Study of Comparative Negligence

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Recommended Citation
A. Chalmers Mole and Lyman P. Wilson, Study of Comparative Negligence, 17 Cornell L. Rev. 604 (1932)
Available at: http://scholarship.law.cornell.edu/clr/vol17/iss4/3

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A STUDY OF COMPARATIVE NEGLIGENCE*
A. CHALMERS MOLE AND LYMAN P. WILSON†

PART II

V. VARIOUS STATE RULES ALLEVIATING THE HARSHNESS
OF THE COMMON-LAW RULE OF CONTRIBUTORY
NEGLIGENCE

a. Workmen's Compensation Acts

In the vast field of master and servant the common-law rule of
contributory negligence proved too harsh. The common law govern-
ing the remedy of workmen against employers for injuries received
in the course of employment proved unsatisfactory in its results and
inconsistent with modern conditions. The remedy of the workman
was slow and inadequate; little of the cost to the employer reached
the workman, and that little at large expense to the public.141 Labor-
ers clamored for legislation which would insure recovery without
necessitating that they prove negligence on the part of employers or
disprove negligence on their part.142 In 1880, England commenced to
modify her law as to liability to employees for injuries,143 and within
a short time virtually all of the countries of Europe and the provinces

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*Copyright, 1932, by A. Chalmers Mole and Lyman P. Wilson. Part I of this
article appeared in the April, 1932 issue of THE CORNELL LAW QUARTERLY.
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the Cornell Law School.
141Theory: IDAHO COMP. STAT. (1919) § 6214; Witte, Theory of Workmen's
White, 243 U. S. 188, 37 Sup. Ct. 247, ANN. CAS. 1917 D 629, L. R. A. 1917D 11;
1911).
142Jeremiah Smith, (1914) 27 HARV. L. REV. 235, 240, commenting on the
English Workmen's Compensation Act of 1897: "The act takes the new line of
creating a duty on the part of employers to compensate workmen for accidental
damage irrespective of any fault on the part of the employees or their fellow-
 servants. There is no need to prove any negligence of employers; and the work-
man loses his right by nothing short of his own serious and willful misconduct
being the cause of the accident. The act covers personal injury by accident arising
out of and in the course of employment. Sometimes the statute is defended on
the ground that it practically divides the loss between workman and employer."
143Employers' Liability Act (1880) 43 and 44 Vict., c. 42, construed in Gibbs
v. Gt. Western Ry., (1884) 12 Q. B. D. 208; infra note 157 for comments on
English Act of 1897, 60 and 61 Vict., c. 37; Employers' Liability Act (1906),
6 Edw. 7, c. 58; but cf. history as set out in 1 IDAHO L. J. 56.
The Federal Employers' Liability Act of 1906 was an entering wedge for labor legislation in the United States, and New York, Massachusetts, Wisconsin and Minnesota led the field in passing workmen's compensation acts. A vast amount of employer's liability and workmen's compensation law has been enacted in nearly every civilized country of the world, and, at present, only four states in the Union have not adopted some form of workmen's compensation.

The most striking feature of such workmen's compensation acts is, perhaps, the provision abolishing the common-law defenses. At common law, if the servant's injury was due to the act of a fellow-servant, or was due to a risk assumed by the employee or was contributed to by his own negligence, the master was not liable. Under workmen's compensation law, unless the injury or death of the employee is caused by his willful or wanton act, he or his repre...

1Wyoming ex rel. McPherren v. Carter, 30 Wyo. 22, 33, 215 Pac. 477, 480, 28 A. L. R. 1089 (1923), "In 1880 England commenced to modify her law as to liability for injuries to employees. The first compensation law was adopted in Germany in 1897, and, about that time, practically all of the countries in Europe and the Provinces of Canada enacted similar laws. The Federal Employers' Liability Act was passed by Congress in 1908. Massachusetts and nine other states enacted a Workmen's Compensation Act in 1911, and since that time similar legislation has been adopted in all, or nearly all, of the other states of the Union. Public conscience, therefore, the civilized world over, has been decidedly changed in the last forty years in its attitude toward those receiving injuries or sustaining death during the course of employment."

2Supra note 114.

3New York was first in the field of workmen's compensation laws. Laws 1910, c. 674, provided that the defenses of fellow-servant, assumption of risk and contributory negligence were abolished in actions for injuries or death, in eight listed employments. Difficulties arose with this law, for employers and employees coming within its purview had no path open except to conform to its rather drastic provisions. A legal battle ensued, in Ives v. So. Buffalo Ry., supra note 141, and the New York Court of Appeals held the law unconstitutional. It was found necessary, in 1913, to amend the Constitution to authorize the enactment of such labor legislation (N. Y. CONST. ART. 1, § 9); Laws 1913, c. 816, re-enacted 1914, Laws 1914, c. 41 allowed an election as to the remedy under the act and that at common law.

4Hatch, Workmen's Compensation will Benefit South Carolina (1930) 20 AM. LAB. LEG. REV. 383; Cochran, South Carolina Balks at Compensation, ibid. 197; Ross, Accident Compensation Needed in Mississippi, ibid. 383; Cooly, An Institute on Compensation in Florida, ibid. 41.

5The various acts differ considerably as to phraseology; cf. complete review in Hunter v. Colfax Co., 175 Iowa 245, 154 N. W. 1037, 157 N. W. 145, ANN. CAS. 1917B 903, L. R. A. 1917D 15.

628 R. C. L. 83, notes 3–6; Burns's Case, 218 Mass. 158, 105 N. E. 601, ANN. CAS. 1916A 787, Sheldon, J., "serious and willful misconduct is much more than mere negligence. It involves something of a criminal nature, the intentional
sentative may recover, contributory negligence being no bar. Where the compensation acts are elective, it is usually provided that if the employer fails to come under the law, he may not in an action at law set up the common-law defenses of fellow-servant, assumption of risk or contributory negligence. In a number of states, question was raised concerning the power of the legislature to abolish these defenses. In 1917, the Supreme Court of the United States said, "The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity." The attitude of the courts rapidly changed, however, and the Court of Appeals of New York, in *Ives v. South Buffalo Railway Company*, although it held the New York act unconstitutional as a taking of property without due process, unequivocally held that the power of the state to make changes in methods of procedure and the rules of law was clearly recognized, and that these common-law defenses could be abrogated by legislative enactment. The Massachusetts Supreme Court, in *Opinion of the Justices*, said that these three defenses were established by the courts, not by the Constitution, and that the legislature might change them or do away with them altogether.

The workmen's compensation acts clearly reflect the belief that in the relation of master and servant the common-law rule of contributory negligence barring relief acts too harshly, does not result

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150 The Washington Act eliminates the entire subject of defenses by disallowing the right of action for damages, *Comp. Stats. Wash. (1922) c. 7, § 7673 et seq.*; in the Iowa Act, a qualified right remains, dependent upon the attitude of employer and employee respectively, as accepting or rejecting the act. When the employer rejects the Iowa Act, he is deprived of these defenses whether the employee has accepted or rejected, whereas if he accepts the law and the employee alone rejects, all defenses are retained by the employer, *Iowa Code (1927) c. 70, § 1374; Cf. 272 U. S. Bureau of Lab. Stat. 91; Dosker, Manual of Compensation Law, § 62; Various acts provide that an employer who elects the act can rely on the common-law defenses as against an employee who rejects the act, *Wis. Stat. (1927) § 102:01, 102:02, 102:04, 102:08; Karny v. Malleable Iron Co., 160 Wis. 316, 151 N. W. 786 (1915).*


152 *supra* note 141.

153 *209 Mass. 607, 96 N. E. 308 (1911).*

154 *Rep. U. S. Labor Comm. 637, "Able counsel, in an argument before the United States Commission, contend that, where the sum recoverable under the workmen's compensation act is only half the actual damage, the statute, in*
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in fairness to either party and should, therefore, be abrogated in this field. It is interesting to speculate whether application of the rule of comparative negligence might not have obviated the necessity for the enactment of labor legislation of such sweeping character, since this rule would work a distribution of loss which, because it would be proportionate to the fault of the respective parties, would be more equitable than the now accepted doctrine of workmen's compensation. This view is rather vigorously expressed by Edwin E. Witte, who says:

"The generally accepted theory of compensation will not bear examination. Further, putting forward the indefensible proposition that the employer should bear the entire cost of accidents makes it more difficult to secure an equitable division of the costs of accidents. When we cease talking about industry's bearing the entire cost of accidents, we may get support for a program of splitting the total costs on something like a fifty-fifty basis, which would represent an immense gain over existing standards, even in the best laws."

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effect, divides the loss in the case of a workman's contributory negligence. They say, 'Few now would venture to maintain the justice of regarding contributory negligence as a complete defense. This doctrine the civil and admiralty laws have always rejected. But simply to abolish the rule of contributory negligence and to make the employer liable for full damages just as if there had been no contributory negligence would not correct its injustice; it would merely shift the injustice from the servant onto the master. The compensation law solves the problem simply and justly by treating the cause of the injury as it is, namely, a joint fault, and dividing the loss accordingly, the employer paying his share in compensation.'; Jeremiah Smith, supra note 142, at 345 says: "A workman may (under the English workmen's compensation act of 1897) recover against a faultless employer, even though the workman himself were negligent and his negligence contributed to cause the damage unless his negligence were such as to amount to 'serious and willful misconduct'. This is different from the case where the maritime law divides the loss between two parties, both of whom are at fault." Under usual workmen's compensation acts, fault on the part of the employer is no longer an element of the employee's right of action, nor need the employee plead freedom from contributory negligence, Ives v. South Buffalo Ry., supra note 141, 289.

Chief Justice Taft prefers workmen's compensation legislation to The Federal Employer's Liability Act in the field of railroad employees. In Proceedings of the American Law Institute (1929) 42, he spoke of the need for a workman's compensation act for railroad employees, and developed the inadequacies of the protection accorded them under the act which has been extended to the seaman, in contrast with the compensation acts of the state. Professor Robinson, in Personal Injury in the Maritime Industry (1930) 44 Harv. L. Rev. 223, 240, concurs with the Chief Justice and applies his comments to personal injuries within the admiralty jurisdiction. Cf. supra note 140, on The Longshoreman's and Harbor Worker's Compensation Act, 44 Stat. 1424, 33 U. S. C. §§ 901-950 (1931 Supp.)

Theory of Workmen's Compensation, supra note 141.
In industrial injuries, an equal division of the loss between industry and labor, or more properly, employer and employee, would be an advance over either the common-law doctrine of contributory negligence or placing the burden entirely on one party or the other, but it is submitted that an apportionment of the damage according to the fault attributable to each party is preferable to any of these rules.

b. State Employers' Liability Acts

The Federal Employers' Liability Act is exclusive in its sphere, that of interstate commerce. Fourteen legislatures, recognizing the inherent fairness of the doctrine of comparative negligence supplied by that act, whereby recovery is to be diminished according to plaintiff's negligence, have enacted laws which are exact copies of the federal act, and which cover all cases of intrastate carriers. Seven other states have used the federal act as a basis for comparative negligence statutes as to intrastate railroads. These statutes provide that "contributory negligence shall not prevent a recovery where the negligence of the person so injured or killed is of less degree than the negligence of the officers, agents or employees of the railroad causing the damage," but damages shall be diminished according to such degree of negligence. Still other states have statutes which

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114 Smith, supra note 142, 243, comments on probable results had the legislature abolished the doctrine of contributory negligence entirely: "Whether confining the abolition of this defense to suits by workmen only would not have been an unjust discrimination in favor of that class, is an interesting question. We do not, however, pause to discuss it, because we think that the doctrine of contributory negligence as applied to any or all plaintiffs (i.e., to plaintiffs in general) is a decadent doctrine, which will ultimately disappear from the law."


116 D. C. ANN. CODE (1929) Tit. 19, c. 7, § 82, p. 184; ILL. REV. STAT. (Cahill, 1927) c. 114, § 323; IOWA CODE (1927) § 8158; KAN. REV. STAT. ANN. (1923) 66: 238; KY. REV. STAT. (1930) § 820b2; MINN. STAT. (Mason, 1927) § 4935; MONT. REV. CODE (Choate, 1921) c. 36, § 6606; N. C. CODE (1927) § 3467; S. C. CODE OF LAWS (1922) vol. 3, 4915; S. D. COMP. L. (1929) § 9707; TEX. REV. CIV. STAT. (1925) § 6440 (6449); VA. CODE ANN. (1924) § 5792; WIS. STAT. (1927) § 192.55 (2) (3); WYO. COMP. STAT. ANN. (1920) § 5387.

117 Ark. Dig. STAT. (Crawford & Moses, 1921) § 8575; Cal. STAT. (1911) p. 796, Employers' Liability ACT (Roseberry); Mich. COMP. LAWS (1929) § 8630; Neb. COMP. STAT. (1929) § 74-703; Nev. Employers' Liability Act, 1915, § 1,
produce substantially the same effect as the Federal Employers' Liability Act but differ in the extent of their operation. These differ merely in wording or require a slightly higher degree of care on the part of complainant in order to permit him to recover.109

In Georgia it is said that the "fact that an employee may have been guilty of contributory negligence, not amounting to a failure to exercise ordinary care, shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee",110 and "if the complainants and the agents of the company are both at fault, the former may recover, but damages shall be diminished by the jury in proportion to the amount of default attributable to him."111 Florida's statutory provisions are similar,112 and the recovery is diminished according to plaintiff's negligence in all actions in specified hazardous employments where there has been mutual fault. In Wisconsin, if the railroad employee's negligence cooperated with that of the master, but was less than that of the master, he may recover, the damages being diminished.113 Although the rules of contributory negligence are now superseded by Nev. Comp. Laws (1929) § 5651, enlarging its sphere of operation; N. Dak. Comp. Laws Ann. (1913) § 4805; Ohio Gen. Code (Page, 1925) § 6245–1.


16Ga. Ann. Code (Parks, 1914) § 2781; Cf. ibid. § 3131, providing that a servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. In suits by the servant, it must be shown that the servant did not know of defects or dangers in the machinery, had not equal means of knowing, nor by the exercise of ordinary care could have known; Cf. ibid. §§ 3471, 3472, 3473, defining respectively ordinary diligence and neglect, slight neglect and gross neglect; and ibid. § 4426, stating the comparative negligence doctrine as it prevails in Georgia, infra pp. 621–625.

17Fla. Gen. Laws (Skillman, 1927) § 7052; Cf. ibid. § 7051, which imposes a presumption of lack of due care against injuring railroad, where damage is done to person or property. By ibid. § 7060, it is provided that where employee and employer are both at fault damages shall be diminished according to default of employee, but where the injury is caused by sole neglect of the employee, with his consent, or by common negligence of the employee and a fellow-servant, there shall be no recovery.

18Wis. Stat. (1927) § 192.55 (2) (3); Cox v. Chicago, etc. R. R., 159 Wis. 491, 149 N. W. 709 (1914); Lese v. Chicago, etc. R. R., 154 Wis. 547, 143 N. W. 676 (1913); Cf. Wis. Laws 1931, c. 242, p. 375, creating § 331.045 Wis. Stat., which
applicable in railroad cases in Oregon, the legislature has provided that the contributory negligence of an employee in certain building and contracting trades shall not bar his cause of action, but merely reduce his damages. Arizona provides that there shall be an apportionment of damages in proportion to plaintiff's contributory negligence in cases involving certain hazardous employments, while in Arkansas, the comparative negligence doctrine applies in all actions of an employee against an employer in any corporation not engaged in interstate commerce; in North Carolina, the doctrine applies to railroads, including logging roads and tramroads. The provides that "contributory negligence shall not bar a recovery in an action... 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 proportion to the amount of negligence attributable to the person recovering." By this statute, Wisconsin adopts in its entirety the comparative negligence doctrine.

ORE. CODE ANN. (1930) §§ 62-1701, renders railroad liable for injuries to an employee caused by his superiors; ibid. §§ 62-1702 provides that the rules and principles of law as to contributory negligence will apply to cases under the act.

ORE. CODE ANN. (1930) § 49-706, "The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury fixing the amount of damage," applying only in employee-employer cases of building owners, contractors, etc., specified in ibid. § 49-701; Cf. Schaeidler v. Columbia Contract Co., 67 Ore. 412, 135 Pac. 536 (1913).

ARIZ. REV. CODE (1928) § 1388; nothing less than sole negligence of injured employee bars action, contributory negligence serving only to reduce damages recoverable, Superior & P. Copper Co. v. Tomich, 19 Ariz. 182, 165 Pac. 1101 (1917).

ARK. DIG. STAT. (Crawford & Moses, 1921) §§ 7144, 7145, applicable to mining and railroad companies as specified in ibid. § 7137; Central Coal & Coke Co. v. Barnes, 149 Ark. 533, 233 S. W. 683, (1921); Chicago Mill & Lumber Co. v. Jett, 32 F. (2d) 976 (C. C. A. 8th, 1929); Cf. ARK. DIG. STAT. (Crawford & Moses, 1921) § 7140, demanding that the negligence of complainant be of lesser degree than that of the employer; and cf. ibid. § 8575, with provisions similar to those in the FEDERAL EMPLOYERS' LIABILITY ACT; Mo. Pac. Ry. v. Johnson, 167 Ark. 464, 268 S. W. 31 (1925); El Bruce Co. v. Leake, 176 Ark. 705, 3 S. W. (2d) 988 (1928).

N. C. CODE (1927) § 3470; prior to enactment of this section, ibid. § 3465, providing for a diminution of damages as to railroad cases, was held to apply by judicial construction to logging roads and tramroads, Roberson v. Greenleaf-Johnson Lumber Co., 154 N. C. 328, 70 S. E. 630 (1911); Buckner v. Madison County R. R., 164 N. C. 201, 80 S. E. 225 (1913); but it was held that a logging road was not a carrier within § 3465 in Williams v. Kenston Co., 175 N. C. 226, 95 S. E. 366 (1918), thus the legislature passed § 3470; Cf. Llilley v. Interstate Cooperage Co., 194 N. C. 250, 139 S. E. 369 (1927); Brooks v. Suncrest Lumber Co., 194 N. C. 141, 138 S. E. 532 (1927); Moore v. Rawls, 196 N. C. 125, 144 S. E. 552 (1928); Stamey v. Suncrest Lumber Co., 197 N. C. 391, 148 S. E. 436 (1929); Stewart v. Lumber Co., 193 N. C. 138, 136 S. E. 385 (1927).
Ohio\textsuperscript{170} and California\textsuperscript{171} legislatures have adopted the rule that "where the employee's contributory negligence is slight and the negligence of the employer is gross in comparison", recovery shall not be barred; the rule in these states extends to all employees, while in Nevada the "slight-gross" statute covers mine or mill owners and common carriers only.\textsuperscript{172} In addition to its statute based upon the Federal Employers' Liability Act,\textsuperscript{173} Iowa enacted legislation making contributory negligence a defense to be pleaded and proved by the defendant in cases of an employee against an employer or by a passenger against a common carrier, and if contributory negligence on the part of plaintiff is shown, it may be used only to reduce the amount of recovery.\textsuperscript{174}

Tennessee holds as a matter of common law that where defendant's is the first or more gross negligence,\textsuperscript{175} plaintiff may recover; also, if injury might have been avoided by the use of ordinary care and caution by the defendant, although plaintiff clearly contributed to his injury by his own negligence, defendant will be liable, contributory negligence merely reducing the damages.\textsuperscript{176} This doctrine applies to all cases of contributory negligence in Tennessee,\textsuperscript{177} although later cases might appear to throw some doubt on the subject. A statute\textsuperscript{178} imposing certain duties upon a railroad has been construed by the Tennessee courts as if it had expressly provided that

\textsuperscript{170}\textit{Supra} note 159; Bartson v. Craig, 121 Ohio 371, 169 N. E. 291 (1929); Zeis v. Kaechele, 29 Ohio App. 54, 163 N. E. 42 (1927) holds an instruction stating that damages are to be reduced in accordance with the ratio which the contributory negligence of the employee bore to the negligence of the employer erroneous. The jury must find whether plaintiff's negligence is slight, and the defendant's gross in comparison, and if so, "to diminish damages in proportion to the negligence attributable to the plaintiff as compared with the combined negligences of plaintiff and defendant."

\textsuperscript{171}\textit{Supra} note 159; Perry v. Angelus Hosp. Ass'n, 172 Cal. 311, 156 Pac. 449 (1916); Scherer v. Danziger, 178 Cal. 253, 173 Pac. 85 (1918).


\textsuperscript{173}\textit{Supra} note 158.

\textsuperscript{174}\textit{Iowa Code} (1927) § 11210.

\textsuperscript{175}Whirley v. Whiteman, i Head (Tenn.) 610 (1858).

\textsuperscript{176}East Tenn., V. & G. Ry. v. Fain, 12 Lea (Tenn.) 128 (1885).

\textsuperscript{177}L. N. & G. Ry. v. Fleming, 14 Lea (Tenn.) 128 (1885); in Dush v. Fitzhugh, 2 Lea (Tenn.) 307 (1879), it was said, "If defendant was guilty of a wrong by which plaintiff is injured, and plaintiff also in some degree was negligent or contributed to the injury, it should go in mitigation of damages, but cannot excuse or justify the wrong of defendant." Cf. So. Ry. v. Pugh, 97 Tenn. 624, 37 S. W. 555 (1896); Wyifie v. Gr. Riv. Lumber Co., 8 Tenn. App. 373 (1928).

\textsuperscript{178}TN. ANN. CODE (Shannon, 1917) § 1574, and cf. note, vol. i, at p. 1092, citing numerous cases involving contributory negligence.
contributory negligence on the part of an injured plaintiff should go in mitigation of damages, although the statute does not so state. In Chattanooga Station Company v. Harper, it is said that "the rule in this State is that when the rights of the parties are to be settled under the statute, which prescribes the precautions that railway companies shall use to prevent [crossing] collisions on the track, the contributory negligence of the person injured can be taken in mitigation of damages. On the other hand, when the rights of the parties are to be settled by the common law, the rule is that where the negligence of the party injured contributed proximately to his own injury, either alone, or, generally speaking, in conjunction with the railway company, there can be no recovery; but in case the negligence of the railway was the proximate cause of the injury, and that of the person injured contributed only remotely, then the contributory negligence can be used only in mitigation; but otherwise if the negligence of the party injured was gross, although, in the absence of such degree of negligence on his part, that of the railway company would be treated as the proximate cause."

But in Tennessee Central Railway Company v. Page, which was an action to recover damages for injuries received in a crossing collision, plaintiff had driven his automobile over the railroad tracks without having first stopped as prescribed by statute: It was held that although plaintiff's conduct was grossly negligent and a proximate cause of his injury, the railroad was not excused from its duty, statutory or otherwise, to protect life and property, and plaintiff's negligence would not defeat recovery. The court said: "But the naked violation of such statute by the plaintiff in negligence cases, though controlled by the principles of the common law, would not in every case defeat recovery. The causal connection between the violation of the penal statute and the accident, and generally the conduct of both parties, is looked to, to determine liability, and if the negligence of plaintiff is imputed solely from the violation of the statute, and he in fact exercised his intelligence and senses, and acted as a reasonably prudent man to avoid injury, such violation of the statute without more would not bar recovery for an injury flowing from the wrongful act of the defendant". Thus it would appear that Ten-

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178Tenn. 562 at 581, 199 S. W. 394 (1917).
180Tenn. Cent. Ry. v. Page, 153 Tenn. 84, 282 S. W. 376 (1926); Cf. So. Ry. v. Matthews, 29 F. (2d) 52 ( C. C. A. 6th, 1929); Louisville & N. Ry. v. Anderson, 159 Tenn. 55, 15 S. W. (2d) 753 (1929); where negligence of deceased continued to operate concurrently with that of the railroad fireman who had failed to signal engineer to stop, up to time of accident, no recovery allowed, Tenn. Cent. Ry. v. Ledbetter, 159 Tenn. 404, 19 S. W. (2d) 259 (1929).
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Tennessee has attempted in its own peculiar way to lessen the severities of the common-law doctrine of contributory negligence, both at common-law\(^{181}\) and in cases involving a statute, which in no way expresses or implies the duty to compare negligences or mitigate damages whether or not plaintiff's contributory negligence was a proximate cause of his injury.

Special state employers' liability acts providing for comparison of negligence and diminution of damages according to plaintiff's negligence form a considerable body of state legislation, and reveal the modern tendency to overcome prejudice against the doctrine of comparative negligence. States which have both an employers' liability act similar to the Federal Employers' Liability Act and a comparative negligence statute uniformly apply the former in employee-employer cases coming within its provisions. It is submitted that this special labor legislation is superfluous in a comparative negligence jurisdiction, and that the adoption of a comprehensive comparative negligence statute in those states operating under the common-law doctrine should obviate the necessity for making important exceptions, such as workmen's compensation acts and employers' liability acts, to the rule of contributory negligence.


There is a well known split of authority concerning the existence of degrees of negligence. Five states expressly provide by statute that there are three degrees of care and diligence,\(^{182}\) and three degrees of negligence,\(^{183}\) and attempt to define such degrees briefly.\(^{184}\) Four-

\(^{181}\)But cf. Bejach v. Colby, 141 Tenn. 686, 214 S. W. 869 (1919) and supra notes 179 and 180.


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teen jurisdictions recognize the several degrees of negligence at common law,\textsuperscript{185} while twenty states assert that in the usual negligence action, it is impracticable, if not impossible, to separate ordinary negligence into several gradations.\textsuperscript{186} The latter view is represented by statements of courts and writers such as is found in Thompson on Negligence,\textsuperscript{187} that, "Such refinements can have no useful place in the practical administration of justice. Negligence cannot be divided into three compartments by mathematical lines. Ordinary jurors, before whom, except in cases of admiralty, actions grounded on negligence are always tried, are quite incapable of understanding such refinements."\textsuperscript{188} On the other hand, the New York Court of Appeals says,\textsuperscript{189} "Irrespective of the decisions of other jurisdictions, the courts of this state have uniformly recognized a distinction between ordinary and gross negligence.... Judge Allen wrote:"\textsuperscript{190} "The term itself (gross negligence) has been quarreled with, but it still has a place in the law, and must have, as long as the measure of liability implied by the term is recognized, and until some better term can be invented to give expression to it.... It has been defined to be the want of that ordinary diligence and care which a usually prudent man takes of his own property of the like description."

Georgia,\textsuperscript{192} of the five states providing by statute for recognition of the varying degrees of negligence, is the only one which applies the terms slight, ordinary and gross to negligence in personal injury actions. Louisiana, despite the fact that its Code specifies these degrees of negligence,\textsuperscript{193} nevertheless in cases of personal injury

\textsuperscript{185} California, Florida, Kentucky, Massachusetts, Michigan, Mississippi, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Washington, Wisconsin, New York. As to New York, see infra notes 189, 190; but see Perkins v. New York Cent. Ry., 24 N. Y. 196, 82 Am. D. 281 (1862); Collection of cases, 45 C. J. 664, n. 66.

\textsuperscript{186} Alabama, Arkansas, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Minnesota, Missouri, Nebraska, New Mexico, North Carolina, Rhode Island, Tennessee, Vermont; and New York, on the strength of the Perkins case, supra note 185, is sometimes cited as conforming to this view; cf. infra notes 273 and 275; collection of cases, 45 C. J. 665, n. 78.

\textsuperscript{187} THOMPSON ON NEGLIGENCE (2d ed. 1901) § 18; supra note 3.

\textsuperscript{188} Supra notes 5-8, 49, 50, 75-78.

\textsuperscript{189} Weld v. Postal Tel.-Cable Co., 210 N. Y. 59, 71, 103 N. E. 957 (1913).


\textsuperscript{191} See Altman v. Aronson, infra note 273; Massaletti v. Fitzroy, infra note 275; (1919) 4 A. L. R. supra note 182.

\textsuperscript{192} Supra note 162; Georgia's comparative negligence rule is discussed in body of article infra, under section title State Comparative Negligence.

\textsuperscript{193} Supra notes 182, 3, 4.
frowns upon the doctrine of comparative negligence and distinctions between degrees of negligence. However, a recent Louisiana case held defendant guilty of "the grossest kind of negligence and an exhibition of a reckless and wanton disregard for human life and human safety", and reversed the lower appellate court, which had reached the conclusion that the plaintiff had "grossly violated" a rule of safe conduct, and thus had proximately contributed to his

194 Belle Alliance Co. v. Texas etc. R. R., 125 La. 777, 51 So. 846 (1910); and in Mathes v. Schwing, 11 La. App. 5 at 9, 119 So. 557, 123 So. 156, rev'd 169 La. 273, 125 So. 121 (1929), Janvier, J. says, "Were we authorized, under the jurisprudence of Louisiana, to weigh the negligence of the defendants against that of young Mathes, and to award a judgment in accordance with the result shown by the scales, we would have no hesitation in saying that the defendants would suffer as a result of that test, because, in our opinion, their negligence would greatly outweigh that of the young man. However, in this state, in spite of the provision of article 3556, Civil Code, the doctrine of comparative negligence is not recognized", citing cases; Rice v. Crescent City R. R., 51 La. Ann. 108, 24 So. 791 (1891).

195 Mathes v. Schwing, supra note 194, in which a motorist emerged from behind a standing street car at a speed of from fifteen to eighteen miles per hour, and struck plaintiff's minor son who was alighting from the street car without looking to see if the road were clear; statutes provided that motorists should stop in such a situation, and that a person alighting from a street car should "make sure the way is clear before crossing behind such car." The father sued in his own right and that of his son, alleging negligence of defendants, who pleaded the injured's contributory negligence. The jury returned verdicts for both father and son; on appeal to the Court of Appeal, verdict and judgment was set aside and plaintiff's demand in both capacities was rejected, finding no negligence in defendants. On rehearing, original judgment was reinstated on ground of contributory negligence of the injured minor. On certiorari to the Court of Appeal, prior judgment of the Court of Appeals was set aside and that of the district court reinstated. See supra note 194, infra note 198.

196 Ibid. 169 La. at 275.

197 Ibid. 11 La. App. 5.

198 Supra note 197 at 7, "We are forced to the conclusion that it (injured's negligence) was of sufficient gravity to constitute contributory negligence and thus to prevent recovery." Note that on appeal, supra note 196 at 278, the court says, "We are in full accord with our learned brothers of the Court of Appeal in their last pronouncement, wherein they found the defendants guilty of a much higher degree of negligence than they attributed to (injured)," and at 283, the court attempts to strengthen plaintiff's right to recovery, by adding, "We attach no probative effect to the statement of the young man that the accident was the result of his own fault. When he made the statement, he was in great agony and in the control of the two men who had run into him. At that time he did not know whether he was to die or get well, nor did he know whether he was being conveyed to the hospital or to the river or woods. The men were strangers to him. If he was in his right mind, it was more natural for him to exonerate rather than to charge the two men with being responsible. The men had an interest and a motive to draw the statement from the young man. They had to fear both civil and criminal responsibility."

Supra note 195 at 19.
injuries. In an earlier case, the Louisiana Court of Appeal reversed the District Court and the appellate court which had agreed in "finding that both the driver of the wagon and the engineer of the locomotive had been negligent, but found a greater degree of negligence, or more culpable negligence on the part of the railroad, and so condemned it in damages". The Court of Appeal, in reversing, simply said that comparative negligence does not prevail in Louisiana, and found for the defendant. These two cases clearly show the drastic results produced in particular cases by the common-law rule of contributory negligence; in one a clearly negligent plaintiff is allowed full recovery from a negligent defendant, because the court is bound to find wholly for one or the other party; in the other case, despite the fact that it was found that the defendant was guilty of the "more culpable negligence" in comparison to plaintiff's default, defendant is let off scot-free, while the injured plaintiff is left to bear the entire physical and financial burden. Such decisions as these are all the more questionable when the statutes of the state provide that there are three degrees of fault in law, the gross, the slight, and the very slight.

It has been pointed out that workmen's compensation acts almost universally bar contributory negligence of the injured employee as a defense, only intoxication or willful or wanton negligence operating

19°Belle Alliance Co. v. Texas, etc. R. R., supra note 194.
2°Ibid. at 778, 51 So. at 846.
2°But see Frazier v. Hull, 127 So. 775 (1930), where defendant was "driving at too great a rate of speed to permit her to stop her automobile or turn aside in time to avoid striking the appellant" who was standing in the rear of his car after having repaired a tire. Evidence conflicted on issue whether plaintiff's rear light was burning as prescribed by statute. Reversing and remanding, the court says, "the failure to have the rear light of the automobile burning, if such failure there was, was more than a mere condition; it was a failure to discharge a duty enjoined by the statute for prevention of the very thing that occurred, and, if it was the sole proximate cause of the accident, would bar the appellant's recovery, or if it merely contributed thereto, would diminish the amount of his damages." (italics the author's); and note the shamefaced admission of the court in Rice v. Crescent City R. R., supra note 194, "We have, in this state, no doctrine or rule that the negligence or imprudence of a plaintiff, while not of the proximate character to defeat his recovery, may yet be looked to by the jury or court in mitigation of damages. Nevertheless, this court has constantly exercised its discretion, within reasonable limits, of increasing or diminishing the sums awarded for damages by the verdicts of juries, or the decrees of inferior tribunals, according as its judgment, operating on the facts, prompted in given cases... The facts and circumstances of this case justify the reduction of the verdict of the jury from $12,500 to $4,000." Were this statement followed at its face value, it would be difficult to distinguish this theory from one providing for a comparison of negligences by the appellate court. 19°Supra note 149.
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to prevent his recovery.\textsuperscript{203} However, in a few such acts, what appears to be a desire for a theory of comparative negligence is evidenced by provisions that where accident is caused in any degree by the failure of the employee to use safety appliances furnished, or to obey the rules of the employer for the employee's safety, "the compensation for which the employer would otherwise have been liable under this act, shall be decreased 15\% in the amount of each payment";\textsuperscript{204} conversely, if the employer is guilty of failure to comply with any state statute and the injury is caused in any degree by such failure, the employee's compensation is increased 15\%.\textsuperscript{205} Also, if the injured employee, or a fellow-servant with his knowledge, removes a safeguard intended to protect the employee, unless by order of a superior, the schedule of compensation shall be reduced 10\%.\textsuperscript{206} Where the employer's liability is increased, the added recovery to the injured employee is in the nature of a penalty for the employer's gross negligence; but in the two cases in which it is decreased,\textsuperscript{207} without expressly so stating, the legislatures have provided that in certain instances the employee shall be deemed guilty of an amount of negligence which is mirrored in the reduced amount of his compensation under the act. The presence of these statutory reductions is explained by the fact that under the older compensation acts contributory negligence was no defense while willful or wanton negligence\textsuperscript{208} involved a total forfeiture of all compensation, and it was felt that there should be an equitable mean between these two extremes.\textsuperscript{209}

Mississippi has adopted the comparative negligence doctrine in its entirety in all personal injury and property damage actions.\textsuperscript{210} Despite this, Mississippi gives full force and effect to several statutes

\textsuperscript{203}\textit{Supra} note 150.


\textsuperscript{205}\textit{Mo. Rev. Stat.} (1929) § 3301.

\textsuperscript{206}\textit{Wash. Comp. Stat.} (Remington, 1922) § 7683 (10\%).


\textsuperscript{208}\textit{Black Mt. Corp. v. Higgins}, \textit{supra} note 207, 11, 10 S. W. (2d) 464, "For an employee to be guilty of willful misconduct, under the statute, his conduct should involve an intentional, deliberate action with a reckless disregard of consequences either to himself or to another—something less than voluntary self-infliction of injury, but greater than gross negligence or wanton carelessness."

\textsuperscript{209}\textit{Supra} notes 154-6.

\textsuperscript{210}\textit{Miss. Code. Ann.} § 511; and see \textit{ibid.} § 512, making contributory negligence a question of fact for the jury.
which provide that running, flying, walking, or kicking a switch,\textsuperscript{211} backing into or along a passenger depot without certain safeguards,\textsuperscript{212} and backing of engines at night without light and pilot\textsuperscript{213} shall be unlawful, and that the railroad company committing such acts shall be liable in damages, without regard to mere contributory negligence of the party injured. The right of recovery, in cases involving these statutes, is held to apply to property as well as to persons injured,\textsuperscript{214} and only willful negligence will bar plaintiff's right.\textsuperscript{215} It is said that these statutes were not intended to introduce into Mississippi degrees of contributory negligence,\textsuperscript{216} and it is held that they are not repealed, altered or modified by subsequently enacted comparative negligence provisions.\textsuperscript{217} Had these special statutes not antedated the comparative negligence rule in Mississippi, it is doubtful whether they would have been enacted, for they would be unnecessary, since plaintiff's right would not have been cut off by his contributory negligence.

Massachusetts, Virginia, Georgia and Florida provide by statute for various forms of comparative negligence in railroad crossing injury cases. Massachusetts states\textsuperscript{218} that if a person is injured, or his property damaged, in a collision at a railroad crossing, the corporation is liable unless it "is shown that in addition to a mere want of ordinary care, the person injured or the person who had charge of his property was, at the time of the collision, guilty of gross or willful negligence,\textsuperscript{219} or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury." Rugg, C. J., says,\textsuperscript{220} "this statute has been in force in some form since St. 1871, c. 352.\textsuperscript{221} It has been construed as relieving the plaintiff

\textsuperscript{211}Ibid. § 6118.
\textsuperscript{212}Ibid. § 6119.
\textsuperscript{213}Ibid. § 6120, 6121.
\textsuperscript{214}Davis v. Thomas, 127 Miss. 174, 89 So. 907 (1921).
\textsuperscript{215}Mobile & R. Co. v. Campbell, 114 Miss. 803, 75 So. 554 (1917); Ala. R. R. v. Jones, 73 Miss. 110, 19 So. 105, 55 Am. St. Rep. 488 (1895); Ill. Cent. R. R. v. Archer, 113 Miss. 158, 74 So. 135 (1917); Pulliam v. Ill. Cent. R. R., 75 Miss. 627, 23 So. 359 (1898); Davis v. Thomas, infra note 214.
\textsuperscript{216}Pulliam v. Ill. Cent. R. R., supra note 215.
\textsuperscript{217}Mobile & R. Co. v. Campbell, supra note 215; in Ill. Cent. R. Co. v. Archer, supra note 215, section 6118 is termed "our concurrent negligence statute."
\textsuperscript{219}See Massaletti v. Fitzroy and Altman v. Aronson, infra notes 275 and 273, discussing and defining gross negligence in Massachusetts.
\textsuperscript{221}The statute rendered the railroad liable to indictment in such crossing injuries; see Brooks v. F. & L. St. Ry. 200 Mass. 8 at 15, 85 N. E. 289 (1908); Cf. Mass. St. 1898, c. 565.
from the burden of proof in respect of due care and imposing a heavy burden of proof upon the defendant as an affirmative defense. Although many cases have arisen under this statute, its constitutionality has never been doubted. The burden of proving gross negligence under these acts is on the defendant, and, if proved, it is imputed to the other occupants of the car, barring their recovery also. Several cases decide that the court may, as a matter of law, hold the plaintiff guilty of gross negligence, but it is rarely true that, in the absence of binding admissions or agreements as to fact, a ruling can be given that as matter of law the material fact of gross negligence has been proven.

Virginia's statute provides that "the fact that a traveler on such highway failed to exercise due care in approaching such crossing shall not bar recovery for an injury to or death of such traveler, nor for an injury to or the destruction of property in his charge... but the failure of the traveler to exercise such care may be considered in mitigation of damages." This section does nothing more than substitute for the doctrine of contributory negligence a kind of comparative negligence in cases of a collision on a highway crossing. If the negligence of the plaintiff contributed to causing the injury, it may and must be considered in mitigation of damages, although the permissive "may" is used in the statute. Under this section, plaintiff must prove not only the railroad's failure to give the prescribed signals and his injury, but a causal connection between such failure and his injury. As stated in a recent case, it is "the cardinal principal...that regardless of the negligence or lack of

223"Gross or willful negligence is more than mere negligence, as these words are used in the statute; but the distinction between them is one of degree. Where the question is whether a given condition of things amounts to negligence, this court in numerous cases has asserted its right to say that negligence existed, and that therefore the plaintiff could not recover. The same must be true as to negligence in a higher degree." Lathrop, J., in Emery v. B. & M. R. R., 173 Mass. 136 at 138, 53 N. E. 278; Cf. Deggins v. Old Colony R. R., 154 Mass. 402, 28 N. E. 274 (1891).
225VA. CODE ANN. (1930) 3959.
228Virginian Ry. v. Haley, supra note 228, 784.
negligence of the plaintiff, there can be no recovery unless there was a causal connection between the failure to give the signals and the injury, and that the establishment of a causal connection between the failure to give the signals and the injury is an essential element of the plaintiff's case. Proof of the failure to give the prescribed signals and proof of the injury, and nothing more, are not of themselves sufficient to support a recovery... A causal connection between the failure to give the signals and proof of the injury will no more be assumed, than that the defendant failed to give the signals or that the plaintiff was injured.” However, if the failure to give the signals in any way contributed to the injury, it has been held in Virginia that the traveler may recover, no matter how grossly negligent he may have been, subject of course to mitigation of damages in proportion to his negligence.230

Counsel in a recent case231 argued that the duty upon a railroad to keep dangerous public crossings guarded was similar to the duty of giving proper signals upon approaching the crossing, and that certainly in the former no recovery could be had by a negligent plaintiff; the court countered by saying,232 “We quite agree with counsel for the railway company in their contention that if the sole question of negligence relied on in the instant case had been the failure of the watchman to be at the crossing to stop travelers from crossing on the approach of trains, there could have been no recovery by the plaintiff, for the reason that there is no provision for apportionment of negligence in such a case and the deceased’s contributory negligence would have barred recovery.” A West Virginia judge233 says, “I am apprehensive that this statute234 has colored the view of the Virginia Courts in other cases involving personal injuries, and I do not consider the more recent Virginia decisions on the doctrine of contributory negligence as Simon-pure as of yore”.235 It is to be hoped that other instances of similar statutes will be enacted in Virginia, with the ultimate result that the comparative negligence theory will be applied in all personal injury cases.

232Ibid. 348.
234Hatcher, J., refers particularly to VA. CODE ANN. (1930) § 5792, supra note 158.
235Hatcher, J., comments also as follows on a Missouri statute: “In 1907 a statute was enacted by the Legislature of Missouri, which repealed the common-law rule of contributory negligence by imposing upon the operator of an automobile on a public road or street ‘the highest degree of care that a very careful
The Georgia\textsuperscript{236} and Florida\textsuperscript{237} statutes are similar to, but more inclusive than, the Virginia or Massachusetts enactments; each of the former states provides that “no person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him.” The Florida court states, in \textit{Louisville & Nashville Railroad v. Yniesta},\textsuperscript{238} in 1886:

“I feel constrained to say in conclusion that in my opinion, and speaking for myself individually, the operation of the principle of contributory negligence is unjust and inequitable. By the law, as it unquestionably stands, no matter how negligently or with what amount of care trains are run, if a person injured by one of them has failed to exercise care on his part, he cannot recover. As it happens in nearly every instance of collision, if not all, that the person on the track is alone injured or killed, the train receiving no damage, there is no present incentive of personal safety on the train hands to use caution, nor a fear of being compelled to make pecuniary compensation when they can rely upon being absolved from their admitted negligence by some careless act of the plaintiff. The law says you were both at fault, and draws from that premise the conclusion that one alone must bear all the damage, provided that one is the plaintiff... Various reasons have been given by judges and commentators in justification of this, to my mind, narrow rule—that it is required by public policy, that the injury was of the plaintiff’s own producing, and that the ‘law has no scales to determine in such cases whose wrong doing weighed most in the compound that occasioned the mischief’. In another branch of jurisprudence these reasons have not been found potent, its ‘scales’ seem better adjusted, and from the same premises of both plaintiff and defendant being in fault is drawn the more rational conclusion that the damages must be equally apportioned between them. This rule in admiralty courts has so commended itself that by act of Parliament (36 and 37 Victoria)

\textsuperscript{236}GA. ANN. CODE (Parks, 1914) \S 2781.

\textsuperscript{237}FLA. GEN. LAWS (Skillman, 1927) \S 7052; and see \textit{ibid} \S\S 7051, 7060, 4424–6.

\textsuperscript{238}21 Fla. 700 at 737, 738, McWhorter, O. J. \textit{Cf.} Florida So. Ry. v. Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631 (1892).
it is made the rule of the other courts in like case, where it used not to be. The law, in cases at least where human life is concerned, certainly needs legislative revision."

The Chief Justice's suggestion was acted upon in the next legislative session, and the resultant enactment was the forerunner of the statute quoted above. The comparative negligence doctrine supplied by this statute extends solely to cases of injury by railroads, or to employer-employee cases in hazardous occupations. The Florida legislature also has placed a statutory presumption of lack of due care upon a railroad causing damage; the presumption does not outweigh proof, and ceases upon defendant's showing that its agents exercised due care. When no evidence is submitted upon which the jury could find a verdict for plaintiff, the court may direct the verdict for defendant, but any evidence of negligence on the part of defendant precludes a directed verdict. The Florida courts follow the rule of apportionment of damages in the Federal Employers' Liability Act, that "the statute contemplates that the amount of the recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant in the premises." According to the terms of the statute, sole negligence of plaintiff will bar him, but if his negligence is merely greater than that of defendant, it operates only to reduce his recovery.

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239C. 3744, approved 1887, superseded 1891 by c. 4071; See F. C. & P. Ry. v. Foxworth, 41 Fla. 1, at 63, 25 So. 338, 79 Am. St. Rep. 149 (1899), stating, "Under these provisions contributory negligence is not a complete defense in bar, but operates only in reduction or diminution of damages. The plaintiff is entitled to recover if defendant's negligence was one of the proximate contributing causes of the injury to the deceased, notwithstanding the deceased's negligence was greater than that of the defendant. This statute does not introduce into this State the Illinois doctrine of comparative negligence nor that prevailing in the State of Georgia."


241Ibid. § 7051, supra note 163.


243Fla. East Coast Ry. v. Nance, 96 Fla. 171, 117 So. 842 (1928); Stevens v. Tampa Elec. Co., 81 Fla. 512, 88 So. 303 (1921); ibid. 523, list of cases in point.

244Atlantic Coast L. Ry. v. Callan, 73 Fla. 688, 74 So. 799 (1917).

245U. S. C. §§ 51-59 (1926), see anno. 53; supra note 114.


247Germak v. Fla. East Coast Ry., 95 Fla. 991, 117 So. 391 (1928); L. & N. Ry.
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Since Florida has adopted the recent startling rule of Justice Holmes that, "if a driver cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, although obviously he will not often be required to do more than stop and look", it would appear that every plaintiff injured at a crossing would be subject to the rule of diminution of damages, for drivers do not in fact consider it incumbent upon them to stop, get out of the

v. Norton, 75 Fla. 597, 78 So. 982 (1918); Atlantic Coast L. Ry. v. Wier, 63 Fla. 69, 58 So. 641 41 L. R. A. (N. S.) 307, Ann. Cas. 1914A, 126, (1912); Davis v. Cain, 86 Fla. 18, 97 So. 305 (1923); Stevens v. Tampa Elec. Co., supra note 244; Atlantic Coast L. Ry. v. Callan, supra note 245; in the Watkins case, supra note 247, Ellis, J., says, "While we think that both the company and its engineer were at fault in the lack of reasonable prudence with which the train was operated at that point, the degree of recklessness and lack of prudence shown by Mr. Watkins was vastly greater. In this view of the case we think the judgment should be reversed unless the defendant in error will enter a remittitur of $5000 (on $10,000 verdict); otherwise the judgment will be reversed." And in Claughton v. Atlantic Coast L. Ry., 47 F. (2d) 679 (C. C. A. 5th, 1931), deceased was negligent in failing to have his car under control as it approached the crossing and to look out for possibly approaching trains, while the railroad's agents were negligent in operating the train at an excessive speed, in failing to blow the whistle or ring the bell, and in not having the train under such control that it might be stopped before reaching the crossing; the Federal court consequently reversed the case and remanded it.


250The rule seems to apply, as does also the Goodman rule, even where there is a flagman and light signals; an excellent example is Seaboard Air Line Ry. v. Ebert, 138 So. 4 (Fla. 1931), rehearing denied Nov. 18, 1931, 138 So. at 12, an action for wrongful death of plaintiff's husband brought against a flagman and two railroad companies. Tracks of the two railroads crossed a city street, a flagman being employed jointly by the two railroads; plaintiff, driving her car, saw the signal light turn red, warning of an approaching train; she waited until the light turned green, and then, assuming that all was clear, started to cross; when on the crossing, the light again turned red and plaintiff attempted to back from the crossing, plaintiff's husband getting out of the car to save himself; the car was hit and the husband killed. Held, the driver was contributorily negligent. "The traveler should not leave undone any reasonable thing that the law requires that he should do for his own safety; that a person fails to do so, relying solely upon the signals given by the flagman, goes to the question of contributory negligence and in this state affects the amount of damages recoverable." On rehearing, the court says, "The amount of damages sought by the plaintiff was $50,000; the amount of the verdict was $15,000. The evidence would have warranted a larger verdict if there had been no contributory negligence on the part of Mrs. Ebert (the driver)." Twelve judges concur, on appeal and rehearing, in the result reached. C. Smith, Watkins and Myrick cases, supra note 243; Davis & Weir cases, supra note 248, Germak case, supra note 249.
car and look, and then enter the car again before starting, in order to feel that they need have no further fear of injury from passing trains; indeed, such an assumption of safety would be unwarranted, since the situation might have changed after the driver re-entered his car.

Georgia's method of dealing with mutual negligence in crossing cases differs somewhat from that of Florida, although Florida had copied the statute from the Georgia Code and thus it would ordinarily follow that the interpretations would be similar. As in Florida, a statutory presumption of negligence\(^{252}\) arises against the defendant railroad upon proof by the plaintiff that the railroad has harmed him; the burden of proof of due care and diligence must then be sustained by the defendant,\(^{253}\) or he must show that the injury was done by plaintiff's consent, or occurred by reason of plaintiff's sole negligence; also, mere negligence of the plaintiff, without reference to its causal connection with the injury or to its degree as respects the railroad's negligence, will not defeat recovery.\(^{254}\) But at this point the Georgia courts differ from the Florida courts in interpretation of the statute, in that the former apply a different rule of damages, apportioning them directly with the amount of default attributable to plaintiff.\(^{255}\) Thus where his negligence is equal to or greater than that of the defendant, plaintiff may not recover any

\(^{252}\) Ga. Ann. Code (Parks, 1914) § 2780; See Central of Ga. Ry. v. Barnett, 35 Ga. App. 528, 134 S. E. 126 (1926); Barrett v. So. Ry., 41 Ga. App. 79, 131 S. E. 690 (1930), where presumption was removed by introduction of rebuttal testimony, yet it was held plaintiff may recover, for jury could have inferred that defendant was guilty of negligence as alleged in the petition; Ga. Ry. & Power Co. v. Shaw, 40 Ga. App. 341, 149 S. E. 657 (1929), presumption rebuttable by proof of ordinary and reasonable care and diligence. 5 Wigmore, Evidence, (2d ed. 1923) § 2491, "The peculiar effect (of such a presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary, the presumption disappears as a rule of law, and the case is in the jury's hands, from any rule.” 1 Cf. Greenleaf on Evidence, (15th ed. 1899) § 33; Ga. So. Ry. v. Sanders, 111 Ga. 128, 36 S. E. 458 (1900).


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damages; also, the Georgia cases state that if the person killed or injured brought about his injury by his own carelessness amounting to a failure to use reasonable care and diligence, he cannot recover.

This statement is most misleading, as one infers immediately that Georgia applies the majority rule of contributory negligence, although the results reached by the cases point conclusively to the fact that the comparative negligence doctrine is used. The statement comes from a separate statute which demands of plaintiffs that they use due care and diligence to avoid the consequences of defendant's neglect; however, by judicial decision, it is held consistently that a plaintiff cannot avoid the consequences of another's neglect until such neglect is operating and has either been brought to plaintiff's attention, or it can be held that as a reasonably prudent person he should have had reason to apprehend its existence. Thus, despite a seemingly repugnant due care statute applicable to the same set of facts, the Georgia courts allow a recovery to a negligent plaintiff according to the obvious intention of the legislature, as expressed in the concurrent negligence statute covering injury by railroads.

d. Statutes Limiting Liability of Owner or Operator of Automobile for Injuries to Guest

In eight states the legislatures seem to have recognized the serious increase in the evils of vexatious litigation between host and guest, the great opportunities for collusion between the parties in such cases when an insurance company is in fact the real party in interest, the consequent fraud upon the court and the risk of manufactured

258 GA. ANN. CODE (Parks, 1914) § 2782; Cf. ibid. §§ 4424, 5, and see supra note 162.
259 Cases cited supra note 255.
claims, to say nothing of the basic injustice of permitting a bare invitee to sue his invitor for merely minor derelictions. As a result each of these states has adopted an act which provides in effect that a guest passenger in an automobile shall have no cause of action against the owner or operator for harm, unless such injury shall be caused by the wanton or willful misconduct of the operator or owner, or caused by his heedless and reckless disregard of the rights of others. In all of these states, these statutes, thus modifying the common-law rule of liability for ordinary negligence have been attacked as unconstitutional, but in each they have been sustained.

While these statutes do not provide for the rule of comparative negligence, they do reveal the willingness to modify the normal pattern of liability for negligent conduct where justice in a given situation demands it. Accordingly, they classify negligence into


\[261\] ORE. CODE ANN. (1930) §§ 55-1209; MICH. COMP. LAWS (1929) § 4648; Vermont Acts 1929, No. 78; CAL. STAT. (1929) p. 1580, § 14334 CAL. VEHICLE ACT; N. Dak. Laws 1931 c. 184, p. 310; IOWA CODE (1927) § 5026-b1, injury must be due to intoxication or “reckless operation by him of such motor vehicle,” see note 263 infra; Conn. Pub. Acts 1927, c. 308, provides that there shall be no recovery “unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others”; Neb. Laws 1931, c. 105, p. 278, which defines guest to include “any person who accepts a ride in any motor vehicle without giving compensation therefor, but shall not be construed to apply to or include any such passenger in a motor vehicle being demonstrated to such passenger as a prospective purchaser.” Cf. generally (1931) 74 A. L. R. 1196; (1930) 65 A. L. R. 952; (1929) 61 A. L. R. 1252 at 1255; (1930) 5 WASH. L. REV. 91. See infra note 262, concerning Kentucky statute.

\[262\] Constitutionality of statutes supra note 260 has been upheld in each case. But Cf. Stewart v. Houk, 127 Ore. 589, 271 Pac. 893, 61 A. L. R. 1236 (1927) holding similar Oregon statute, which deprived guest of right to recover against owner or operator for injuries, invalid as supplying implied stipulation for non-liability in event of the host’s negligence, regardless of the degree of culpability of the host; Storla v. Spokane, P. & S. Transp. Co., 297 Pac. 367 (12 Ore. Adv. Ch. 801, 1931), rearg. den. 298 Pac. 1065, held later Oregon statute, supra note 260, valid. And see Kentucky Acts 1930, c. 85, p. 253, which disallows any action of a guest for injury “unless such accident shall have resulted from an intentional act on the part of said owner or operator.” It is pointed out in (1932) 20 KY. L. J. 153 that the Act is violative of the Kentucky Constitution, in that it is not only a limitation on the right to recover for injuries, but practically destroys the right to recover, no matter how gross the negligence of the operator or owner, unless injury is intentionally caused. A Fayette Circuit Court case, unofficially reported and as yet not appealed to the Kentucky Court of Appeals, is authority for the note-writer’s statements.
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degrees in these gratuitous guest cases. They further illustrate a tendency to depart from the view that there are no degrees of negligence. While they do not directly affect the measure of or apportionment of damages where the negligences of the parties differ, they place a liability on the owner or operator of the car only where his active misconduct or gross negligence has caused the injury.

The courts hold, consistently with Silver v. Silver, that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by common law, to attain a permissible legislative object". These statutes were held to have such an object, and the classification which permits the gratuitous guest to recover only for gross negligence is held to be not arbitrary or unjustified. Silver v. Silver states that, "Such a distinction between the duty imposed in the case of the gratuitous performance of services and the performance of them for hire is to be found running through many fields of the law, as for example between the gratuitous bailee and the bailee for hire, the common carrier and the private driver, the innkeeper and the ordinary social host. In some jurisdictions it is held that the owner or operator of a motor vehicle is liable to a guest only in the case of gross negligence, in analogy to the rule prevailing in the case of a gratuitous bailment of goods."

263Within the meaning of the Iowa statute, "reckless" is held to mean "proceeding without heed of or concern for consequences", and not "negligence"; recklessness implies no care, coupled with disregard for consequences, Siessenger v. Puth, 239 N. W. 46 (Iowa, 1931). Wagner, J., (with whom concur Stevens and Morling, JJ.) says, at 56, "in the opinion of the writer of this dissenting opinion, recklessness necessarily includes negligence. A reckless act is necessarily a negligent act, but a negligent act may or may not be reckless." By the majority opinion, a new term, recklessness, is added to the law of torts, and must be distinguished from slight, ordinary, gross, wilful or wanton negligence. The court, attempting to follow an imagined legislative intention concerning the meaning of the term, forced itself to hold that "it follows that contributory negligence is not an element to be considered or dealt with, either by pleading, proof, or instruction of the court, in cases under this statute", (at p. 54); likewise, in the next Iowa guest case, the court held that the guest's contributory negligence could not be considered at any stage of the case, since plaintiff's action is founded upon recklessness, and not upon negligence, Neeson v. Armstrong, 239 N. W. 56 (Iowa, 1931); cf., in connection with the Iowa statute, Brandsoy v. Bromeland, 177 Minn. 298, 225 N. W. 162 (1929); Cerny v. Secor, 234 N. W. 193 (Iowa, 1931); Thomas v. Disbrow, 208 Iowa, 873, 224 N. W. 36 (1929); Redfern v. Redfern, 236 N. W. 399 (Iowa 1931); Cf. Recklessness Under The Iowa Guest Statute, (1932) 17 Iowa L. Rev. 268.


265Silver v. Silver, supra note 260, 108 Conn. at 379.

266Cf. note (1919) 4 A. L. R. 1195, Duty and Liability of Gratuitous Bailee or Mandatary.
In cases arising under these statutes, the courts have held that the terms "gross negligence" and "willful negligence" are not so uncertain as to render the act inoperative. The terms are familiar in legal nomenclature and often have been defined and discussed by the courts", says Naudzius v. Lahr. The greatest imagined difficulty was the framing of a workable definition of "gross negligence". Storla v. Spokane, Portland & Seattle Transportation Company says, "A brief definition I think I can say is 'great negligence'. The term 'gross' means great or extreme. Gross negligence must include an element of carelessness so great that the jury can say that there was not only an absence of the due care that should have been exercised, but also a degree of negligence materially greater than that which would constitute ordinary negligence. ... Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence."

The court quotes Krause v. Rarity as follows: "In many jurisdictions the division of negligence into degrees is not countenanced (20 R. C. L. 21); the concept being that such phrases as 'gross negligence' and 'slight negligence' are misnomers. In this state the degrees of negligence have been frequently recognized. The term 'gross negligence' has been defined as 'the want of slight diligence', as 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.'" The Oregon court in the Storla case finds that it is difficult for "gross negligence" to achieve the definiteness of meaning that "negligence" possesses, since in the former there is no reasonable man standard, and that if such a standard were possible as to gross negligence, it would have to be that of a careless, thoughtless or inattentive person. It would seem, therefore, that a substantially smaller amount of care and diligence, or conversely, a substantially greater amount of negligence than a person of ordinary prudence would exhibit, is in fact based upon the reasonably prudent man standard, and would be little more difficult of application than in the case of ordinary negligence.

268Naudzius v. Lahr, supra note 260, at 229.
269Supra note 262, at 369.
270Supra note 267, at 655.
271See supra note 263, as to 'recklessness'. For additional authority on owner-guest statutes, see Curtze, Liability in Guest-Owner Cases, (1931) 35 Dickinson
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e. The Minority Common-Law Rule in Guest Cases

The courts of several states have adopted as common law the minority rule that requires a finding of gross negligence on the part of an owner or operator of a vehicle in order to justify a recovery by an injured guest.272 As early as 1907,273 the Massachusetts court held274 that an invitor was liable to a gratuitous invitee to the same extent that a gratuitous bailee is liable to his bailor, that is, only for so-called gross negligence. This was followed in *Massaletti v. Fitzroy*,275 in which the court said that Massachusetts still recognized the several degrees of negligence, and concluded with the statement that, "Justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay. There is an inherent difficulty in stating the difference between the measure of duty which is assumed in the two cases. But justice requires that, to make out liability in case of a gratuitous undertaking, the plaintiff ought to prove a materially greater degree of negligence than he has to prove where the defendant is to be paid for doing the same thing. It is a distinction which seventy-five years practice in this commonwealth has shown is not too indefinite a one to be drawn by the judge and acted upon by the jury."276 The court repudiates the rule that "The law furnishes no definition of gross negligence as distinguished


273Recognition of degrees of negligence, and that gratuitous bailee was liable to his bailor only for gross negligence, prevailed in Massachusetts as early as 1821, Altman v. Aronson, 231 Mass. 588, 21 N. E. 505, 4 A. L. R. 1187 (1919); Note (1919) 4 A. L. R. 1196.

274West v. Poor, 196 Mass. 183, 81 N. E. 960, 11 L. R. A. (N. S.) 936, 124 Am. St. Rep. 541 (1907), where a milkman who found children in his milk delivery wagon drove on without ordering them out, and plaintiff fell to the ground when the wagon started, the court stated, "The nearest analogy that occurs to us is that of a self-invited guest in whose presence the host acquiesces and whose enjoyment he seeks to promote, or that of a gratuitous bailee... in order to render the bailee liable, it must appear that he has been guilty of gross negligence."


276*Massaletti v. Fitzroy*, *supra* note 275 at 510.
from want of reasonable and ordinary care, which can be of any practical utility," and it discusses at length the history of degrees of negligence in Massachusetts and in England. In Altman v. Aronsen, in an exhaustive opinion concerning the degrees of negligence, the Massachusetts court states:

"Expressions of dislike of the term, gross negligence, or of inability to understand or formulate the distinction between gross and ordinary negligence, which at various times and in divers jurisdictions have found their way into judicial opinions, are no longer relevant to discussions of that branch of the law as it prevails in this commonwealth. The difficulty in stating that distinction in cases where the evidence requires it must be met and overcome as far as possible. Indeed, simple negligence has sometimes been said not to be susceptible of easy definition. But legal obligations must be marked out and explained for the guidance of jurors, the enlightenment of the parties and the information of the public."

The court's definition, as follows, is often quoted and is consistently upheld in Massachusetts:

"Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character, as distinguished from a mere failure to exercise ordinary care... The element of culpability which characterizes all negligence is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is something less than the wilful, wanton, and reckless conduct which renders a defendant who has injured another liable to the latter, even though guilty of contributory negligence, or which renders a defendant in rightful possession of real estate liable to a trespasser whom he has injured... Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct which is,

278 Supra note 273, at p. 591.
or ought to be, known to have a tendency to injure. This definition does not possess the exactness of a mathematical demonstration, but it is what the law now affords.”

Baron Rolfe was responsible for the famous and oft-quoted statement, “I said I could see no difference between negligence and gross negligence—that it was the same thing, with the addition of a vituperative epithet.” However, the Massaleti case traces the history of gross negligence in bailment cases in England, and finds that “It would seem in England the liability of a gratuitous bailee and the liability of one who undertakes a gratuitous transportation is the same. And to this one thing more must be added, namely: However much the English judges have quarrelled with the meaning of the words gross negligence, it is the fact that when pushed to a decision the judges of England have invariably held that to make out liability in case of a gratuitous undertaking (no matter what the nature of the gratuitous undertaking was) gross negligence has to be made out.” The court further states that judges in the Federal Courts have experienced little or no difficulty in recognizing degrees of negligence, as in the case of gratuitous bailments.

Washington has adopted, and firmly upheld the minority rule in guest cases. Pinckard v. Pease held that, in order to make the driver liable, his negligence “must have been practically gross or wilful”. Heiman v. Klosner stated that the degree of care required of the driver is somewhere between that required where the carriage is one for hire and that necessary to be exercised with reference to the safety of a mere trespasser. Saxe v. Terry deduces from this that “it must follow that before an invited guest can recover a showing of gross negligence is necessary.” A recent article submits, that “it may be ventured that the minority rule began its existence in Washington due to a misapprehension of the court as to the effect of the prior holding.”

\[\text{\textsuperscript{280}}\text{Later Lord Cranworth, in Wilson v. Brett, supra note 6.}\]
\[\text{\textsuperscript{281}}\text{Supra note 275 at 506, citing Giblin v. McMullen, L. R. 2 P. C. 317 (1868); Moffatt v. Bateman, L. R. 3 P. C. 115 (1869); Coughlin v. Gillison, (1899) 1 Q. B. 145.}\]
\[\text{\textsuperscript{283}}\text{115 Wash. 282, 197 Pac. 49 (1921).}\]
\[\text{\textsuperscript{284}}\text{139 Wash. 455, 247 Pac. 1034 (1926).}\]
\[\text{\textsuperscript{285}}\text{140 Wash. 503, 250 Pac. 27 (1926).}\]
\[\text{\textsuperscript{286}}\text{Mechem & Mickelwait, Gross Negligence, (1930) 5 Wash. L. Rev. 91, 93. The Washington cases are adequately covered in the article, which terms the minority rule the “Washington Rule.” In addition, see Wold v. Gardner, 159 Wash. 665, 294 Pac. 574 (1930); Craig v. McAtee, 295 Pac. 146 (Wash. 1931).}\]
At one time it appeared that Pennsylvania was about to adopt the minority rule; in *Cody v. Venzie*,\(^{287}\) it was held that where the gratuitous carriage was for the sole benefit of the guest, that the owner or operator was liable only for gross negligence, while if the carriage was for the mutual benefit of both parties, host and guest, the carrier was liable for ordinary negligence. However, later cases in Pennsylvania\(^{288}\) did not mention the above distinction, and it is held in several recent cases\(^{289}\) that the gratuitous carrier owes the duty of exercising ordinary care for its guest, and the rule carries with it no qualification. Maine also, at one time, looked upon the *Massaletti* case with favor,\(^{290}\) although it did not adopt its terminology, and it then appeared that Maine would apply the minority rule in guest cases; two recent cases,\(^{291}\) however, impose the duty of ordinary care on the owner or operator for the protection of his guest.\(^{292}\)

The Virginia court states\(^{292}\) that "as a matter of fact the classification of negligence into appropriate grades is too natural to be ignored." *Boggs v. Plybon*\(^{293}\) says, "To hold that a guest who, for his own pleasure, is driving with his host, may recover from him for injuries suffered where there is no culpable negligence, shocks one's sense of justice." The court cites the *Massaletti* case\(^{293}\) with approval and quotes from the Supreme Court of the United States as follows:\(^{295}\)

"We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence.

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290 Avery v. Thompson, 117 Me. 120, 103 Atl. 4, L. R. A. 1918 D 205 (1918).
291 Trumpfeller v. Crandall, 130 Me. 281, 155 Atl. 646 (1931); Chaisson v. Williams, 156 Atl. 154 (Me. 1931).
293 Boggs v. Plybon, 160 S. E. 77 (Va. 1931) at 80.
294 *Supra* note 293 at 81.
295 *Supra* note 275.
Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits... In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence', and this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfillment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed."

Georgia also adhes firmly to the minority rule which demands a showing of gross negligence upon which to predicate the liability of owner or operator to his guest.

The use of the minority rule in host-guest cases, whether provided for by legislative enactment or judicial opinion, is a step forward, which, by demonstrating that certain refinements in dealing with negligence are not only possible but are even desirable, tends to lessen the historical disfavor of any judicial process which calls for the application of comparative degrees of negligence. It thus seems to pave the way for the adoption of a rule providing for a proper apportionment of damage where both parties are guilty of negligence whether of equal or unequal degree, and offers hope that the fair, just and flexible rule of comparative negligence may ultimately overcome the almost incomprehensible prejudice against any doctrine tending to alleviate the strict common-law views about negligence and contributory negligence.

VI. STATE COMPARATIVE NEGLIGENCE

In view of recent attempts in New York to induce the legislature to enact the comparative negligence statute referred to previously in this paper, our interest now centers upon the application by various states of the doctrine of comparative negligence or diminution of damages. It is often stated that at various times Kansas, Florida, Tennessee and Georgia have applied the doctrine. To a certain


298 Cf. (1926) 12 CROLL LAW QUARTERLY 113.
extent only are these statements correct. Kansas for a time considered the doctrine, but did not adopt it. Florida approves the doctrine only in cases involving injury by railroads and injury in the employer-employee relationship, although at times the Florida courts reveal a desire to make use of the Georgia rule. The Tennessee holdings have been explained in a previous section, and have been distinguished from cases applying the comparative negligence rule. Illinois adopted and followed for a number of years what it considered to be comparative negligence, only later to repudiate and never return to it. However, the Illinois doctrine was not truly that of comparative negligence, although it separated negligence into degrees and stated that the contributory negligence rule was too harsh in its application and should be alleviated. The Illinois rule was doomed from the beginning, inasmuch as it did not attempt to apply the necessary corollary to the comparative negligence rule, that of diminution of damages according to the amount of default of the plaintiff.

As explained by the Illinois court in Galena & Chicago Union Railroad v. Jacobs:

"The question of liability does not depend absolutely upon the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care, as manifested by both parties, for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think, is, that in proportion to the negligence of the defendant, should be measured the degree of care required of the plaintiff—that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover... We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered, and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."

It will be seen that Illinois simply said that to bar a plaintiff guilty of but slight fault was a hardship which the courts would not impose. This doctrine is, in one sense of the term, as harsh as that of contributory negligence, inasmuch as it allows a negligent plaintiff to recover

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300Supra notes 177-181.  
301Supra notes 13-17.  
302Supra note 13; cf. supra note 158, Illinois statute applying the rule of comparative negligence in employer-employee actions for personal injuries.  
303Reference is made particularly to the rule of diminution of damages as under the Federal Employers' Liability Act; no state allows full recovery to a contributorily negligent plaintiff.  
304Supra note 13 at 496, 7.
full damages of a more guilty defendant who should be allowed to plead plaintiff's fault in mitigation of the total damages. It was not difficult to foresee that this anomalous Illinois doctrine would disappear from the books, unless judicial decision could be made to reflect the respective degrees of negligence of the parties in the amount of the verdict to be reached.

The Georgia rule has been discussed briefly in a preceding section of this article. At first glance the rule appears to be that of comparative negligence, but on analysis distinctions in terminology, although not necessarily in result, may be seen. By the Georgia statute,\(^{305}\) "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." The terms 'ordinary care' and 'comparative negligence' immediately suggest an irreconcilable conflict, but the courts have, to a certain extent, overcome this apparent conflict, although the cases reveal some confusion regarding the correct name to be given to the Georgia rule.\(^{306}\)

Jenkins, P. J., says,\(^{307}\) "the term 'contributory' negligence has been construed by the courts as synonymous with what is perhaps more accurately termed 'comparative negligence', or the rule of diminution of damages, where the plaintiff's negligence is not such as to wholly bar a recovery"; Cobb, J., says\(^{308}\) that the rule which requires one to exercise ordinary care and diligence to avoid the consequences of another's negligence necessarily applies to a case where there is an opportunity of exercising this diligence after the negligence of the defendant has begun and has become apparent.

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\(^{305}\)GA. ANN. CODE (Parks, 1914) § 4426; cf. ibid. §§ 4424, 4425, 3471, 3472, 3473, 2781, 2782, 2783.

\(^{306}\)Note that in 1859, McDonald, J., said, in Macon & W. R. R. v. Davis, 27 Ga. 113, that "one member of the court is of opinion that the presiding Judge ought to have instructed the jury that, in the event they should find that both parties were at fault, but that of the defendant was greatest, the quantum of fault of the plaintiff must be weighed and the damages should be abated accordingly. We know of no rule for graduating the damages in that way... It might so happen, in a case of mutual negligence, that the jury could not determine the preponderance of the blame, and that some authorities say that in such case, there being no mode of apportioning damages at law, there can be no recovery. But if the parties are not equally in the wrong, how can the damages be apportioned? It would be difficult to set off negligence against negligence and apportion the damage. He who is guilty of the greater negligence or wrong, must be considered the original aggressor and accountable accordingly."


\(^{308}\)Western & Atl. R. R. Co. v. Ferguson, supra note 255.
or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence, and that "in such cases and in such cases only does the failure to exercise ordinary care to escape the consequences of negligence entirely defeat a recovery. In other cases, that is, where the person injured by the negligence of another is at fault himself, in that he did not, before the negligence of the other became apparent, or before the time arrived when as an ordinarily prudent person it should have appeared to him that there was reason to apprehend its existence, observe that amount of care and diligence which would be exercised under like circumstances by an ordinarily prudent person, such fault or failure to exercise due care and diligence at such a time would not entirely preclude a recovery, but would authorize the jury to diminish the damages in proportion to the amount of default attributable to the person injured."

The position of Georgia upon the issue of contributory negligence was clarified in 1908 by Lumpkin, J., who stated: "Confusion sometimes arises from the use of the expression 'contributory negligence'. In most jurisdictions contributory negligence is used as referring to such negligence on the part of the plaintiff, contributing to causing the injury to himself, as will prevent a recovery by him. In this State we have a doctrine, which is sometimes called that of comparative negligence, under which, if the plaintiff is not without fault, but his negligence does not amount to such a failure to use ordinary care which will prevent a recovery, he may recover damages of the de-  

30In re the Georgia rule, Brandsoy v. Bromeland, 177 Minn. 298, 225 N. W 162 (1929), supra note 263, states, "the law will not permit one in possession of his faculties to shut his eyes or benumb his faculties and in the absence of distracting circumstances fail to see or ascertain danger which is plainly visible or ascertainable, and then to successfully assert that the danger was not apparent or obvious", quoted approvingly in Siessenger v. Puth, supra note 263 at 55, and further citing Menzie v. Kalmonowitz, 107 Conn. 197, 139 Atl. 698 (1927).


32The extreme lengths to which the Georgia courts will go to find for a negligent plaintiff are shown by Louisville & N. R. v. Stafford, 146 Ga. 206, 91 S. E. 29 (1916); at 209, Atkinson, J., says, "the railroad might be negligent per se in violating the statute in regard to running trains over public crossings, and the plaintiff might be negligent per se in violating the statute in regard to running automobiles while approaching and crossing railroad tracks; but it would not necessarily follow that the negligence of the plaintiff would be the proximate cause of the injury or that it would be as great as that of the defendant, or that the plaintiff by the exercise of ordinary care could have avoided the consequences of the defendant's negligence after it had commenced or become apparent, or the circumstances would have afforded reason to apprehend its existence. The question of negligence and the degree of negligence of the respective parties would be for
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fendant, in a proper case, but the amount of his recovery will be reduced in proportion to the amount of default attributable to him. In this sense the term 'contributory negligence' will generally be found to have been used in Georgia, rather than in the sense of negligence which will prevent a recovery."

It is submitted that although the Georgia rule in terms requires the plaintiff to exercise ordinary care to avoid the consequences of the defendant's negligence, this prerequisite is so limited and qualified by judicial decision that Georgia cases approximate the result obtainable under the rule of comparative negligence.

In 1913 Nebraska adopted a comparative negligence statute which provided that in all personal injury actions "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 the contributory negligence attributable to the plaintiff." In construing this statute, Morrison v. Scotts Bluff County held that, "the true rule is that, if the plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though the defendant was negligent, unless the contributory negligence of plaintiff was slight, and the negligence of defendant gross in comparison therewith. If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negli-

the jury under the particular facts." On affirmance for plaintiff, Beck, J., dissenting, says at 210, "the plaintiff was violating a criminal statute at the time of the injury received by him, and his violation of the statute was the efficient cause of his injury. The great weight of authority is against his right to recover under this state of facts, although the defendant may have been guilty of violating the statute in reference to railroads." Cf. Standard Oil Co. v. Parrish, 40 Ga. App. 814, 151 S. E. 541 (1930).

Lumpkin, J., later said, in Elk Cotton Mills v. Grant, 140 Ga. 727, 731, 79 S. E. 836, 48 L. R. A. (N. S.) 656 (1913), that "As has been more than once noticed in opinions of this court, the words 'contributory negligence' are generally employed to express a degree of negligence which will preclude a recovery. In this State, unfortunately perhaps, those words are commonly used to express negligence which will diminish, but not defeat, a recovery, under the doctrine of comparative negligence, which is recognized here. But if the injured person causes the injury by his own negligence, or if the plaintiff by the use of ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover."


104 Neb. 254, 256, 177 N. W. 158 (1930).
gence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery. And even when plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct, from the amount of damage sustained, such amount as his contributory negligence, if any, bears to the whole amount of damage sustained." Of course, sole negligence, as well as negligence more than slight, on the part of plaintiff proximately contributing to the injury will bar recovery; if plaintiff's testimony reveals negligence more than slight upon his part, the court may enter a judgment of dismissal or direct a verdict for the defendant.

It may be asserted that the results obtained in personal injury actions in other states differ little from those obtained under the Nebraska doctrine, inasmuch as a jury probably discounts plaintiff's slight default in its findings. However, it must be remembered that the contributory negligence of the plaintiff, however slight, is always a theoretical bar to his recovery, and in those jurisdictions in which the majority rule of contributory negligence obtains, the jury is so instructed.

Recent Nebraska cases point to the conclusion that the courts are at times more lenient in application of the Nebraska doctrine.

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316 Rogers v. Chicago, R. I. & P. Ry., supra note 316; Eggeling v. Chicago, R. I. & P. Ry., 119 Neb. 229, 235, 228 N. W. 361, (1929), stating, "Eggeling's duty of self-protection was not lessened by reason of any excessive speed (of defendant). His obligation to stop, look and listen, when any of these or all would have proved beneficial, remained the same although the speed was excessive. Failure to do so is negligence more than slight, in comparison with that of the defendant, and will defeat a recovery, even though the whistle was not blown and the bell not rung, or the speed may have been excessive." (Italics the court's.)
318 Kelso v. Seward County, 117 Neb. 136, 219 N. W. 843 (1928) where plaintiff car driver plunged into an unlit and unprotected excavation in a public highway at night; the trial court's charge failed to stress the proposition that if the negligence of the defendant fell short in any degree of gross negligence, then plaintiff could not recover. Despite this, verdict for plaintiff affirmed on appeal. Cf. Giles v. Welsh, 239 N. W. 813 (Neb. 1932), in which defendant's employee left his stalled truck after nightfall for several hours without lights and with no guard to warn oncoming cars of danger. Defendants claimed negligence more than slight on plaintiff's part in having been unable to stop his car within the range of his lights and in having failed to keep a proper lookout for his own safety. The trial court held for plaintiff; affirmed on appeal. Cf. Folken v. Union Pac. R. R.
than the wording of the comparative negligence statute in that jurisdiction would suggest. An interesting example is *Emil v. Standard Oil Company.*220 Defendant’s employee invited a child to ride with him and help him distribute gas and oil on the regular route; as the child attempted to enter defendant’s truck, the employee suddenly started the truck and swerved it away from the child, with the result that the latter fell under the truck and died from injuries sustained. The trial court charged in part,221 "If you find that both were negligent, then it is your duty to fix the degree of the deceased’s negligence as compared with that of the defendant. If you find from the evidence that each was guilty of an equal degree of negligence, or that the negligence of the deceased was greater than that of the defendant, then you should in either event return a verdict for the defendant." Obviously under such an instruction the jury would be justified in concluding that if the negligence of deceased did not equal or exceed that of defendant, then the plaintiff would be entitled to recover. Also, no mention was made in the charge concerning the "slight-gross" wording of the statute or the rule laid down in the *Morrison* case, yet the appellate court held that the instruction was not reversible error, although it was criticized as being a less full and accurate statement of the law of comparative negligence than might be desired,222 and the appellate court advised trial courts in the future to use the rule laid down in the *Morrison* case.

Wisconsin, in 1931, passed a comparative negligence statute223 applying to all actions "to recover damages for negligence resulting in death or injury to person or property", and providing that contributory negligence shall not bar recovery "if such negligence was not as great as the negligence of the person against whom recovery is sought."224 Although valuable suggestions as to proper application

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22012 Supra at 421, 2 and 687.
221Wis. Laws 1907, c. 254, amending Wis. Stats. 1898, § 1816 (5), provided that a railroad should be liable for injuries if caused in whole or in the greater part by negligence of its employees, and further provided that "in all cases under this act, the question of negligence and contributory negligence shall be for the jury." Statute construed as constitutional in *Kiley v. Chic., M. & St. P. Ry.*, 138 Wis. 215, 119 N. W. 309 (1909); cf. *Klein v. Valerius*, 87 Wis. 54, 57 N. W. 1112, 22
and administration of the comparative negligence statute have recently appeared, as yet no cases have arisen under the Wisconsin Act which became effective June 17, 1931.

Mississippi has been more successful than any other state in its application of the doctrine of comparative negligence. In 1910, the Mississippi legislature passed an Act which stated that in all personal injury or death or property damage actions, 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." This Act is nearly identical with the bill proposed in New York during the past year. The next succeeding section of the Mississippi Code prescribes that all questions of negligence and contributory negligence shall be for the jury to determine, but the courts have qualified this latter section by holding that there must be a conflict of testimony or an actual issue concerning negligence or contributory negligence in order that such questions be submitted to the jury. Also, the court may charge as a matter of law that plaintiff's negligence proximately contributed to his injury, and must then instruct on the comparative negligence doctrine.


Bull. State Bar Ass'n Wisconsin, vol. IV, No. 4, 232-236; (1931) 16 Marq. L. Rev. 3.

Tomasik v. Lauferman, 238 N. W. 847 (Wis. 1931). Here plaintiff alleged both ordinary negligence and gross negligence. Trial court submitted both degrees of negligence to the jury, instructing that if gross negligence were found, the jury need not consider the questions relating to ordinary negligence. Held, defendant's drunken driving constituted gross negligence, thus plaintiff's negligence, if any, was immaterial. The jury gave a verdict for plaintiff of $25,250, which was subsequently reduced to $15,000. (Injury occurred Dec. 9, 1930, judgment entered April 11, 1931, statute not taking effect until June 17, 1931).

Miss. Ann Code (Hemingway, 1930) § 511.

Ibid., § 512.

McCollum v. Thrift, 156 Miss. 376, 125 So. 544 (1930).

Natchez & S. R. R. v. Crawford, 99 Miss. 697, 55 So. 597 (1911); see supra note 324 and infra note 332.

Hudson v. L. & N. R. R., 30 F. (2d) 391 (C. C. A. 5th, 1929); see Yazoo & M. V. R. R. v. Williams, 114 Miss. 236, 74 So. 835 (1917), where plaintiff was guilty of gross negligence in attempting to cross railroad track, but jury awarded him $10,000 damages; on appeal, the court held that even if plaintiff had been guilty of no negligence, he would have been entitled to no more than $10,000 or $12,000, and where, as here, it is obvious that the jury failed to diminish plaintiff's damages according to his negligence, the court may either order a remittitur and affirm, or will reverse and remand the case. Remittitur of $5,000 ordered.
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By judicial construction of the Mississippi statute, the contributory negligence of plaintiff, whether slight, ordinary or gross, will not bar a recovery, although it is stated that "this statute does not deal with, and was not intended to introduce into our jurisprudence, degrees of contributory negligence, but it deals with contributory negligence proper of every character." Plaintiff's sole negligence will of course bar his right to recovery, but his gross contributory negligence results only in a diminution of the damages by the jury in proportion to his default. Defendant must be shown

322Natchez & S. R. Co. v. Crawford, supra note 330, at 718, 719, states that, "there is no merit whatever in the contention that it violates either the due process or the equal protection clauses of the Constitution of the United States. It is clearly within the police power of the state. The statute makes a classification of all actions for personal injuries. This classification is based on reason and justice, and is not a discrimination in favor of defendants in other character of actions." Cf. Jones v. A. & V. Ry., 72 Miss. 22, 16 So. 379 (1894), construing similar special statutes in Mississippi, cited supra notes 210-213.


324Yazoo & M. V. R. R. v. Carroll, 103 Miss. 830, 835, 60 So. 1013 (1913); the court further states, "this statute is plain, unambiguous, and easily construed. Prior to its passage contributory negligence—any contributory negligence, slight, ordinary, or gross, if negligence can in fact be so classified—barred a recovery, and the manifest legislative purpose of enacting it was simply to alter the rule on this subject, which had been established by the courts, so that such negligence should not thereafter bar recovery, but should simply cause a diminution of the amount thereof."

325McWhorter v. Draughn, 134 Miss. 247, 98 So. 397 (1924), where it is held that the test as to whether recovery can be had is whether defendant was guilty of any substantial negligence which proximately caused the injury; and see Columbus & G. Ry. v. Buford, 150 Miss. 832, 116 So. 817 (1928), which holds that negligence which may be imputed to plaintiff is a defense pro tanto.

326Friedman v. Allen, 152 Miss. 377, 118 So. 828 (1928); Yazoo & M. V. R. R. v. Williams, supra note 331; Chapman v. Powers, 150 Miss. 687, 116 So. 609 (1928). In the Chapman case, plaintiff was riding with her husband, who was driving while drunk, when their car hit defendant's unlit gravel pile. Plaintiff appealed from a $500 verdict, as being so grossly inadequate as to manifest passion or prejudice on the part of the jury. The appellate court stated, at 694, "A large part of the negligence proximately contributing to appellant's injuries was her own negligence in riding in a car, between eleven and twelve at night, driven by her husband, who was in such a drunken condition as to render him unfit to drive the car with reasonable care and skill." The court affirmed the $500 verdict for plaintiff. Cf. Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861 (1923), in which plaintiff was clawed by a bear which she attempted to feed in a city-owned zoo.
to be guilty of negligence which proximately contributed to cause plaintiff's injury or damage.\textsuperscript{337} The duty of the jury to diminish damages in proportion to the default of plaintiff is mandatory,\textsuperscript{338} and where it is manifest that the jury has failed to consider plaintiff's default, the court will not permit the verdict to stand.\textsuperscript{339} Although each party alleges sole negligence of the other party as the cause of the injury complained of, such pleadings do not prevent the trial court from instructing on the doctrine of comparative negligence.\textsuperscript{340} It is also held that, although the pleadings do not set up the statute, and no instructions on the doctrine of comparative negligence were requested by either party, the court may instruct on the doctrine.\textsuperscript{341} In the event that the court does not, the jury may apply the rule of comparative negligence, in the absence of directions to the contrary, for the Mississippi court endows its juries with a knowledge of the law.\textsuperscript{342}

The comparative negligence statute has been applied in Mississippi satisfactorily for over a score of years; courts, juries, counsel and litigants appear satisfied with its operation and administration, and it is obvious that it approaches more closely the ideals of theoretical and practical justice than the harsh and inflexible rule of contributory negligence which assumes that the total burden, financially and physically, must lie upon the injured party who has been slightly negligent,\textsuperscript{343} and that there can no more be an apportioning

The bear's keeper had left it in the open park, on a ten or twelve foot chain. Defendant demurred and pleaded plaintiff's sole negligence. The trial court sustained the demurrer. The court on appeal applied the New York rule making it the duty of the city to exercise reasonable care to make its parks safe, and held that the case should go to the jury under the statute of comparative negligence.

\textsuperscript{337} McWhorter v. Draughn, \textit{supra} note 335.

\textsuperscript{338} Tendall v. Davis, 129 Miss. 30, 91 So. 701 (1922).

\textsuperscript{339} Yazoo & M. V. R. R. v. Williams, \textit{supra} note 331; Seiferman v. Leach, 138 So. 563 (Miss. 1932).

\textsuperscript{340} Morrell Packing Co. v. Branning, 155 Miss. 376, 124 So. 356 (1929); Tendall v. Davis, \textit{supra} note 338.

\textsuperscript{341} Goodman v. Lang, 158 Miss. 204, 130 So. 311 (1930).

\textsuperscript{342} \textit{Supra} at 208, "While it is true that no instruction or pleading was made setting up contributory negligence, still the jury is presumed to have a knowledge of law, and, in the present case, must have acted upon it."

\textsuperscript{343} See Standard Oil Co. v. Evans, 154 Miss. 475, 122 So. 735 (1929), where defendant's servant overflowed plaintiff's gasoline tank; plaintiff pointed out the danger of injury to the attendant, but the latter refused to do anything about it. Plaintiff's car burst into flames after he drove about 160 feet from the station, personal injury and property damage resulting. Defendant conceded that it was negligence on the part of the attendant to overflow the tank, but claimed that plaintiff's negligence in driving the car was the proximate cause of his injury and furthermore, that plaintiff assumed the risk by driving the car. \textit{Held}, defendant should have reasonably foreseen that the overflow might have become ignited in
of the damages than there can be an apportionment of negligences of the respective parties.

VII. COMPARATIVE NEGLIGENCE IN NEW YORK

It was pointed out in the first section of this paper that an Act was submitted recently to the New York Assembly\(^4\) whereby the Civil Practice Act would have been amended to allow an action for damages for personal injury or property damage despite contributory negligence, such contributory negligence to be considered by the jury only in diminution of damages. The proposed Act follows closely the wording of both the Federal Employers' Liability Act\(^5\) and the Mississippi Comparative Negligence statute,\(^6\) which we have discussed at length.

Many problems arise concerning the desirability of enacting this proposed Act. To consider the problems in order briefly, since limitations of space forbid too involved or lengthy a discussion:

1. **Is There any Real Need for Comparative Negligence in New York?**

   It may be said that there is always need for law which metes out justice.\(^7\) When a specific legal doctrine is shown to be outmoded\(^8\) some manner, resulting in injury to plaintiff. This being true, defendant's negligence was a proximate cause, and the doctrine of assumption of risk has no application.

\(^4\)The Act was introduced by Mr. Foody, read once in Assembly and referred to the Committee on Codes, wherein it was killed. In February, 1932, the Rochester Bar Association Legislative Committee reported favorably on the Act but deferred definite action in order to ascertain views of attorneys on the bill.

\(^5\)Fourteen legislatures have enacted acts identical to the Federal Act; seven states have Acts similar, while other states have acts which produce the same effects. *Supra* notes 157–160. Mention of the *FEDERAL EMPLOYERS' LIABILITY ACT* in this section of this paper signifies the comparative negligence portion of that act (45 U.S.C. § 53), and such mention is meant to include similar or identical state legislation. See *supra* notes 115–116.

\(^6\) *Supra* note 327.

\(^7\)Duff, J., in *Grand Trunk Pac. R. R. v. Earl*, (1923) 2 D. L. R. 741, 742, (1923) Can. L. Rep. 397, says, "This is one of those cases that sometimes cause one to turn a rather wistful eye to jurisdictions in which where injury results from the combined negligence or misconduct of the plaintiff and the defendant, the burden of the loss can be equitably distributed." *Ibid*, Mignault, J., at 751, "If I may say so, the doctrine of the civil law, in force in the Province of Quebec and also adopted in admiralty matters, is much more equitable, for where there is common fault, the liability of each party is measured by his degree of culpability. This prevents the negligent defendant from entirely escaping punishment, because the plaintiff, in a greater or less degree, has contributed by his negligence to the accident. However, this is a matter for the consideration of the lawmaker, for the courts are obliged to apply the law however harsh it may seem." *Cf.* opinion of Anglin, J., in the instant case.

\(^8\)The authors acknowledge indebtedness to J. A. Padway, member of Wis-
and defective, and to act unjustly in many cases and when it appears that the rule has been changed in several allied fields in the furtherance of justice, it is high time to consider whether a change from the old and arbitrary rule is desirable in all, rather than in a few, fields of litigation. When, as in the case of the doctrine of contributory negligence an adequate substitute has been found in the rule of comparative negligence, when it appears that this rule has been effective in each of the fields in which it has been applied; when it is realized that the damages awarded under the proposed rule provide a more exact and satisfactory remedy, the least that can be said is that a prima facie case in favor of the substitute rule has been made out.

2. Does the Rule of Contributory Negligence Operate as a Real Deterrent?

It is clear that it does not. The primary reason upon which the rule was supposed to rest has clearly failed, and it is no longer possible to claim that it, by being a bitter punishment, truly acts as a restraint upon negligent conduct. The vast number of negligence cases to be found in every jurisdiction entirely negatives its effectiveness as a deterrent. Granting that the rule of contributory negligence may

349Ibid. at 4, quoting 2 BLASHFIELD, CYc.AuTo LAw, (1927) 1008, on contributory negligence, "In some of its aspects it offends every instinct of good sportsmanship. . . . the doctrine has been uncertain and unsatisfactory, and not infrequently has been productive of serious injustice. Like the defense of alibi in criminal cases, the defense of contributory negligence is frequently set up merely to raise a cloud of dust under cover of which to escape the penalty for a grave error. . . . The doctrine of comparative negligence which at one time was almost obsolete, has been restored to favor in many jurisdictions. . . . There are particular reasons for modifying the doctrine in its application to the relation of motorist and pedestrian. . . . The scales will hang more evenly between these two classes of travelers if the doctrine of contributory negligence, if not entirely abolished, shall be restricted in its application to the pedestrian."
have acted as a deterrent at the time of Butterfield v. Forrester, experience under the changed conditions of a machine age seems to demonstrate that belief that the rule of contributory negligence thus acts is based on pure imagination.

The contributory negligence doctrine does nothing more than bar recovery by an injured and negligent plaintiff. The negligent defendant is usually guilty of the greater negligence proximately causing the injury, and is thus the party against whom the deterrent must operate if it is to be truly effective. As long as we allow a concededly negligent defendant, who is mainly responsible for the injury, entirely to escape the consequences of his negligent conduct we are hardly in a position to assert that the rule of contributory negligence acts as a satisfactory deterrent against commission of negligent torts.

3. Is the Proposed Law an Exception to the Rules of Negligence which may Prove Disadvantageous to Courts and Claimants?

Successful application of the doctrine of comparative negligence in the several special fields, as in admiralty, workmen's compensation acts, employers' liability acts and in automobile guest cases, reveals the practicability of this change in the rules of negligence. It has been shown conclusively that courts and claimants and their counsel have experienced no difficulty with the doctrine of comparative negligence or its application. Judging from the practical experience of admiralty courts, state and federal courts applying the Federal Employers' Liability Act, or courts applying special statutes dealing with comparative negligence, there are no hidden pitfalls in the doctrine into which courts may fall, other than certain ever-present problems in connection with proper instructions by trial courts covering the mode of division or apportionment of damages. After the first decision outlining the proper method of apportionment, and giving a careful judicial construction of a comparative negligence statute, this difficulty should disappear. The experience already in hand leaves no ground for any claim that lawyers or clients do not

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350 East 60 (1809). The entire doctrine of contributory negligence dates from this case; see Bohlen, Contributory Negligence, (1908) 21 HARV. L. REV. 233, SELECTED ESSAYS ON THE LAW OF TORTS (1924) 469.

34See supra note 348. Arguments used in favor of adoption of workmen's compensation acts are applicable also in favor of the extension of comparative negligence in other fields. See the statement of policy behind workmen's compensation acts contained in IDAHO COMP. STAT. (1919) § 6214, supra note 141.

35Supra notes 345, 116, 117.

36Emil v. Standard Oil Co., supra note 320, illustrates this possible difficulty; the appellate court pointed out correct wording or trial court instructions.
know or cannot easily ascertain their rights under the doctrine of comparative negligence. Justice Marshall in a Wisconsin case sounds the only caveat when he says, "The comparative negligence law should be administered in its spirit, rather than in its letter, otherwise what was intended to be a beneficial change in our system might prove to be the very reverse."

4. Have New York Courts had any Experience from which we may Judge Whether the Results Obtainable under Comparative Negligence are Desirable?

A number of New York cases have applied the comparative negligence rule under special statutes. In Hendricks v. New York, New Haven & Hartford Railroad, plaintiff was employed by defendant railroad in interstate commerce. Defendant gave plaintiff free transportation to the station nearest his home, and plaintiff occupied the last seat in a rear car of the train. The car stopped on a trestle some distance from the station, which was ahead and separated from plaintiff's car by two main tracks. Plaintiff thought the train would start again before he could make his exit from the front of the car, and so attempted to leave by the rear, but found his way blocked by a girder. However, he descended to the planks of the trestle and fell through to the street below when the planks gave way. The trial court apportioned damages. The Appellate Division held that "the submission of the question of liability on the theory of proportionate negligence under the [Federal] Employers' Liability Act was error, since the means pursued by plaintiff constituted a deviation from the employment and pursuit of plaintiff's own private desires and concerns, to enable him to make use of a shortcut or exit not provided for that purpose," in other words that this deviation took him beyond the scope of his employment. The Court of Appeals reversed, stating that defendant was under a duty to provide reasonable means of exit, that plaintiff's conduct under the circumstances was reasonable, and that "he is entitled under this statute, whether negligent or otherwise, to recover in some amount by way of apportionment of damages, unless his means of exit constitutes a deviation from his employment." The Court specifically stated that this was not a deviation from employment.

356 Supra note 355, 225 App. Div. 687; Kapper and Hagarty, JJ., dissent.
357 Supra note 355 at 300, per O'Brien, J.
358 Cardozo, Lehman, JJ., dissent.
In *Rocco v. Lehigh Valley Railroad*, plaintiff's testator was a track inspector of defendant railroad. While making an inspection, having failed to comply with an oral company rule that inspectors should ascertain the positions of trains on the tracks before making inspections, plaintiff's testator was fatally injured by defendant's train, which failed to sound its whistle in approaching the curve at which the accident took place, and which was three and a half hours late due to landslides on the road. The jury found that concurring negligence of deceased and the engineer of the train caused the injury, and without difficulty rendered its verdict on the theory of comparative negligence. This was affirmed on appeal.

The outstanding case of comparative negligence in New York is *Fitzpatrick v. International Railway*; plaintiff was injured in Ontario, Canada, while in the employ of defendant railway, a New York corporation. Suing in New York, plaintiff claimed the benefit of the 'Ontario Contributory Negligence Act,' which permits a negligent plaintiff to recover against a defendant who is guilty of a greater degree of negligence, and provides that if it is impracticable to determine the respective degrees of fault, the defendant shall be liable for one-half of the damages sustained. Under this statute, the burden of proving contributory negligence is placed upon the defendant. Under the New York rule, contributory negligence would have barred recovery, and the burden would have been on plaintiff to prove freedom from contributory negligence. The trial court charged in accordance with the Ontario statute that the burden of proving contributory negligence was upon the defendant and that damages might be apportioned in proportion to plaintiff's default.

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360 Van Kirk and Davis, JJ., dissenting, latter stating at 326, "disobedience of a safety rule is something more than contributory negligence. It may constitute generally, as I think it did in this case, a primary cause of the accident... The burden of responsibility may not so easily be shifted to another by saying that the engineer should have given a whistle signal before rounding the curve, and, therefore, comparison may be made between negligent acts." The majority of the court attempts to distinguish Unadilla Valley R. R. v. Caldine, 277 U. S. 578, 48 Sup. Ct. 433 (1928) (supra note 120) on ground that there the company order was printed rather than oral.
362 Ontario Laws 1924, c. 32.

*Supra* note 344, § 4.
the jury found plaintiff guilty of 10% of the total negligence and judgment was rendered for him for 90% of the loss.365

Judge Crane, speaking for a unanimous court, says,365 "While it is true that in this State we speak of the proof of freedom from contributory negligence as being a burden of proof resting upon the plaintiff, it is, in reality, even here, more than a mere burden of proof, it is a substantive part of the plaintiff's right to recover... As we have said, the Ontario Act goes beyond a matter of procedure and gives a right unknown to the common law, the right of an injured person to recover for another's negligence, even though contributing by his own neglect to bring it about. For these reasons the trial court was quite correct in charging the jury in accordance with the Ontario statute367... If we are to adopt a part (of the Ontario statute) we must apply it as a whole, because it affects the substantial rights of the parties. Under our rule, it would be impossible for the plaintiff to prove his own contributing neglect, without proving himself out of court, as we have no comparative negligence rule for actions at common law."368

The question of New York's experience with comparative negligence is clearly and concisely answered by Justice Crane in the Fitzpatrick case as follows:369

"Furthermore, the courts of this State are not unaccustomed to the application of the law of contributory negligence adopted by the Ontario act. We have a similar provision under Section 3 of the Federal Employers' Liability Act.370 Although the

365The authors submit that the finding of direct percentages of negligence is unusual in administration of statutes dealing with comparative negligence or under the English admiralty rule of apportionment. However, it is obvious that substantial justice may be done, as in the present case, where the jury finds the plaintiff guilty of one-tenth of the total negligence and thus reduces plaintiff's damage by one-tenth. Cf. supra note 348 at 12, 14; Kalashian v. Hines, 171 Wis. 429, 177 N. W. 602 (1920), where jury found plaintiff's negligence contributed to the extent of forty percent to his injury as compared to the total negligence of both plaintiff and defendant, and sixty percent of the damages was allowed to plaintiff; Richter v. Chicago, M. & St. P. Ry., 176 Wis. 188, 186 N. W. 616 (1921).

366Supra note 361 at 133.

367Ibid. at 135.

368In Sapone v. N. Y. Cent. & H. R. R., supra note 361, where injury occurred in Quebec, and the administrator sues in New York, suit was barred because Quebec law allows only the consort and ascendant and descendant relatives to sue for wrongful death. An apparent limitation is placed upon the Fitzpatrick case by Wikoff v. Hirschel, 258 N. Y. 28, 179 N. E. 249 (1932), which holds that a cause of action for wrongful death given by a foreign (New Jersey) statute is enforceable in New York unless against public policy or unless remedies prescribed cannot be adapted to New York procedure. 369Supra note 361 at 135-136.

370Citing it as Act of April 22, 1908, 35 Stat. at Large 66, c. 149.
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acts of Congress form part of the laws of the State of New York, unlike the laws of Ontario, yet the application, when it is to be made, is very much similar in both instances. The burden of proof has also been shifted in death cases. Under the Workmen's Compensation Law if an employer fails to insure his employees, the employee may maintain an action in the courts for damages on account of an injury received. Not only shall it be unnecessary to plead or prove freedom from contributory negligence, but even the defense of contributory negligence may not be pleaded. Jacobus v. Colgate may be consulted for an explanation of the difference between rights and remedies, the former pertaining to the law of the place of occasion and the latter to the law of the forum. The acts giving a right of recovery for negligence causing death generally contain a time limitation. These short Statutes of Limitations of foreign jurisdictions have been applied by our courts as constituting a condition or part of the right of cause of action.

Thus it is seen that New York has had adequate experience with comparative negligence, and in this connection three subordinate questions arise:

(a) Did this Experience Reveal any Real Defect or Difficulty in Application of the Rule or in its Administration?

The trial courts in the Rocco, Hendricks and Fitzpatrick cases had no trouble with, and clearly charged the jury in accordance with the rule of comparative negligence and diminution of damages provided by the special statutes. After the foreign law had been pleaded and proven as fact in the Fitzpatrick case, and had been made the basis of the court's instructions, no great or unusual intelligence on the part of the jury was demanded in order for it to form a verdict according to the Ontario comparative negligence statute. The remedies prescribed by the foreign statute must have been entirely capable of adaptation to the forms of New York procedure, else the Court

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373 Citing Laws of 1922, c. 615, § 11; Cons. Laws, c. 67.
379 Supra note 355.
380 Supra note 361.
of Appeals would have failed to unanimously uphold the trial court in the Fitzgerald case, for where foreign law is contrary to public policy in New York or is incapable of adaptation to our forms of procedure, the court will refuse to enforce it.\footnote{381}

(b) \textit{What Major Change or Changes in Procedure or Substantive Law Would be Brought About by Adoption of the Comparative Negligence Rule in New York?}

If the rule were provided by statute, the statute would merely have to be pleaded;\footnote{382} trial court instructions would then follow the general wording of the provisions of the act rather than the rule of contributory negligence, and the verdict would reveal a diminution of plaintiff's damages according to the amount of his default. Further, if either the legislature or the courts adopted a form of special verdict under the comparative negligence rule such as that recently adopted in Wisconsin,\footnote{383} then the procedure would be varied by submission to the jury under such special verdict and by the jury's findings according to that special verdict. However, the most important and far-reaching change which would be produced in New York by adoption of comparative negligence appears in the burden of proof in negligence cases. As has been pointed out above, subject to certain exceptions,\footnote{384} the burden of proof of lack of contributory negligence is upon the plaintiff in New York, and is a substantive part of the plaintiff's right.\footnote{385} Proof of defendant's negligence is not alone sufficient to justify a recovery. Two elements are necessary, de-

\footnote{381}{Wikoff v. Hirschel, \textit{supra} note 368; Slater v. Mexican Nat. R. R., 194 U. S. 120, 24 Sup. Ct. 581 (1904); Loucks v. Standard Oil Co. of New York, 224 N. Y. 99, 120 N. E. 198 (1918). In the last case, note that the Massachusetts statute in consideration levied liability against a person or corporation causing death by negligence, for "damages in the sum of not less than $500, nor more than $10,000, to be assessed with reference to the degree of his or its culpability." The Appellate Division (172 App. Div. 227) held that a statute which graded damages in proportion to the negligence of defendant, which was penal rather than compensatory, and which was at variance with the law of this State, would not be enforced. The Court of Appeals reversed.

\footnote{382}{But see \textit{supra} notes 340-342.}

\footnote{383}{See \textit{supra} note 325 at 233-5; \textit{supra} note 348 at 23-4; form of verdict follows Hamus v. Weber, 199 Wis. 320, 226 N. W. 392 (1929). \textit{Cf.} form of special verdict used in Montreal Tramways Co. v. McAllister, \textit{supra} note 363 at 430 and 175.

\footnote{384}{\textit{Supra} notes 372-374. Under the Wisconsin special verdict, the burden of proof is sometimes on the plaintiff and sometimes on the defendant, see \textit{supra} note 325 at 235. Also see EMPLOYERS' LIABILITY LAW (N. Y.) § 5, formerly §202-a LABOR LAW (Laws 1910, c. 2.), making contributory negligence of the injured employee a defense to be so pleaded and proved by the defendant.

\footnote{385}{Fitzpatrick v. International Ry., \textit{supra} note 361; see \textit{supra} note 366.}
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fendant's negligence and plaintiff's freedom from negligence, and
plaintiff must establish both of these elements in order to recover.
If the rule of comparative negligence were adopted it would be a
useless procedure which would demand of plaintiff that he negative
his contributory negligence, when it was no longer an essential
element of his cause of action. Contributory negligence would be
purely a defense pro tanto, to be pleaded and proven by the de-
fendant, as it is at present under all statutes providing for the rule of
comparative negligence and diminution of damages.

(c) Are These Changes Desirable?

Pleading of the statute and correct charging by the trial court
involve little additional labor, in comparison with the far greater
justice reached under comparative negligence. It may be questioned
whether a special form of verdict is desirable. Wisconsin follows
the following form and submits to the jury these questions:385

1. Was defendant negligent?
2. Did defendant's negligence proximately cause the injury?
3. Was plaintiff negligent?
4. Was plaintiff's negligence a proximate cause of the injury?
5. Was plaintiff's negligence greater or less than defendant's?
6. What is the full damage plaintiff has sustained?
7. What is plaintiff's damage as diminished in the proportion
to the amount of negligence attributable to him?
8. What is the full damage sustained by defendant?
9. What is defendant's damage as diminished in proportion to
his negligence?

Submission of these special questions does help the jury to under-
stand the rule of comparative negligence and to form the verdict in
accordance with it, but such special verdicts have been found cumber-
some and unnecessary in most jurisdictions dealing with comparative
negligence, and may well be left to be given or refused in each case
within the discretion of the trial judge.

Placing the burden of proof of contributory negligence definitely
upon the defendant would prove beneficial rather than disadvan-
tageous. It has always appeared to the authors that forcing plaintiff
to negative his contributory negligence is an anomaly in the law, in
that it makes plaintiff anticipate and disprove what should be con-
sidered a purely defensive matter,387 which otherwise might never

385Supra note 383.
1914), "Before the amendment of the Labor Law and of the Code requiring
contributory negligence to be pleaded and proven as an affirmative defense, the
have been raised. The change would lighten the burdens of counsel for plaintiff, and should result in a saving of time of the courts, which instead of having to deal with the pleadings concerning contributory negligence in every negligence case, would have to deal with that problem only in those cases in which defendant affirmatively set up the defense, and New York would be in line with the vast majority of American jurisdictions.

5. Is the Wording of the Proposed New York Act Ambiguous?

The Georgia statutes, apparently demanding ordinary care on the part of plaintiff, the Nebraska “slight-gross” negligence act and the Wisconsin statute allowing recovery where plaintiff’s “negligence was not as great as the negligence of the person against whom recovery is sought”, have each resulted in a reasonably just comparison of the negligence of the parties and a proper diminution of damages according to the default of the claimant; however, the wording of each of these statutes has obvious defects which might possibly have resulted in the very reverse of a beneficial change in the law of negligence had they been construed by less liberal courts than those which were called upon to administer them. The proposed New York act, following the general wording of the Mississippi and Federal Employers’ Liability Acts, provides more clearly for comparative negligence in that it simply points out that no longer shall contributory negligence be a complete defense, but shall be merely a defense pro tanto according to the amount of plaintiff’s default. The Ontario Contributory Negligence Act is considerably more specific than any of the above statutes, and its wording would seem to lead to less difficulty in judicial construction. It provides in part that:

“In any action or counterclaim for damages hereafter brought, which is founded upon fault or negligence, if a plea of con-

plaintiff was often denied relief because of the impossibility of obtaining proof as to how the accident happened, so as to show that he was guiltless of contributory negligence. It was deemed a harsh rule to put this burden upon the plaintiff, especially in case of an accident resulting in death, and in any case it was deemed that the burden of proof should properly be with the defendant to establish by a preponderance of the evidence that the negligence of the party injured contributed to the result. To remedy these apparent inequities it is fair to presume that the change of rule was made by the Legislature, and the law should be so construed as to give to a plaintiff in a negligence action the full benefit which it was apparently contemplated that a plaintiff should have.”

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388 See supra note 354. 389 Supra note 287. 390 Supra note 314. 391 Supra note 323. 392 Supra note 327. 393 See supra notes 345, 115, 116. 394 Supra note 362.
tributory fault or negligence shall be found to have been established, the jury, or the judge without a jury, shall find:—

First: The entire amount of damages to which the plaintiff would have been entitled had there been no contributory fault or neglect;

Secondly: The degree in which each party was in fault and the manner in which the amount of damages found should be apportioned so that the plaintiff shall have judgment only for so much thereof [i.e., so much of plaintiff’s damage] as is proportionate to the degree of fault imputable to the defendant.

4. Where the judge or jury finds that it is not, upon the evidence, practicable to determine the respective degrees of fault the defendant shall be liable for one-half of the damages sustained.”

Does it not seem preferable that the proposed New York act should conform to the wording of the Ontario act, since the latter covers the field of comparative negligence with a greater degree of thoroughness, provides specifically the manner of apportionment of damages, and definitely authorizes reduction of liability to one-half where it is found impracticable to determine respective degrees of negligence of the parties? However, other jurisdictions are satisfied merely to set out the statutory rule of comparative negligence and to rely upon judicial wisdom in solving the various problems of construction which naturally arise under comparative negligence, and there is no reason to expect the courts of New York to deviate from their record of sound judgment if the comparative negligence doctrine should be adopted in this state.

(a) Defects in the Proposed Act

The New York act as submitted to the Assembly was subject to several interpretations:

1. Where both parties are guilty of contributory fault and each sustains damage, one construction of the proposed act might be that the total loss should be determined and the parties recover a proportion of the total damages computed according to their respective fault as based upon that total loss.

2. The negligence of each party might be taken as a unit. For example, suppose that the more derelict of the parties is chargeable with complete lack of care, and the less guilty party is found to have used only ten percent of the care which he should have used, then, if the less guilty has suffered $1,000 damage, he would recover but $100.\footnote{Supra note 348 at 1.}

\footnote{This possible construction, which is the least logical and least desirable of the four suggested constructions, is discussed briefly by Padway, supra note 348 at 18.}
3. The proposed act could be construed as the Federal Employers' Liability Act is, namely, that where both parties are negligent, the plaintiff's total damages shall be diminished in the proportion that plaintiff's own negligence bore to the combined negligence of both plaintiff and defendant.\

4. It might be construed to mean that in computing the net judgment to be allowed, each should, as the first step in such computation, be allowed a tentative recovery from the other, but reduced in each instance in proportion to the negligence displayed by him; that is, where he is guilty of one-fourth of the total negligence involved, he recovers but three-fourths of the damages he otherwise would have recovered had he been guilty of no negligence. For example, according to the British proportional rule in admiralty, if ship A has sustained $100,000 damage and ship B $50,000, and ship A is found guilty of one-fourth of the total negligence while ship B is guilty of three-fourths of the negligence involved, A recovers three-fourths of $100,000 and B one-fourth of $50,000. Result; net recovery to A, $62,500.

The wording of the proposed bill would not indicate whether the legislative intention is that an injured plaintiff should recover regardless of the degree of his negligence unless it were the sole proximate cause of the injury, or whether only a plaintiff less negligent than the defendant should recover. The bill in no way considers or provides for contribution between joint tort-feasors where all parties are negligent, nor does it provide for a counterclaim by a negligent defendant who has suffered loss in the same accident. If a plaintiff more negligent than defendant could not recover under the proposed act, it is obvious that a more negligent defendant should not be allowed to recover upon a counterclaim in the same action. However, if, as in Mississippi, it were held that a plaintiff could recover unless his negligence were the sole proximate cause of the injury, defendant's counterclaim should be valid unless defendant were the sole negligent party.

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Huger, Proportional Damage Rule in Collisions at Sea, (1927) 13 CORNELL LAW QUARTERLY 531, 534, 540.

Ibid. 540.

Note that the recent Wisconsin Act, supra note 323, provides that plaintiff, in order to recover, must be less negligent than defendant.

The problem is discussed briefly in connection with the Wisconsin Act by Padway, supra note 348 at 17, 19.

Ibid. 17, 18.

Supra note 327; see supra notes 328-343.
These defects and difficulties are merely suggested. They involve considerable difficulty and are subject to various permutations and combinations. The limits of space and imagination preclude exhaustive comment. We believe that court adjudication should iron out these difficulties rather than that the legislature should attempt to outline proper courses of action by detailed statutory enactment. To attempt in advance to avoid all questions and defects by such enactment might hamper rather than aid the court. We are warned against over-particularization by Wisconsin’s recent experience with comparative negligence acts. A bill was submitted to the Wisconsin legislature in 1925 based upon the Federal Employers’ Liability Act and similar to the proposed New York act except that it allowed recovery only where plaintiff’s negligence was not as great as defendant’s. Later a substitute bill, providing specific rules for the judicial administration of the law, was submitted to the Assembly Judiciary Committee. In 1931, the Committee, changing its mind, decided that the original bill should be adopted rather than the more detailed substitute bill, for it was believed, with excellent reason, that the courts should freely supervise application of the rule of comparative negligence rather than that they should be so limited by specific administrative rules. The vast number of negligence decisions which have arisen under the Federal Employers’ Liability Act and such state enactments as the Mississippi comparative negligence act argue forcibly for adoption of the proposed New York act as it is now worded, since the constitutionality of the act would be unquestioned and there is ready to hand a very respectable body of precedent upon which to rely.

Comparative negligence will not be written into the law of New York without a struggle. It will require and should enlist the support of all who desire more exact justice in personal injury cases. If enacted it will demand thought and study, but perplexing legal problems have been effectively solved in the past, and the solution of this problem should be hastened by the precedents available in sister jurisdictions. The step is neither new nor revolutionary. Steady encroachments upon the doctrine of contributory negligence have weakened its claim of authority, and only respect for its age can now be urged for its complete retention.

404 Supra note 348 at 1.  
405 Supra note 397.  
406 Supra note 348 at 6; Cf. supra note 332.