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LOSS DISTRIBUTION BY COMPARATIVE NEGLIGENCE

By CHARLES O. GREGORY*

INTRODUCTION

THE familiar rules of loss distribution in negligence actions are beginning to give way to more equitable notions. In many states a non-negligent plaintiff may no longer place where he chooses the loss he sustains from the joint negligence of others.¹ And in a few jurisdictions one who sustains damages may recover a portion of his loss in spite of his admitted contributory negligence.² There are even instances of a combination of these features of contribution between tortfeasors and comparative negligence, with apportionment of fault and division of loss accordingly.³

With the realization that the word "negligence" has become in a modern world little more than a moral sounding tag signifying a basis for liability in damages, has apparently come the conviction that each of several negligent parties responsible for the same loss is justified in requiring that this loss should be fairly divided among them. The chief reason for this change seems to be the inevitability of accidents involving several parties, all or more than

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¹For an account of contribution between tortfeasors from various angles, including citations of statutes and cases, see Leflar, *Contribution and Indemnity between Tortfeasors*, (1932) 81 U. Pa. L. Rev. 130; (1936) Report of the Law Revision Commission of New York 701-747; Notes (1911) 11 Col. L. Rev. 665; (1931) 45 Harv. L. Rev. 349; *Legis.* (1931) 45 Harv. L. Rev. 369; Gregory, *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action*, (1933) 47 Harv. L. Rev. 209; Gregory, *Tort Contribution Practice in New York*, (1935) 20 Corn. L. Q. 269.

²See for citations and discussion Gregory, *Legislative Loss Distribution in Negligence Actions*, ch. 8, p. 56; Mole and Wilson, *A Study of Comparative Negligence*, (1932) 17 Corn. L. Q. 333, 604.

³See the Canadian statute, e.g., Ontario, Statutes 1930, 20 Geo. V, ch. 27, amended in 1931 21 Geo. V, ch. 26.

one of whom are equally "at fault." Since the nature of so-called fault sufficient to warrant liability for damages or to prevent recovery because of contributory negligence is ceasing to be regarded as morally reprehensible, the conviction is growing that a party's negligence ought not to bar him from securing a fair division of the damage arising out of a single negligence transaction.

It is not the purpose of this article to treat with contribution between tortfeasors except as a device to be used in combination with comparative negligence and apportionment of fault and loss accordingly. That subject has been discussed at considerable length elsewhere from various points of view.⁴ The purpose rather is to set forth in sharp relief the fundamental requirements of a practicable comparative negligence statute, including the procedural and administrative features deemed necessary to its successful operation.

OBJECTIVES ATTAINABLE THROUGH COMPARATIVE NEGLIGENCE

The strict rules of common-law negligence have never been popular. Aside from the developments in admiralty,⁵ the first use of comparative negligence at common law to mitigate the harshness of contributory negligence was the device of gross negligence. In many jurisdictions, if the negligent plaintiff could show that the defendant's negligence was gross as compared to his, the plaintiff might still recover in spite of his own negligence. Other jurisdictions reached the same result by using the nomenclature of wilful or wanton indifference instead of gross negligence; and the doctrine of last clear chance is, in some ways, related to these devices.⁶

The use of these devices, however, permitted the plaintiff to recover his entire damages and not a proportional part of them. The loss had to fall entirely on the plaintiff or entirely on the defendant. In the latter case, the device completely nullified the legal effect of the defense of contributory negligence, and this device is simple and effective if this result is desired.

Many state compensation acts and the federal employers' liability act, as well as a few isolated railroad crossing statutes, in-

⁴Leflar, *Contribution and Indemnity between Tortfeasors*, (1932) 81 U. Pa. L. Rev. 130.

⁵See as to the admiralty rules Mole and Wilson, *A Study of Comparative Negligence*, (1932) 17 Corn. L. Q. 333, 339-59.

⁶See Gregory, *Legislative Loss Distribution in Negligence Actions*, ch. 7, p. 49.

clude comparative negligence provisions for a different purpose.⁷ These measures provide that if a plaintiff (employee or vehicle driver) is hurt, partly because of his own negligence, such negligence shall not be a complete defense but shall diminish his recoverable damages in some indicated proportion. These are somewhat unusual cases, of course, since the employers' liability in the compensation cases did not depend upon negligence in the first place and since the extra hazard at a railroad crossing might warrant extraordinary remedial facilities. Nevertheless, the important thing to note is that the loss is not left entirely on the plaintiff or defendant but is split between the two roughly in accordance with the estimated negligence of the plaintiff.

Nebraska and Wisconsin statutes have introduced interesting variations on the devices just discussed for application, apparently, to all negligence actions involving injury to person and property. The Nebraska statute⁸ reads as follows:

"In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury."

Here, it is seen, the comparison of slight-gross is made as a sort of condition precedent to the application of the apportionment of loss clause. For unless it appears first that the plaintiff's negligence was slight in comparison with the defendant's gross negligence, an issue of importance only if the defendant has first pleaded and offered proof of contributory negligence, the court will not permit the plaintiff to invoke the comparative negligence feature of apportionment of fault and incidental division of loss accordingly. On top of all this, the supreme court of Nebraska has foolishly retained the last clear chance doctrine⁹ which most leading jurists recognize as a sheer expedient to allay the harshness of common-law contributory negligence, a wholly unnecessary adjunct in a state having a comparative negligence statute of any

⁷See Mole and Wilson, *A Study of Comparative Negligence*, (1932) 17 *Corn. L. Q.* 333, 604-25.

⁸Nebraska, *Comp. Stats.* 1929, sec. 20-1151.

⁹*Cf.* *Seiffert v. Hines*, (1922) 108 *Neb.* 62, 187 *N. W.* 108; *Stanley v. Chicago, R. I. & P. Ry.*, (1925) 113 *Neb.* 280, 202 *N. W.* 864.

sort. The restricted scope of this Nebraska statute is obviously little improvement over the common-law devices of loss distribution and, in fact, achieves invidious distinctions in denying recovery to a negligent plaintiff whose fault is determined as being of the same character and kind as that of the defendant.

The Wisconsin statute is not much different, but it seems much more retrogressive when viewed from the perspective of the highly advanced tort contribution practice developed by the supreme court of that state without the aid of the legislature. The Wisconsin statute¹⁰ reads as follows:

“Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributable to the person recovering.”

The similarity of this statute to that of Nebraska is apparent. Instead, however, of employing the slight-gross formula as a prerequisite to application of the statute, Wisconsin uses the less-greater test, a slightly broader preliminary requisite than that used by Nebraska, inasmuch as a plaintiff's negligence may conceivably be less than a defendant's without the latter's negligence being gross in comparison. Thus, before the statute applies at all, it must appear that the plaintiff's negligence was “not as great as” the negligence of the defendant. If it appears that the plaintiff's negligence is as great as or greater than the defendant's, the ordinary rules of common-law contributory negligence apply, and the plaintiff's claim is completely barred.

This gives rise to a somewhat anomalous situation. Suppose P and D collide with their automobiles under circumstances indicating that each was negligent, P suffering damage of \$5,000. If the evidence indicates to the court that the plaintiff's negligence is less than the defendant's, the court will permit the jury to apportion the negligence and to diminish the plaintiff's recoverable damages accordingly. Theoretically the jury could find in such a case that the plaintiff's negligence was 49 per cent of the combined fault, and that the defendant's was 51 per cent. The result of this finding would be a verdict of \$2,550 for the plaintiff. This is in accordance with the method of apportionment and division of loss worked out by the Wisconsin court. But if the jury finds

¹⁰Wisconsin, Stats. 1933, sec. 331.045.

that the plaintiff and defendant were equally negligent, a shift of only 1 per cent each way, the plaintiff can recover nothing under the statute. It is likely that more harm than good will eventually result from a statute of this sort.¹¹

But this is not all. In Wisconsin's excellent practice permitting contribution between tortfeasors, no feature of comparative negligence with apportionment of fault and loss accordingly was ever devised by the court. One of the first questions raised after passage of the statute was concerning the effect of the statute on this tort contribution practice. This practice, of course, presupposed mutual negligence on the part of parties to an action for contribution, which negligence had resulted in recoverable damage to some other party. The court had taken the attitude that the claimant for contribution could recover, if he had compensated the damaged party, half of what he had paid in discharge of such party's claim, as contribution, whether the claimant for contribution had been equally negligent with, or more or less negligent than, his defendant. After the comparative negligence statute was passed, however, the court has apparently taken the attitude that it could not apply to contribution cases, recognizing that an anomaly exists and refusing to change its contribution practice in any way.¹² It seems clear, then, that the splendid effort which the Wisconsin court initiated to develop a truly modern system of loss distribution based on negligence was checkmated by a piece of inconsistent and probably poorly thought out legislation.

The Mississippi legislature in adopting its comparative negligence statute apparently envisioned a system of loss distribution of a sort more comprehensive than any yet discussed, to apply in all kinds of negligence actions. The statute¹³ of that state reads as follows:

"In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property."

¹¹For this in general see an excellent and comprehensive article by Campbell, Wisconsin's Comparative Negligence Law, (1932) 7 Wis. L. Rev. 222, particularly at 228 and 246; see also Gregory, Legislative Loss Distribution in Negligence Actions, ch. 8, p. 64.

¹²See Gregory, Legislative Loss Distribution in Negligence Actions, ch. 8, p. 66.

¹³Mississippi, Code Ann. 1930, sec. 511.

Under this act no preliminary inquiry of a slight-gross or less-greater nature is involved. The plaintiff may recover even if he was equally negligent with the defendant or, indeed, more negligent. The only restriction is that in such a case his recoverable damages are diminished accordingly. Thus, it is apparent, the objective of the Mississippi legislature is radically different from that of either Nebraska or Wisconsin, in that it is intended to eliminate contributory negligence as a complete defense in *all* cases and not just in the cases where the plaintiff, although negligent, was not as negligent as the defendant. In this way the legislature saved its courts an immense amount of cumbersome administrative and legalistic detail and at the same time penalized the too negligent plaintiff by providing for a substantial decrease in his recoverable damages.

The Mississippi statute, however, attempts in one sentence to introduce a system of loss distribution that is very complicated indeed. Conceivably, with a highly developed ancillary practice and procedure, the one sentence statute providing the main principle would be adequate, although this is hard to imagine without facilities for contribution between joint tortfeasors. But Mississippi affords no such facilities and its statute can apply only to the most simple cases.

Suppose, for instance, that T and A collide because of their mutual negligence, T suffering damage of \$5,000 and A of \$3,000, T's negligence being 40 per cent and A's 60 per cent of the whole. In T's suit against A, unless A may file a counterclaim, T will recover \$3,000 or 60 per cent of his loss, whereas it is clear he should recover only \$1,800, or the difference between the total loss attributable to him (\$8,000 times 40 per cent or \$3,200) and the loss he actually sustained (\$5,000). It is not clear that in Mississippi A would not have to bring a separate action against T, in which action a different jury hearing a different presentation of the same evidence might find the damages differently, as well as the apportionment of the negligence.

And if there were three parties involved, each suffering damage and each negligent, the further complication, where each cannot file his claim in the same action, and where two parties jointly sued cannot protect themselves from unequal distribution of loss by mutual cross-claims for contribution, becomes glaringly apparent.

Some of the Canadian jurisdictions have shown a proper appreciation of the real difficulties involved, and of these, only

Ontario has made a real attempt to solve them. It should be noted, of course, that these jurisdictions have endorsed the broad type of loss distribution system, retaining negligence as the basis of liability, rather than the narrow type of objective adhered to in Nebraska and Wisconsin.

Since the Ontario statute and practice thereunder is the most highly developed instance of a loss distribution system based on comparative negligence and division of loss according to apportionment of fault, the balance of this section will be devoted to it. The Ontario statute¹⁴ reads, in part, as follows:

"3. Where damages have been caused or contributed to by the fault or neglect of two or more persons the court shall determine the degree in which each of such persons is at fault or negligent, and where two or more persons are found liable they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

"4. In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

"5. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent.

"6. Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant upon such terms as may be deemed just."

In passing it may be remarked that highly developed as this statute is, it neglects to make clear a factor expressly covered in the more simple British Columbia statute,¹⁵ section 2(b) of which reads as follows: "Nothing in this section [the essential part of the Act] shall operate so as to render any person liable for any loss or damage to which his fault has not contributed." This point, however, will be referred to later.

The Ontario Act is, of course, buttressed by a very advanced system of procedure and practice contained in their statutes and rules of court. Under this statute all claims arising out of a single transaction may be, and in many cases have been, raised and liti-

¹⁴Ontario, Statutes 1930, 20 Geo. V. ch. 27, amended in 1931, 21 Geo. V, ch. 26.

¹⁵British Columbia, Statutes 1925, ch. 8.

gated in the same action and are governed by a common and consistent set of special findings concerning damage, cause and proportional negligence. Thus, suppose T, A and B collide under circumstances indicating that each is negligent, T suing A and B jointly. Under Ontario practice, A and B may file cross-claims against each other for contribution and damages and may also file counterclaims against T for damages. The effect of these pleadings, of course, is to make A virtually a plaintiff suing T and B jointly for his damages, and B a plaintiff suing T and A jointly for his damages, which necessitates further cross-claims for contribution between T and A concerning possible joint liability for B's damages, and between T and B concerning possible joint liability for A's damages. This may sound complicated, but it is perfectly simple and logical, and is the only way in which an intelligent distribution of loss can be approached from the pleading angle on a consistent set of findings concerning damage, cause and negligence arising out of the same transaction or accident.¹⁶

After this pleading the case is tried and the jury makes a series of special findings, based on all the evidence submitted by a common group of witnesses whose testimony is germane to each claim raised. Suppose the jury's evidence is as follows: All three parties were negligent, and each suffered damage to which his own as well as the negligence of the other two contributed, 20 per cent of the negligence being attributable to T, 30 per cent to A and 50 per cent to B; T suffering damage of \$5,000, A, \$4,000 and B, \$3,000. The task remains for the trial court to enter judgment on this special verdict, and it is submitted that this is an extremely simple task, far safer for the trial judge to perform than for the jury.

Since it is apparent that \$12,000 damage occurred, of which B is responsible for half, A for 30 per cent and T 20 per cent, B's share of the burden of loss is \$6,000, A's \$3,600 and T's \$2,400. Therefore T should recover the difference between his actual loss of \$5,000 and his share of the burden of loss, \$2,400, or \$2,600; A, the difference between his actual loss, \$4,000 and his share of the burden of loss, \$3,600, or \$400; and B must supply the difference between his actual loss of \$3,000 and his share of the burden of loss, \$6,000, or \$3,000, and the slate is cleaned by the court

¹⁶For a detailed discussion, with a variety of hypothetical fact situations, see Gregory, *Legislative Loss Distribution in Negligence Actions*, ch. 11, p. 88, with particular reference to a graphic illustration of the pleadings of one of such actions on page 103.

awarding T a judgment against B for \$2,600 and A a judgment against B for \$400.

This situation could be varied readily by a finding that T's negligence contributed only to his own damage, whereas A's and B's negligence contributed not only to T's but to that of each other, the rest of the findings remaining unchanged. The judge's task here is a little more difficult, but not appreciably so. T's verdict should be 80 per cent of his damages or \$4,000, because he caused 20 per cent of his own loss. This \$4,000 is split between A and B on their mutual cross-claims for contribution on a 30/50 basis, in accordance with their respective degrees of negligence. Thus three eighths of this loss, or \$1,500, is placed on A and five eighths, or \$2,500, is placed on B. Then A should recover five eighths of his loss of \$4,000 from B as damages, or \$2,500, and B should recover three eighths of his loss of \$3,000 from A as damages, or \$1,125. However T executes his joint judgment for \$4,000, assuming that the somewhat unsuitable device of joint and several judgment is retained under such a statute as it is in Ontario, after the set-off occurs between A and B with respect to their cross-claims for damages, T will have recovered \$4,000, of which A will have paid \$1,500 and B, \$2,500, and A will recover as damages from B \$1,375, being the difference between A's claim of \$2,500 recoverable damages against B, and B's against A for \$1,125. Thus A, besides his \$4,000 damage, will be out of pocket \$125 cash, and B, besides his \$3,000 damage, will be out of pocket \$3,875.

But these are only two of the many types of cases which may arise. Others may present even more complicated situations although this is unlikely.¹⁷ It will be noted that these cases are disposed of on the assumptions: (1) that all parties are financially responsible and (2) that they are willing to pay into court or to the judgment creditors what it is decided they properly owe. If all the judgments on all the claims presented were entered and executed the result might be chaos. And such possibilities have to be seriously contemplated by a legislature choosing to introduce a system of really equitable loss distribution based on comparative negligence.

It cannot be too plainly and frequently stated, however, that any jurisdiction desiring a system of loss distribution such as that now in vogue in Ontario (the only type which really distributes the loss fairly and equitably under a legal system retaining negligence

¹⁷See for a list of actual cases in briefed form Appendix A, p. 179 of Gregory, *Legislative Loss Distribution in Negligence Actions*.

as the basis of liability) must provide facilities of procedure and practice permitting all of the claims arising out of a single fact transaction or accident to be filed and litigated in the same action. Otherwise there can be absolutely no assurance that the loss distribution which would ultimately take place after a series of law suits concerning these claims, involving the judgments of different juries with respect to the same evidence and the same testimony from the same witnesses regarding the same fact transactions and parties, will be uniform and consistent.

Although this may seem a very radical change presenting insuperable obstacles to many legislatures, it can be done and it has incidental compensations. The saving in time, trouble and expense to the courts, jury panels, parties, witnesses and commonwealth are apparent. It is true that the lawyer interested in making a good living at the expense of the parties involved frequently asks of the reformer: "Why have one law suit when you can have two or more?" But to the progressive and public-minded citizen whose real interest is the advance of legal administration and the promulgation of justice, the proper question would seem to be: "Why have two or more law suits when you can do it all in one and so much more fairly and efficiently at that?"

SPECIFIC CONSIDERATIONS IN ADOPTING THE ONTARIO METHOD

It is apparent from the preceding discussion that none should enter the field of thoroughgoing loss distribution in negligence actions by comparative negligence with apportionment of negligence and division of loss accordingly unless he is ready to understand really what he is getting into and, after having taken the first step, to take the additional steps necessary to achieve the goal. A part way measure like that in Mississippi is worse than no step at all, because it merely emphasizes the unfairness of the common-law system of contributory negligence in the many cases it doesn't touch. The Nebraska and Wisconsin methods are all right if such half way measures are desired; but the inconsistency created in Wisconsin would appear to be anything but desirable.

In the following pages will be noted briefly various practical points which should be investigated by any legislature contemplating a statute based on comparative negligence with apportionment of fault and division of loss accordingly.

1. *Contribution between Tortfeasors.*—The device of contribution between joint tortfeasors seems to be essential to any prac-

licable plan of thoroughgoing loss distribution in negligence actions. Its need in every case where jointly sued defendants are found to have negligently contributed to the damage of a negligent plaintiff whose negligence, in turn, has contributed only to his own damage, is readily apparent. The inconsistency of permitting one who is negligent to recover *damages* in spite of such negligence and of denying one who is negligent the right to shift part of the burden of paying some plaintiff's damages to another who jointly contributed with him to such damages, simply because such claim is for *contribution* instead of *damages*, is obvious. And if suits for damages are to be governed by apportionment of fault with division of loss accordingly, so should claims for contribution. The recent English statute¹⁸ providing only for contribution between tortfeasors permits proportionate contribution in accordance with respective percentages of negligence, but in Wisconsin, where a comparative negligence statute of sorts exists, contribution between tortfeasors is not on a similar basis at all, but has been retained on an arbitrary share and share alike basis.

The intricacies of contribution between tortfeasors might, of course, fill several articles. Much has been written concerning the essential requirements of a workable contribution statute, both from the substantive and procedural point of view. It is felt, however, that in a state adopting a loss distribution based on comparative negligence, the contribution feature may be combined with the statute.

2. *Allocation of Fault, Loss and Insolvency of Parties.*¹⁹—Although the Ontario statute and practice thereunder embody a thoroughgoing apportionment of fault in negligence actions, it is open to question as to what is the best method of doing this. To the writer it has seemed most advisable to treat all the negligence involved (and in discussing negligence for this purpose it occasionally seems necessary to regard this concept as a quantitative hypostasis) as a unit and attempt to divide it up among *all* of the parties involved, and to govern their claims accordingly.

Thus, suppose T, A and B have a three-cornered collision in which each is equally negligent, only T suffering damage. If T sues A and B jointly, shall we say that half of the negligence should

¹⁸Law Reform (Married Women and Tortfeasors) (1935) Act 25 & 26 Geo. V, ch. 30, sec. 6, 7 and 8 discussed in *Legis.*, (1935) 49 Harv. L. Rev. 312.

¹⁹See in general Gregory, *Legislative Loss Distribution in Negligence Actions*, ch. 9, p. 72. For distributing risk of insolvency in particular, see p. 142 et seq.

be attributed to each side of the law suit, thus permitting T to recover only 50 per cent of his actual damage, or shall we say one-third is attributable to T and two-thirds to the defendants jointly? And if we do the latter, had we not best require a specific allocation of percentages to each of A and B, to govern claims for contribution arising between them in that action? And to govern their mutual claims, should two-thirds of the negligence be attributed to them jointly, or should it be one-third to each from the beginning, the size of T's recovery against them jointly to be determined by adding their respective percentages of fault? This may not seem to make much difference in the easy hypothetical case under discussion, but it is of great practical importance where the percentages of negligence as among the parties vary.

Now suppose in the above case that T chooses to sue only A. Shall B's negligence be included in determining the apportionment of fault, so that the finding would be one-third to T and one-third to A; and if so shall T recover for one-third or two-thirds of his damage, or shall B be ignored and the negligence fixed as fifty per cent for T and the same for A, with T recovering just half of his damages from A? And, if so, shall T have action for the remaining one-sixth from B? And if T sues only A, and A adds B as a third party in order to claim contribution, T not amending his complaint to include B, shall B still be ignored in allocating loss so that T shall recover only 50 per cent of his actual loss, half of which A may shift to B; or shall T take two-thirds of his loss from A as if B were a codefendant, leaving A to shift half of this burden to B?

The situations could be varied almost infinitely and since it is impossible to do more than to raise the problem because of limited space, reference is made to the writer's more detailed discussion elsewhere. Suffice it to say that decisions on these points are not controlled by arithmetical considerations but are rather conclusions concerning grave matters of policy.

An additional matter should be noted in passing, concerning the possibility that the joint judgment is unsuitable under a system of this sort unless it appears that A in no event, if he is called upon in the above case to pay a judgment for two-thirds of T's damages, will be saddled with more of the loss than T himself eventually suffers. In other words A must not be made to bear more risk of B's insolvency in contribution proceedings than does T himself. Unless some allowance is made for B's insolvency in such a case,

it would be far better to junk the joint judgment and give T two judgments against A and B, both executable, each for one-third of the damages, with the understanding that if, say, A pays all his and B does not, A will, by further payment to T, share equally with T as to B's inability to pay, so that T and A, having been equally at fault, will bear equal parts of T's loss.

This matter of allocating fairly the risk of insolvency is extremely important and is discussed in considerable detail elsewhere.²⁰ In spite of its great importance in the development of a fair system of loss distribution of this sort, it has been entirely overlooked in all existing statutes. Its significance is much greater than has been indicated in this limited space and to be truly understood it should be investigated at length in some of its other ramifications.

3. *Procedural and Practice Developments.*²¹—Reference has been made to the importance of litigating in the same action all claims arising out of the same accident or transaction if an effective practice is to be achieved under a comparative negligence statute. This development is no more than the usual code reforms carried to their logical conclusion, and will not be an innovation in the leading code states.

Provisions must be made for counterclaims between plaintiffs and defendants, for the adding of third party defendants²² in order for the sued defendants to claim damages or contribution against them and also for such third parties or already sued codefendants to cross-claim against other defendants for damages or contribution, and for outside parties to come in and make themselves parties to existing litigation in order to file claims and to be themselves subject to claims. The only limitation on such provisions should be the requirement that all the claims involved must have arisen out of the same accident or fact transaction giving rise to the original action.

It is apparent that considerable difficulty may conceivably arise where parties essential to the complete disposal of a cause of

²⁰See Gregory, *Legislative Loss Distribution in Negligence Actions*, 142 et seq.

²¹See in general Gregory, *Legislative Loss Distribution in Negligence Actions*, ch. 12, p. 114.

²²For third party practice, a fairly recent development in America, see Cohen, *Impleader: Enforcement of Defendants' Rights against Third Parties*, (1933) 33 *Col. L. Rev.* 147; Bennett, *Bringing in Third Parties by the Defendant*, (1935) 19 *MINNESOTA LAW REVIEW* 163; Gregory, *Third Party Practice under the New Illinois Practice Act and Chicago Municipal Court Rules*, (1934) 1 *U. Chicago L. Rev.* 536.

action and all its resulting claims are outside the jurisdiction.²³ In many cases of this sort involving automobile accidents where the absent persons are non-residents, it is possible to secure service on them through a statute²⁴ such as that in Massachusetts which compels them to appoint automatically, by their presence in the state, the commissioner of motor vehicles as their agent to accept service.²⁵ But it is clear that some situations are bound to arise where two or more separate actions may be necessary, requiring separate findings by different juries on practically identical evidence from the same witnesses.

One practical change that should certainly be considered, however, is abolition of the joint and several judgment.²⁶ This has already been referred to; but it is worth stressing the fact that where all parties to a law suit are negligent, there is little reason for retaining a principle of practice like the joint judgment and joint and several liability, which was developed in a system where the plaintiff, to recover, had to be absolutely free from negligence. If this device is retained, extremely difficult problems of shifting the risk of insolvency and of placing the initiative on issuing execution are bound to arise. For why should a *negligent* plaintiff be permitted to place on one of two negligent defendants the burden of loss allocated to both such defendants collectively, when the judgment is for considerably more than half of the plaintiff's actual damage and the luckless judgment debtor executed against was found to have been no more negligent than, if, indeed, as negligent as, the plaintiff?

All of these matters, which of necessity can only be referred to in this article, are discussed at considerable length elsewhere. Their practical bearing on the general matter under discussion must not be overlooked by a legislature interested in creating a system of loss distribution based on comparative negligence.

4. *Special Verdict or Findings in Trials Before Juries.*—There is a tendency in Ontario to have many of the negligence actions tried before a court without a jury.²⁷ But when cases are tried

²³See Gregory, Legislative Loss Distribution in Negligence Actions, at 115 et seq.

²⁴See ch. 90, Massachusetts, Gen. Laws current in 1923, as amended by Massachusetts, Statutes 1923 ch. 431, sec. 2.

²⁵See Scott, Jurisdiction over Nonresident Motorists, (1926) 39 Harv. L. Rev. 563.

²⁶See Gregory, Legislative Loss Distribution in Negligence Actions, at p. 120.

²⁷See Gregory, Legislative Loss Distribution in Negligence Actions, cases in Appendix A, p. 179.

before juries, it has been found practicable under their comparative negligence statute to require special verdicts or findings.²⁸ The confusion which would result from any other course seems apparent when one considers the number of interdependent claims that have to be settled in a single action such as one of those illustrated above in this article. The nature of the findings²⁹ themselves is very simple, being first to determine which parties were negligent, and in what proportions with respect to claims contributed to by the negligence of more than one party. Then the jury must find whose negligence contributed to whose damages, and then it must find what the actual damage in issue amounted to with respect to each party claiming. On these findings, it is submitted, the trial court can always enter a judgment satisfactorily allocating the loss to the various parties, although it seems apparent that if the jury were to render a general verdict covering all the claims in issue, confusion would result unless the case were extremely simple, involving only one or two claims. Even then, if general verdicts were given, the court would have no way to check up on the accuracy of the deductions the jury made from the preliminary findings the jury must have arrived at for its own convenience.

The Canadian jurisdictions have included in their statutes a clause³⁰ which seems extremely desirable in practice under a comparative negligence act, but which would be impossible to use under statutes like these in Nebraska and Wisconsin. This clause provides that if the trial judge determines from the evidence submitted that it would be impracticable to permit the jury to attempt to apportion negligence nicely between two or more parties, he should instruct the jury that if it finds such parties negligent at all, they shall be held equally negligent. This device is frequently used in Canadian cases and gives the judge a very sensible control over the possible vagaries of a jury.

5. *Abolition of Doctrines of Last Clear Chance or Ultimate Negligence.*—The doctrine of ultimate negligence which entered the common law in *Davies v. Mann*,³¹ has become entrenched in the Canadian jurisdictions having comparative negligence statutes, and persists in spite of the fact that after the adoption of such statutes its function had entirely ceased. For it seems very clear

²⁸See Gregory, Legislative Loss Distribution in Negligence Actions, cases in Appendix A, p. 179.

²⁹See Gregory, Legislative Loss Distribution in Negligence Actions, at 121 et seq.

³⁰E.g., sec. 5 of the Ontario statute, quoted supra p. 7.

³¹(1842) 10 M. & W. 546.

that the common-law doctrine was initiated merely to overcome the harshness of the strict common-law rule of contributory negligence. Retention of this common-law doctrine along with the statute results in a situation somewhat like that which obtains under the Nebraska and Wisconsin statutes.

The appellate law surrounding this doctrine is extremely intricate and the courts' task of administering the comparative negligence Act is rendered far more difficult by the presence of an issue considered by many leading Canadian lawyers to be quite unnecessary in view of the Act itself.³² It is hardly conceivable that had the comparative negligence act preceded the doctrine of ultimate negligence the court would have adopted the common-law doctrine in question.

6. *Assumption of Risk and Breach of Statute as "Negligence" under Comparative Negligence Statutes.*—It has been a matter of some doubt before the supreme court of Wisconsin whether or not voluntary assumption of risk should be regarded as negligence for the purpose of administering their comparative negligence act.³³ Perhaps it would be advisable to leave the distinction between contributory negligence and assumption of risk to the courts to work out, if a legislature contemplating the passage of a comparative negligence law chooses not to make the two synonymous for the purpose of such an act. It is not apparent, however, that the distinction should be retained.

There is a difference in kind between consciously confronting a dangerous situation with complete appreciation of the hazard involved, and carelessly but inadvertently exposing one's self to the same situation. A legislature might be justified in concluding that one guilty of the former type of conduct should not recover any damages on the ground that the negligent defendant did not contribute at all to the plaintiff's damages, but rather that it was entirely the plaintiff's fault for deliberately stepping into the path of danger. This conclusion, however, is somewhat questionable, although precedent for it exists.

The writer has examined the problem at considerable length and in detail elsewhere, however, and has offered a suggested statutory provision preserving the distinction along clearly defined lines.³⁴ Whether or not this sort of provision is considered de-

³²See Gregory, *Legislative Loss Distribution in Negligence Actions*, 126 et seq.

³³Gregory, *Legislative Loss Distribution in Negligence Actions* 134.

³⁴Gregory, *Legislative Loss Distribution in Negligence Actions*, 170, sec. 14(b) of the proposed draft statute.

sirable, it cannot be denied that considerable thought should be given to this matter by a legislature undertaking to introduce a system of loss distribution based on comparative negligence.

It is more apparent that breach of a criminal statute, such as safety traffic laws, should be regarded as negligence under comparative negligence acts.³⁵ This is a conclusion which slight investigation would confirm; and it is a matter of common knowledge that social conduct prohibited or commanded by what are ordinarily called safety statutes would, in the absence of such statutes, usually be denominated as negligence by the courts. Indeed, about the only difference the statutes make is to set a legislative standard of reasonable conduct and thus to foreclose the jury from passing on the issue of due care under the circumstances.³⁶

CONCLUSION

The preceding brief account of some of the difficulties of achieving a thoroughgoing system of loss distribution in negligence actions is not calculated to discourage legislatures, but to warn them of what they must inevitably face if they undertake anything of the sort. Almost any sincere attempt to overhaul some of the archaic doctrines of negligence, however, would be justified in spite of the time and hard work such a venture is sure to require. The writer has, in another place, suggested a draft statute which might be used as a point of departure by a legislature determined to bring about a change of the kind under discussion.³⁷ Although this draft statute is rather long and detailed, it is very comprehensive both as to the substantive features required in such an act and as to the administrative and procedural details necessary to make it work.

³⁵Gregory, *Legislative Loss Distribution in Negligence Actions* 139.

³⁶See Thayer, *Public Wrong and Private Action*, (1914) 27 *Harv. L. Rev.* 317, *Selected Essays on Law of Torts* 276.

³⁷This draft statute appears with comments on each section in chapter 14, pp. 154 et seq. of the writer's book, Gregory, *Legislative Loss Distribution in Negligence Actions*. The whole purpose in writing this book and in drafting a proposed statute was to give legislatures interested in adopting a system of loss distribution based on comparative negligence a fairly complete survey of the task ahead of them and some assistance in undertaking the task of intelligible and practical legislation. Naturally the writer expects no legislature to enact his statute as it appears in the book. But he does expect them to consider it seriously if they contemplate legislation of the sort in their own states. The writer apologizes for having referred to his own articles and book so frequently; but since so few people have written on the practical aspects of this sort of legislation, he has found it advisable and convenient to refer to these sources.

The task of compiling a workable statute of this sort is not an enviable one. It is hoped, however, that our American legislatures will in the future perceive the folly of the one-sentence affairs such as that of Mississippi and the proposed New York act, and those of Nebraska and Wisconsin. With a model such as the Ontario statute so close at hand, it is difficult to believe that they will fail to do so.