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Kevin T. Martin

Richard J. Phelan

John H. Scheid

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COMMENTARY

COMPARATIVE NEGLIGENCE — PANACEA OR PANDORA'S BOX?

By RICHARD J. PHELAN*
KEVIN MARTIN†
JOHN SCHEID‡

In *Maki v. Frelk*¹ the Illinois Appellate Court held that a complaint alleging "that at times relevant hereto if there was any negligence on the part of the plaintiff or the plaintiff's decedent it was less than the negligence of the defendant, Calvin Frelk, when compared,"² will withstand a motion to dismiss for failure to state a cause of action, even though the complaint admits that the plaintiff may have been guilty of a lesser degree of negligence which proximately contributed to his injuries. Prior to this decision, the complaint would have been dismissed. Considering the history of the case, this decision may be a prelude to the Illinois Supreme Court's adoption of a comparative negligence system in Illinois.³

The *Maki* case was initially appealed to the Illinois Supreme Court which found no constitutional issues on direct appeal but transferred the case to the appellate court to consider "*the question of whether, as a matter of justice and public policy, the rule should be changed.*"⁴ The appellate court, in reaching its decision, reviewed the arguments made by the proponents and opponents of comparative negligence.

Proponents have argued that the contributory negligence rule is anachronistic and socially undesirable in that it would deny recovery to a slightly negligent though seriously injured party. Comparative negligence, on the other hand, would simply reduce the plaintiff's verdict by an amount reflecting the negligence attributable to him. Also, comparative negligence would reduce the current court backlog because it would increase the incidence of jury waivers and pre-trial settlements.

* Associated with firm of Phillip Corboy. Instructor, Kent Law School.

† Associated with firm of Phillip Corboy.

‡ Faculty, The John Marshall Law School.

¹ 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967).

² *Id.* at 440, 229 N.E.2d at 285.

³ The *Maki* case is presently pending before the Illinois Supreme Court. Oral arguments were heard on January 25, 1968, at the University of Chicago Law School. Amicus curiae briefs were submitted by both the plaintiff and defense bar, addressed to the question of whether Illinois should adopt a system of comparative negligence.

⁴ 85 Ill. App. 2d at 440, 229 N.E.2d at 285.

Opponents have argued, on the other hand, that under the present system juries, in effect, already compare the plaintiff's negligence to the defendant's when they arrive at compromise verdicts. In addition, if adopted, the system would increase the frequency of claims and lawsuits without any promise of reducing the backlog by an increase in settlements. They further urge that its adoption would probably effect an increase in the cost of liability insurance. Finally, it is contended that where a comparative negligence system exists, it has been created by legislation and not by judicial fiat.⁵

The *Maki* court, in adopting comparative negligence, stated that it provides a "more just and socially desirable distribution of loss,"⁶ and held that since the doctrine of contributory negligence was created by the courts it could be judicially abrogated.

The court, however, favored the adoption of the "modified" form of comparative negligence as opposed to the "pure" form. Under the latter, plaintiff's damages are simply reduced to the extent of his own negligence, even if plaintiff's negligence might exceed that of the defendants. The general verdict form and instructions in a Federal Employers' Liability Act case exemplify this "pure" form. Under the "modified" form now in use in Wisconsin and Arkansas, the contributory negligence doctrine is not completely abandoned. Only if the jury finds the plaintiff less negligent than the defendant will the plaintiff recover the damages he sustained, less that amount attributable to his own negligence. If the defendant's percentage of negligence does not exceed that of the plaintiff, there is no recovery whatever.

In Wisconsin, the jury records the percentage allocations on a special verdict form. On a second form the jury makes a finding as to the total damages incurred. The trial judge then makes the mathematical computation to reduce damages by the extent of the plaintiff's percentage of negligence. In Arkansas the verdict is a general one and the jury is simply told to compare the negligence of the parties, and if the plaintiff's negligence is equal to or greater than the defendant's to return a verdict for the defendant. If, however, the plaintiff's negligence is less than the defendant's, the jury is then to reduce damages in proportion to the plaintiff's negligence. Thus, in Arkansas the jury rather than the judge computes the net award of damages.

⁵ Georgia, however, did inaugurate comparative negligence judicially in railroad cases, which was later complemented by statute. See Goodrich, *Origin of the Georgia Rule of Comparative Negligence and Apportionment of Damages*, 1940 GA. B.A.J. 174; *Moore v. Sears, Roebuck & Co.*, 48 Ga. App. 185, 172 S.E. 680 (1934); *Wynne v. Southern Bell Tel. Co.*, 159 Ga. 623, 126 S.E. 388 (1925); GA. CODE ANN. §§66-401, 404 (1966).

⁶ 85 Ill. App. 2d at 449, 229 N.E.2d at 290.

With this brief introduction, it would be instructive to determine what changes and ramifications in Illinois law may occur if a system of comparative negligence is adopted. A review of the decisions under the Wisconsin statute indicates that the implementation of the Wisconsin system in Illinois will probably engender some changes in the substantive tort law of Illinois and unquestionably will affect our present adjective law.⁷

STANDARD OF CARE

Will plaintiff's and defendant's negligence be compared when there are differences in their standard of care? Although courts consistently repeat that the standard is always ordinary care under the circumstances,⁸ on occasion a defendant, *e.g.*, a common carrier, will be held to the "highest degree" of — presumably ordinary — care.⁹ Jury instructions in Wisconsin recognize different levels or standards of care in such cases without pointing out how this differentiation should affect apportionment.¹⁰ The apportionment might be reasonably made by comparing the degree of relative deviation of each party from his own standard of care. Thus, for example, in a child pedestrian auto case, where the minor is eight years old and the driver an adult, the acts of the child would be compared with others of his age, intelligence, and experience, and the degree of any deviation from this standard should then be compared with the degree of deviation of the adult driver from his standard of care. The jury, however, might well have serious difficulty in attempting to assign percentages of fault when there are two apparently disparate standards of care applicable.

Under the Illinois Guest Statute the defendant's liability is predicated only upon a finding of "wilful and wanton misconduct".¹¹ The courts have distinguished between this type of conduct and ordinary negligence. As Dean Prosser has written:

Lying between intent to do harm, which . . . includes proceeding with knowledge that the harm is substantially certain to occur, and the mere unreasonable risk of harm to another involved in ordinary negligence, there is a penumbra of what has been called 'quasi intent'. To this area the words 'wilful,' 'wanton,' or 'reckless', are customarily applied. . . . They have been grouped together

⁷ See text at notes 30-31 *infra*. Wisconsin has certain procedural systems that Illinois does not have, such as a direct action statute, WIS. STAT. ANN. §260.11 (1965); non-unanimous jury verdicts, WIS. STAT. ANN. §270.25 (1965); and a more liberal joinder statute, WIS. STAT. ANN. §260.11 (1965). Since these systems are not incorporated under the *Maki* decision, they will not be discussed, although they undoubtedly affect verdicts, both in kind and degree.

⁸ See W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 184 (3d ed. 1964).

⁹ See I.P.I. 100.01 (Illinois Pattern Jury Instructions). See also *Sinopoli v. Chicago Rys.*, 316 Ill. 609, 147 N.E. 487 (1925).

¹⁰ WIS. J. I., Civil #1582.

¹¹ ILL. REV. STAT. ch. 95½, §9-201 (1967).

as an aggravated form of negligence, differing in quality rather than in degree from ordinary lack of care.¹²

In short, the distinction is one of kind and not degree. Illinois courts have interpreted wilful and wanton as conscious indifference to or utter disregard for the safety of others.¹³ If plaintiff established that defendant was guilty of such conduct and that he himself was free of such conduct, he was entitled to recover. The guest passenger was not barred from recovery if he himself was guilty of ordinary negligence. If comparative negligence were adopted should the guest passenger's ordinary negligence be compared with the driver's wilful and wanton conduct; or further, the guest's wilful conduct with the driver's wilful conduct? If so, how should such comparison be made? Until recently Wisconsin did not compare negligence where each of the parties were found to have been negligent to a different degree. Thus plaintiff's ordinary negligence, for example, was not compared to defendant's gross negligence. However, the Wisconsin Supreme Court now permits such comparison to be made without providing any guidelines to facilitate the comparison, yet retaining, at least in theory, the distinction in degree.¹⁴

Analogous to this problem is the question of whether active and passive negligence should be compared. Recently, the Wisconsin Supreme Court reversed a trial court which had permitted a verdict form to be submitted to the jury which compared the passive negligence of the co-guests with that of the host.¹⁵ The court held:

It was not proper to include the passive negligence of the two guest-passengers in the same comparative negligence questions with the active negligence of the host and thus require the jury to assume the total of the negligence, active and passive, of all the parties constituted 100 per cent. Such form of verdict would be correct in the rare case where the negligence of the passengers was active in the sense it contributed with the host's negligence to the accident and thus each party could be considered a tort-feasor as against the other parties.¹⁶

If our court adopts comparative negligence and the courts continue to pay lip service to the distinction between active and passive negligence, aside from negligence imposed because of derivative liability, a decision must be made whether to compare these two kinds of negligence.

ASSUMPTION OF RISK

Where the doctrine of assumption of risk is applicable, comparative negligence is not. Assumption of risk by the plaintiff

¹² See W. PROSSER, *supra* note 8, at 187-8.

¹³ *Turner v. Schaeffer*, 30 Ill. App. 2d 376, 174 N.E.2d 690 (1961).

¹⁴ *Bielski v. Schultz*, 16 Wis.2d 1, 114 N.W.2d 105 (1962).

¹⁵ *Vroman v. Kempke*, 34 Wis.2d 680, 150 N.W.2d 423 (1966).

¹⁶ *Id.* at 685, 150 N.W.2d at 425.

is therefore an absolute defense even under the comparative negligence doctrine. Until recently, for example, the comparative negligence doctrine was not applied in Wisconsin to suits of an automobile passenger against his driver since Wisconsin applied the assumption of risk doctrine to such cases. In *McConville v. State Farm Automobile Insurance Company*,¹⁷ the Wisconsin Supreme Court abolished the assumption of risk doctrine as applied to the host-guest automobile relationship and supplanted it with the comparative negligence system. In Illinois, the doctrine of assumption of risk has been applied most often to situations involving contractual relationships, particularly to spectators and participants at baseball parks, hockey rinks, golf courses and the like.¹⁸ Unless the Illinois Supreme Court decides to expand the application of the assumption of risk doctrine in Illinois, possibly to the area of products liability, the doctrine will probably not interfere substantially with or limit the application of a comparative negligence system.

PRODUCTS LIABILITY

In products liability cases the Illinois Supreme Court has recently ruled that an allegation that the plaintiff exercised ordinary care at the time of the occurrence is necessary to a complaint alleging breach of warranty.¹⁹ It is maintained by some that it is therefore also necessary to allege freedom from contributory negligence in actions brought under a theory of strict liability.²⁰ If correct, an anomalous situation results. Since plaintiff is not required to prove defendant's negligence to recover, there will be no basis for comparison with the result that any contributory negligence whatsoever would bar recovery. Since the purpose of strict liability is to afford recovery regardless of negligence, the consideration of contributory negligence runs counter to the purpose of the doctrine. If plaintiff need not prove his own ordinary care but need only establish that he did not assume the risk by continued use of a defective product, plaintiff's negligence would not be in issue and comparative negligence would not apply. If plaintiff's conduct were such that it was an intervening and superseding cause of his injury, the defendant could prove that plaintiff's conduct and not the alleged defect was the proxi-

¹⁷ 15 Wis.2d 374, 113 N.W.2d 14 (1962).

¹⁸ See I.P.I. 13.00, Introductory comment to instructions on assumption of risk.

¹⁹ *People ex rel. General Motors v. Bua*, 37 Ill.2d 180, 196, 226 N.E.2d 6, 16 (1967).

²⁰ *Dunham v. Vaughan & Bushnell Mfg. Co.*, 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967); *Elman, Suvada at two*, 48 CHI. B. REC. 172, 175 (April-May, 1967).

mate cause and thereby avoid liability.²¹ Comparative negligence would, of course, apply to actions for negligent design, manufacture, processing, distributing, shipping and retailing which involve only questions of negligence by both parties.

MULTIPLE PARTIES — CONTRIBUTION

Where there are multiple defendants in Wisconsin their negligence is not compared as a unit to the plaintiff's negligence, except when the defendants are or may be deemed to be acting as agents for each other. Thus, if plaintiff is 30% negligent, defendant A 30% and defendant B 40%, plaintiff can recover only against B, since plaintiff's negligence is equal to that of A.²² The plaintiff recovers 70% of his damages from defendant B although this defendant is only 40% negligent.²³ However, if plaintiff is 33⅓% negligent, defendant A 33⅓%, and defendant B 33⅓%, plaintiff receives nothing.

Wisconsin has recently adopted, by judicial decision, a comparative contribution rule.²⁴ It provides that each defendant should bear that portion of the amount owed to the plaintiff in the ratio of its negligence to the total amount of negligence found attributable to the defendants liable to plaintiff.

As a result of Wisconsin's joinder statute²⁵ and its recently adopted comparative contribution rule, multiple party suits can involve relatively complex computations. Thus, if the plaintiff is found 20% negligent and damaged in the sum of \$10,000, and defendant A is 15% negligent, defendant B 25% and defendant C 40% negligent, plaintiff recovers \$8,000 to be paid by either B or C who are jointly and severally liable for 80% of the damages. Each defendant can then seek contribution from the other to the extent that he paid in excess of the following respective percentages: B, 25/65ths and C, 40/65ths. While plaintiff cannot recover from defendant A because plaintiff's negligence is greater, defendants B and C must bear the total amount of damages awarded to plaintiff, in the ratio their negligence bears to each other and not the whole. As a result they absorb defendant A's

²¹ It may be possible under the comparative negligence system to compare whether defendant's defective and unreasonably dangerous product was the dominating and substantially producing cause of the injury or whether the plaintiff's contributory negligence was the dominating and substantially producing cause. This comparison could be reduced to percentages, which, like other tort cases, would ultimately reduce plaintiff's recovery if it were less than the defendant's.

²² *Cameron v. Union Auto Ins. Co.*, 210 Wis. 659, 246 N.W. 420 (1933).

²³ Under the Wisconsin system plaintiff's damages are reduced in proportion to his negligence, not in the ratio of his negligence to that of the defendant. See *Cameron v. Union Auto Ins. Co.*, 210 Wis. 659, 246 N.W. 420 (1933).

²⁴ *Bielski v. Schultz*, 16 Wis.2d 1, 114 N.W.2d 105 (1962).

²⁵ WIS. STAT. ANN. §260.11 (1965).

negligence. Furthermore, in a contribution action defendant C recovers from B even though his negligence was greater than B's. It is self-evident that a liberal contribution rule is a natural corollary of the Wisconsin comparative negligence system.

The *Maki* court considered comparative contribution among tort-feasors when Judge Moran stated:

Properly applied, we feel that this rule will eliminate the need for continued adherence to these fictions of 'active-passive' or 'primary-secondary' negligence, for actions for contributory or indemnification will fall under the same rule as original actions for recovery of damage.²⁶

This portion of the opinion, read in conjunction with *Sargent v. Interstate Bakeries, Inc.*,²⁷ which reversed a trial court decision that had previously dismissed a third-party complaint for indemnification, would seem to strongly suggest that the appellate courts are encouraging the Illinois Supreme Court to adopt some form of contribution. In *Sargent*, Judge Dempsey said:

The possibility of inequity is unavoidable until the rule against contribution yields to a more rational approach which will place upon each tort-feasor liability in proportion to his own culpability.²⁸

It is, however, questionable whether the supreme court by judicial decision should abolish Illinois prohibition against contribution among joint tort-feasors as recognized in section 25 (2) of the Illinois Civil Practice Act which provides that: "Nothing herein applies to liability insurers or creates any substantive right to contribution among tort-feasors or against any insurer or other person which has not heretofore existed."²⁹

PLEADINGS AND PROCEDURE

In *Maki*, the Illinois Appellate Court approved the following allegation in lieu of the traditional allegation that the plaintiff was at all times in the exercise of ordinary care:

[T]hat at all times relevant hereto if there was any negligence on the part of the plaintiff or the plaintiff's decedent it was less than the negligence of the defendant, Calvin Frelk, when compared.³⁰

By approving this allegation the court in effect reaffirmed that even under the modified comparative negligence system the plaintiff retains the burden of proof with respect to his own lack of contributory negligence to the extent that such negligence affects his right to recover. While under the modified comparative negligence system plaintiff need not show complete freedom from contributory negligence, he must show by a preponderance of the evidence that if he was negligent his negligence was less than that of the defendant when compared.

²⁶ 85 Ill. App. 2d at 451, 229 N.E.2d at 290.

²⁷ 86 Ill. App. 2d 187, 229 N.E.2d 769 (1967).

²⁸ *Id.* at 202, 229 N.E.2d at 776, 777.

²⁹ ILL. REV. STAT. ch. 110, §25(2) (1967).

³⁰ 85 Ill. App. 2d at 440, 229 N.E.2d at 285.

INSTRUCTIONS — ALLOCATION OF PERCENTAGES

Instructions must be drafted explaining how the jury is to handle the special verdict and defining what comparative negligence is and how, if at all, the jury should make its allocations.

The following is an instruction approved by the Board of Circuit Judges in Wisconsin:

By your answer to Question 5 (special verdict calling for comparison of fault) you will determine how much or to what extent each party is to blame for the collision in question. You will weigh the respective contributions of these parties to the collision and, considering the conduct of the parties named in the question, considered as a whole, determine whether one made a larger contribution than the other, and if so to what extent it exceeds that of the other. In making your apportionment of negligence, you will fix the percentage of negligence attributable to each participant in proportion to how much the fault of each contributed to cause the collision, and by your answer to this question record your determination.³¹

The Wisconsin instruction does not point out in sufficient detail how and on what basis the jury should apportion negligence. Experience may have shown that the less said the better. However, it would seem that in a matter as complex as apportionment some firmer guidance to a jury would be necessary. The following suggested instruction may ameliorate the foregoing deficiency in the Wisconsin instructions.

You are instructed that you must determine first whether the plaintiff and defendant were negligent as defined in these instructions and if so whether that negligence proximately caused or contributed to cause the occurrence. You are to indicate your answers to these questions in answers 1-2 and 3-4 of the special verdict by stating yes or no on the line provided for the answer. In question 5 you are to assign a percentage of negligence to both parties according to what proportion you believe the parties' negligence proximately contributed to the occurrence. In determining the percentages reliance should not be exclusively placed upon the sum of the various acts of negligence of which a party may have been guilty. Apportionment should be the result of your analysis of the degree to which such acts proximately contributed to the occurrence bearing in mind the circumstances of the party at the time of the occurrence including their respective standards of care. [The latter statement should be given only when there are different standards of care.]

The next question for determination is who should apply the percentages to the award of damages. Once the jury makes its allocation of fault and makes its determination of the total damages incurred, the question remains whether the reduction of damages to reflect the percentage of plaintiff's negligence should be a jury function or should remain for the judge. Inherent in this question is a more basic consideration whether a jury can be trusted to objectively determine the damages and the negligence percentage, if it is advised of the ultimate purpose of the percentage allocations. Conversely, can the jury be trusted to enter total damages objectively where it is not apprised of the fact that

³¹ WIS. J. I., Civil #1580.

the judge will reduce the damages by the percentage of negligence found attributable to plaintiff. Arguably, the jury in such instances may enter a modified damage verdict to insure that plaintiff's percentage of negligence will be reflected in his recovery, thus leading to a double reduction, first by the jury, and then by the judge.

Prior to 1949 Wisconsin provided by statute that the juries were to reduce damages by the percentage of negligence attributable to the plaintiff. In 1949 the statute was amended to provide that the judge was to reduce the verdict.³² As a consequence of this amendment the jury does not know what effect, if any, the percentages have on the amount awarded. Nor is the jury informed that plaintiff will not recover, if his negligence is found to be equal to or greater than that of the defendant. This latter consequence of the jury's lack of information is not, however, inconsistent or unfair since the Wisconsin statute specifically prohibits recovery by the equally or dominantly negligent plaintiff.

SPECIAL VERDICTS

The comparative negligence system seeks to apportion damages by apportionment of fault. The system, by its nature, thus requires relatively precise analysis and computation through a clear understanding of the event in controversy. To encourage such analysis, Wisconsin has adopted the special verdict system. Originally, Wisconsin juries were given interrogatories which required them to decide whether litigants were guilty of such acts as "lookout," "speed," "control," "yielding the right-of-way," and the like. Because of a great deal of confusion in the verdicts based upon these specific findings, especially where such findings were not supported by the evidence, the Wisconsin court changed the procedure, so that presently there are no specific findings, but only a determination of whether the litigants' acts, undefined by detailed interrogatories, were causally connected to the occurrence.³³

In *Maki*, the appellate court stated:

We believe that the experience in Wisconsin has been largely satisfactory and that the procedural corollaries, particularly the special verdict generally in use in that state, could easily be adopted here.³⁴

While this language is not mandatory, it is suggestive that the

³² WIS. STAT. ANN. §331.045 (1965).

³³ It should be noted that the change in procedure is not mandatory and that either side may require specific interrogatories. However, the experience in Wisconsin since the change shows that neither plaintiff nor defendant frequently request such interrogatories. At least one conclusion may be drawn: both plaintiff's and defendant's bar agree that there are inherent defects in the detailed interrogatories, undoubtedly resulting from the complications in their use.

³⁴ 85 Ill. App. 2d at 451, 229 N.E.2d at 290.

special verdict system employed in Wisconsin as an implementation of its comparative negligence system should be adopted in Illinois for that same purpose.

One Illinois appellate district was called to decide whether a case occurring in Wisconsin and governed by Wisconsin's comparative negligence statute required the submission of special verdicts in Illinois.³⁵ It is noteworthy that this court held that the special verdict is substantive in nature and is integral to the comparison system:

If our judgment is correct, then the proper use of the Wisconsin interrogatory process is so intimately tied to the correct application of the comparative negligence doctrine as to constitute an integral part of the substance of that doctrine. To hold otherwise, and to permit a reading of the Wisconsin statute to the jury, accompanied by imprecise instructions, would have the practical effect of emasculating the Wisconsin statute which we seek to apply. More than mere procedure is involved here. As a result of the trial court's ruling defendant was deprived of the benefit of the Wisconsin Comparative Negligence Act which is well established in that state and which we hold relates to substance, rather than to procedure, so that the Wisconsin interrogatory procedure must be employed in actions brought here.³⁶

Arkansas recently has gone from the "pure" to the "modified" form of comparative negligence and has discontinued the use of the special verdict.³⁷ The jury is instructed that if they find the defendant negligent but not the plaintiff, the plaintiff receives the full amount of damages. If, however, both are found negligent, then the jury is to compare and if the plaintiff's negligence is less than the defendant's the plaintiff's award should be reduced by an amount reflecting his negligence. If the defendant is not negligent, or the plaintiff's negligence is equal to or greater than the defendant's, then the verdict must be returned for the defendant.³⁸

³⁵ *Millsap v. Cent. Wis. Motor Transp. Co.*, 41 Ill. App. 2d 1, 189 N.E.2d 793 (1963).

³⁶ *Id.* at 20, 189 N.E.2d at 802.

³⁷ See text at notes 6-7 *supra*.

³⁸ See ARK. STAT. ANN. ch. 27-1730.1 (1962):

Contributory negligence shall not bar recovery of damages for any injury, property damage or death where the negligence of the person injured or killed is of less degree than the negligence of any person, firm, or corporation causing such damage.

See also ARK. STAT. ANN. ch. 27-1741.1-1741.3 (1962). The verdict of a jury may be general but a trial court may require the jury to return only special findings upon each issue of fact. The court also has discretion to give special interrogatories to the jury along with the general verdict. *Brown v. Keaton*, 232 Ark. 12, 334 S.W.2d 676 (1960). In *Smith v. Tipton*, 237 Ark. 486, 374 S.W.2d 176 (1964) the jury returned a general verdict plus a special finding that plaintiff was 20% negligent. The trial court then reduced damages and the action was affirmed on appeal.

Since 1957 the trial court has complete discretion in the submission of special interrogatories. In *Cobb v. Atkins*, 239 Ark. 151, 388 S.W.2d 8 (1965), the court refused counsel's special interrogatories on plaintiff's negligence, defendant's negligence and percentage of fault, and this action was affirmed as within the trial court's discretion.

Outside of Wisconsin, the remainder of the jurisdictions operating under a comparative negligence system employ the general verdict, as in the Federal Employers' Liability Act. Considering the fact that states which have comparative negligence followed Wisconsin chronologically, it is significant that they do not also have the special verdict procedure.

There appears to be a greater need for a special verdict form when the comparative negligence system is of the "modified" type. In this instance, there is an express prohibition against a plaintiff's recovery when his fault is equal to or greater than the specific defendant against whom recovery is sought. Hence, to determine whether the plaintiff may recover notwithstanding his possible negligence it is necessary to first determine if his negligence is 50% or more of the total. The special verdict seems to fill this need.

Special verdicts could be more readily discarded if the comparative negligence were the "pure" form, in which a plaintiff 90% negligent would recover 10% of his damages. However, it is questionable whether "a more just and socially desirable distribution of loss" will be effected under this system. For example, in a two car accident both drivers are frequently injured and a counterclaim is filed. A grossly negligent plaintiff (or defendant in the counterclaim) who is 90% at fault but who suffers \$50,000 damages will recover \$5,000. Whereas the defendant (or plaintiff in original action) who is 10% at fault and suffers damages of \$5,000 is entitled to \$4,500. Hence the dominantly negligent party will be awarded a net of \$500. This anomalous situation, which may arise under the "pure" form, might then be remedied by each party's respective insurance carrier paying the other party's reduced damages. However, if both parties were uninsured, the dominantly negligent party would recover. To obviate this contingency some form of compulsory insurance would be necessary.

DIRECTED VERDICTS

Recently, the Illinois Supreme Court in *Pedrick v. Peoria & Eastern Railroad Co.*³⁹ held that trial judges must weigh the evidence before the cause is submitted to the jury as they previously were required to do following the return of the verdict. No longer is the test whether there is *any* evidence but rather whether all the evidence is so overwhelmingly in favor of the party moving for the directed verdict that no contrary verdict would stand. The court in reaching the conclusion held that it would adopt this rule rather than affirm a rule that required the trial judge to sub-

³⁹ 37 Ill.2d 494, 229 N.E.2d 504 (1967).

mit a case to the jury which he would ultimately set aside at the post-trial stage.

The policy of the *Pedrick* decision is to encourage disposition by directed verdict. Under comparative negligence the weighing of negligence appears to be peculiarly a jury function,⁴⁰ and it would seem unlikely that the trial court will direct as many verdicts as it did even before *Pedrick*. Thus, at least in the area of comparative negligence, the *Pedrick* policy is thwarted.

APPELLATE REVIEW

Appellate review of comparative negligence judgments may become increasingly cumbersome and complex. A review of negligence cases decided in Wisconsin discloses that the appellant usually argues: that there was insufficient evidence to support the verdict, and that the jury's apportionment of negligence was not based on the evidence. While the Wisconsin Supreme Court has said with regularity that they do not intend to invade the jury's function on issues of negligence and apportionment,⁴¹ it reviews and reverses with almost the same regularity.

Since Wisconsin's comparative negligence statute precludes recovery by a plaintiff when the plaintiff's negligence is equal to or greater than defendant's, the court has reversed plaintiff's verdicts, holding as a matter of law that plaintiff's negligence was at least equal to defendant's.⁴² Where plaintiff appeals from a judgment for defendant the court can only order a new trial, since it cannot recalculate the negligence percentages, but can only determine as a matter of law that defendant's negligence was greater than plaintiff's. However, appellate courts would not necessarily become deluged with appeals if they declare repeatedly enough that the determination of division of fault is peculiarly a jury function — presuming the use of special verdicts on percentage of negligence —, that gross variations of negligence among the parties can be resolved by the trial judge through the use of directed verdicts, and finally that the damages are ultimately determined by the trial judge's mathematical application of percentages.

SETTLEMENTS

Will comparative negligence reduce the backlog of pending litigation? Will it foster settlements? How, if at all, will it affect insurance premiums? These questions today assume greater importance because of the four and one-half to five

⁴⁰ *Caldwell v. Piggly-Wiggly Madison Co.*, 32 Wis.2d 447, 145 N.W.2d 745 (1966); *Blahnik v. Day*, 22 Wis.2d 67, 125 N.W.2d 364 (1964).

⁴¹ *Lawver v. Park Falls*, 35 Wis.2d 308, 151 N.W.2d 68 (1967); *Firkus v. Rombalski*, 25 Wis.2d 352, 130 N.W.2d 835 (1964); *Ligman v. Bitker*, 270 Wis. 556, 72 N.W.2d 340 (1955).

⁴² *Kornetzke v. Calumet County*, 8 Wis.2d 363, 99 N.W.2d 125 (1959).

and one-half year backlog in Cook County, Illinois, the rising cost of insurance premiums and the frequency of liability insurance company bankruptcies. No studies on whether comparative negligence will reduce the backlog have been made. While the backlog in Milwaukee County is nowhere near that of Cook County, Illinois, no reliable conclusions can be drawn from the experience, since the smaller backlog may be attributable to variables other than the comparative negligence system. In one study of the effect of comparative negligence on insurance premiums, the author reached the conclusion that there was no perceptible difference in the insurance premiums charged under a comparative negligence system than those charged in states without such a system.⁴³

Unquestionably some cases which otherwise would have been turned away by the plaintiff's attorney because of rather obvious contributory negligence would now be taken and filed since the plaintiff's fault will not necessarily bar recovery.⁴⁴ For example, pedestrian, automobile intersection, child dart-out and fall-down cases, in all of which the defense of contributory negligence is a potent bar, may now be more enticing to a plaintiff's attorney. On the other hand, cases with low verdict yield and substantial contributory negligence would be shunned. There would be less reason to gamble since any moderate recovery would be reduced even further in proportion to the plaintiff's negligence, and it would not be feasible or profitable to handle such a case. Insurance companies, recognizing these facts, may be more prone to dispose of cases earlier in their history. The doctrine of comparative negligence dictates that the jury and not the judge must ultimately weigh fault. With rising jury verdicts, an attitude may well develop in the insurance industry that cases should be terminated early and often, rather than be submitted to a jury.

CONCLUSION

Essentially, the *Maki* decision requires an analysis of present social needs: *viz.*, whether a system which distributes loss in proportion to fault is more equitable than one which denies plaintiff any recovery in the event he has contributed to his injuries. The former system seems to be more consistent with the present day attitude of assisting those who are disadvantaged, despite their own deficiencies. Illinois law presently bars a plaintiff's recovery

⁴³ Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1959).

⁴⁴ Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959). In a symposium held at the University of Arkansas when that state was in the process of adopting a comparative negligence statute, a poll taken of the Arkansas Bar revealed that most lawyers would accept more cases on a contingent basis under a comparative negligence system than they would have otherwise.

if he is 1% negligent. Wisconsin, under the modified system of comparative negligence, raises this percentage to 50%. The Wisconsin system is apparently nothing more than an arbitrary compromise with the opponents of any comparative system, and as such is neither fish nor fowl. Thus, the present Chief Justice of the Wisconsin Supreme Court has advocated that Wisconsin should have a pure form of comparative negligence as found under the Federal Employers' Liability Act.⁴⁵

While the adoption of a comparative system will create an abrupt transition, experience in those states presently operating under such a system indicates that it may be adopted without excessive disruption and can be accommodated with minimal change in the procedural operation of the trial court.

⁴⁵ *Lawver v. Park Falls*, 35 Wis.2d 308, 151 N.W.2d 68 (1966).

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