University of Miami Law Review

Volume 28 | Number 2 Article 12

1-1-1974

Comparative Negligence: Justice in Florida for the Contributorily Negligent Plaintiff

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> against property damage loss—as is, in effect, required by Fla. Stat. § 627.733, F.S.A., with respect to other possible damages—the issues would be different. A reasonable alternative to an action in tort would have been provided . . . .[38]

The remaining portion of Florida's no-fault insurance law still may have to withstand the equal protection of law and trial by jury arguments, but similar laws in other jurisdictions have withstood these arguments.[39]

Nineteen states have now adopted no-fault insurance programs in one form or another, and the question of whether no-fault plans should be adopted is pending in many state legislatures.[40] The *Kluger* decision is an indication that in spite of the recognized virtues of no-fault insurance, the courts will not allow traditional constitutional guarantees to be abrogated. States which are now in the process of enacting no-fault laws should consider the guidelines established by *Kluger* in drafting their no-fault legislation to help avoid nullification by the courts.

BRUCE S. GOLDSTEIN

COMPARATIVE NEGLIGENCE: JUSTICE IN FLORIDA FOR THE CONTRIBUTORILY NEGLIGENT PLAINTIFF

Following the death of her husband in a truck-car collision, plaintiff brought actions for wrongful death alleging that defendant Phillip F. Hoffman had been negligent in operating a truck owned by a defendant Pav-A-Way Corporation.[1] The defendants' answers pleaded general denials and the defense of contributory negligence. The plaintiff's request for jury instructions based upon comparative negligence was denied by the trial judge and a jury verdict in favor of the defendants resulted. The plaintiff appealed to the District Court of Appeal, Fourth District, which, in an unprecedented decision, reversed the judgment of the trial court and ordered a new trial in accordance with its opinion rejecting the rule of contributory negligence and adopting the principle of comparative negligence.[2] The Supreme Court of Florida on conflict

38. 281 So. 2d at 5.

39. Pinnick v. Cleary, — Mass. —, 271 N.E.2d 592 (1971) (upholding the constitutionality of Massachusetts' no-fault insurance law); *contra*, Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (striking down Illinois' no-fault insurance law as unconstitutional).

40. BUSINESS WEEK, June 9, 1973, at 33.

1. Jones v. Hoffman, 272 So. 2d 529 (Fla. 4th Dist. 1973). The plaintiff maintained one action in her individual capacity as widow, and the second as administratrix of the decedent's estate.

2. *Id.* The holding of the district court was unprecedented in that it attempted to overrule precedent established by the Supreme Court of Florida 87 years earlier in *Louisville*

certiorari reveiw, *held*, affirmed: In a negligence action, a contributorily negligent plaintiff is no longer absolutely barred from recovery, and may now recover, under the comparative negligence rule, that amount of damages which the jury finds to have been proximately caused by the defendant's negligence minus the amount the jury finds to be proximately caused by the plaintiff's negligence. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

Prior to the *Hoffman* case, a contributorily negligent plaintiff in Florida was denied any recovery.[3] Florida's courts had defined contributory negligence as conduct by the plaintiff which contributes as a legal cause to his injuries and which falls below the standard of care that he is required to observe for his own protection.[4] The rationale for the rule stemmed from the assumption that a court of law was incapable of apportioning the damages which arose from injuries caused by the mutual and contemporaneously concurring negligence of the plaintiff and defendant.[5]

The Supreme Court of Florida, in scrapping this doctrine for one of comparative negligence, specifically rejected the contention that contributory negligence had been adopted in Florida by the legislature and could only be altered by that body. It reached this decision by reasoning that contributory negligence was a judicial creation which had been specifically adopted by the court in *Louisville & Nashville R.R. v. Yniestra*,[6] and not by the legislature in enacting section 2.01 of the Florida Statutes, which declared in force the common and statutory law of England that was of a general nature as of July 4, 1776.[7] The majority's conclusion, which Justice Roberts vigorously disputed in his solitary dissent,[8] was grounded upon its belief that the first clear cut pronounce-

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& N.R.R. v. Yniestra, 21 Fla. 700 (1886), in which the supreme court adopted the rule of contributory negligence. The district court recognized the importance of the issue it had decided and certified it to the supreme court as one involving a question of great public interest. However, mere certification by the district court could not vest the supreme court with jurisdiction. A petition for certiorari by one of the parties was needed in addition to the certification by the district court. FLA. CONST. art. V, § 3(b)(3). For this, the district court was treated to a severe reprimand by the supreme court, which admonished the district court by drawing its attention to the uncertainty and confusion its premature decision had created in the minds of attorneys and trial and appellate judges. It concluded its reprimand by holding that, in the event of a conflict between a decision of a district court of appeal and the supreme court, the latter's decision would prevail until overruled by a subsequent supreme court decision. Hoffman v. Jones, 280 So. 2d 431, 433-34 (Fla. 1973).

3. Louisville & N.R.R. v. Yniestra, 21 Fla. 700 (1886) [hereinafter referred to as *Yniestra*].

4. Shayne v. Saunders, 128 Fla. 891, 176 So. 495 (1937).

5. Winner v. Sharp, 43 So. 2d 634 (Fla. 1949); Wachula Mfg. & Timber Co. v. Jackson, 70 Fla. 596, 70 So. 599 (1916).

6. 280 So. 2d at 434, *citing* Louisville & N.R.R. v. Yniestra, 21 Fla. 700 (1886).

7. 280 So. 2d at 434-35 *construing* FLA. STAT. § 2.01 (1971). This statute's predecessor was first enacted by the legislature in 1829, Act of Nov. 6, 1829, § 1, which was 67 years prior to the *Yniestra* decision.

8. 280 So. 2d at 440-41 (dissenting opinion). Justice Roberts asserted that in Florida the rule had been legislatively adopted in section 2.01 of the Florida Statutes, and that the

ment of the rule as a complete bar to recovery by the English courts did not come until at least 33 years after the operative statutory date of July 4, 1776.[9] It then made the observation that it was under no obligation to adhere to a common law doctrine which was not "plain" as of that date.[10]

However, the court did not rest here. It reasoned that even if the contributory negligence rule is an element of our common law because of prior judicial decision, it can be modified whenever social conditions so demand. It buttressed this argument by surveying generally its exercise of this power to modify common law doctrines,[11] and by specifically noting the changes it had wrought upon the harshness of the rule of contributory negligence by adopting such ameliorating doctrines as "appreciable degree," "last clear chance," "gross, willful and wanton negligence," and "strict liability."[12]

Having decided it possessed the power to both reexamine and alter its position in *Yniestra*[13] if it chose to do so,[14] the court embarked upon

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majority was violating the separation of powers doctrine in concluding that the court possessed the power to alter it. He based his reasoning on the premise that contributory negligence had become a part of the common law in *Bayly v. Merrell*, 79 Eng. Rep. 331 (K.B. 1606), decided 170 years before the statute's operative date of 1776. The language in *Bayly* upon which Justice Roberts relied, "and being his own negligence, he is without remedy," does not support his assertion. It should be realized that this language is dictum and that the action in *Bayly* was for fraud and deceit, not personal injuries. The language was labeled misleading by the majority since it originally referred to a negligent act by the plaintiff which was the effective direct cause of his injurious accident, and not to the lack of due care by a plaintiff which contributes to his injuries. 280 So. 2d at 434, *citing* Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 196 (1950).

9. 280 So. 2d at 434, *citing* Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809) [hereinafter cited as *Butterfield*]; Raisin v. Mitchell, 173 Eng. Rep. 979 (C.P. 1839) [hereinafter cited as *Raisin*]. The majority was on firm ground in stating that most scholars attribute the origin of the rule as we know it today to *Butterfield*. Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 141-42 (1958) [hereinafter cited as *Maloney*]; W. PROSSER, LAW OF TORTS § 65, at 416 (4th ed. 1971). However, the majority is in error in citing *Raisin* as standing for the principle that contributory negligence was not a complete bar to recovery 30 years after *Butterfield*. The jury in *Raisin* disregarded its instructions "to find for the defendant if they found that the plaintiff's injuries were caused in any degree by his lack of care," and awarded the plaintiff half of the admitted damages. This jury can be considered to have been among the first of its kind to ameliorate the rule's harshness by ignoring its instructions. *See Maloney*, *supra*, at 151-52.

10. 280 So. 2d at 435.

11. 280 So. 2d at 435-36. The court had modified doctrines which previously had: given a father superior custody rights to a child, Randolph v. Randolph, 146 Fla. 491, 1 So. 2d 480 (1941); allowed a tortfeasor's liability for personal injuries to be abated upon his death, Waller v. First Sav. & Trust Co., 103 Fla. 1025, 138 So. 780 (1931); and prohibited a wife from recovering for the loss of consortium resulting from her husband's injuries, Gates v. Foley, 247 So. 2d 40 (Fla. 1971).

12. 280 So. 2d at 435. It also noted that these "refinements" had necessarily effectuated a judicial transformation of any "statutory creation" the rule might possibly have enjoyed.

13. Louisville & Nashville R.R. v. Yniestra, 21 Fla. 700 (1886).

14. 280 So. 2d at 436. The court did not exclude the appropriateness of legislative action, but reasoned it would be abdicating its own function in a peculiarly nonstatutory field if it declined to reconsider an old and unsatisfactory court-made rule. *Id.* at 435-36, *citing* Gates v. Foley, 247 So. 2d 40 (Fla. 1971).

a critical evaluation of the compatibility of contributory negligence with today's conceptions of "equity" and "justice." It first observed that there was not only any contemporary justification for a rule which places the entire burden of accidental loss on a slightly negligent plaintiff.[15] It reasoned that if fault were to remain the test of liability, then comparative negligence represented a more equitable system of determining liability and a more socially desirable method of loss distribution.[16]

The doctrine of comparative negligence allocates damages based upon the proportion of each party's negligence. Each pays that part of the total damages he has *legally* caused the other, and is only barred from recovering those damages which he inflicted upon himself. The court reasoned that this system is more desirable than one which could place the entire burden of loss on only one of two legally responsible parties.[17]

The court also observed that there was little or no merit in the argument that juries tend to ameliorate the theoretical harshness of the rule in ignoring their instructions. It reasoned that there has to be something basically wrong with a rule of law which causes a layman to breach his solemn oath to follow the judge's instructions. It decided that this rule's perpetuation could only engender further hypocrisy and disrespect for the law on the part of the lay community.[18]

The court, on the basis of this reevaluation, concluded that it would shirk its duty if it did not adopt the comparative negligence rule and therefore affirmed the district court by holding that "a plaintiff in an action based on negligence will no longer be denied any recovery because of his

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This reasoning by the *Hoffman* court certainly does not square with that of its predecessors in either *Yniestra* or *Co-Operative Sanitary Baking Co. v. Shields*, 71 Fla. 110, 70 So. 934 (1916). It is entirely possible that the *Hoffman* court adopted this position after it realized there was little or no chance for the legislative enactment of comparative negligence. The court itself in *Georgia Southern & Florida Ry. v. Seven-Up Bottling Co.*, 175 So. 2d 39 (Fla. 1965), had impeded the legislature's efforts by declaring the 1887 comparative negligence railroad accident statute unconstitutional on the grounds that it was of limited and not general application. It had also witnessed the sustaining of a gubernatorial veto of a comparative negligence statute of general application passed by the 1943 legislature, 280 So. 2d at 437-38, and it had most likely discerned the great influence the insurance lobby could exert upon legislators. *See Maloney*, *supra* note 9, at 161. The *Hoffman* majority noted that there had been little legislative effort in this area since the 1943 veto, and that this could have meant that the legislature considered the adoption of comparative negligence to be a judicial problem. 280 So. 2d at 438.

15. 280 So. 2d at 436. It found that the historical justification of "protecting the essential growth of industries, particularly transportation," was no longer valid and that modern society favored the individual, not industry. *Id.* at 436-37.

16. *Id.* at 436.

17. *Id.* at 437. The court was utilizing the principles attributable to the *pure form* of comparative negligence. *See id.* at 438; Annot., 32 A.L.R.3d 463, 473 (1970).

18. 280 So. 2d at 437, *citing Maloney*, *supra* note 9, at 151-52. Juries' dissatisfaction with contributory negligence as a complete bar to recovery has been evidenced by their rejection of the former rule and unauthorized application of the principles of comparative negligence. Comment, *Dilemma of the Florida Defendant in a Personal Injury Suit*, 6 MIAMI L.Q. 106, 108 (1951), Gilliam, *Comparative Negligence Under Earlier Arkansas Statutes*, 10 ARK. L. REV. 65, 65-6 (1956); Comment, *The National Traffic and Motor Safety Act: Must the Reasonable Man be Concerned*, 19 U. FLA. L. REV. 635, 649 (1967).

contributory negligence."[19] It expressly exempted from the operation of this rule defendants who could not have prevented injuring the plaintiff by exercising due care or whose negligence was not a direct legal cause of the plaintiff's injuries. It also denied its availability to plaintiffs whose negligence by itself, or in concurrence with that of a third person other than the defendant, is the sole legal cause of their injuries. The court also noted that the plaintiff's doctrine of "last clear chance" will have no application in ensuing litigation.[20]

While the majority did affirm the decision of the fourth district, it expanded the latter's decision in two major areas. First, the court adopted the *pure form* of comparative negligence, which permits a jury to award a 99 percent legally responsible plaintiff the damages caused to him by a defendant who was only one percent legally responsible.[21] The purpose of the *pure form* is:

> (1) *To allow a jury* to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury: and
>
> (2) To apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.[22]

Thus, if both the plaintiff's and defendant's negligence were to some degree a legal cause of the plaintiff's injuries, the jury in assessing damages should only award the plaintiff such damages as were attributable to the defendant's negligence.

> [*T*]*he jury* should apportion the negligence of the plaintiff and the negligence of the defendant; then, in reaching the amount due the plaintiff, *the jury* should give the plaintiff only such an amount proportioned with his negligence and the negligence of the defendant.[23]

19. 280 So. 2d at 438.

20. *Id.*

21. *Id.* The obtaining of this result would depend on whether or not the defendant counterclaimed. *Id.* at 439. Florida is the fifth state to adopt the *pure form* of comparative negligence, but is the first to do so by a judicial abrogation of the common law. Mississippi, Washington, Rhode Island, and Arkansas have adopted the *pure form* by statute. It should be noted that Arkansas followed the *pure form* for only two years (1955-57). In 1957, the Arkansas legislature substituted the *modified form* for the *pure form*. Washington enacted a *pure form* statute in 1973, but it did not become operative until April 1, 1974. Fisher & Wax, *Comparative Negligence—Some Unanswered Questions*, 47 FLA. B.J. 566, 567 (1973) [hereinafter cited as *Fisher*]. There are two other generally recognized forms of comparative negligence. These are the *modified* and *slight versus gross negligence* forms. Both are generally adopted by statute. The modified form allows the apportionment of damages based on the proportioned negligence of each party only if the plaintiff's negligence is not "greater than" the defendant's. The slight negligence of the plaintiff versus the gross negligence of the defendant approach allows an apportionment only if the plaintiff's negligence was slight in relation to the defendant's. Annot., 32 A.L.R.3d 463, 474-78 (1970). For a general discussion of the various forms of comparative negligence see 57 AM. JUR. 2d *Negligence* §§ 426-55 (1971); 65A C.J.S. *Negligence* §§ 169-73 (1966).

22. 280 So. 2d at 439 (emphasis added).

23. 280 So. 2d at 438.

A jury which finds the negligence of the defendant to be 40 percent and that of the plaintiff to be 60 percent and also finds the latter to have suffered $10,000 in damages, should award the plaintiff $4,000. The jury would arrive at this amount by first multiplying the percentage it finds the plaintiff's proportionate negligence to be (60 percent) times the amount of damages it finds he has suffered ($10,000). It would then subtract the resulting figure ($6,000), which equals the amount of damages that the plaintiff caused himself, from his total damages ($10,000). The remainder ($4,000) represents the dollar amount of damages that the 40 percent negligent defendant legally caused the 60 percent negligent plaintiff. The same procedure would be followed if the defendant counterclaimed and the jury found his damages to be $10,000. The jury, by using this formula would find that the defendant was legally responsible for $4,000 of his own damages and would award him $6,000. The jury would then return two verdicts. One of $4,000 for the plaintiff, and a second verdict for the defendant—counterclaimant of $6,000. The trial judge, by utilizing the contract litigation principle of "set off," would subtract the smaller verdict from the larger and enter one judgment for the remainder ($2,000). This judgment would be in favor of the party who had received the larger verdict. Hence, in such a case, the plaintiff would receive nothing.[24]

The second area of expansion by the *Hoffman* court was in granting trial judges the discretionary power to require juries to return special verdicts.[25] In Florida, prior to *Hoffman*, special verdicts were discretionary with the jury except in cases involving the determination of punitive damages against joint tortfeasors,[26] and possibly in declaratory

24. 280 So. 2d at 438-39. The defendant's counterclaim referred to in this example and by the court is of a compulsory nature. Compulsory counterclaims are governed by FLA. R. CIV. P. 1.170(a). It would be to the defendant's benefit to counterclaim against the plaintiff, since any verdict returned for the plaintiff would be diminished by both the jury's apportionment of negligence and by the amount of the counterclaim verdict. Of course, it is also possible, as in the example, that the defendant's counterclaim verdict may exceed that of the plaintiff's. 280 So. 2d at 439.

25. 280 So. 2d at 439. Florida is the first state to judicially authorize the use of special verdicts in applying the *pure form*. *See* Annot., 32 A.L.R.3d 463, 473 (1970); Ghiardi & Hogan, *Comparative Negligence—The Wisconsin Rule*, 18 DEF. L.J. 537, 547 (1969) [hereinafter cited as *Ghiardi*].

26. Spencer Ladd's Inc. v. Lehman, 167 So. 2d 731 (Fla. 1st Dist. 1964) [hereinafter cited as *Spencer Ladd's*], *rev'd in part and aff'd in part*, Lehman v. Spencer Ladd's Inc., 182 So. 2d 402 (Fla. 1965) [hereinafter cited as *Lehman*]. The District Court of Appeal, First District, in *Spencer Ladd's* relied on precedent and held that a jury could ignore a trial judge's request for a special verdict and simply return a general verdict. Lincoln Tower Corp. v. Dunhall's-Florida, Inc., 61 So. 2d 474 (Fla. 1952); Florida E.C. Ry. v. Lassiter, 58 Fla. 234, 50 So. 428 (1909). The supreme court in *Lehman* abrogated its prior holdings in *Lincoln* and *Lassiter* only to the extent of granting trial judges, in cases where punitive damages against joint tortfeasors are in issue, the power to require the jury to return a special verdict in assessing the punitive damages against each tortfeasor. The court refused to extend its holding beyond this point and consequently held that it was still within a jury's discretion to refuse to return a special verdict in the determination of compensatory damages.

judgment actions where the nature of the triable issues were in common law and not in equity.[27] When viewed with the court's examples of the jury's role in the practical application of the *pure form* role,[28] this special verdict provision raises the question of whether or not the court intended the term "special verdicts" to be construed and utilized in accord with their common law usage in Florida.[29] The better view is that it did not, as the use of this type of verdict by trial courts would deprive the jury of the very duties attributed to it by the *Hoffman* court. In returning a common law special verdict, a jury acts only as a fact finder. It makes specific and separate findings on each issue of fact submitted to it by the trial court, leaving to the court the application of the relevant principles of law to the special verdict findings.[30] It is patently clear from the examples in the opinion that the *Hoffman* court intended for juries to discharge these dual duties.[31]

Having found it unlikely that the supreme court intended for common law special verdicts to be used in the implementation of the *pure form* rule, it is necessary to determine the type of verdict which can be utilized by the trial courts. It is possible to interpret the opinion as allowing trial judges to choose among three additional types of verdicts: the general verdict, statutory special verdict, and general verdict with written interrogatories. This conclusion is well justified for three reasons. First, the *Hoffman* court authorized, but did not require, the use of special verdicts;[32] second, broad discretionary power was granted to trial judges for the purpose of accomplishing the objectives expressed in the opinion; and third, the supreme court stated its belief that possible problems should be solved by the trial courts in a practical manner, rather than theoretically by the appellate courts.[33]

A trial court could utilize the general verdict. However, its use should be discouraged, since a trial court would have no way of ascertaining whether or not the jury had applied the principles of the *pure form* of comparative negligence. The trial court would also be unable to determine how the jury had decided upon the amount of damages it returned in its verdict, or if it had disregarded or misunderstood the

27. *See* FLA. STAT. § 86.071 (1971), relating to jury trials in declaratory judgment actions.

28. 280 So. 2d at 438-39.

29. *See* 32 FLA. JUR. *Trial* §§ 246, 269 (1960).

30. 32 FLA. JUR. *Trial* §§ 246, 269 (1960); Annot., 6 A.L.R.3d 438, 440 (1966); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2503, at 488 (1971) [hereinafter cited as *Wright*]; Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 499-500 (1953) [hereinafter cited as *Prosser*]. It is clear from the progressive tone of the opinion that the supreme court could not have intended to burden the trial courts with the onerous problems that attend the usage of the common law special verdict, such as the requirement that every controverted issue of material fact be submitted to the jury for a special verdict finding. *See Wright, supra*, § 2501, at 484.

31. 280 So. 2d at 438-39.

32. *Id.* at 439.

33. *Id.* at 440.

court's comparative negligence instructions.[34] Hence, an overly sympathetic jury could assess the plaintiff's entire damages against the defendant without actually apportioning the negligence of the parties.[35] This has been a criticism leveled at Mississippi's *pure form* statute under which only the general verdict is utilized.[36]

A second form of verdict which could be utilized is the statutory special verdict. Variations of this type of special verdict are employed under Wisconsin's *modified form* comparative negligence statute[37] and codified by Federal Rule of Civil Procedure 49(a).[38] Submission of special verdicts by Wisconsin trial courts is discretionary, unless their use is requested by either of the parties.[39]

The Wisconsin special verdicts require the jury to determine: (1) the percentage of the defendant's negligence, (2) the percentage of the plaintiff's contributory negligence, (3) causation, and (4) damages suffered. The jury returns its answers supposedly without knowing what effect they will have. It is then the duty of the court to diminish the plaintiff's damages in proportion to his percentage of negligence and award a general verdict.[40] It should be noted that these special verdicts may contain mixed questions of fact and law; therefore, legal conclusions by the jury are proper.[41]

The federal special verdict does not differ appreciably in its operation from its Wisconsin counterpart. Under the federal rule, the use of special verdicts is wholly within the court's discretion.[42]

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34. *Ghiardi, supra* note 25, at 547; Leflar, *Comparative Negligence: A Summary for Arkansas Lawyers*, 10 ARK. L. REV. 54, 59-60 (1956) [hereinafter cited as *Leflar*]; Lindsey, *Arkansas Experience with Comparative Negligence*, 10 ARK. L. REV. 70, 71 (1956); *Prosser, supra* note 30, at 501-02. *See* Knoeller, *Review of the Wisconsin Comparative Negligence Act-Suggested Amendment*, 41 MARQ. L. REV. 397, 415 (1958) [hereinafter cited as *Knoeller*]. Use of the general verdict will certainly not serve to facilitate appellate review. *Leflar, supra*, at 59-60.

35. *Maloney, supra* note 9, at 171; *Prosser, supra* note 30, at 502.

36. *Ghiardi, supra* note 25, at 547; Pfankuch, *Comparative Negligence v. Contributory Negligence*, 1968 INS. L.J. 725, 728 (Feb. 1968) [hereinafter cited as *Pfankuch*].

37. *Ghiardi, supra* note 25, at 558. This authority, along with the others which will be cited in relation to Wisconsin's statute, analyzed the provision which allowed the plaintiff to recover if his negligence was not as great as that of the defendant. This statute was amended in 1971. Dusenberry, *Comparative Negligence: A Time for Change in Alaska*, 3 U.C.L.A.-ALASKA 103, 111 (1973) [hereinafter cited as *Dusenberry*]. Section 895.045 of the Wisconsin statutes now allows recovery even if the negligence of the parties is equal.

38. FED. R. CIV. P. 49(a).

39. WISC. STAT. ANN. § 270.27 (Supp. 1973). The statute also provides for a general verdict with written interrogatories.

40. *Dusenberry, supra* note 37, at 112; *Ghiardi, supra* note 25, at 558-66; Heft and Heft, *Comparative Negligence: Wisconsin's Answer*, 55 A.B.A.J. 127, 128-29 (1969) [hereinafter cited as *Heft*]; *Knoeller, supra* note 34, at 411-14; *Maloney, supra* note 9, at 171-72; *Pfankuch, supra* note 36, at 727-29; *Prosser, supra* note 30, at 497-503. In both the *Ghiardi* and *Knoeller* articles there are excellent discussions on the form and substance of the Wisconsin statutory special verdict. The latter article also gives Wisconsin's solutions to inconsistent special verdicts.

41. See authorities cited in note 40 *supra*.

42. FED. R. CIV. P. 49(a); *Wright, supra* note 30 §§ 2505-10, at 483-520. The discre-

Much can be said for the use of the statutory special verdict. It possesses numerous advantages over the general verdict. First, it would enable the trial court to know whether the jury has found contributory negligence and if it has proportionally divided the damages. Second, it forces the jury to give detailed consideration to specific issues rather than allowing it simply to find a general conclusion. Third, it avoids the need for lengthy and complicated instructions. Fourth, the appellate court by ordering a remittitur could avoid granting a new trial. Finally, if a new trial is necessary, it could be limited to those issues not correctly found by the jury, or to which the judge applied the law incorrectly.[43]

Proponents of limiting the role of juries will undoubtedly capitalize upon the apparent inconsistencies in the *Hoffman* court's opinion.[44] The major one is the supreme court's statement of its purposes for adopting the *pure form* rule. The court prefaced its first purpose of "fault apportionment" with the words *to allow a jury*, but omitted them in stating its second purpose of "diminution of damages in proportion to fault."[45] This omission could be construed as favoring the Wisconsin type of special verdict procedure in which the jury apportions the percentage of negligence and fixes the proportionate damages, but leaves to the court the reduction of damages.[46] However, the effect of this inconsistency is ameliorated when viewed in conjunction with the court's examples in which it depicts the jury, and not the judge, fulfilling both of these purposes.[47] There is also the *Hoffman* court's statement in the "counterclaim example" that the trial court's primary responsibility is to enter a judgment which reflects the true intent of the jury as expressed in the verdicts.[48]

A general verdict with written (special) interrogatories would harmonize these apparent conflicts.[49] It represents the middle ground between the general and special verdicts.[50] This verdict form possesses many of the latter's advantages,[51] and in addition, permits the jury to apply the law to its fact findings.[52] Its use in the federal courts under

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tionary feature of the federal rule is in accord with the special verdict provision in the *Hoffman* decision. 280 So. 2d at 439.

43. *Prosser, supra* note 30, at 502. Dean Prosser points out that special verdicts operate in the defendant's favor. For examples of comparative negligence special verdicts see 7 AM. JUR. TRIALS *Motorboat Accident Litigation* § 83, at 117-20 (1964).

44. 280 So. 2d at 438-39.

45. *Id.* at 439.

46. Authorities cited note 40 *supra.*

47. 280 So. 2d at 438-39.

48. *Id.* at 439.

49. *Compare* 280 So. 2d at 438-39 *with Wright, supra* note 30 §§ 2511-13, at 521-33 *with* FED. R. CIV. P. 49(b). For a general discussion as to the provisions of these verdicts see *Wright, supra* note 30 § 2513, at 526-33.

50. *Wright, supra* note 30 § 2511, at 521.

51. Authorities cited note 43 *supra.* The "instruction advantage" is of course not applicable.

52. Annot., 6 A.L.R.3d 426, 440 (1966); *Wright, supra* note 30 § 2511, at 521; *Prosser, supra* note 30, at 497-98. General instruction on the applicable legal standards is required under rule 49(b). *Wright, supra* note 30 § 2509, at 512.

Federal Rule of Civil Procedure 49(b) entails the submission of written interrogatories with a general verdict form to the jury.[53] One of the advantages of the 49(b) general verdict with written interrogatories over the 49(a) special verdict is that the interrogatories need not be submitted on every material issue.[54] The decision whether or not to use the general verdict with written interrogatories is solely within the trial court's discretion.

The purpose of the general verdict with written interrogatories is much more in accord with the intent of the *Hoffman* court than are the other verdict forms.[55] However, in view of the *Hoffman* court's grant of broad discretionary power to the trial courts, it is reasonable to conclude that any one of these verdict forms could be utilized.

These "special verdict" problems are only a few of the many left unsolved by the *Hoffman* court. Trial judges will have to forge practical solutions to these problems by utilizing their broad discretionary power.[56] One source of possible solutions is the case law established in construing Florida's former *pure form* comparative negligence railroad statute. The *Hoffman* court expressly ruled that much of it would be applicable under the new rule.[57]

It is evident that unfamiliarity with the *pure form* of comparative negligence will present a number of problems for both litigants and judges. For example, as a result of the *Hoffman* court's abrogation of contributory negligence as an absolute defense, defendants are confronted with the threshold problem of what they have to plead in order to establish the defense of comparative negligence, and to activate the *pure form's*

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53. *Wright, supra* note 30 § 2512, at 523. For an example of a general verdict with comparative negligence interrogatories see L. FRUMER, 3 BENDER'S FEDERAL PRACTICE FORMS ANNOT., Form 3166 at 313-15 (1974).

54. *Wright, supra* note 30 § 2512, at 524.

55. *Compare* Moore-McCormack Lines Inc. v. Maryland Ship Ceiling Co., 311 F.2d 663, 669 (4th Cir. 1962); Nordbye, *Comments on Selected Provisions of the New Minnesota Rules*, 36 MINN. L. REV. 672, 687 (1952), *with* 280 So. 2d at 438-39. The rule 49(b) verdict form has been said to be more satisfactory when a defendant counterclaims. Guinn, *The Jury System and Special Verdicts*, 2 ST. MARY'S L.J. 175, 179 (1970). *But see* Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 339-40 (1967).

56. 280 So. 2d at 440.

57. *Id.* at 439, referring to ch. 3744, § 1, 2, [1887] Fla. Laws [hereinafter referred to as the Florida Railroad Statute]. This statute was declared unconstitutional by the Supreme Court of Florida in 1965. The statute while in force (section 768.06 of the Florida Statutes (1963)) provided 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 plaintiff and the agents of the company are both at fault, the former may recover, but the amount of the recovery shall be such a proportion of the entire damages sustained as the defendants negligence bears to the combined negligence of both the plaintiff and the defendant.

In addition to cases tried under this statute, Florida juries have also applied the principles of the *pure form* of comparative negligence in actions brought under the Florida Hazardous Occupations Act. FLA. STAT. § 769.03 (1973); Peninsular Tel. Co. v. Dority, 128 Fla. 106, 174 So. 446 (1937). However, the *Hoffman* court did not hold the cases decided under this statute applicable to the *pure* form rule. 280 So. 2d at 439.

formula of comparison, apportionment, and reduction.[58] A defendant should specifically plead the defense of comparative negligence and prove the contributory negligence of the plaintiff which acts as an affirmative partial defense. The *pure form* rule is only activated and the defense of comparative negligence deemed established when the defendant has met his burden of proof by showing that the plaintiff was guilty of contributory negligence.[59] Cases construing the Florida Railroad Statute have held that proof of the plaintiff's contributory negligence would diminish the plaintiff's recoverable damages, which in effect means that the defendant has established the defense of comparative negligence.[60]

As noted, the defendant should specifically plead and prove contributory negligence as an affirmative partial defense. Both Mississippi[61] and Wisconsin[62] also adhere to this view by requiring similar pleading under their respective *pure* and *modified* forms of comparative negligence. This was also the better practice under the Florida Railroad Statute.[63] However, even if it was not specifically pleaded, a defendant could still utilize the defense if evidence of contributory negligence was introduced by either party.[64]

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58. *See* 280 So. 2d at 438; *Knoeller*, *supra* note 34, at 408; Shell & Bufkin, *Comparative Negligence in Mississippi*, 27 MISS. L.J. 105, 118 (1956) [hereinafter cited as *Shell*]; *Ghiardi*, *supra* note 25, at 554.

59. Note, *Torts—Effect of Mississippi's Comparative Negligence*, 39 MISS. L.J. 493, 503-04 (1968) [hereinafter cited as *Torts*].

60. Powell v. Proctor, 143 Fla. 153, 196 So. 419 (1940); Cline v. Powell, 141 Fla. 119, 192 So. 628 (1940); Tampa Elec. Co. v. Gibson, 119 Fla. 112, 161 So. 727 (1935). Atlantic Coast Line R.R. v. Bracewell, 110 So. 2d 482 (Fla. 1st Dist. 1959); Bowe v. Butler, 133 So. 2d 347 (Fla. 2d Dist. 1956).

61. *Shell*, *supra* note 76, at 118. This view was also followed by Arkansas defendants in pleading under that state's 1955 *pure form* statute. Leflar, *Comparative Negligence: A Survey for Arkansas Lawyers*, 10 ARK. L. REV. 54, 57-58 (1956). One serious disadvantage in this method in Mississippi was the danger that plaintiff's counsel would argue that the defendant's pleading was an admission of liability and an effort to reduce the judgment. This created the risk that the jury might construe the pleading against the defendant. *Torts*, *supra* note 59, at 503.

62. *Ghiardi*, *supra* note 25, at 554; *Knoeller*, *supra* note 34, at 408.

63. Atlantic Coast Line R.R. v. Britton, 109 Fla. 212, 146 So. 842 (1933); Warfield v. Hepburn, 62 Fla. 409, 57 So. 618 (1912); Farnsworth v. Tampa Elec. Co., 62 Fla. 166, 57 So. 233 (1912). This view is in accord with FLA. R. CIV. P. 1.110(d) (pleading of affirmative defenses).

64. Atlantic Coast Line R.R. v. Britton, 109 Fla. 212, 146 So. 842 (1933). Earlier cases had limited the availability of the defense's use of the contributory negligence defense to such negligence found in the evidence introduced by the plaintiff. *E.g.*, Warfield v. Hepburn, 62 Fla. 409, 57 So. 618 (1912). This practice remains viable in light of a 1960 decision by the Florida Supreme Court which held that:

> Read together Rule 1.8(d) [1.110(d)] relating to affirmative defenses, Rule 1.11(h) relating to waiver of defenses, and Rule 1.15(b) [1.190(b)] providing for amendments to conform with evidence, have to do with a large area of procedural or adjective law and if *affirmative defenses are not proffered but are tried by express or implied consent of the parties, they shall be treated as if they had been raised by the pleadings.* They may be made to conform to the evidence as late as or after judgment or decree. This is particularly true if essential to justice or if the presentation of the merits will be effectively expedited. It is part of what we call liberality of amendments.

There are also a number of complete defenses which defendants could plead. These could be pleaded either in the alternative to, or in lieu of, contributory negligence. Defendants could plead that the plaintiff was guilty of assumption of risk,[65] that the negligence of the plaintiff was the sole legal cause of his injuries,[66] or that the negligence of the plaintiff coinciding with that of a person other than the defendant was the legal cause of the former's injuries.[67] If a defendant is able to prove any of these three complete defenses, the *pure form* comparative negligence rule would be inapplicable.[68]

Juries will also be confronted with a number of problems left unsolved by the *Hoffman* court. Of these, three are readily discernible. First, what basis will juries use in their apportionment of the legally causal negligence of each party? It appears that the court wants the jury to compare the degree of causation, and not the kind, character, or number of acts of negligence by each party.[69] It is obvious that this process can never attain mathematical precision,[70] and no solution was advanced by the court.[71] Second, how will a jury diminish the plaintiff's damages if it should find that a certain percentage of the negligence was attributable to an intervening cause? For example, a jury could find the plaintiff free of negligence, the defendant 85 percent negligent, and attribute the remaining 15 percent of negligence to an intervening cause. How should the jury diminish the plaintiff's damages? Should it diminish the plaintiff's damages by the 15 percent attributable to the intervening cause or should it award the plaintiff the entire amount of damages sustained. The first result would be unfair to a non-negligent plaintiff, but the second result would be unfair to the defendant whom the jury had found to be only 85 percent negligent. This hypothetical situation poses a very real problem to juries. Third, how will juries diminish a plaintiff's damages when it finds that the injuries caused to him by the defendant were the proximate cause of subsequent injuries to the plaintiff? If the case law

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Garret v. Oak Hall Club, 118 So. 2d 633, 635 (Fla. 1960) (current rule numbers in brackets) (emphasis added).

The Mississippi Supreme Court has held that it is within the discretion of the jury to mitigate the damages even when contributory negligence is not pleaded and no instruction is given concerning it. *Torts*, *supra* note 59, at 503-04.

65. 280 So. 2d at 439.

66. *Id.* at 438.

67. *Id.*

68. *Id.* at 438-39. It is to be noted that a plaintiff still has the burden of pleading and proving that the defendant was the proximate cause of the plaintiff's damages in a *pure form* comparative negligence jurisdiction. For example, failure by a Mississippi plaintiff to prove causation entitled the defendant to a directed verdict. *Shell*, *supra* note 58, at 111. This also appears to have been the view under the Florida Railroad Statute. Florida E.C. Ry. v. Davis, 96 Fla. 171, 117 So. 842 (1928); Smith, Richardson & Conroy v. Tampa Elec. Co., 82 Fla. 79, 89 So. 2d 352 (1921).

69. *See Ghiardi*, *supra* note 25, at 559; Aiken, *Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulation*, 53 MARQ. L. REV. 293, 294-97 (1970) [hereinafter cited as *Aiken*].

70. *Knoeller*, *supra* note 34, at 400; Annot., 32 A.L.R.3d 463, 492 (1970).

71. 280 So. 2d at 438-40.

construing the former comparative negligence railroad statute prevails, the jury should diminish the plaintiff's damages in proportion to the plaintiff's fault in causing the added injury.[72]

Another problem which will be of immediate concern is that of jury instructions.[73] Florida's civil standard jury instructions will require four amendments to insure their conformity with the *Hoffman* court's decision.[74] The Florida Railroad Statute cases will also be helpful in solving this problem.[75]

In addition to this case law, the instructions utilized under the respective pure form statutes in the Arkansas,[76] Mississippi,[77] and federal courts should be invaluable in the formulation of Florida's comparative negligence jury instructions.[78]

72. Atlantic Coast Line R.R. v. Wallace, 61 Fla. 93, 54 So. 893 (1911).

73. 280 So. 2d at 439.

74. *Fla. Standard Jury Instructions Civil*, 3.8, 4.3 (contributory negligence only diminishing, not barring plaintiff's recovery), 6.1(b) (apportionment of damages). A general comparative negligence instruction must be added. 280 So. 2d at 439.

75. These cases indicate that it was reversible error for a trial judge to refuse to instruct the jury that the portion of either party's negligence which did not proximately cause any damage should be disregarded in apportioning the plaintiff's and defendant's negligence, Florida Cent. & P.R.R. v. Williams, 37 Fla. 406, 20 So. 588 (1896); that it is the duty of every person to exercise due care commensurate with the danger to be apprehended, Florida Ry. v. Geiger, 64 Fla. 282, 60 So. 753 (1913); how to measure the recovery under comparative negligence, Brickley v. Atlantic Coast Line R.R., 13 So. 2d 300 (Fla. 1943); that the jury must believe that the defendant's negligence was the legal cause of the plaintiff's loss, Florida E.C. Ry. v. Smith, 61 Fla. 218, 55 So. 871 (1911); and if the jury believes that the plaintiff's loss was caused by his own negligence, it must find for the defendant, as to the proper measure of recovery under comparative negligence. *Id.*

Similarly, it was held *not* to be reversible error for a trial court to instruct the jury that a plaintiff was guilty of negligence as a matter of law and that it should determine if the defendant was guilty of legally causal negligence, Kirkpatrick v. Atlantic Coast Line R.R., 259 F.2d 409 (5th Cir. 1958), and that the negligence of the parents of an injured child should be disregarded, Tampa Elec. Co. v. Bazemore, 85 Fla. 164, 96 So. 297 (1923). It was also held to be proper for the court to charge the jury on contributory negligence when evidence had been presented which could warrant a jury finding that the plaintiff was contributorily negligent, Atlantic Coast Line R.R. v. Bracewell, 110 So. 2d 482 (Fla. 1st Dist. 1959); to refuse to give the charge that the plaintiff could not recover if his negligence was the sole legal cause of his injuries where there had been no evidence presented to that effect, Director Gen. of. Railroads v. Into, 83 Fla. 377, 91 So. 269 (1922); and to refuse to give the jury an example of the *pure form* rule's practical application in reinstructing the jury where several inquiring jurors indicated that the court's further charge made the question clear, Bush v. Louisville & N.R.R., 260 F.2d 854 (5th Cir. 1958).

76. *Panel on Instructions and Special Verdicts Under Comparative Negligence*, 10 ARK. L. REV. 94, 100-113 (1956). Arkansas adopted a *pure form* type statute in 1955. Ark. Acts 1955, no. 191 § 1. Two years later the statute was amended to allow recovery only when the plaintiff's negligence was of a lesser degree than any defendant's. ARK. STAT. ANN., §§ 27-1730.1 & .2 (1962) (originally enacted in 1957).

77. MISS. CODE ANN. § 1454 (1956) (originally enacted in 1910). It should be remembered that in Mississippi only the general verdict is utilized. *Ghiardi, supra* note 25, at 547.

78. There are *pure form* comparative negligence provisions in the Jones Act, 46 U.S.C. § 688 (1970), the Death on the High Seas Act, 46 U.S.C. § 766 (1970), and the Federal Employers' Liability Act, 45 U.S.C. § 53 (1970). For an excellent example of *pure form* instructions see 7 AM. JUR. TRIALS *Motor Boat Accident Litigation* § 82, at 114 (1972).

For additional examples of *pure form* comparative negligence jury instructions see 18 AM. JUR. PLEADING AND PRACTICE FORMS *Negligence* Forms 292 (degree of plaintiff's negligence exceeding defendant's negligence no bar to plaintiff's recovery), 293 (multiple defendants—negligence of defendants treated as unit), 294 at 530 (rev. ed. 1972) (multiple de-

In addition, the *Hoffman* court left the problem of appellate review to subsequent judicial pronouncement. The question of whether an appellate court will delve into the jury's fault apportionment and damage diminution remains to be answered although under the Florida Railroad Statute this was held to be a proper subject of appellate review.[79] However, these cases also indicate that the verdict should not be disturbed if reasonable men could have reached the same conclusion,[80] or if the verdict is not patently unreasonable.[81]

Countless more problems will undoubtedly arise as judges, juries and attorneys attempt to apply the *pure form* rule in the courtroom. Problems such as whether to allow contribution among joint tortfeasors,[82] and the effect this rule will have upon negligence doctrines such as res ipsa loquitur[83] and negligence per se[84] are yet to be resolved. But, regardless of its complexity or magnitude, no problem can overshadow this rule's fundamental fairness and justice in equitably distributing the burden of accidental loss.[85]

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fendants—individual negligence of each defendant as basis of comparison); 17 AM. JUR. PLEADING AND PRACTICE FORMS *Master and Servant* Forms 283-84, at 542-43 (rev. ed. 1971) (contributory negligence as basis for reducing damages); 21 AM. JUR. PLEADING AND PRACTICE FORMS *Railroads* Form 126, at 108-09 (rev. ed. 1972) (measure of damages); 3 AM. JUR. PLEADING AND PRACTICE FORMS *Automobiles and Highway Traffic* Form 1467 (apportioning percentage of negligence).

79. Florida E.C. Ry. v. Meachan, 77 Fla. 701, 82 So. 232 (1919); Atlantic Coast Line R.R. v. Hobbs, 71 Fla. 109, 70 So. 939 (1916); Atlantic Coast Line R.R. v. Teuton, 110 So. 2d 485 (Fla. 1st Dist. 1959). If an appellate court found the jury's apportionment of damages to be incorrect in proportion to the comparative fault of the parties, a new trial was granted unless the prevailing party complied with the court's remittitur order requiring damage reduction. Atlantic Coast Line R.R. v. Watkins, 97 Fla. 350, 121 So. 95 (1929).

80. Triay v. Seals, 92 Fla. 310, 109 So. 427 (1926).

81. Florida E.C. Ry. v. Frederitzi, 77 Fla. 150, 81 So. 104 (1919).

82. *Fisher, supra* note 21, at 571-72. Wisconsin, which follows the *modified form* of comparative negligence, permits contribution among joint tortfeasors. However, the liability of each is determined in accord with the principles of the *pure form*. *Aiken, supra* note 69, at 299; *Ghiardi, supra* note 25, at 552; *Heft, supra* note 40, at 129-30; *Pfankuch, supra* note 36, at 729. For other articles containing discussions regarding the effect of contribution between joint tortfeasors and multiple parties *vis-a-vis* comparative negligence, see Annot., 46 A.L.R.3d 794 (1972). Annot., 8 A.L.R.3d 722 (1966); Annot., 100 A.L.R.2d 1 (1965); Annot., 34 A.L.R.2d 1101 (1954); Heft, *Comparative Negligence-Problem Child: A Study of Growth to Manhood*, 7 DEF. L.J. 46 (1960); Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1 (1960); Leflar, Walker, & Bethell, *Panel on Comparative Negligence Third Party Practice*, 10 ARK. L. REV. 88 (1956); Prosser, *supra* note 30.

83. The Wisconsin Supreme Court has held that its *modified form* comparative negligence rule abrogates the requirement that the plaintiff's injury must not have been due to any of his own voluntary or contributory acts. *Ghiardi, supra* note 25, at 555.

84. *Fisher, supra* note 21, at 569. For the effect that Mississippi's *pure form* statute has had on such doctrines, see *Torts—Effect of Mississippi's Comparative Negligence Statute on Other Rules of Law*, 39 MISS. L.J. 493 (1968).

85. 280 So. 2d at 436. It will also be interesting to see what effect the *pure form* rule will have on the increase or reduction in pre-trial settlements. A survey of Arkansas' two year experience with its pure form statute, conducted in 1959, found that the number increased. Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959).