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COMPARATIVE NEGLIGENCE IN MONTANA

Mae Nan Ellingson

I. INTRODUCTION

Montana has joined an ever increasing number of states in modifying the harsh common law doctrine of contributory negligence.1 The 1975 legislature enacted a statute which provides that contributory negligence will not bar recovery by a person seeking damages for personal injury, death, or property damage if such negligence is not greater than the negligence of the person against whom recovery is sought.2

The notion behind the doctrine of comparative negligence is to allow a plaintiff, who may have been negligent, to recover from a negligent defendant the amount of damages caused by the defendant’s conduct, in spite of plaintiff’s negligence. The degree to which the plaintiff can be negligent and still recover a portion of his damages varies among the various jurisdictions.

The purpose of this article is to summarize the history of comparative negligence in this country, to examine Montana’s statute in light of that history, to analyze the mechanics of the Montana approach, to outline the possible effects of comparative negligence on the existing tort law, to suggest some directions that the courts might take in construing the statute, and to indicate the need for additional legislation to make the statute more workable.

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2. Revised Codes of Montana, (1947) [hereinafter cited as R.C.M. 1947] § 58-607.1. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

Enacted by Sec. 1, Ch. 60, L. 1975.
II. DEVELOPMENT OF COMPARATIVE NEGLIGENCE

The growing acceptance of "so-called" comparative negligence is grounded on the dissatisfaction of courts and practitioners of tort litigation with the common law doctrine of contributory negligence. That doctrine has traditionally barred a plaintiff from recovering any damages if his actions in any way contribute to his injury. As Dean William Prosser so aptly stated:

The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free.  

Such a harsh policy, being unjustifiable and at the same time, firmly embedded in the common law, resulted in judicial and legislative attempts to ameliorate its effect through the doctrines of last clear chance and discovered peril. The application of these doctrines has become tortured, complex, and inadequate, since they can be applied in only a few of the personal injury cases where contributory negligence is an issue. Consequently the severe application of contributory negligence has gone largely unabated.

Criticism of the doctrine has increased in recent years, however, and courts have shown some sensitivity to the inequities of the rule. In spite of their sensitivity, the courts of most states have emphatically declared that it is the legislature's responsibility to rid the law of the contributory negligence defense. Nevertheless, the

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3. The term "so-called" is used here to indicate that the use of the term comparative negligence may be a misnomer. Nowhere in the statute is the term comparative negligence used. Rather, the statute has eliminated contributory negligence as a complete defense and its place provides for diminution of damages of the person injured when he has been guilty of negligence that has contributed to his own injury.


5. Davis v. Mann, 152 Eng. Rep. 588, 589 (Ex. 1842). The rule states that a plaintiff may recover in full for his injuries regardless of his own negligence if the defendant in exercise of reasonable care could have avoided the injury.


Supreme Courts of Florida and California have recently ruled that the doctrine of comparative negligence is available in those states.\(^9\) Notwithstanding these two court decisions, the advent of comparative negligence in this country has been due to the efforts of state legislatures,\(^10\) with the bulk of this effort occurring in the years since 1969.\(^11\)

In spite of this relatively recent emphasis on comparative negligence, the doctrine is not a new one. The courts of this country have long apportioned damages and fault in admiralty cases.\(^12\) The courts did not, however, apportion damages by degree of fault, but rather divided the damages equally among the negligent parties.\(^13\) Illinois was the first state to modify contributory negligence in the field of civil law. In the 1858 case of *Galena & Chicago Railroad Co. v. Jacobs*,\(^14\) the Illinois supreme court characterized negligence as either slight or gross and held that if the plaintiff was slightly negligent and the defendant was grossly negligent in comparison, the plaintiff could recover.\(^15\) Although currently in use in some states,\(^16\) Illinois has found this standard to be unworkable and abandoned it in 1894.\(^17\)

Notwithstanding these early attempts and one successful effort\(^18\) at apportioning damages, the real legislative history of comparative negligence began in 1908 with the adoption of the Federal Employer’s Liability Act.\(^19\) The FELA provides that a suit brought

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9. Hoffman v. Jones, 280 So.2d 431, 435-438 (Fla. 1973); Li v. Yellow Cab Co. of California, *supra* note 1. The Supreme Court of Florida in the *Hoffman* case determined that it had the power to change a common law doctrine.

10. See statutes, *supra* note 1.


13. *Id.* at 208. This is still the rule in admiralty cases in the United States.


15. If both defendant and plaintiff were similarly negligent, there could be no recovery. *Green, Illinois Negligence Law*, 39 Ill. L. Rev. 36, 45-47 (1944).

16. Neb. Laws 1913, ch. 124 § 1 at 311 (now Neb. Rev. Stat. § 25-1151 (1964)); S.D. Laws 1941, ch. 160 at 184 (now S.D. Compiled Laws Ann. § 20-9-2 (1967)). Both Nebraska and South Dakota have adopted the "slight-gross" approach to comparative negligence. In both states, as in Illinois, the standard is imprecise, confusing and unworkable. It is not surprising that this form of comparative negligence has been rejected in favor of the "pure" or "modified" type.


18. In 1860 Georgia passed a comparative negligence statute that included apportionment of damages in proportion to fault for injuries suffered in railroad accidents. *Ga. Code* § 2979 (1860), and § 2914 (1862). This law was subsequently expanded by judicial interpretation in Berry v. Jowers, 59 Ga. App. 24, 200 S.E. 195 (1939), to include all defendants. There has been a recent codification of the rule in *Ga. Code Ann.* § 105-603 (1968), which provides that:

If the plaintiff by ordinary care could have avoided the consequences to himself caused by defendant’s negligence, he is not entitled to recover. In other cases, the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.

by an employee against a railroad for personal injury or death is not barred by an employee's contributory negligence, but the damages recoverable are diminished in proportion to the amount of negligence attributable to the employee.\textsuperscript{20} Many states, including Montana, have enacted employer's liability acts covering railroad employees patterned after the FELA.\textsuperscript{21} Montana also enacted a general Workman's Compensation Act which provides that contributory negligence of the employee is not a defense in an action brought by an injured workman against his employer, but the statute does not provide for the apportionment of damages.\textsuperscript{22}

The FELA is classified as a pure, as opposed to a modified, comparative negligence statute.\textsuperscript{23} The pure and modified forms of comparative negligence are alike in that the plaintiff's recoverable damages are diminished in proportion to his degree of fault. Conversely, the defendant is liable for the proportion of damages for which he is to blame.\textsuperscript{24} The critical factor that distinguishes pure comparative negligence from the modified form is the amount of negligence of which the plaintiff may be guilty and still recover some damages from a negligent defendant. In a pure jurisdiction, the plaintiff may be found to be more responsible for this injury than the defendant, and still recover. For example, if the plaintiff is adjudged to be 98 percent negligent and the defendant is found to be 2 percent negligent, the plaintiff can recover 2 percent of his damages. By contrast, such recovery would not be permitted in any of the modified jurisdictions. Absent a pure form of comparative negligence, a plaintiff cannot recover if his negligence exceeds that of the defendant.

To date, only a small number of states have followed the FELA and enacted pure comparative negligence statutes. Mississippi was the first to do so in 1910 and consequently the pure form of comparative negligence has become known as the "Mississippi type."\textsuperscript{25} Puerto Rico followed Mississippi in 1930\textsuperscript{26} and three states have

\begin{itemize}
\item \textsuperscript{20} Id.
\item \textsuperscript{21} R.C.M. 1947, § 72-649. This statute, which is limited to railroads, was applied in \textit{Great Northern Ry. Co. v. Wojtala}, 112 F.2d 609 (9th Cir. 1940).
\item \textsuperscript{22} R.C.M. 1947, § 92-201. Under this section, the negligence of the employer is not an essential element of his liability for injuries sustained by an employee during employment, nor are defenses or contributory negligence and assumption of risk available.
\item \textsuperscript{24} The plaintiff cannot recover if he is solely responsible for his injury. Hawley v. Alaska S.S. Co., 236 F.2d 307, 311 (9th Cir. 1956).
\item \textsuperscript{25} Miss. Laws 1910, ch. 135 at 125 (now Miss. Code Ann. § 1454 (1956)).
\item \textsuperscript{26} P.R. Civil Code § 1802 (1930) (now P.R. Laws Ann. tit. 31, § 5141 (1968)).
\end{itemize}

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recently adopted the pure form of comparative negligence—Rhode Island, Washington, and California.

The modified form, or the Wisconsin rule, has been adopted by the majority of states. In all modified comparative negligence statutes, any plaintiff who is responsible for more than half of his injuries or damages can recover nothing. Under this general principle, however, the various states have chosen different approaches allowing recovery. One group of states, led originally by Wisconsin, provide that a negligent plaintiff can recover as long as his negligence is less than that of the defendant. This means that the plaintiff’s negligence must be 49 percent or less in order to recover. The other approach, which is that currently taken by Wisconsin, provides that a plaintiff can recover if his negligence is not greater than the negligence of the defendant. A simple example will illustrate the difference between the two approaches.

In a jurisdiction with the 49 percent, or “less than”, type of statute, if a jury apportions the negligence equally between the plaintiff and the defendant, as juries are likely to do, the plaintiff would be allowed no recovery. In a jurisdiction following the “not greater than” rule, a plaintiff found 50 percent negligent would be entitled to recover 50 percent of his damages from a defendant who was 50 percent negligent. In such jurisdiction, however, once the jury determines that the plaintiff’s negligence exceeds 50 percent, e.g. 51 percent, the plaintiff recovers nothing. By way of contrast, in a pure jurisdiction, the plaintiff who is 51 percent negligent could recover 49 percent of his damages from a negligent defendant.

Even though the modified type of comparative negligence has more advocates than the pure form, it has not gone without criticism, most of which is directed toward the 49 percent rule. Before Wisconsin amended its statute to conform to the 50 percent rule, several courts of Wisconsin voiced dissatisfaction with the 49 percent rule and urged the adoption of a pure form of comparative negligence. The most valid criticism seems to lie in the inherent illogic of allowing a plaintiff, 49 or 50 percent negligent, to recover

29. Li v. Yellow Cab Co. of California, supra note 1.
30. The modified rule is also consistently referred to by writers as the Wisconsin rule because Wisconsin, in 1931, was the first jurisdiction to adopt this form of comparative negligence. Wis. Laws 1931, ch. 242 (now Wis. Stat. Ann. § 895.045 (1966)).
31. In 1966, Wisconsin changed from this form of comparative negligence to the “greater than” or 50% type. Wis. Laws 1971, ch. 47 at 50 (now Wis. Stat. Ann. § 895.045 (Supp. 1973)).
32. Vincent v. Papst Brewing Co., 47 Wis.2d 120, 177 N.W.2d 513, 513-17 (1970); Spaeth v. Sereda, 41 Wis.2d 448, 164 N.W.2d 246, 248 (1969); Lawyer v. City of Park Falls, 35 Wis.2d 308, 151 N.W.2d 68, 72 (1967).
49 or 50 percent of his damages, while denying a plaintiff 51 percent negligent any recovery at all. The only answer to this criticism is the argument that it is quite fair and logical to deny recovery to a plaintiff who is more negligent than the defendant.

Any definitive evaluation of the benefits and detriments of the different forms of comparative negligence can only be made after a substantial body of law has developed around the recently enacted statutes. Certainly either form of comparative negligence is preferable to the common law rule of contributory negligence.

III. THE MONTANA COMPARATIVE NEGLIGENCE STATUTE

The Montana comparative negligence provision contains only one section. The following brief analysis of that section is based on the interpretations of identical statutes in other jurisdictions and on a common sense reading of the statute. No Montana cases are yet reported construing the statute, because it did not take effect until July 1, 1975.

The Montana statute allows the plaintiff to recover if his negligence is not greater than the negligence of the defendant. The application of this provision can be predicated upon the interpretations of the New Hampshire and Wisconsin statutes. The New Hampshire statute removes contributory negligence as a bar to recovery where "such negligence was not greater than the causal negligence of the defendant." Under this statute, it has been held that the plaintiff may recover from the defendant if he is 50 percent at fault, but not if he is 51 percent at fault.

In 1931 the Wisconsin legislature passed a law that allowed a contributorily negligent plaintiff to recover "if such negligence was not as great as the negligence of the defendant." This was interpreted as a 49 percent statute. As a result of the criticism mentioned above, the Wisconsin legislature amended its statute by substituting the words greater than for as great as. The revised statute, which is identical to the Montana and New Hampshire stat-

34. R.C.M. 1947, § 43-507, provides that the effective date of new statutes is July 1 of the year in which enacted, unless the statute provides otherwise.
36. N.H. REV. STAT. ANN., § 507.7-a, as amended by L. 1970, ch. 35. The New Hampshire statute removes contributory negligence as a bar to recovery where "such negligence was not greater than the causal negligence of the defendant." Under this statute, it has been held that the plaintiff may recover from the defendant if he is 50 percent at fault, but not if he is 51 percent at fault.
38. Wis. Laws 1931, ch. 242 (now Wis. STAT. ANN. § 895.045 (1966)).
utes, has been interpreted as adopting a 50 percent rule. It logically follows that Montana has also adopted the 50 percent rule of modified comparative negligence.

The following hypothetical situation illustrates how the Montana statute should be applied. Assume that the plaintiff has suffered damages of $20,000 and the defense of contributory negligence is raised. If the jury determines that the plaintiff and defendant are each 50 percent negligent, the plaintiff recovers $10,000. If the plaintiff is 51 percent negligent and the defendant is 49 percent negligent, the plaintiff recovers nothing. For a more typical example, assume that the jury finds the plaintiff 25 percent negligent and the defendant 75 percent negligent. The plaintiff is entitled to recover 75 percent of his damages or $15,000.

IV. **Effect of the Comparative Negligence Statute on Existing Tort Law**

In its apparent haste to enact a comparative negligence statute, the Montana legislature drafted a statute that establishes the general principal of comparative negligence, but ignores other areas of tort law that are inextricably interwoven with contributory negligence. The statute is devoid of any provisions limiting the application of doctrines that are part of the common law notion of contributory negligence or doctrines that are inconsistent with comparative negligence.

When the first cases raising the issue of contributory negligence are filed under the new statute, the Montana courts will have to determine the impact of Montana's version of comparative negligence on the other areas of tort law recognized in the state. The following analysis will discuss the areas of tort law affected by the enactment of a comparative negligence statute, describe the approaches taken in other states, and suggest alternatives for the Montana courts and legislature.

A. **Assumption of Risk**

Traditionally, the defense of assumption of risk has been a complete defense similar to contributory negligence, and, where found, a complete bar to recovery. The question that arises is how assumption of risk should be regarded in a jurisdiction with a comparative negligence statute.

Some comparative negligence statutes deal specifically with this question. The FELA abolishes the defense, as does the Con-

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41. Lupie v. Hartzheim. 54 Wis.2d 415, 195 N.W.2d 461, 462 (1972).
necticut comparative negligence statute. The statutes of Oregon and Utah merge assumption of risk into contributory negligence as one of the elements of plaintiff's conduct which is to be compared with the defendant's conduct. Montana's statute is silent regarding assumption of risk, and either the courts or the legislature must decide whether it will continue to be a complete defense or whether it will be merged with the doctrine of comparative negligence.

There are basically three situations where the defense of assumption of risk will arise. In the simplest form, the plaintiff, in advance, gives his consent to relieve the defendant of a duty toward him, and takes his chances of injury from a known risk, arising from what the defendant is to do or leave undone. The second situation is where the plaintiff voluntarily enters into a relationship with the defendant, with the knowledge that the defendant will not protect him against any risk. Again the defendant is relieved of the duty which would otherwise exist. The plaintiff, in the third situation, is aware of the risk already created by the defendant's negligence and proceeds voluntarily to encounter it.

In these situations, if the plaintiff's conduct is reasonable and knowingly engaged in, the defense of assumption of risk operates to deny defendant's negligence by eliminating defendant's duty of due care. If plaintiff's conduct in encountering a known risk is itself unreasonable, as it could be in the second and third situations where the danger is out of proportion to the advantage he seeks, his conduct is a form of contributory negligence. In such cases the defenses of assumption of risk and contributory negligence overlap and the defendant may plead either defense. Such overlap indicates the need to address this question directly under a comparative negligence rule. If the defendant can characterize conduct that is really contributory negligence as assumption of risk, the purpose of the comparative negligence statute could be easily subverted.

A recent Mississippi case illustrates the importance of such a characterization of plaintiff's conduct in a comparative negligence jurisdiction. Before June 29, 1973, Mississippi had traditionally recognized assumption of risk as a complete and separate defense. In a 1973 case, however, the Mississippi supreme court, recognizing

43. Conn. Pub. Acts No. 73-62, § 1(c) (now Gen. Stat. of Conn. § 52-572(h) (1975)).
46. Prosser, supra note 4 at 440.
47. Id. at 441.
48. Id.
49. Id. at 442.
the similarity of the defenses of assumption of risk and contributory negligence, held:

When appellant entered the lumber bin, it mattered not whether he was encountering a known risk, or a risk that he should have discovered because of his experience in the construction business, the issue is whether he acted as a reasonably prudent man by entering the lumber bin. In this case, the doctrine of assumption of risk overlaps and coincides with contributory negligence. Since assumption of risk is a bar to recovery, but contributory negligence is not under our statute of comparative negligence, we see the necessity of adopting a rule to govern cases where the two overlap and coincide. We do not abolish the doctrine of assumption of risk, but where assumption of risk overlaps and coincides with contributory negligence the rules of the defense of contributory negligence shall apply. 52

At a minimum, Montana should provide that where these two defenses overlap, the rules of contributory negligence will apply. An even better approach is that taken by the Wisconsin 53 and Minnesota 54 courts, which merged the defense of assumption of risk into contributory negligence and held that this result was more in harmony with the principle of comparative negligence than the former rule. The Supreme Court of Washington declared in 1973 that when that state’s comparative negligence statute became effective on April 1, 1974, a merger of assumption of risk and contributory negligence would occur and all previous distinctions would be abolished in the comparison process. 55 This year the California supreme court adopted comparative negligence by judicial decision 56 and in the process declared that:

We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence. 57

Such an approach is inherently more logical than the approach of Arkansas, which recognizes assumption of risk as a complete

52. Id. at 672.
The court held that assumption of risk was no longer a defense, but was evidence to be considered by the jury in attributing degrees of negligence.
56. Li v. Yellow Cab Co. of California, supra note 9 at 1239.
57. Id. at 1241.
defense, separate and apart from contributory negligence. Under this rule, when assumption of risk is raised as an issue, a jury must determine that it does not apply before it can consider the comparative negligence rule. Henry Woods, a tort litigation attorney of prominence in Arkansas, suggests, however, that in view of the legislature’s recent modification of the comparative negligence statute, the court may interpret the amendment as intending that assumption of risk should be compared as contributory negligence is compared.

There is sufficient precedent for either the courts or the legislature to merge the doctrine of assumption of risk into the category of contributory negligence for comparison purposes. Such action would place the Montana Comparative Negligence statute more in harmony with comparative negligence.

B. Last Clear Chance

That a majority of comparative negligence jurisdictions continue to recognize the last clear chance doctrine indicates support for the notion that last clear chance and comparative negligence are not inherently inconsistent. It also probably indicates that comparative negligence statutes or rules are generally advocated by the plaintiff’s bar and that a retention of the last clear chance doctrine is clearly advantageous to the plaintiff. The courts have, nevertheless, justified this approach by holding that since the defendant has the last opportunity to avoid the accident, his failure to do so is the sole proximate cause of the injury. Dean Prosser never found that justification satisfactory in light of the development of the common law doctrine of last clear chance. He viewed the development of last clear chance as a judicial attempt to ameliorate the harshness of the application of contributory negligence and that the justifica-

59. Woods, Trial of a Comparative Negligence Case, 21 AM. JUR. TRIALS 718, 739 [hereinafter referred to as Woods].
60. The 1973 amendments substituted the words “fault” and “fault chargeable to a party claiming damages” for the words “negligence” and “contributory negligence.” ARK. STAT. ANN. §§ 27-1730.1 and 27-1730.2 (1962). A separate section of the new act defines “fault” to include negligence, willful and wanton conduct, supplying of a defective product in an unreasonable dangerous condition or any other act or omission or conduct actionable in tort.” ARK. STAT. ANN. §§ 27-1763 through 27-1765 (1962).
61. Woods, supra note 59 at 739.
62. See cases, supra notes 51, 53, 54, 55 and 56.
63. See statutes, supra notes 42, 43, 44 and 45.
66. Id. at 427-28.
tion in terms of proximate cause was an afterthought. This theory finds support in the better reasoned position that where comparative negligence becomes the law, the need for the last clear chance doctrine no longer exists, and the application of the doctrine should be abandoned. This position has been adopted both legislatively and judicially.

The Supreme Court of California in its decision adopting comparative negligence noted that the continued application of the doctrine of last clear chance would result in a windfall for the plaintiff, in direct contravention of the principle of liability in proportion to fault. The court held that last clear chance was to be subsumed under the general process of assessing liability in proportion to fault. In *Cushman v. Perkins* the Maine supreme court held that when contributory negligence was abolished as a complete defense, last clear chance was as well.

The most recent decision rendered under the FELA is supportive of the trend of abolishing last clear chance. In that case the court held that the last clear chance doctrine was obsolete except insofar as it defined one variety of negligence to be considered in the apportionment of damages. An earlier FELA case had reached the opposite result, and the United States Supreme Court has yet to rule on the issue.

The current application of the doctrine of last clear chance in Montana may have a substantial impact on the future of that doctrine under comparative negligence. The type of last clear chance applied in Montana employs the concept of "discovered peril," which is also applied in Texas. Under the Montana application of

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67. *Id.* at 428.
70. *Li v. Yellow Cab Co.* of California, *supra* note 1 at 1240.
71. *Id.* at 1242.
73. *Id.* at 850.
this doctrine, for the defendant to be liable to a negligent, inattentive plaintiff, the injury must have been caused by the negligence of the plaintiff; actual discovery of the perilous situation of the person or property must have been made by the defendant in time to avert injury; and the defendant must have thereafter failed to use ordinary care to avert the injury. As a recent law review article noted, the application of discovered peril, instead of the traditional last clear chance doctrine, might provide a rationale for retaining last clear chance in a jurisdiction that has adopted comparative negligence. Because the defendant, under the discovered peril doctrine, must have actual knowledge of the plaintiff’s danger and fail to prevent the accident, the defendant’s conduct could be characterized as willful or wanton. Since willful and wanton conduct extends beyond simple negligence, an argument can be made that such conduct should not be affected by comparative negligence.

Another rationale for the continued recognition of the doctrine of last clear chance in Montana under the new comparative negligence statute is based on the position taken by the Montana supreme court in cases brought under the FELA. In a 1916 case the court ruled that a complaint, proceeding upon the theory of last clear chance, was proper under FELA, notwithstanding its comparative negligence provision. The rationale of the court in applying the last clear chance doctrine was clearly enunciated by the court in a subsequent case. Referring to its earlier opinion, the court explained:

[U]nder the act (FELA) the contributory negligence of the injured employee did not defeat his recovery but might diminish the amount of damages, and it was only for the purpose of avoiding the latter contingency that the doctrine of last clear chance was injected into the case.

These Montana supreme court decisions construing the FELA do not obviate the need for a fresh new consideration by the court of the applicability of last clear chance under the new comparative negligence statute. Vigorous defense lawyers will advocate the retention of the doctrine of assumption of risk so that the negligent defendant will be absolved of any liability to the plaintiff, while the

79. Garrett, supra note 64.
81. Sugarland Indus. v. Daily, 135 Tex. 532, 143 S.W.2d 931, 933 (1940).
83. Id. at 586.
85. Id. at 372.
ardent plaintiff's attorney will insist on the retention of the doctrine of last clear chance so that the negligent defendant will be responsible for 100 percent of the damages of the plaintiff, in spite of plaintiff's initial negligence. Granting a plaintiff full recovery for defendant's failure to utilize his "last clear chance," despite the plaintiff's negligence in the first place, is not in keeping with the spirit of the comparative negligence concept of allocating damages in proportion to fault. 86

C. Multiple Parties

1. Comparison of Negligence

When a plaintiff is injured by the concurring negligence of two or more defendants, the threshold question that will arise under the new comparative negligence statute will be whether the plaintiff's negligence is to be compared against the negligence of each defendant or against the combined negligence of all defendants. 87

The legislature could have resolved this question statutorily as have the legislatures of Connecticut, 88 Nevada, 89 and Texas; 90 and it may do so in a subsequent session. But before the legislature will have an opportunity to consider such an addition to the statute, the courts will undoubtedly be confronted with the question.

To illustrate the problem the courts will face, assume that the plaintiff is 40 percent negligent and that defendant one and defendant two are each 30 percent negligent. Does the plaintiff recover any of his damages? The two pioneering jurisdictions in the field of comparative negligence reached diametrically opposed conclusions. In Wisconsin the plaintiff would recover nothing. 91 In Arkansas, the plaintiff would receive 60 percent of his damages. 92

The Wisconsin court held that the plaintiff's negligence must be compared with that of each defendant and that the plaintiff cannot recover from any defendant whose negligence is equal to or less than that of the plaintiff. 93 The Arkansas court determined that the negligence of all defendants should be combined and compared to that of the plaintiff. 94 If the combined negligence of all the defen-

87. This problem occurs only in "modified comparative negligence" states, since in "pure" comparative negligence states the plaintiff recovers regardless of the percentage of fault attributable to him.
88. GEN. STAT. OF CONN. § 52-572(h) (1975).
89. NEV. REV. STAT. § 41.141 (1973).
90. TEX. REV. CIV. STAT. ANN. art. 2212(a), § 1 (Supp. 1975).
Comparative Negligence

When the negligence of a defendant exceeds that of the plaintiff, the plaintiff can recover from any of them, even from a defendant whose individual negligence is substantially less than that of the plaintiff. 85

In recognizing the illogic and inequity of the rule advocated by Wisconsin, the Arkansas court noted that it was impossible to explain why a plaintiff responsible for one-third of the negligence could recover two-thirds of the damages in a two-party case, but could not recover anything if two-thirds of the negligence were spread evenly among several defendants. 86 Such a rule would discourage the plaintiff from joining all possible defendants, since a large number of defendants would be likely to spread the responsibility so thin that the plaintiff's negligence would exceed that of each defendant. Conversely, it would be to the advantage of the defendant to search for any and all possible joint tortfeasors.

The approach taken by the Arkansas court was recently codified by the Texas legislature in their new comparative negligence bill. 87 Section 2(b) of that act provides that in multiple defendant cases, the plaintiff's negligence will be compared to the negligence of the defendants taken as a unit to determine if the negligence of the plaintiff has reached a level that bars recovery. 88 Since the modified comparative negligence section of the Texas statute is identical to that adopted by Montana, the experience under the Texas statute serves as a useful example of what can and should be done under the Montana statute.

Assume that the plaintiff's damages in a case are $20,000 and the plaintiff's negligence has been adjudged to be 40 percent. Defendants One, Two, and Three are each 20 percent negligent. The negligence of the plaintiff clearly exceeds the negligence of each defendant viewed individually, but the total negligence of the defendants is greater than the negligence of the plaintiff. Under the Texas statutory rule or the Arkansas court-imposed rule, the plaintiff would recover $12,000 or 60 percent of his damages; in Wisconsin he would recover nothing.

2. Contribution Among Joint Tortfeasors

The second problem arising in cases involving multiple defendants is the distribution of damages among the several responsible defendants. The new Montana statute does not speak to this issue and the courts will again be required to formulate appropriate rules.
This brief discussion of this very complicated area of tort law will serve to illustrate various results that can occur under the different statutory and judicial constructions of the concepts of contribution among joint tortfeasors and of joint and several liability. It will also offer some precedent that might be helpful to the courts and practicing attorneys in determining what Montana's law ought to be.

Montana courts have followed the traditional common law rule that there is no contribution among joint tortfeasors in the absence of legislative enactment. And Montana has not adopted the Uniform Contribution Among Joint Tortfeasors Act or any other contribution act that would resolve the inequity that results when contribution is not allowed. While only nine jurisdictions have adopted the Uniform Contribution Among Tortfeasors Act, and only nine jurisdictions have allowed contribution in the absence of legislation, a majority of the American states now permit contribution among tortfeasors. Because the notion behind contribution among joint tortfeasors, namely the allocation of damages based on proportion of fault, is central to the purpose of comparative negligence, most of the states recently adopting comparative negligence have specifically provided in their statutes for contribution among tortfeasors.

The most popular form of contribution is that adopted by Arkansas, which provides for a pro rata contribution according to fault. Arkansas adopted this provision shortly before it adopted its comparative negligence statute and consequently there is no history in that state of the operation of comparative negligence without contribution among tortfeasors. Wisconsin, the other pioneer in comparative negligence, reached the same result judicially, and the

100. Arkansas, Delaware, Hawaii, Maryland, Michigan, New Mexico, Pennsylvania, Rhode Island and South Dakota.
102. See jurisdictions cited supra note 100, 101 and infra note 103.
104. Woods, supra note 59 at 741.
court further declared that the right of one tortfeasor to contribution is not barred because his negligence may be equal to, or greater than, the negligence of his joint tortfeasor.\textsuperscript{106}

As Dean Prosser points out in his treatise on tort law, there is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants are responsible, to be shouldered by one alone, while the other goes scot free.\textsuperscript{107} Whether the decision on contribution is made by the courts or by the legislature, the guiding principle in their deliberations should be the injustice of the present system and the far-sighted approaches recently taken by other states.

Because the Texas approach of spreading liability among all negligent defendants is both equitable and logical, it will be discussed and compared with the other approaches and will be offered as a responsible solution for Montana.

The Texas statute enacting comparative negligence specifically addresses itself to the issue of contribution among tortfeasors and joint and several liability. It provides that:

\textit{[I]n multiple defendant cases in which the plaintiff's negligence does not exceed the total negligence of all defendants, contribution to the plaintiff will be in proportion to the percentage of negligence attributed to each defendant.}\textsuperscript{108}

Section 2(c) of that statute states that each defendant is jointly and severally liable for the entire judgment awarded, but contains the exception that a defendant less negligent than the plaintiff is liable only in proportion to the percentage of negligence attributed to that defendant.\textsuperscript{109} For example, the plaintiff's damages are $10,000. The plaintiff is determined to be 40 percent negligent and defendants One, Two, and Three are 10, 20 and 30 percent negligent. Since the combined negligence of the defendants is 60 percent, the plaintiff is entitled to recover $6,000 under comparative negligence. Defendant One is liable for $1,000, defendant Two is liable for $2,000 and defendant Three is liable for $3,000. None of the defendants are jointly and severally liable for the negligence of the other since the negligence of each is less than that of the plaintiff. In all multiple defendant suits where plaintiff's negligence is less than each defendant's negligence, the defendants are jointly and severally liable to the plaintiff for all recoverable damages.

The significance of the Texas approach can be seen by compar-

\textsuperscript{106} Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962).
\textsuperscript{107} W. PROSSER, LAW OF TORTS, § 50 at 307 (4th ed. 1971).
\textsuperscript{108} TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(b) (Supp. 1975).
\textsuperscript{109} TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(c) (Supp. 1975).
ing the results achieved under it with the results obtained in jurisdictions following a traditional contribution principle. Assume that plaintiff's damages are $10,000 and that he is 20 percent negligent. Defendants One, Two and Three are 10 percent, 30 percent and 40 percent negligent—a total of 80 percent negligent. The plaintiff is entitled to recover $8,000. Under the New Hampshire approach to contribution the plaintiff could recover nothing from defendant One, since his negligence is less than the plaintiff's. Logically it would appear that defendant Two is responsible for $3,000 and defendant Three for $4,000. That amount, however, would only equal $7,000 of the $8,000 that the plaintiff is entitled to receive. Consequently, these two defendants must make up the remaining $1,000 in proportion to the amount of their own negligence. The result is that the plaintiff recovers his full measure of damages, two defendants pay more than they were responsible for and defendant One gets by with paying nothing, although he is 10 percent negligent. Under the Texas approach defendant One would be liable for the $1,000 of damages he caused, but he would not be jointly and severally liable since his negligence is less than that of plaintiff.

Wisconsin achieved a contribution rule similar to that of New Hampshire by judicial decision. In the landmark case of Bielski v. Schulze, the Wisconsin supreme court held that multiple defendants are liable only for an amount proportionate to their individual degrees of negligence. In that case there were two defendants—one was 95 percent negligent and the other was 5 percent negligent. The 95 percent negligent defendant sought a 50 percent contribution of damages from the other defendant. The Court held that contribution was to be determined by degree of negligence, so that the defendant who was 95 percent negligent paid 95 percent of the damages. A subsequent Wisconsin case specifically held that joint and several liability still applied to negligence actions. In that case the plaintiff was 5 percent negligent, defendant One was 75 percent negligent and defendant Two was 20 percent negligent. Defendant One was judgment proof, so defendant Two had to pay the plaintiff's 95 percent judgment. The same result would be achieved under the Texas statute, because defendant Two was more negligent than the plaintiff and therefore, jointly and severally liable. The exception from joint and several liability applies only to a defendant whose

110. Orcutt & Ross, supra note 37 at 9. This article notes that New Hampshire has abolished joint and several liability.
112. Id.
113. Chille v. Howard, 34 Wis.2d 491, 149 N.W.2d 600, 605 (1967).
114. Id. at 604-605.
negligence is less than that of the plaintiff.

Any statutory treatment of the problem of contribution must deal with a great many more issues than can be discussed here, such as the effect of settlement on contribution, the effect of a release, and when contribution claims are to be determined. The Texas statute specifically answers these questions and any person intending to legislate on this subject would do well to look at the statute.

One good solution to the potential problems of comparative negligence in Montana would be for the legislature to enact a statute that would compare the plaintiff's negligence with the combined negligence of all defendants. The statute should also allow contribution among joint tortfeasors, based on the proportion of negligence and modify the doctrine of joint and several liability to the extent that a defendant less negligent than the plaintiff should not have to shoulder the entire burden of all defendants' negligence. However, such legislation cannot come soon enough for courts that will be faced with cases before the next legislature meets. It is urged that such courts follow the Arkansas precedent of comparing the plaintiff's negligence with the combined negligence of all defendants, and the Wisconsin court's rule that allows for a pro rata contribution among defendants based on fault.

D. Proximate Cause

The adoption of comparative negligence should have no effect on the rule of proximate cause—proximate cause being defined as that which, in "a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." In practice, however, there may be some effect. Contributory negligence has been explained by a majority of courts in the United States in terms of "proximate cause", saying that the plaintiff's negligence is an intervening, or insulating cause between the defendant's negligence and the result. Since the comparative negligence statute does not eliminate contributory negligence as a defense but merely abrogates the common law rule that contributory negligence is no longer an inexorable bar to recovery, the same causal connection must be shown. In other words, where fault can be apportioned, courts will

118. Mize v. Rocky Mountain Bell Telephone Co., 38 Mont. 521, 100 P. 971 (1909);
not be quick to find a remote, intervening cause of the plaintiff's damages.\textsuperscript{120}

Where the negligence on the part of a plaintiff will not defeat that plaintiff's recovery, there will be an increased emphasis on the proof of proximate cause, since a finding that the plaintiff's negligence was the sole proximate cause or a finding that defendant's negligence was not the proximate cause of injury will be an exculpatory defense even in "pure" comparative negligence jurisdictions.\textsuperscript{121} While both juries\textsuperscript{122} and the courts\textsuperscript{123} in Mississippi have been influenced by the "sole proximate cause" argument, Arkansas\textsuperscript{124} and Wisconsin\textsuperscript{125} juries and courts have been reluctant to find a sole proximate cause that would defeat plaintiff's recovery.

Whether comparative negligence has any effect on the application of proximate cause in Montana may very largely depend on how the case is submitted to the jury. In Wisconsin, where interrogatories are extensively used, it is the practice to submit separate interrogatories on negligence and proximate cause.\textsuperscript{126} The result is often a finding of negligence but not of proximate cause, resulting in a mandatory verdict for the defendant.\textsuperscript{127} The Arkansas system of including negligence and proximate cause in one interrogatory is probably preferable for the plaintiff,\textsuperscript{128} since the jury under the Wisconsin system may not fully understand the definition and importance of proximate cause, and may exculpate the defendant without intending to do so.

E. Trial of a Comparative Negligence Case

1. Pleading

Contributory negligence is still an affirmative defense and must be pleaded in a comparative negligence jurisdiction as in other jurisdictions. It is apparently a common practice in jurisdictions with modified comparative negligence statutes to allege affirmatively that the plaintiff's negligence has exceeded that of the defendant and that the plaintiff is therefore entitled to no recovery under the complaint. Such language is unnecessary since the mere assertion

\begin{enumerate}
\item[120.] Woods, \textit{supra} note 59 at 728.
\item[121.] See, \textit{e.g.}, Mississippi Export Ry. Co. v. Summers, 194 Miss. 179, 11 So.2d 429 (1943), \textit{sugg. of error overr.} 194 Miss. 193, 11 So.2d 905 (1943).
\item[122.] See, Bates v. Walker, 232 Miss. 804, 100 So.2d 611 (1958).
\item[123.] Illinois Central Ry. Co. v. Smith, 243 Miss. 766, 140 So.2d 856 (1962).
\item[125.] Presser v. Siesel Constr. Co., 19 Wis.2d 54, 119 N.W.2d 405 (1963).
\item[126.] Woods, \textit{supra} note 59 at 731.
\item[127.] Wills v. Regan, 58 Wis.2d 328, 206 N.W.2d 398 (1973).
\item[128.] Woods, \textit{supra} note 59 at 731.
\end{enumerate}
of contributory negligence brings the comparative negligence principle into play.\textsuperscript{129}

2. \textit{Voir Dire and Opening Statement}

The trial techniques used in a comparative negligence jurisdiction do not differ appreciably from techniques used in any other tort litigation. Perhaps the crucial decision that the plaintiff's attorney must face is whether to concede that this client was negligent to some degree or whether to argue that all of the negligence should be charged to the defendant. The general consensus appears to be that if proof is likely to establish negligence on the plaintiff's part, it is better to concede such negligence at the earliest opportunity and concentrate on establishing that it was less than that of the defendants or not the proximate cause of the plaintiff's injury.

3. \textit{Instructions, Interrogatories, and General or Special Verdicts}

The most important change in trial practice with comparative negligence is how the case is submitted to the jury. Since a thorough discussion of instructions, interrogatories, and verdicts is not possible here, this discussion will address only the most salient points and offer some observations as to what procedure should be used in Montana to derive the best and most consistent advantage from the new comparative negligence statute.

Montana's Rule 49(a) and (b) of the Rules of Civil Procedure provide that at the judge's discretion, cases may be submitted on either the general or special verdict.\textsuperscript{130} At the outset, it might be noted that, as a tactical matter, general verdicts are more favorable to plaintiffs and special verdicts are more favorable to the defendants. It is hoped, however, that the relative advantages to either side will be subordinate to considerations of which method seems more consistent with the goals of comparative negligence.

Here again the two pioneers in the field of comparative negligence have taken contrary positions. In Arkansas, where discretion rests with the trial judge as it does in Montana, the general verdict is favored.\textsuperscript{131} Dean Prosser suggests that such retention has nothing to do with the advantages of the general verdict but is, by and large, the result of a bar and court system's traditional inertia toward innovation in procedure.\textsuperscript{132} Another possible reason for the failure of many jurisdictions to use special verdicts with their comparative

\textsuperscript{129} Id.

\textsuperscript{130} Montana Rules of Civil Procedure, Rule 49(a) and 49(b).

\textsuperscript{131} Woods, supra note 59 at 750.

\textsuperscript{132} Prosser, supra note 4 at 491.
negligence statutes, or to incorporate the special verdict into the statute, lies in the fact that plaintiff's attorneys generally sponsor the comparative negligence legislation. In Wisconsin, where the court must, when requested by either party, direct the jury to find a special verdict, special verdicts are used universally and are considered to be a crucial substantive part of the system of comparative negligence. Even though the use of a special verdict may be somewhat disadvantageous to the plaintiff, there is much to commend its use.

In a case requiring apportionment of damages under the Wisconsin procedure, the jury is not asked to return a general verdict for the plaintiff with an assessment of the recoverable damages, but rather, it is asked a series of specific questions. These basic, elemental questions are essential to a clear understanding of the issues confronting the jury and should be used as special interrogatories accompanying the general verdict, if a special verdict is not used. The question so submitted should be simply and concisely worded and should include the elements contained in the sample questions below:

1. At the time of the accident, was defendant X negligent in the operation of his automobile? A. Yes.
2. Was defendant X's negligence a cause of the accident? A. Yes.
3. At the time of the accident was plaintiff Y negligent in the operation of her bicycle? A. Yes.
5. If you answer all of questions 1, 2, 3, and 4 "Yes", then answer this question: What percentage of the total negligence is attributable to the defendant X? A. 75 percent. What percentage of the total negligence is attributable to plaintiff Y? A. 25 percent.
6. What is the amount of damages that Plaintiff Y has sustained? A. $20,000.

Once the jury has answered these questions, the court can apportion

135. Not only are special verdicts, or special interrogatories submitted with general verdicts, more likely to arrive at substantial justice, but they also provide a way in which to ameliorate the problem of an unreliable and irresponsible jury. Prosser, supra note 4 at 497. When a case is submitted on a special verdict or a general verdict with special interrogatories, the need for long complicated instructions on the law is avoided. A special verdict requires answers to specific questions only on issues, without any general verdict for plaintiff or defendant. Special interrogatories are asked, in addition to the instructions to return a general verdict, as a check on the jury's conclusion. General instructions are usually not given where special verdicts are used, and instructions on special issues are limited to those necessary and appropriate to enable the jury to understand.
136. Prosser, supra note 4 at 498.
the damages and enter judgment for plaintiff Y for 75 percent of her damages or $15,000. The jury is not told the effect of its answers, and indeed it has been held to be error for counsel to so advise them or read the apportionment statute to them.\textsuperscript{137}

The Montana bar can look for guidance to the voluminous history in Wisconsin on the use of the special verdict in comparative negligence cases.\textsuperscript{138} Valuable information can also be obtained from North Carolina and Texas where the special issue has become standard procedure.\textsuperscript{139} An Illinois case construing the Wisconsin law illustrates the importance of the special verdict in conjunction with the comparative negligence statute. In \textit{Millsap v. Central Wisconsin Motor Transport Company},\textsuperscript{140} the Illinois supreme court found it to be reversible error to use a general verdict in a comparative negligence case. The court reasoned as follows:

\begin{quote}
[T]he 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 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.\textsuperscript{141}
\end{quote}

It is hoped that there will be general support in Montana for the use of special verdicts in comparative negligence cases. There are at least three methods of insuring such use. One is the approach taken by Kansas in which the comparative negligence statute requires that findings of the jury be determined by special verdict.\textsuperscript{142} This approach requires legislative enactment. The second approach, also requiring legislative enactment, is to amend Rule 49 of the present Montana Rules of Civil Procedure to \textit{require} the court to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{137} De Groot v. Akkeron, 225 Wis. 105, 273 N.W. 725 (1937).
\item \textsuperscript{138} See, e.g., Schulz v. General Gas Co., 233 Wis. 118, 288 N.W. 803 (1939); Tomany v. Camozzi, 238 Wis. 611, 300 N.W. 508 (1941); Horn v. Snow White Laundry & Dry Cleaning Co., 240 Wis. 312, 3 N.W. 2d 380 (1942); Werner Transp. Co. v. Barts, 57 Wis.2d 714, 205 N.W.2d 394 (1973).
\item \textsuperscript{139} Prosser, \textit{supra} note 4 at 500, n. 203 states that: The Texas procedure still has the reputation of creating confusion because of the tendency of Texas attorneys to put complicated questions on over-refined neceties. See Dooley, "The Use of Special Issues Under the State and Federal Rules," \textit{20 Tex. L. Review} 32 (1941); McCormick, "Jury Verdicts Upon Special Questions in Civil Cases," 2 F.R.D. 176, 180 (1943). McCormick says that in North Carolina "simplicity and directness in the submission by questions to the jury is the key to the success of the method," and that in Wisconsin the questions although more numerous than in North Carolina, "are apparently held within reason." \textit{Id.} at 179.
\item \textsuperscript{140} Millsap v. Cent. Wis. Motor Transp. Co., \textit{supra} note 134.
\end{itemize}
\end{footnotesize}
direct a special verdict on the request of either party to the lawsuit. The third method of achieving the widespread use of the special verdict in Montana is for the courts to adopt the position of the courts in Wisconsin and Illinois that the use of the special verdict is essential to the purpose of the comparative negligence statute. Short of these approaches, it can be hoped that Montana judges will follow the suggestion of Judge Frank and require special verdicts or written interrogatories, on their own motion or when requested to do so. Judge Frank's opinion in Skidmore v. Baltimore & Ohio R.R. Co., is a persuasive and forceful account of the failure of the general verdict and an impassioned plea for the use of special verdicts in order to ensure the rendition of substantial justice for all persons.

Dean Prosser reports that, in spite of the reputed advantages to the plaintiff of the general verdict, plaintiff and defense attorneys alike in Wisconsin find the use of the special verdict indispensable to the successful operation of comparative negligence. Apparently, the increase in the number of recoveries that results from the abrogation of the complete defense of contributory negligence has been balanced by a reduction in the size of verdicts, as juries apportion the damages instead of refusing to find contributory negligence.

V. Conclusion

The Montana comparative negligence statute is a welcome product of the 1975 legislature. It is hoped that the next session of the legislature will specifically address itself to some of the issues raised in this comment and enact companion legislation to more fully implement the concept of comparative negligence in Montana.

143. This is the procedure required in Utah. Utah Code Ann. § 78-27-37 (1953).
144. See cases, supra notes 134 and 140.
146. Id.
147. Prosser, supra note 4 at 502.
148. Id. at 502.