

#### THE ACT DOES NOT CHANGE LAW AS TO PUNITORY DAMAGES.

Of course, punitive damages where allowable now in the discretion of the jury, will still be allowable under Chapter 242.

#### THE ACT DOES NOT CHANGE LAW AS TO BURDEN OF PROOF AND PROXIMATE CAUSE.

Under Chapter 242 it will be necessary for the party complaining to establish negligence on the part of the party complained against. It will be necessary for the party seeking to defeat recovery to establish contributory negligence on the part of claimant, and that such contributory negligence is greater. It will be necessary for the party asserting negligence on the part of the other to establish that such negligence is a proximate cause of the injury he complains of.

While under the Wisconsin practice it may not strictly be necessary to plead by way of defense contributory negligence for the purpose of obtaining a diminution of damages, it seems to the writer, under the comparative negligence law, it will prove better practice to affirmatively plead contributory negligence as a whole and partial defense. It is necessary to do so in some states under the Federal Act.

JURY SHOULD BE INFORMED BY COURT AND LAWYERS AS TO WORKINGS  
OF THE LAW.

Under Chapter 242, the rule that court and lawyers must not inform the jury of the effect their answers will have on the outcome of the suit is virtually abrogated, for this writer cannot conceive how a jury can justly make findings and bring in a verdict unless it is fully and properly instructed as to the rule and the effect of the same on the outcome. This writer may digress to say that he has never been convinced that the rule as used for many years in this state has been conducive to justice. The law provided no means of ascertaining how many on a jury knew the effect of the answer to contributory negligence. A smart juror has frequently encouraged other jurors to find contributory negligence by misleading them as to the effect of answer in a verdict. Although told not to, jurors will consider the effect. It would have been productive of much greater justice if a special verdict were treated in the same manner as the general verdict insofar as jurors' realizing the effect of their labors is concerned. Blindfolders ought never to be put on a jury under the comparative negligence law. A much more intelligent verdict will be secured because of the knowledge jurors will have as to the effect of their findings.

ROMAN CIVIL LAW AND MARITIME LAW.

Comparative negligence is used in the Roman Civil Law and, in a degree, is used in maritime law. We shall not discuss the Maritime Law nor the Civil Law. These subjects may be of interest to the student, but not of very much help in the administration of comparative negligence laws as adopted by statutes in the United States. There is ample authority to guide us in the administration of the statutory enactments. To those who may be interested in the admiralty feature, we refer you to 1 Corpus Juris, page 1327, Sec. 238. A leading case in United States Admiralty Law is *The Steamer Max Morris vs. Curry*, 137, U. S. 1, 34 L. Ed. 586. The case is worth reading as there is contained in it an excellent discussion of the principle of comparative negligence. It should be borne in mind, however, that Admiralty Law is administered without a jury. As to the Civil Law, we refer you to 40 Corpus Juris, page 1324, Sec. 127, Paragraph 4. The article in Corpus Juris is not exhaustive.

IS THE ACT RETROACTIVE?

The question is presented whether Chapter 242 is remedial or deals with substantive rights and whether it is retroactive. The writer does not wish to express a final opinion on this matter but submits it for

further study by the profession. The case of *Clemons vs. Chicago, St. P. M. & O. R. Co.*, 137 Wis. 387 may be of considerable assistance. This case applies to Chap. 595, Laws of 1907, and holds that a law of this nature is not retroactive, particularly where the legislature fails to so specify in the enactment. We call attention to 32 A. L. R. p. 803 under the note "AS A MATTER OF REMEDY OR PROCEDURE." There is also a note in 45 Corpus Juris p. 1043, section 599, under the title "What Law Governs." The case of *Johnson v. Chicago, etc., R. Co.*, 59 N. W. 66 (Iowa) holds that the doctrine permitting recovery is a remedial right. There are however other cases which hold that it is a substantive right. See *Keane Wonder Min. Co. v. Cunningham*, 222 Fed. 821, 138 CCA 247; *Caine v. St. Louis, etc., R. Co.*, 209 Ala. 181, 95 S 876, 32 ALR 793; *Louisville, etc., R. Co. v. Whitlow*, 105 Ky. 1, SW 711, 41 LRA 614, 19 KYL 1931. We call attention to the case of *Fuller v. Ill. Cent. R. Co.*, 56 So. 783, Miss. 1911, wherein the court says in discussing the comparative negligence statute "but this statute has no reference to the instant case because passed subsequent to the injuries complained of."

See also the case of *Freeby v. Incorporated Town of Sibley*, 191 N. W. 869, Iowa (1923), wherein in a decision of a statute involving comparative negligence the court says:

"This statute did not go into effect until July 4, 1915. The injury complained of, on which this suit was brought, occurred in June, 1914. Said statute affected a substantial right. It was not retrospective. We do not think it applied in this case where the action had fully matured prior to the time said statute went into effect. In this case the ordinary rule which required the appellant to allege and prove that the decedent was free from contributory negligence applied."

However, the writer calls attention to the case of *Reiter vs. Grober*, 173 Wis. 493. For many years and under a long line of decisions this state had adhered to the doctrine of imputed negligence. This, in the opinion of the writer, created a substantive right in favor of the defendant who was sued by the occupant of a vehicle, the driver of which was guilty of negligence. Under the doctrine of imputed negligence the defendant was not liable to the guest in a car when the driver-host was negligent. Thus the defendant won out through imputed "contributory negligence." In *Lightfoot vs. Winnebago T. Co.* 123 Wis. 479, "Mr. Chief Justice Cassoday said that the rule had been steadily adhered to and that if a contrary rule was to prevail it was for the legislature to say so." Yet in *Reiter vs. Grober* the court held that this defense of "contributory negligence" imputed to the guest so as to defeat his recovery "is not a rule of property. It is a pure judicial

decree relating to liability for negligence, and the court would not for a moment give countenance to an argument that a wrongdoer relied upon it. We are therefore at liberty to change the rule in the interests of justice and to conform to the overwhelming majority rule." (Citing authorities.) If the *court* can abolish contributory negligence as a defense, surely the legislature may do so—*Lightfoot vs. Winnebago T. Co.*, *supra*. *Reiter vs. Grober* was made immediately applicable to the precise case and every other action then pending or cause of action thereafter brought. The writer can see no difference in the abandonment of contributory negligence as a defense in the case of a guest than in the case of any other claimant and under the authority of *Reiter vs. Grober* it would seem that the legislature having changed the rule of contributory negligence as a defense did no more than the court did in *Reiter vs. Grober* and that Chapter 242, Laws of 1931 is immediately applicable to all pending actions and all actions brought for injuries occurring prior to the passage of the act. The writer is aware, however, of the contention that the change of a rule of law by a court as in *Reiter vs. Grober* carries with it a declaration that the rule as changed was always the law but had been incorrectly applied, while no such declaration is implied in a statutory change. To follow this further will involve a discussion of "judicial legislation" which the writer is not disposed to enter into in this article.

#### FORM OF SPECIAL VERDICT RELATING TO COMPARATIVE NEGLIGENCE ON COMPLAINT AND COUNTERCLAIM.

(The form of verdict follows *Hamus vs. Weber*, 199 Wis. 320.)

Question 1: In operating his automobile at the time of and immediately preceding the collision, was the defendant Smith negligent in respect to speed and control of his car?

Answer: \_\_\_\_\_

Question 2: If you answer Question 1 "Yes," then answer this: Was the defendant Smith's negligence a cause of the collision?

Answer: \_\_\_\_\_

Question 3: In operating his automobile at the time of and immediately preceding the collision, was the plaintiff, Jones, negligent in respect to the speed of his car?

Answer: \_\_\_\_\_

Question 4: If you answer Question 3 "Yes," then answer this: Was the plaintiff Jones' negligence a cause of the collision?

Answer: \_\_\_\_\_

Question 5: In the event you answer all of Questions 1, 2, 3 and 4 "Yes," then answer this: Was the negligence of defendant Smith greater or less than the negligence of the

plaintiff Jones? Answer by writing in the word "greater" or the word "less."

Answer: -----

Question 6: In the event you answer all of Questions 1 and 2 "Yes," and 3 or 4 "No," then answer this: What is the full damage Jones has sustained?

Answer: \$-----

Question 7: In the event you answer all of Questions 1, 2, 3, 4 "Yes" and 5 "greater" then answer this: What is plaintiff Jones' damage as diminished in the proportion to the amount of negligence attributable to him?

Answer: \$-----

Question 8: In the event you answer Question 1 or 2 "No," and Questions 3 and 4 "Yes," then answer this: What is the full damage Smith has sustained?

Answer: -----

Question 9: In the event you answered all of Questions 1, 2, 3 and 4 "Yes," and Question 5 "less," then answer this: What is defendant Smith's damage as diminished in the proportion to the amount of negligence attributable to him?

Answer: \$-----