Proportioning Comparative Negligence: Problems of Theory and Special Verdict Formulation

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Whatever proves to be the eventual denouement of the current wave of wholesale attacks on the fault principle as the keystone of tort liability, it is now plainly apparent that many jurisdictions will move inexorably toward more sophisticated distinctions of degrees of fault than conventional tort law has previously recognized. There has been a current resurgence of interest in various comparative negligence systems, primarily as a substitute for the all-or-nothing approach of the traditional contributory negligence doctrine, but of incidental interest in buffering the ill-defined "strictness" of new doctrines of product liability and other "risk allocation" concepts. At the same time, the conventional refusal to permit "wrongdoers in pari delicto" to recover contribution from one another has begun to yield to more sophisticated notions of "equitable" contribution, involving one or another conception of cooperative or "comparative" fault.¹

Without any necessary intention to commend or condemn these trends, there is a serious need for some objective analysis of the theoretical and practical problems involved in them. A close study of Wisconsin's experience with its comparative negligence and comparative contribution doctrines, and their procedural implementations, yields a rich lode of provocative questions and answers, particularly significant to the general bar because Wisconsin's comparative negligence formula appears, on broad consensus, to be favored over the small group of other systems with which there has been any amount of legal and practical experience. On August 12, 1969, the House of Delegates of the American Bar Association adopted the report of its Special Committee on Automobile Reparations, recommending that the various states adopt a Wisconsin type of comparative negligence supported by a special verdict procedure.²

² A.B.A. Special Committee on Automobile Reparations 77, Jan. 27, 1969.
SOME PREFATORY CONVICTIONS

It may be well to preface an analysis such as this with a few basic observations which may help to identify the jurisprudential point of view from which it proceeds. First of all, the matter cannot be approached objectively from a plaintiff-oriented, defendant-oriented, or insurance-oriented standpoint, because there will inevitably be a whole welter of offsetting benefits and detriment to each of those interest-groups, concentration on which will only serve to obscure and confuse the real issues. The only interest appropriate for concentrated attention is the broad interest of the bench and bar in improving the fairness and efficiency with which the tort system operates.

Second, there is nothing to be gained by limiting the study either to purely theoretical or purely procedural or practical considerations. Flawed theory inevitably erupts in unworkable and wasteful practice and procedure; and even the most perfect of theoretical solutions to a problem is sterile and useless if it is not accompanied by procedural and practical implementation of at least adequate quality. Nevertheless, it is impossible to analyze an integrated question without separating its theoretical from its practical parts, recognizing, in doing so, that no broad conclusions may be drawn until those essentials are reunited in a single context.

DEGREES OF FAULT—THE CONCEPT ITSELF

On these foundations, we may proceed to examine the theoretical concept of "degrees of fault." Immediately, we encounter an anomaly, with which we will be required to struggle throughout our study. "Fault" is not a finite object. It is, rather, an evaluative judgment about the quality of conduct or performance. As such, it is not a judgment which proceeds out of sensory observation or measurement in the same direct sense that quantitative evaluations or conclusions do. A judgment of fault, in other words, is only mediately supported by objective evidence; immediately and directly, it is a subjective legal or ethical pronouncement of responsibility for wrongdoing.

It is therefore inevitable that every such judgment will be heavily colored by the personal ethical code, and by the conscious and unconscious moral prejudices and rationalizations, of the individual who makes it. The ethically overscrupulous person will find fault in circumstances in which the libertine will find none; and, in circumstances where both will concede that fault is present, the overscrupulous judge or juror will recognize gross fault where the liberal will find relatively slight wrongdoing.

It is out of a candid recognition of the essential subjectivity of these judgments that "the rule of law" attempts, by book and by instruction, to superimpose its own standards and definitions on subjective conceptions of fault and nonfault, and solemnly charges its judges and jurors
to adopt and apply those standards and definitions in the process of litigation. In this vein, we devise careful legal definitions of such concepts as "negligence" and "cause," identifying specific standards for determining their presence or absence.

If, for lack of any alternative, we are compelled to accept the somewhat naive notion that this process of superimposition really works to unseat the studied or instinctive preconceptions of the individuals concerned, it is sheer fantasy to assume that subjective standards of evaluation will not continue to govern the matter where no rational or objective legal standard or definition is possible, or is even suggested. Such is the case with respect to the concept of "degrees of causative negligence.

This is not necessarily to exclude all logical possibility of declaring "degrees" (or proportions, ratios, percentages, fractions, quotients, or other measurements or comparisons) of fault. It is simply to suggest that such measurements and comparisons, unlike their more familiar physical counterparts, are ultimately judgments which have only one legally defined reference point. Fault, like virtue or pregnancy, may be confidently asserted, on stated facts, only to be either present or absent, because once the legal or ethical judgment is made, it has consumed its own definition.

Contrast physical measurements of all kinds, which are, by definition, inevitably relative, and can only be expressed, in comparative terms, by employment of at least two reference points. Between the subtle activity of a "stationary" vehicle and the blinding progress of light, there are defined "degrees" of speed or movement, none of which touches the absolutes of zero or infinity. Because finite objects do not depend upon human judgment for their existence or for their physical attributes, they are inherently capable of being scaled and measured against the objective, sure, and consistent standards of the physical and mathematical sciences.

In law, however, we find objective evidentiary support only for our findings of what has happened, or of what was done or not done. But the superimposed declaration, that the conduct so found is blameworthy or blameless, is capable of accurate comparative evaluation only in the sense that it can be declared, somewhat analogously, to be more or less blameworthy than other blameworthy conduct (actual or hypothetical), which may be adopted as an ad hoc standard for comparison. Qualitative thought, in short, is not inherently susceptible of supportable comparison except, at most, in terms of good-better-best or bad-worse-worst. To assert a judgment that one instance of wrongdoing represents a precise degree of mathematical "worseness," even as compared to another, requires the presence of a calibrated scale of "badness," which simply does not exist in reality or in our conceptual framework.
Nor do we help the matter significantly if we assert that what we seek to measure is not degrees of negligence (or other wrong) but degrees of "cause," or contribution to a stated damage, injury, or accident. This is true essentially because, as men of science (and especially psychiatrists and psychologists) have repeatedly reminded the bench and bar, it requires the simultaneous, interactive, and cooperative presence of a number of conditions to produce a given result. To suggest the possibility of "weighing" the relative causal contribution of one such condition, regarded in isolation from the others, is necessarily to deny the essential interaction of causes without which the precise result would not have occurred. Thus, while it is possible to state whether or not a given condition or circumstance was a cause, or contributing condition, of a given composite result, it is not possible to specify or isolate the precise degree of its contribution to that result.

Especially is this true if we attempt to measure the causal contribution of an isolated factor against less than all of the causes involved in producing the composite result under investigation. By that process, we produce a relative numerical rating or "weight" which is not relative to the result itself; but is, at best, valid only as a comparative evaluation of the factors considered. Assume, for example, that factors a, b, and c actually combine to produce a result, so that those factors, regardless of their individual values, constitute 100 percent of the causes of that result. If factor c is excluded arbitrarily from consideration, it is obvious that factors a and b must now be regarded, together, as constituting 100 percent of the causes of the same result, necessarily increasing the percentage-value attributed to one or both of those factors. If factors a, b, and c are assumed to have equal values, the arbitrary exclusion of one of the factors increases the scale value of the remaining factors from 33 1/3 percent to 50 percent.

The problem reaches maximum intensity if the scale-values sought to be assigned are themselves a composite of two distinct standards of evaluation, as is true when we attempt to attach a single relative value to the concept of "negligent cause." As suggested above, neither negligence nor cause, taken independently, is capable of any specific evaluation in numerical terms; and, while not all negligence is necessarily causal with respect to a given damage or injury, neither are all causes of the damage or injury necessarily negligent, or necessarily actionable even if negligent (as in the case of immunities). Passing these questions, we lack any standard under which high degrees of negligence can be integrated with low degrees of causation, or vice versa, so as to produce a numerical composite of the two in either absolute or relative terms.

Identical considerations apply to all processes of mathematical relationship or comparison, whether stated in terms of proportion, per-
centage, ratio, fraction, or quotient—all of which are different expressions of the same basic process of comparing one thing with another. All depend, for their validity, upon the accuracy with which one fixes the objects to be compared upon a calibrated scale having some sort of defined dimensions. We cannot validly allocate proportions, percentages, ratios, fractions, or quotients to the concept, at least without a clear acknowledgment that our allocations are subject to all of the potential errors and approximations of every process of somewhat strained analogy. By the same token, such attempted dimensioning of qualitative concepts must not be expected to yield results which will withstand precise analysis or factoring in terms of consistent mathematical formulae. The analogical process may have a decent degree of validity and consistency in some relatively simple and general applications, but fail entirely to meet those standards in other, more complex or specific, applications.

We therefore summarize this brief theoretical analysis of the concept of “degrees of fault” by concluding that such appraisals achieve their greatest validity in cases in which they fall at or near the extremes, or at or near the balance point, of whatever qualitative scale of values we choose to apply. We can, in short, assert a judgment that a quality is present or absent, or that it is more or less present in one case than in another; but we lack any legal or conceptual scale upon which to calibrate the relative ratios of its presence or absence as between two or more cases; and, when the quality involved is actually a compound of two or more qualities, we lack the means of proportioning the valences of the several ingredients into a single conceptual compound.

These theoretical considerations have an obvious and profound, but not necessarily decisive, effect upon the question whether we should abandon the conventional contributory negligence doctrine in favor of any alternative which is based upon a comparison of causative faults. They may also supply several cogent reasons for preferring one comparative system over another.

COMPARATIVE NEGLIGENCE SYSTEMS COMPARED

It is probably a safe assertion that the theoretical anomalies above suggested have been one principal deterrent to broad acceptance by American jurisdictions of the comparative negligence principle in mitigation of the harshness (in theory, at least) of the traditional doctrine of contributory negligence. A second deterrent, certainly no less troublesome, has been the difficulty of formulating and executing a workable procedural format under which court and jury can function to implement a comparative rule objectively, justly, efficiently, and without excessive disruption of the procedural patterns governing civil litigation in general.

The principle of comparative negligence itself has always character-
ized the civil tort law of the countries of Europe, and it has been rather
anciently and uniformly accepted as a basis of apportionment of dam-
ages in admiralty. In 1908, it became one of the governing concepts
of the Federal Employers’ Liability Act\textsuperscript{3} and, in various forms, it has
been accepted as a general tort principle in eleven jurisdictions of the
United States.\textsuperscript{4}

All of the systems of comparative negligence adhere to the basic
“fault” principle of \textit{Butterfield v. Forrester},\textsuperscript{5} in that they generally
penalize a damage claimant for his own negligent contribution to his
own damages. Whereas the \textit{Butterfield} doctrine (abandoned in Eng-
land under the Reform Act of 1945)\textsuperscript{6} blocked all recovery by a claimant
found to be contributorily negligent “in any degree,” the various com-
parative negligence theories in current vogue foreclose a negligent
claimant entirely only (1) where his negligence exceeds a relatively
“slight” contribution to the causes of his injury, as compared to that
attributable to the party or parties claimed against; or (2) where his
negligence equals or exceeds the contribution of the party claimed
against; or (3) where his negligence is the entire cause of his own in-
jury. Except under the “slight negligence” doctrine, the claimant’s
“full-compensation” damages are at least theoretically reduced, where he
is permitted to recover at all, in proportion to the degree of causal neg-
ligence attributed to him.

The “slight-gross” basis of comparison obtains by statute in South
Dakota\textsuperscript{7} and Nebraska.\textsuperscript{8} Somewhat surprisingly, it has apparently failed
to win broader acceptance because of its lack of numerical specificity,
which, in terms of our earlier theoretical analysis, should be its greatest
virtue. More probably, however, the general lack of enthusiasm for the
doctrine stems from a candid recognition that, in net practical effect, it
operates to very much the same conclusion as does the traditional strict
principle, as ameliorated by “last clear chance” considerations. To say
that a claimant was guilty of “slight” causal negligence, as compared
to that of the defendant, is not a significantly different appraisal from
one which exonerates the claimant entirely. The “slight-gross” doctrine
may avoid a few overtechnical directed verdicts, but is does not other-
wise represent a very substantial departure from the principle of “all
or nothing.”

Theoretically at the opposite end of the spectrum of comparative
negligence systems is the “pure” proportionate formula which character-

\textsuperscript{3} 45 U.S.C. 53 (1908).
\textsuperscript{4} Ghiardi and Hogan, \textit{Comparative Negligence}, 9 \textit{Wis. Cont. Legal Ed.} 4
\textsuperscript{5} 11 East 60, 103 Eng. Rep. 926 (1907).
\textsuperscript{6} 8-10 Geo. 6, c. 28.
\textsuperscript{7} S.D. Comp. Laws § 20-9-2 (1967).
izes the FELA,\(^9\) Merchant Marine Act,\(^10\) and the general negligence law of Mississippi.\(^11\) This doctrine was lately espoused, either flatly or by strong indication of judicial preference, by at least three of the seven members of the Wisconsin Supreme Court.\(^12\) In terms of sheer theoretical elegance and symmetry, and accepting without too much cavil the total validity of the process of mathematical proportioning as applied to causal negligence, the doctrine is clearly the most appealing and "logical" of the three, and has garnered an impressive array of endorsements.\(^13\) Indeed, the principle of "pure" comparison has already been incorporated, in a somewhat different and probably distinguishable context, into the tort law of Wisconsin. Eight years ago, Bielski \(v.\) Schulze\(^14\) abolished the long-standing principle of equal contribution between joint tort-feasors in favor of "pure" comparative contribution. Under that rule, joint tort-feasors are required to contribute to an adverse judgment, inter sese, in the literal and numerical ratio of their respective negligent contributions to the damages of their victim.

The third principle, barring recovery only where the claimant's causal negligence is equal to or greater than that of the party claimed against, and reducing damages proportionately to the claimant's causal negligence in all other cases, governs negligence actions in Wisconsin, Arkansas, Georgia, Hawaii, Maine, Massachusetts, and Minnesota.\(^15\) In addition, New Hampshire has adopted a variant of the principle which permits recovery where the claimant's negligence is no greater than that of the party claimed against.\(^16\)

When one thinks in terms of reducing a verdict-damage award expressed in numerical dollar-values by the amount of a percentage, proportion, or ratio representing the claimant's own negligent contribution to that damage, he instinctively assumes that the amount of reduction must be calculated mathematically, and therefore in numerical terms. Actually, of the nine states which purport in theory to reduce verdict-damages in this way, only Wisconsin and Arkansas have had any amount of experience with a procedure which actually and consistently required the isolation, in a special verdict finding, of the specific numerical factors which control either the gross damages or the causal negli-

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\(^12\) Vincent \(v.\) Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970).  
\(^13\) See Prosser, Comparative Negligence, 51 Mich. L. Rev. 465 (1953); Campbell, Wisconsin Law Governing Automobile Accidents, 1962 Wis. L. Rev. (1962); 47 Wis. 2d at 131, 177 N.W.2d at 518 (dissenting opinion).
\(^14\) 16 Wis. 2d 1, 114 N.W.2d 105 (1962).
gence reduction ratio. Of these, Arkansas abandoned its requirement in 1957, after having encountered a series of frustrations with the procedure.\textsuperscript{17} Similar views have been expressed with reference to New Hampshire and Maine procedures.\textsuperscript{18}

In the remaining states, including Mississippi, there is apparently no general requirement and no general practice that the theory be translated faithfully, literally, or consistently into terms of specific numerical apportionment. Instead, the whole magnificent doctrine, with all of its appealing mathematical certitude, is, in terms of its visible and practical execution, permitted to live or die on the basis of a routine jury instruction, saving the possibility that an occasional verdict may be set aside as unsupported by credible evidence.

This is said as much in terms of praise as of criticism of the states which temper their acceptance of a strictly mathematical approach to comparative negligence by burying their processes of computation in the jury room. Especially is that procedural evasion sensible in Mississippi, where the relatively reliable estimate of whether one party's negligence is greater or less than that of another is devoid of all legal significance, and the total issue of liability in terms of the net judgment is declared as the product of an estimated degree of damage times an estimated degree of negligent contribution. If this nice theory were carried out literally and openly in practical procedures, the compounded consequences of a variance of a few points of degree in one formula or the other would make our present problems of retrial, proportioning, remittitur, and additur look like a kindergarten exercise by comparison.

More will be said of the comparative efficiencies of the several systems in the concluding parts of this paper, after we have performed a closer analysis of the detailed workings of the Wisconsin system. The present point is simply that, as extensions of the analogized mathematical logic of comparative negligence become less and less defensible, prudence seems to require that we relax our emphasis upon spelling out the mathematics by which the ultimate judgment must be supported. Otherwise, for all of our sophistication of theory, we will inevitably contradict and confuse juries, ourselves, and everyone else.

\textbf{WISCONSIN JURY SUBMISSION PROCEDURE}

The Wisconsin approach is more sharply distinguished by its procedural implementation than by its substantive provisions, which have often been criticized as a largely unprincipled, "political" compromise. Whatever is lost by substantive compromise is compensated, by comparison with other systems, by a far greater fidelity to legal theory in

\textsuperscript{17} Leflar, \textit{Comparative Negligence: A Survey for Arkansas Lawyers}, 10 Ark. L. Rev. 54 (1955-56).

\textsuperscript{18} Nixon, note 16 supra. See also Matzke, \textit{Special Findings and Special Verdicts in Nebraska}, 35 Neb. L. Rev. 523 (1956).
actual legal practice. The numbers, for whatever they are worth, are actually revealed and used in determining the judgment.

The basic policy governing the functions of court and jury is significantly less tolerant, in Wisconsin, of the jury's possible tendency to interpret instructions according to their own lights, especially as such instructions verge on the complex. In substantially all cases in which either comparative negligence or comparative contribution is in issue, the case is submitted on a special verdict of rather sophisticated design, under which the jury is progressively required to return specific findings on each "ultimate fact" in issue which may be relevant to the judgment. In actions sounding in negligence (which, under Wisconsin doctrine, include actions involving strict products liability, strict safety statutes, safe place, and a broad group of property nuisances), the typical verdict includes basic (and separate) negligence and cause questions relating to each party whose conduct may have contributed in any substantial respect to any of the claims or cross-claims being litigated in action; a question or questions (requiring specific numerical response) comparing the degrees of causal negligence attributable to each party found to have contributed, by causal negligence, to a claimed injury or damage; and a set of questions designed to fix dollar values on the various items of injury or damage. By instruction, these dollar values are required to represent full compensation values, undiminished by any prior considerations of causal fault or comparisons of fault.

Ostensibly to preserve their objectivity, the Wisconsin jury may not be informed, either by remark of counsel or by court instruction, of the legal effect of their answers in terms of liability, nonliability, or judgment. Unless they have acquired extrinsic information (which they are charged not to take into consideration), they are unaware of the fact that a finding of causal negligence against a plaintiff or other claimant in a degree equaling or exceeding that found against the opposite party precludes recovery entirely; and they are similarly unaware that the claimant's damage award will be reduced by the degree of causal negligence attributed to him in any event.

Because of the emphasis which this system of jury submission places upon the express isolation of a precise numerical proportion between the causal negligences of the various parties, the Wisconsin procedure operates, when it works properly, to maximize the opportunity to test each finding against its supportive evidence. But, because of the same high degree of exactitude with which the procedure discloses the jury's apportionment of causal negligence between the various participants, a long series of problems has been encountered in determining the appropriate verdict form for submission of the question, and in translating the ver-

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dict result into proper judgments. Those problems have not been entirely solved, even at this writing, nearly 40 years after the original enactment.\textsuperscript{20}

**The Terms of the Proportion**

Present Wisconsin Statute § 895.045 (renumbered from § 331.045 in 1965) provides, in substantially the same language employed in the original enactment:

Contributory negligence shall not bar recover 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.

In terms, the statute obviously requires a verdict which extrapolates two essential and conceptually separate determinations:

(a) a determination, as between the causal contribution of each claimant's own negligence to his own injury and the contribution thereto of each negligent actor other than the claimant, whether the former was less than the latter; and

(b) a determination of "the amount of negligence attributable to [each] person recovering "with respect to his several elements of damages, in terms of the ratio, fraction, or proportion between that "amount" and the "amount" contributed by all other actors to the same elements of damage.

On the face of the matter, the two determinations are not identical, and serve different statutory purposes. The first determination is needed in order to ascertain that the claimant's negligence was "not as great as the negligence of the person against whom recovery is sought."\textsuperscript{21} The second determination is needed in order to settle the amount by which the claimant's "damages allowed shall be diminished."

The point of significance, however, is that the first comparison operates simply between parts of a whole, determining whether one part is equal to, or greater or less than, another. It is not significant to this determination to fix precise ratios of difference. The second comparison necessarily includes, and must be consistent with, the first; but the only legally relevant factor to be isolated from the second comparison, specifically under the statute, is the proportion between the claimant's negligent contribution to his own damage and all other negligent contributions to that damage. This proportion must be fixed precisely as to each claimant, but need not be fixed, for statutory purposes, as to each other person responsible for the claimant's damage.

\textsuperscript{20}Wis. Laws ch. 242 (1931).
However, Wisconsin's espousal of the doctrine of comparative contribution requires a precise fixing of the proportionate causal negligences of parties claimed against in every case in which there are cross-claims for contribution between them, regardless of whether any contributory negligence of the plaintiff is involved. Because potential rights to contribution between "joint tort-feasors" are very broadly in issue under Wisconsin's liberal definition of "joint tort-feasors," it is now generally necessary to fix precisely, for contribution purposes, the proportionate responsibilities of each party whose negligence may have caused a given item of claim or damage.

In "simple" cases it will be obvious that one ratio can serve all three purposes, without extravagant possibility of distortion. In this context, a "simple" case is one in which the contributing actors and the causative factors relating to all asserted claims are fully identical. Most obviously, this case arises in either of two contexts: either where there are only two litigating actors whose claims and counterclaims arise from entirely identical causes, or where there is only one principal claim being litigated.

**COMPARING NEGLIGENCE IN MULTIPLE CLAIM CASES**

The same simplicity is not necessarily present when more than one claim is being litigated between more than two litigants, even though the causative sources of the several claims are identical. Suppose, for example, that a three-way collision occurs between vehicles driven by A, B, and C, under circumstances in which those parties are the sole causes of the collision, and the collision, in turn, is the sole cause of the personal injuries and property losses of A, B, and C. Now suppose that each claims against the other two for his damages, and each claims against one of the others, alternatively, for contribution with respect to a possible judgment in favor of the third. This "simple" case involves nine distinct claims:

5. (6), (7) A v. C and C v. A for contribution if A and C are held responsible for B's damages.
6. (8), (9) B v. A and A v. B for contribution if A and B are held responsible for C's damages.

A verdict which establishes any stated proportionality between the causal negligence of A, B, and C may establish that A was less negligent than B, and that B was less negligent than C, as, for example, a finding of 10 percent (A), 30 percent (B) and 60 percent (C). Such

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22 Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).
a verdict would dispose of all the claims concerned with A's damages without difficulty. A's verdict damages would be reduced by 10 percent, and B and C would contribute, as between themselves, 30/90ths and 60/90ths of the judgment. Further, since A has no liability for the damages of either B or C, his causal negligence being less than theirs, the claims by or against A for payment of and for contribution those damages would necessarily fail. By this reasoning, we have disposed entirely of the claims above-numbered (1) and (4)-(9), and have reduced claims (2) and (3) to simple two-party claims between B and C. Furthermore, we have fixed a ratio of causal fault with respect to the B and C claims, and as between B and C, at 30/90ths and 60/90ths respectively, so as to make it apparent that C was more negligent than B, and consequently that claim (3) must fail.

A slightly more subtle question is whether we have fixed, with respect to B's claim against C, the amount by which the claimant's "damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering." If the verdict-findings are to be used at all, it is apparent that the appropriate "proportion" attributable to B must be 30 percent, since that was found to be the amount, in terms of a percentage of a whole, by which B negligently caused the collision and his own resultant injuries. Moreover, since there is no longer a problem of contribution between A and C, the fact that C must bear 70 percent of B's damages on the basis of only 60 percent of the causal fault has not, until the Vincent case, been a matter of serious legal or logical concern. Under the 50-50 contribution formula of the Uniform Contribution Among Joint Tort-feasors Act, which governed Wisconsin practice in principle prior to the Bielski decision, a tort-feasor only 1 percent causally negligent would have paid 50 percent of the damages.

What is of some concern is the fact that the verdict-apportionment of 30 percent to B is the result of the inclusion of a factor—A's 10 percent of causal negligence—which is legally irrelevant to B's claim against C. Had the jury been asked simply to proportion the negligences of B and C as causes of B's injury, it is evident, assuming consistency of their appraisal, that the ratio would have been 1 to 2, producing a reduction of B's damages by 33 1/3 percent instead of 30 percent. Thus, while the verdict properly proportions the sources of B's damages among all of the actual tortious actors, it does not confine its allocations to the legally responsible parties.

The Wisconsin decisions have rather consistently adhered to the

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23 Id.
26 Wis. Stats. §§ 113.01-113.10 (1967).
proposition that actual participation in the negligent causation of an injury—not legal responsibility to compensate—is the criterion under which the statutory proportion of the claimant’s contribution to his own injury should be determined. Indeed, the same proposition obtains even though a participant in the transaction is not formally a litigant in the case. In *Ross v. Koberstein*, *Hardware Mutual Cas. Co. v. Harry Crow & Son, Inc.*, and *Patterson v. Edgerton Sand & Gravel Co.*, the trial court’s failure to require the express inclusion of an actual participant in the comparison question submitted to the jury was determined to be an error, but one which did not operate to the prejudice of a named defendant; although there was an implicit concession that the plaintiff was prejudiced thereby. The *Patterson* decision explained that:

If the jury had found that a certain percentage of that total negligence was attributable to Finley (the omitted party), that would have left a balance of less than one hundred percent attributable to Westcott (the appellant) and the plaintiff; and if the jury had apportioned that balance between the latter two in the same ratio in which it apportioned the one hundred percent between them (as the jury presumably would have done), then... the deduction from the jury assessment of damages would have to be a smaller percentage thereof than the fifteen percent deduction made under the verdict which was returned, and the defendants would have been liable to the plaintiff for the full amount of his consequently greater recovery.

In practical terms, it is highly unlikely that a jury would, in fact, adhere to precisely the same ratio in allocating causal negligence between three parties as they adopted in allocating the same negligence between two parties, although there is no disputing the likelihood asserted in *Patterson* that a three-party allocation would presumably operate to reduce the amount of negligence attributed to the plaintiff in some degree. In cases involving narrower margins than the 15-85 ratio considered in *Patterson*, however, the inclusion of a third participant could operate so as radically to alter the legal result. Suppose, for example, a suit between *A* and *B* in which each was guilty of relatively slight causal negligence, constituting together no more than 10 percent of the total negligence causing *A*’s injuries. On a 100 percent scale, it is conceivable that the causal negligences of the two parties might be apportioned as narrowly as 49 percent to 51 percent, *A* receiving the lesser allocation. But if the negligence of participant *C* were included in the proportion at 90 percent, it is not probable that a jury would

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28 220 Wis. 73, 264 N.W. 642 (1936).
29 6 Wis. 2d 396, 94 N.W.2d 577 (1959).
30 227 Wis. 11, 277 N.W. 636 (1938).
31 Id. at 22, 277 N.W. at 640.
return 4.9 percent against A and 5.1 percent against B, to complete the 100 percent proportion. It is far more probable that the figures would be rounded, either at 5 percent each, or at 4 percent to 6 percent, 3 percent to 7 percent, or some similar alternative.

This example demonstrates two things. First, it shows how a verdict which fails to proportion negligences among all participants—even those who may be legally or financially immune from paying anything—can radically affect the amount by which the plaintiff's eventual judgment is reduced under the Wisconsin formula. Second, it shows how slight variations in ratio, prompted by the tendency to "round off" numbers of different scales, can actually reverse the legal effect of a judgment.

If the question were to be approached from a standpoint of total logic, in fact, even causes of an injury which were conceded to be totally without legal significance—the purely accidental circumstances which so frequently trigger our modern catastrophes—should be allocated their appropriate causal weight in the proportion, a process which would dramatically alter the ratios upon which Wisconsin comparative negligence recoveries are now based. To include such things as the sting of an errant bee in the proportioning process, regardless of its "irrelevancy" for purposes of determining legal liability, would often enlarge the scale of comparison to a point at which the relative contributions of the human participants would be miniscule indeed. Fortunately, the cases have not carried the "pure" logic of the matter to any such lengths.

*Pierringer v. Hoger,*32 established another, distinctively post-Bielski, basis upon which a verdict excluding a participant from the proportionment can operate to the prejudice of an included party. All but one of a number of alleged joint tort-feasors had settled with the plaintiffs, taking releases which reserved plaintiff's rights against the non-settlor, but released and satisfied whatever fraction or proportion of the total liability was attributable to the settling tort-feasors. Plaintiffs then sued the nonsettling tort-feasor; and, after impleader proceedings had formally joined the settling parties, they sought summary judgment of nonliability. Substantively, it was first determined that the nonsettlor could have no rights to receive contribution from them, since "they have bought their peace in any event." There remained the questions whether the undetermined and unsatisfied part of the liability attributable to the nonsettlor's negligence could be fixed in an action from which the settling parties had been dismissed; and whether the proportion of causal negligence attributable to the nonsettling tort-feasor could be determined without including in the verdict an express finding as to the amount of causal fault attributable to the settling tort-feasors, whether

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32 21 Wis. 2d 182, 124 N.W.2d 106 (1963).
or not they remained formally in the action as parties. After holding that the dismissals were proper, the court said:

The issue between the plaintiff and the nonsettling defendant... is the percentage of causal negligence, if any, of the nonsettling defendant, but such percentage of negligence can only be determined by a proper allocation of all the casual negligence, if any, of all the joint tort-feasors and of the plaintiff if contributory negligence is involved... the allocation, if any, of the causal negligence to the settling tort-feasors is merely a part of the mechanics by which the percentage of causal negligence of the nonsettling tort-feasor is determined.33

To appreciate the sense of this principle, it is necessary to frame the issue more concretely, in terms of Wisconsin law and practice after Bielski. To begin with, assume an eventual verdict-award of damages of $100,000 to plaintiff A, and assume that A received $35,000 from the settling tort-feasors. Ignoring possible reduction of damages by reason of A's contributory negligence, C, the nonsettlor, will be liable to A for a percentage of $100,000 corresponding to C's proportionate causal fault, but not ultimately exceeding $65,000. Obviously, at least two terms are required to fix a proportion. If, then, C's causal negligence, fixed in proportion to all of the negligence causing A's injuries, is determined at less than 65 percent, the settling tort-feasors have settled cheaply at the expense of A. If C's causal negligence is fixed at more than 65 percent, C's excess of liability over the $100,000 maximum of A's entitlement will redound, either by way of a right of contribution or by way of a right of subrogation and indemnification, in favor of the settling tort-feasors. In either event, the impossibility of isolating C's causal negligence except as a part of a whole is apparent.

INCLUSION OF FACTUALLY IRRELEVANT COMPONENTS IN THE PROPORTION

Whatever occasional degrees of tolerance the Wisconsin court may have demonstrated for the failure to include all factually relevant conduct in the comparative negligence question of the special verdict, it has repeatedly insisted that the statutory reduction of a claimant's verdict damages may not be determined by any process of proportional factor-ing-out of legally and factually irrelevant conduct, which the jury has been permitted to include in the formula. The rationale of Patterson v. Edgerton Sand & Gravel Co.,34—that the omission of one or more persons from the inquiry is harmless to a defendant because the jury would "presumably" have adhered to "the same ratio," as between the parties actually inquired about, if omitted party had been included in the inquiry—apparently does not work in reverse.

33 Id. at 191, 124 N.W.2d at 111.
34 227 Wis. 11, 227 N.W. 636 (1938).
Thus, in *Callan v. Wick*, the Jury returned a verdict ascribing 10 percent of the negligence causing the plaintiff's injuries to the plaintiff, 80 percent to the host-driver, and 10 percent to the third-party driver. When the trial court erroneously ruled that the finding of causal negligence against the plaintiff was contrary to law and the evidence and ordered judgment against the host's insurer and the third party for the full amount of damages returned under the verdict, the host's insurer and the third party appealed. The supreme court saw fit to agree neither with the jury nor with the trial court. It ruled that the finding of causal negligence against the plaintiff could not be set aside as a matter of law, but that the finding against the third party appellant was totally unsupported in the evidence, and ordered dismissal of the claim against him on the merits. This left for decision the question whether plaintiff should recover either 88.89 percent or 90 percent of his verdict-damages from the host-driver; or whether the comparison, having been adulterated by inclusion of an improper factor, was invalid and required new trial.

If the improperly included 10 percent had been "factored-out" according to "the same ratio" established in the verdict, it is obvious that the plaintiff's verdict-damage should have been reduced by 11.11 percent (one-ninth). It is equally obvious that no jury would be likely to return so abstruse a percentage against the plaintiff. The court stoutly insisted:

> Under Sec. 331.045, Stats, when a comparison of negligence is made and the same is expressed in percentages, the total aggregate must always equal 100 percent . . . (A) new comparison must be had between the plaintiff . . . and the defendant.

Another reported instance of the same judicial reluctance to presume that an apportionment of negligence including an improper factor establishes a valid ratio between the other factors was *Vroman v. Krempke*. Two passengers, the host's wife and daughter, sought to recover from the host for their respective injuries. The verdict-form required the jury, if the passengers were found contributorily negligent, to proportion their negligence with that of the host in a single, three-part proportion, totalling 100 percent. The jury dutifully returned 25 percent against each of the passengers and 50 percent against the host. The trial court ordered judgment against the host for 75 percent of the respective verdict-damages.

The source of the problem, obviously, was that the negligence of each passenger operated as a cause only of that passenger's injury; and, having no tendency to cause the accident itself, was in no sense relevant to the other passenger's damages. Describing the trial court's interpre-

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35 269 Wis. 68, 68 N.W.2d 438 (1955).
36 *Id.* at 74, 68 N.W.2d at 441.
37 34 Wis. 2d 680, 150 N.W.2d 423 (1967).
tation of the verdict as "speculation," and saying that a one-third, two-thirds proportion (the true ratio) "can as reasonably be argued," the court remanded both cases for retrial on the issues of negligence and causation.

The net result of the Callan and Vroman decisions should not be permitted to pass unnoticed. It may be confidently assumed that, if the cases were retried as the court's mandate directed, the proportions of causal negligence established in the second verdicts would not correspond with those established originally, though the lack of correspondence would excite no legal or judicial concern whatever. The first proportions having been declared void by judicial fiat, essentially because they were determined upon an overbroad scale, they simply drop out of existence in legal contemplation.

In mathematical contemplation, however, no mere change in the size of scale can affect a validly established proportion as between two proper factors. If factors $A$, $B$, and $C$ are compared and proportioned with one another, and $C$ is thereafter determined to have been an irrelevant factor in determining the relationship of $A$ to $B$, the reduction of scale which results from the exclusion of $C$ will necessarily affect the numerical values assigned to $A$ and $B$ on the original scale; but such exclusion will have no effect upon the relative values of $A$ and $B$, i.e., the ratio between them. Thus, in Vroman, the original verdict established a precise ratio of 1 to 2 between the causal negligences of each plaintiff and the defendant, casting this ratio on a scale which included an improper and irrelevant factor of 25 percent with respect to each plaintiff. To revalue this ratio on a consistent 100 percent scale confined to the relevant factors requires, in mathematical terms, only that the ratio of 25 to 50, or 1 to 2, be revalued upon the proportion of 75 to 100, by the formula $25:75$ as $X:100$. By mathematical solution, the new value of the negligence of each plaintiff is 33 1/3 percent. It is not mathematically possible for a second jury, charged with a redetermination of the proportion, to return any other comparison than 1 to 2 without performing a fundamental reappraisal of the relative weights of the factors, ostensibly in the merely mechanical process of assigning corrected scale-values to those factors.

Is this to say that there is no logical basis for requiring redetermination, where a foreign factor has been permitted to intrude itself? If one clearly recognizes the essentially analogous nature of the mathematical proportioning demanded by Wisconsin's comparative negligence law and procedure, he also recognizes that the objective rigidities of mathematical laws can—and often do—lead to confusion, deception, and error when applied to qualitative judgments. It may be claimed with some logic, therefore, that even the ratio fixed upon an overbroad (or underbroad) scale is unreliable and deceptive in its apparent mathe-
matical precision, in much the same sense that computation of pain and suffering awards, in jury argument, by unit-of-time multiplication was criticized in *Affett v. Milwaukee & S. T. Corp.* In rejecting the conclusion of the much cited *Rattner v. Arrington,* the court described the problem of reduction of scales as ultimately productive of "absurdity."

If a day may be used as a unit of time in measuring pain and suffering, there is no logical reason why an hour or a minute or a second could not be used, or perhaps even a heartbeat, since we live from heartbeat to heartbeat. If one cent were used for each second of pain, this would amount to $3.60 per hour, to $86.40 per twenty-four-hour day, and to $31,536 per year. The absurdity of such a result must be apparent, yet a penny a second might not sound unreasonable.

**INTERNAL CONTRADICTION IN A SINGLE VERDICT**

While, therefore, it may be a feasible and defensible practice to reject and annul the ratios established upon underbroad or overbroad scales, and to ignore the predictable inconsistencies which will develop upon a second trial, the process of retrial is hardly the ideal solution to the necessity of disposing of as many claims as possible in a single and internally consistent verdict. Unfortunately, that necessity involves several vexing problems of its own, upon which the cases have been only mildly helpful at best, and downright confusing at worst.

*McConville v. State Farm Mut. Auto Ins. Co.* translated the conventional assumption of risk defense, especially as applicable to guest-passengers, into terms of contributory negligence under Wisconsin's comparative negligence doctrine. As a result, a large category of new "causal negligences" was born and required accommodation in the comparison-formula of the special verdict. The new class was particularly problem-provoking, however, because it consisted mainly of "passive" conduct of the passenger in consenting unreasonably to ride with a negligent driver—conduct which may well have "caused" the passenger's personal injuries, but, of itself, does not operate to cause the collision, or the resultant damages of anyone else. *Vroman v. Kempke,* involved the inclusion of two such "passive" negligence factors in one comparison; but essentially the same problem is presented whenever a "passive" factor is included in a comparison with "active" factors, and the case involves more than the single claim for personal injury damages of the "passively" negligent party. As to the other claims, the "passive" negligence is an irrelevant factor, which must be excised in some fashion in order to produce an accepta-

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38 11 Wis. 2d 604, 106 N.W.2d 274 (1960).
39 111 So. 2d 82 (Fla. 1959).
40 Affett v. Milwaukee & S.T. Corp., 11 Wis. 2d at 613-14, 106 N.W.2d at 280 (1960).
41 15 Wis. 2d 374, 113 N.W.2d 14 (1962).
42 34 Wis. 2d 680, 150 N.W.2d 423 (1967).
ble set of ratios and values upon which those other claims may be adjudicated.

To place the matter in entirely proper perspective, it should be noted that McConville accentuated, but did not entirely originate, the problem of utilizing a single verdict-comparison for disposition of multiple claims where one of those claims involves “passive” negligence. In a comment, Collateral Estoppel in Negligence Actions, student editor Adrian Schoone isolated the problem of what he named “unidirectional” negligence, illustrated by the somewhat common habit of extending an arm or elbow outside of a moving vehicle. More recently, seat belt installations have given rise to another kind of “passive” negligence defense. These suggest cases in which “passive” negligence may exist without any necessary reference either to passengers or to the abolition of assumption of risk as a specific defense.

The McConville opinion recognized that its basic rule would:

Require care and attention in framing a verdict under some situations . . . If there were claims of one driver against the other for damages, it would be necessary to have more than one comparison question. The guest's negligence with respect to riding with the host would affect the guest's right to recover from the host or other driver or both, and would enter into the comparison of the guest's causal negligence with that of each driver but would be immaterial with respect to the right of one driver to recover from the other. (Emphasis supplied).

However, Justice Thomas E. Fairchild, who wrote the McConville opinion, appeared to have second thoughts about the matter. Only a few months later, he prepared a paper on Recent Developments in the Area of Torts, in which he stated:

After McConville, the jury will not be asked whether Guest assumed the risk, but whether she was negligent and whether her negligence caused her injuries. If the only issue as to Guest's negligence is whether she was negligent in riding with Host, the problem is not difficult. Assume 20 percent of all the negligence causing her injuries is attributed to her, 45 percent to Host and 35 percent to Other Driver. Guest recovers 80 percent of her damages from Host and Other Driver, jointly and severally. But only 80 percent of the found negligence caused the collision and the injuries to Host and Other Driver. Should not Other Driver be given judgment against Host for 45/80 of Other Driver's damages? He will be awarded contribution of any amount he pays Guest in excess of 35/80 of her recovery.

It has also been suggested that it may not be necessary to include more than one comparison question in a verdict, even

43 41 MARQ. L. REV. 456 (1957).
45 15 Wis. 2d at 385, 113 N.W.2d at 20.
where a guest's "active" negligence be claimed. It has been suggested that a verdict might be so framed as to call for separate findings on a guest's negligence with respect to riding with the host and her negligence in some other respect, causing the collision, and to include but one comparison question, which would nevertheless be a basis for a proper judgment.

Assume that in answer to the comparison question, the jury attributes 10 percent of all the negligence causing Guest's injuries to Guest's negligence with respect to riding with Host, 15 percent to Guest's negligence with respect to interfering with Host's proper lookout, 45 percent to Host's negligence, and 30 percent to Other Driver's negligence. Guest will be given judgment for 75 percent of her damages. Should not Other Driver have judgment against Host for 30/90 of his damages? The denominator 90 is the total of Guest's active negligence (15) plus Host's negligence (45) plus Other Driver's negligence (30). A single comparison question will reduce claims of inconsistency between answers. Won't the single comparison question, so framed, be adequate in most cases, notwithstanding the reference in McConville to "more than one comparison question?"46

In the following year, the Wisconsin court adverted, somewhat hypothetically and by way of dicta, to the Fairchild proposals:

When there is an issue between a host-driver and another driver concerning the injuries or property damage to either or both of them, separate comparison questions may not be necessary as suggested in McConville. A recent law review article points out that one apportionment question might still be used as basis for the two comparisons and the avoidance of a possible inconsistent verdict. In such a case the inquiries relating to the cause questions of negligence of the host and other driver could be stated in terms of causing the collision and also, if it is in the case, the question of the guest's active negligence. The question concerning the guest's passive negligence would be stated only in terms of causing his own injuries and not also of causing the collision. The apportionment question would include all the negligence which caused the collision or the injuries. In such a comparison, the guest's right of recovery would be determined as in an ordinary case by considering the guest's total negligence in reducing the amount of his recovery. The issue between the host and the other driver for their respective damages would be determined by considering only the negligence causing the collision, and the percentages of negligence found in the verdict would be converted by the court into proportional fractions of that negligence for that purpose. The same result could be reached by stating all the causal questions in terms of causing injuries to the plaintiff. Since the negligence of the host and the other driver and the active negligence of the plaintiff, if any, causing the plaintiff's injuries would necessarily be a cause of the collision, the same basis of causal negligence attributable to the damages suffered by the host or the other driver would be

It is difficult to regard this suggested process of court-performed proportioning as constituting anything other than the same scaling down of an overboard verdict, so as to "factor-out" irrelevancy, which the court had so persistently condemned before; and, in fact, condemned thereafter in both the _Vroman_ and _Dutcher_ cases. A plainer case of a court trapped in the illogic of its own logic can scarcely be imagined.

The essence of the problem which produced this judicial confusion and self-contradiction lies in the near impossibility of avoiding internal inconsistency of ratio in a verdict which adopts the "two-comparison" approach suggested in _McConville_. If, for example, a jury returns 20 percent "passive" causal negligence against a passenger-guest, 45 percent "active" negligence against the host, and 35 percent against the other driver, a ratio of 45 to 35 (or 9 to 7) has been established between host and other driver. Justice Fairchild, apparently seconded by the _Theisen_ case, would now determine the other driver's judgment against the host, factoring out the irrelevant 20 percent of passive negligence, under the formula $35:80 = X:100$, producing a mathematical formula reduction of other driver's verdict damages of 43.75 percent. But his _McConville_ procedure would submit to the jury, in the same verdict, a separate comparison of active negligences between host and third party. Any allocation other than 43.75 percent to other driver and 56.25 percent to host would be contradictory of the first ratio, and the contradiction (almost certain to occur) would appear on the face of a single verdict.

Is there, then, no escape from the dilemma of contradiction? Must we either accept the suspect process of mathematical factoring-out, or learn to abide an inevitable series of self-contradictory verdicts? I submit that there is one possibility, not altogether "pure" or perfect," but supported in all of its aspects by some semblance of judicial and mathematical precedent. The key to the puzzle is simply to factor the passive negligence into a pre-established ratio of the active negligence, rather than attempting to factor it out of an established mixed ratio.

Thus, assume the case as before, where there is evidence under which the cross-complaining host and other driver may both be found negligently to have caused the collision, and passenger-plaintiff to have been causally negligent for his own safety, with respect to riding with host, wearing a seat belt, or otherwise. After appropriate preliminary form instructions directing the jurors to answer only if they have es-

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48 34 Wis. 2d 680, 150 N.W.2d 423 (1967).
49 _Dutcher v. Phoenix Ins. Co._, 37 Wis. 2d 591, 155 N.W.2d 609 (1968).
established causal negligence requiring comparison under their answers to prior special verdict questions, they could be asked to compare, on a 100 percent scale, the negligences which operated to cause the collision. Next, and after a further preliminary direction, the verdict might require the jury to proportion the passive negligence of the plaintiff out of the total causal negligence contributing (actively or passively) to the plaintiff's injury. To avoid the necessity of restating (reproportioning) the active negligences, the question could be so confined as to require that the jury answer only as to the percentage of an assumed total at which they appraise the passive negligence.

In formula, if the relevant active negligences were designated a, b, and c, and the passive negligence of a claimant were designated p, then a plus b plus c plus p would constitute 100 percent of the negligence causing the personal injuries of the passively negligent claimant; and a plus b plus c would constitute 100 percent of the negligences causing the collision (and the damages of cross-claimants). The values of a, b, and c would be first fixed in their proper proportions as causes of the collision. Then the value of p would be determined under a formula inquiring: p is what percent of the total of a plus b plus c plus p?"

If, then, the values assigned in the first proportion to a, b, and c were 25 percent, 35 percent, and 40 percent, respectively, and the value assigned to p in the second proportion were 15 percent, all of the value-factors necessary to determine the appropriate verdict-reductions as to all claimants would be provided. The passively negligent claimant, obviously, would recover 85 percent of his verdict damages; and the ratio of joint tort-feasor contribution to that claimant's judgment, between themselves, would be 25:35:40. The same ratio would control the disposition of cross-complaints between the joint tort-feasors, and the liabilities of actors b and c to contribute, between themselves, to the damages of actor a.

The utility of this approach is not weakened in any way if it happens that a claimant is found to have been both actively and passively negligent in producing his own injuries—a problem which struck Justice Fairchild as one of special complexity in his law review paper. The complexity is handled simply by including the active negligence of the claimant as one of the factors in that proportion, and isolating the passive negligence precisely as above suggested.

A slight problem is created, in such cases, by the necessity of adjusting the figures returned in response to the active negligence proportion in order to reflect the necessary inclusion of the claimant's passive negligence, restoring the formula a plus b plus c plus p equals 100 percent where both a and p must be combined to produce the proper reduction of the claimant's verdict damages. The solution, however, is not inordi-
nately difficult. If the verdict values a at 25 percent, b at 35 percent, and c at 40 percent of the total negligent causes of the claimant's injuries, it is necessary to scale down the a, b, and c values to accommodate the inclusion of 15 percent in the formula. The corrected values, computed by the court, are 21.75 (a), 29.25 (b), and 34.00 (c). In this example, claimant has lost his right to recover for personal injuries at all, since the aggregate of his active and passive negligences exceeds the amount attributable to either of the other two parties on a single, all-inclusive scale.

Thus, the results of the process may sometimes be a bit startling. To cite another illustration, suppose a simple two-party action in which a car driven by A collides with one driven by B, damaging both cars and injuring both drivers, and producing a claim and counterclaim. Assume that the active negligences are apportioned 45 percent to A and 55 percent to B. Now assume that A is found to have aggravated his own injuries by failing to fasten his seat belt, and that this negligence is found to represent 10 percent of the total causes of A's personal injury. B having been found to have contributed more than half of the causes of his own injuries and damages, he is foreclosed of recovery. By the same token, A recovers his auto damages reduced by 45 percent. But the recalculated proportion with respect to A's personal injuries places the values at 49.5 percent against B and 50.5 percent (40.5 percent plus 10 percent) against A—foreclosing A from recovering for his personal injuries in a collision which was, itself, more the fault of B than of A.

SOME CONCLUSORY OBSERVATIONS

In his dissent in Vincent v. Pabst Brewing Co., supra, Chief Justice Hallows of the Wisconsin Supreme Court offered a compelling argument for the proposition that, in all logic and justice, Wisconsin should immediately adopt by judicial decree the doctrine of "pure" comparative negligence. His brethren differed unanimously on only one point: whether, by reason of prudent abstention or lack of power, the court should defer to a pending legislative study of the matter.

In order procedurally to accommodate his proposal, the Chief Justice urged a number of other changes. He would also adopt a version of the remittitur-additur principle, as modified in Powers v. Allstate Ins. Co. to include judicial reapportionment of negligence. He also urges that:

... juries should be instructed on the effect of their apportionment of negligence and that their verdict is subject to the control of the court. Juries should know what they are doing and not be allowed to determine a verdict on their false assumptions.

Vincent v. Pabst Brewing Co., 47 Wis. 2d at 131, 177 N.W.2d at 518.

10 Wis. 2d 78, 102 N.W.2d 393 (1960).

47 Wis. 2d at 139, 177 N.W.2d at 522.
At an earlier place, the Chief Justice responds to the critics of the "pure" comparative negligence doctrine by alleging that their arguments "evince a curious lack of confidence in the jury system." This, perhaps, touches upon the critical question to be considered in the disposition of the entire set of questions to which this paper has been addressed.

Anglo-American trial procedure has not always required that juries confine their attention to "the evidence given in court and the law according to the instructions of the court"; and, in fact, there are vast segments of modern American trial practice in which juries, realistically speaking, may give their verdicts with relative impunity upon whatever set of standards they see fit to adopt. If the process of jury instruction, among several dozen other devices for court control of jury "lawlessness," does not evince a certain "lack of confidence in the jury system," then certainly Wisconsin's special verdict procedure (only recently reformed from the impending chaos of its former absurd length and technicality) indicates a strong suspicion that jurors may not, in fact, find it possible to comprehend all of the marvelous complexities of law, and to incorporate them accurately and faithfully into a consistent verdict. What other reason or excuse exists for the requirement that jurors report not merely their ultimate award, but each "ultimately factual" component necessary to arrive at such an award, after a thorough inspection of the propriety of the verdict-answers by the court?

Is it not simple prudence, however, to assume that unlearned jurors will confuse and mistake the working of ratios and proportions which have managed somehow to confuse almost two generations of distinguished lawyers and judges? The rules of Bielski and McConville are nearly ten years old, and we have yet to settle so ostensibly "easy" a question as the matter of moving from one scale of comparison to another—a question which has perched naggingly on the shoulder of comparative negligence theory from its earliest adoption, but which we have managed somehow never to answer.

Comparative negligence theory, in the last analysis, is precisely as logical, and as productive of justice, as the validity of its comparisons permits it to be. So far as the critical decision of liability rests on a basic determination that the causal negligence of one actor is simply greater or less that that of another, the comparison is essentially valid and reliable; but when basic liability depends only on the more speculative and undefined assertion that the causal negligence of an actor constituted a specific percentage of the total causes of an injury, that finding is often so unencumbered by objective proofs and disproofs as to be largely arbitrary, speculative, and unreliable.

This basic fact is not controverted by a repetitious insistence that every tort-feasor ought, in reason and justice, to pay "his just propor-

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53 Id. at 139, 177 N.W.2d at 522.
tionate share" of the damages which he has caused, whether to himself or to others. Of course, he should! But that is sheer question-begging, because it assumes the basic fact that "his just proportionate share" has been objectively ascertained pursuant to some sensible and defined standard of valuation and comparison.

When a jury is commanded, without benefit of rational definition or standard, to produce precise numerical ratios which, when applied in several sophisticated combinations to the several claims and cross-claims of perhaps half a dozen litigants, will justly compensate each of them in dollar amounts according to a single, internally consistent formula, it is a profound understatement—and it does not evince a curious lack of confidence in the jury system—to assume that the resultant verdict-proportions may be something less than totally valid.

Something is apparently wrong with the justice of a verdict such as that illustrated at the close of the last section of this paper, where neither claimant is permitted to recover anything for his personal injuries, but one may recover 55 percent of his auto damages. But what is wrong? Is it the "equal to or less than" rule, as the Chief Justice insists, or may it be the numbers themselves?

Simply in order to illustrate the possibility that shocking and anomalous results can arise even from "pure" comparison, and even assuming the total accuracy of the numerical ratio, let us reexamine the same case there suggested (A 45 percent, B 55 percent actively negligent, A 10 percent passively negligent) under "pure" theory. Of course, we must now make some additional assumptions about the "recoverable damages" of the respective parties, the presence or absence of liability insurance, and perhaps about the extent to which one party or the other has passed his damages onto a "collateral source."

Therefore, let us assume that A is a laborer, and B a corporate executive. A's car damage is worth $500, his loss of earnings for six months $5,000, and his medical expenses amount to $1,000. He has no liability insurance, and no "collateral sources" have picked up any of his losses. Assume a pain and suffering factor of $5,000.

B's auto damage is $3,000, his loss of earnings for six months is $50,000, and his medical expenses are billed to his hospital-surgical insurer at $15,000. Ignoring the subrogation claim of his collision carrier, all of the "losses" are compensated by collateral sources, and B is insured against liability. Assume, evenhandedly, a pain and suffering factor of $5,000.

In terms of comparative fault, and in terms of the basic kind and nature of damages directly sustained by A and B in the collision, this case is rather closely balanced. Each driver lost his car, each lost six months of work and each "suffered" to the same extent.

54 Ibid.
On the Wisconsin formula, A and B would stand their own damages, ameliorated only by the payment of $275 by B's insurer toward A's auto repair bill. The accident would have cost $6,225 in out-of-pocket loss.

On the "pure comparison" formula, improved "logic and justice" would operate so as to require B's insurer to pay A, in addition to the $275, 50.5 percent of his personal injury damages, or $5,555. By the same token, A would be required to pay B 45 percent of his auto loss and personal injury damages, amounting to a neat $32,850, subject to the subrogation rights of B's collision insurer. After appropriate set-off, B would take the $5,830 owed to A by B's insurer; and A could, if he wished, bankrupt out the deficiency of $27,020, so as to achieve a net out-of-pocket loss of $6,500 plus the costs of bankruptcy.

As between the two systems, "pure" comparison would cost A a minimum of $275 plus a bankruptcy, and would profit B somewhere between $5,830 and $32,850, with the lower amount being borne by the premium-paying public. Had A been insured, the same public would have paid B $32,850—a rather handsome compensation to a driver whose negligence was the major cause of an accident.

The moral is presumably that, as with a comparison of causal negligences, comparative negligence systems can be proportionately evaluated only when all of the relevant factors are taken into account.