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COMPARATIVE NEGLIGENCE OF AN AUTOMOBILE GUEST— APPORTIONMENT OF DAMAGES UNDER THE COMPARATIVE NEGLECTANCE STATUTE

John M. Gradwohl*

The purpose of this article is twofold: first, to analyze and consider those situations in which the contributory fault of an automobile guest may present either a total or partial bar to his recovery for his damages and injuries; and second, to analyze and consider the methods of apportionment of the guest's damages and injuries under Nebraska law in situations where he has been guilty of some form of contributory negligence.

During the last few years, the Nebraska Supreme Court has carefully stated, explained, and clarified the written law of contributory negligence applicable to the automobile guest. Yet, in an extremely large percentage of these cases the Court has reversed the lower court's decision when it came to an application of this law to the facts of the particular case. The problem facing the trial judge or counsel has not been one of knowing "how" to instruct, but, rather, one of "when" to instruct, on the issue of contributory negligence. Thus, while the current stated law seems clear, as a practical matter it is difficult to delineate that type of conduct by an automobile guest which may actually bar a recovery by him either in whole or in part.

The recent decision in *Segebart v. Gregory*¹ may be used to illustrate an interesting and important problem of apportionment, under the comparative negligence statute, of the damages to an automobile guest. Plaintiff was a guest in Sandoz's automobile which had been parked on an abandoned highway on a rainy night. In starting up, Sandoz drove onto the left-hand lane, and hit defendant's car which was either parked or driving slowly without lights. The court noted that "The primary cause of the collision of course was the driving of the Sandoz automobile into that of the defendant."² But, nevertheless, the plaintiff could recover the entire amount of his damage from defendant on a joint tortfeasor theory, even though Sandoz's negligence may have been the greater contributing cause in fact, and even though under the motorist guest statute³ Sandoz might have had a complete defense to any action by the plaintiff against him.

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¹ 156 Neb. 261, 55 N.W.2d 678 (1952).

² Id. at 269, 55 N.W.2d at 683.

³ Neb. Rev. Stat. § 39-740 (Reissue, 1952): "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle."

This holding is apparently a standard result in jurisdictions applying the common law rule that each joint tortfeasor is liable for the entire indivisible damage suffered by a plaintiff⁴ even though the other tortfeasor may have a complete defense to plaintiff's action.⁵ Thus one who is a joint tortfeasor with an immune governmental unit⁶ or with the spouse of an injured party in a jurisdiction where tort suits are barred between spouses⁷ will be forced to pay the entire amount of damage to the plaintiff.

But suppose that in *Segebart v. Gregory* the plaintiff had been guilty of some type of conduct which would constitute contributory negligence on his part. The common law rule that plaintiff's contributory negligence is a complete defense to an action founded in negligence⁸ has been abolished in Nebraska by the comparative negligence statute,⁹ which provides:

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

Assume, for example, that the accident were found to have been caused 10% by the contributory negligence of plaintiff, 50% by the negligence of Sandoz, the host, and 40% by the negligence of defendant, the third party driver.¹⁰

(1) Is plaintiff's recovery diminished by a comparison of his negligence to the total amount of accident causing negligence—that is, the ratio of 10% to 100%, or 1/10th, giving the plaintiff a 90% recovery?

(2) Is plaintiff's recovery diminished by a comparison of his negligence to that of the other acting parties—that is, the ratio of 10% to 90%, or 1/9th, giving plaintiff an 88.89% recovery?

(3) Is plaintiff's recovery diminished by a comparison of his negli-

⁴ Restatement, Torts §§ 875-879 (1939).

⁵ Restatement, Torts § 880 (1939).

⁶ *Robertson v. Chicago, B. & Q. R.R.*, 108 Neb. 569, 188 N.W. 190 (1922). Also see Restatement, Torts § 880, comment a, § 888, comment c (1939).

⁷ Restatement, Torts § 880, comment a (1939).

⁸ Restatement, Torts §§ 467 et seq. (1934).

⁹ Neb. Rev. Stat. § 25-1151 (Reissue 1948).

¹⁰ The particular figures are used for illustrative purposes only. Whether these percentages would constitute "gross" or "slight" negligence under any of the requirements of either the motorist's guest statute or the comparative negligence statute is itself problematical. See particularly the material covered by notes 51 to 57 *infra*. Also see Grubb, Comparative Negligence, 32 Neb. L. Rev. 234, 239-241 (1953).

gence to the total negligence of plaintiff and the other party to the suit (in this example, the third party driver)—that is, the ratio of 10% to 50%, or 1/5th, giving the plaintiff an 80% recovery?

(4) Is plaintiff's recovery diminished by a comparison of his negligence to the negligence of the other party to the suit—that is, the ratio of 10% to 40%, or 1/4th, giving plaintiff a 75% recovery?

While the contributory negligence of the automobile guest has been alleged by the third party in a large number of Nebraska cases,¹¹ in only a very few of these has the Supreme Court actually applied the defense as any sort of a bar to the action. Thus, the issues presented by these examples have not yet been fully resolved by the Nebraska court. To attack these problems, this article will first analyze the type of conduct which may constitute contributory negligence of the guest, and then analyze the allocation of the guest's damages in a situation where he has been guilty of such conduct.

Contributory Fault of an Automobile Guest

The duty applied to an automobile guest is a general rule of reasonableness of care for one's own safety.¹² The court will take into con-

¹¹ The following contains the bulk of the Nebraska cases, specifically considering the defense as presented by the third party against the guest, which have been decided by the Supreme Court: *Kuska v. Nichols Construction Co.*, 154 Neb. 580, 48 N.W.2d 682 (1951) (dictum: as a matter of law, no contributory negligence); *Hendrix v. Vana*, 153 Neb. 531, 45 N.W.2d 429 (1951) (jury verdict for defendant reversed; as a matter of law, no contributory negligence); *Erickson v. Morrison*, 152 Neb. 133, 40 N.W.2d 413 (1950) (refusal to instruct on contributory negligence, affirmed); *Costello v. Hild*, 152 Neb. 1, 40 N.W.2d 228 (1949) (no evidence of contributory negligence); *Remmenga v. Selk*, 150 Neb. 401, 34 N.W.2d 757 (1948) (no evidence of contributory negligence); *Allen v. Clark*, 148 Neb. 627, 28 N.W.2d 439 (1947) (no evidence of contributory negligence); *Hamblen v. Steckley*, 148 Neb. 283, 27 N.W.2d 178 (1947) (guest adequately warned host); *Huston v. Robinson*, 144 Neb. 553, 13 N.W.2d 885 (1944) (warning by co-passenger sufficient); *Crandall v. Ladd*, 142 Neb. 736, 7 N.W.2d 642 (1943) (error to fail to instruct on contributory negligence); *Fulcher v. Ike*, 142 Neb. 418, 6 N.W.2d 610 (1942) (dictum: no evidence of contributory negligence); *O'Brien v. Case Co.*, 140 Neb. 847, 2 N.W.2d 107 (1942) (no duty to warn); *Fischer v. Megan*, 138 Neb. 420, 293 N.W. 287 (1940) (no negligence shown, dictum that guest contributorily negligent); *Gleason v. Baack*, 137 Neb. 272, 289 N.W. 349 (1939) (no evidence of contributory negligence); *Lewis v. Rapid Transit Lines*, 126 Neb. 158, 252 N.W. 804 (1934) (refusal to instruct on contributory negligence, affirmed); *Murphy v. Shibiya*, 125 Neb. 487, 250 N.W. 746 (1933) (jury verdict for defendant, affirmed); *Tomjack v. Chicago & N.W. Ry.*, 116 Neb. 413, 217 N.W. 944 (1928) (jury verdict for plaintiff, reversed on grounds of failure to warn).

¹² *Sautter v. Poss*, 155 Neb. 62, 50 N.W.2d 547 (1951); *Kuska v. Nichols Construction Co.*, 154 Neb. 580, 48 N.W.2d 682 (1951); *Hendrix v. Vana*, 153 Neb. 531, 45 N.W.2d 429 (1951); *Costello v. Hild*, 152 Neb. 1, 40 N.W.2d 228 (1949); *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943). See *Lewis v. Rapid Transit Lines*, 126 Neb. 158, 252 N.W. 804 (1934). Cf. *Glick v. Poska*, 122 Neb. 102, 239 N.W. 626 (1931).

sideration such factors as weather conditions,¹³ past knowledge of the driver and his abilities,¹⁴ the condition of the road,¹⁵ time of day or night,¹⁶ the position of the guest in the automobile,¹⁷ traffic conditions,¹⁸ the condition of the vehicle,¹⁹ and other miscellaneous factors, as that the driver had a windshield wiper²⁰ or an unobstructed view²¹ whereas the guest did not. But to successfully invoke the defense of contributory negligence to an action by the guest, the defendant has the burden of showing specific acts of non-reasonable care.²²

Ordinarily the guest may "reasonably" assume that his host is a safe and careful driver²³ and a duty to warn exists only in unusual circumstances.²⁴ The guest need not normally watch the road or advise the driver in the management of the car;²⁵ but if he actually perceives danger, or reasonably should perceive such danger, then he has a duty to warn the driver.²⁶ The court has stated, as possible exceptions

¹³ *Allen v. Clark*, 148 Neb. 627, 28 N.W.2d 439 (1947); *Murphy v. Shibiya*, 125 Neb. 487, 250 N.W. 746 (1933); see *Fischer v. Megan*, 138 Neb. 420, 293 N.W. 287 (1940) (fog and mist increased duty of care of guest).

¹⁴ *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943). See *Fischer v. Megan*, 138 Neb. 420, 293 N.W. 287 (1940) (fact that host and guest were strangers increased guest's duty); *Komma v. Kreifels*, 144 Neb. 745, 14 N.W.2d 591 (1944) (no assumption of risk where guest had previously ridden safely with host). Also see Note, Assumption of Risk As A Defense In Nebraska Negligence Actions Under the Comparative Negligence Statute, 30 Neb. L. Rev. 608 (1951).

¹⁵ *Murphy v. Shibiya*, 125 Neb. 487, 250 N.W. 746 (1933) (known slippery road). See *Allen v. Clark*, 148 Neb. 627, 28 N.W.2d 439 (1947); *Kovar v. Bekius*, 133 Neb. 487, 275 N.W. 670 (1937).

¹⁶ *Murphy v. Shibiya*, 125 Neb. 487, 250 N.W. 746 (1933) (dark night with no moon increased guest's duty); *Fischer v. Megan*, 138 Neb. 420, 293 N.W. 287 (1940).

¹⁷ *Mackechnie v. Lyders*, 134 Neb. 682, 279 N.W. 328 (1938); see *Tomjack v. Chicago & N.W. Ry.*, 116 Neb. 413, 217 N.W. 944 (1928).

¹⁸ *Allen v. Clark*, 148 Neb. 627, 28 N.W.2d 439 (1947); see *Erickson v. Morrison*, 152 Neb. 133, 40 N.W.2d 413 (1950).

¹⁹ See *Fischer v. Megan*, 138 Neb. 420, 293 N.W. 287 (1940) (weak headlights increase duty of guest).

²⁰ *Lewis v. Rapid Transit Lines*, 126 Neb. 158, 252 N.W. 804 (1934); also see *Gleason v. Baack*, 137 Neb. 272, 289 N.W. 349 (1939).

²¹ See *Lewis v. Rapid Transit Lines*, 126 Neb. 158, 252 N.W. 804 (1934).

²² *Costello v. Hild*, 152 Neb. 1, 40 N.W.2d 228 (1949); *Hendren v. Hill*, 131 Neb. 163, 267 N.W. 340 (1936).

²³ *Erickson v. Morrison*, 152 Neb. 133, 40 N.W.2d 413 (1950); *Gleason v. Baack*, 137 Neb. 272, 289 N.W. 349 (1939); *Kovar v. Beckius*, 133 Neb. 487, 275 N.W. 670 (1937). But cf. *Fischer v. Megan*, 138 Neb. 420, 293 N.W. 287 (1940) (impliedly placing a heavier duty upon a "stranger").

²⁴ *Huston v. Robinson*, 144 Neb. 533, 13 N.W.2d 885 (1944) (dust cutting visibility to fifteen feet raised such a duty); *Fischer v. Megan*, 138 Neb. 420, 293 N.W. 287 (1940) (fog, nighttime, and insufficient headlights raised the duty). See *Mackechnie v. Lyders*, 134 Neb. 682, 279 N.W. 328 (1938) (excessive speed raises duty to warn or protest).

²⁵ *Hendrix v. Vana*, 153 Neb. 531, 45 N.W.2d 429 (1951); *Gleason v. Baack*, 137 Neb. 272, 289 N.W. 349 (1939).

²⁶ *Crandall v. Ladd*, 142 Neb. 376, 7 N.W.2d 642 (1943); *Murphy v. Shibiya*, 125 Neb. 487, 250 N.W. 746 (1933); *Tomjack v. Chicago & N.W. Ry.*, 116 Neb.

to this rule, that there is no duty to warn where the warning would go unheeded or be of no avail, where the driver already has knowledge of the situation, or where the driver has an equal ability to observe the danger.²⁷

Thus it has been held where the guest testified that she had been watching the road intently and could see the effect of falling snow upon visibility, that a jury was justified in denying recovery because of her contributory negligence in failing to warn of the obvious dangers and protest for her safety.²⁸ If the guest has been drinking to such an extent that it is a contributing cause of the accident,²⁹ or permits himself to ride with one who is known to have been drinking heavily,³⁰ or furnishes liquor to the driver,³¹ he may be guilty of contributory negligence as a matter of law. The court has held that under some circumstances it is contributory negligence as a matter of law to fail to warn where this is an adequate opportunity.³²

Where a guest saw the third party driver's car a distance from the intersection and told another passenger that she (the guest) hoped that the other driver would look where he was going, but made no warning to the host, it was error to refuse to instruct on contributory negligence.³³ But if the driver himself remarks that he sees an obstruction, then the guest might have no duty to warn.³⁴ And if another passenger in the car fully warns the driver, the plaintiff guest has no further duty.³⁵ If the guest answers "O.K." in response to the question

413, 217 N.W. 944 (1928). See *Kuska v. Nichols Construction Co.*, 154 Neb. 580, 48 N.W.2d 682 (1951); *Costello v. Hild*, 152 Neb. 1, 40 N.W.2d 228 (1949); *Hamblen v. Steckley*, 148 Neb. 283, 27 N.W.2d 178 (1947); *Rogers v. Brown*, 129 Neb. 9, 260 N.W. 794 (1935); *Behr v. Duling*, 128 Neb. 860, 260 N.W. 281 (1935).

²⁷ *Erickson v. Morrison*, 152 Neb. 133, 40 N.W.2d 413 (1950); *Hamblen v. Steckley*, 148 Neb. 283, 27 N.W.2d 178 (1947). See *Kuska v. Nichols Construction Co.*, 154 Neb. 580, 48 N.W.2d 682 (1951); *Hendrix v. Vana*, 153 Neb. 531, 45 N.W.2d 429 (1951); *Fulcher v. Ike*, 142 Neb. 418, 6 N.W.2d 610 (1942).

²⁸ *Murphy v. Shibiya*, 125 Neb. 487, 250 N.W. 746 (1933).

²⁹ The rule is that the fact that the guest is intoxicated does not per se constitute contributory negligence, nor does it change the general rule of "reasonable care" for one's own safety. The intoxication must contribute as a proximate cause of the injury complained of. See *Remmenga v. Selk*, 150 Neb. 401, 34 N.W.2d 757 (1949); *Nichols v. Halvot*, 142 Neb. 534, 7 N.W.2d 84 (1942); *McGrath v. Nugent*, 133 Neb. 237, 274 N.W. 549 (1937).

³⁰ *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943); *McGrath v. Nugent*, 133 Neb. 237, 274 N.W. 549 (1937). But cf. *Koma v. Kreifels*, 144 Neb. 745, 14 N.W.2d 591 (1944) (guest must have knowledge of past acts of recklessness by host).

³¹ *McGrath v. Nugent*, 133 Neb. 237, 274 N.W. 549 (1937). See *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943).

³² *Tomjack v. Chicago & N.W. Ry.*, 116 Neb. 413, 217 N.W. 944 (1928) (reversing jury verdict for plaintiff).

³³ *Crandall v. Ladd*, 142 Neb. 736, 7 N.W.2d 642 (1943).

³⁴ *James v. Krebeck*, 141 Neb. 73, 2 N.W.2d 629 (1942), vacated on other grounds, 142 Neb. 757, 7 N.W.2d 637 (1943).

³⁵ *Huston v. Robinson*, 144 Neb. 553, 13 N.W.2d 885 (1944).

of whether the driver should pass another car,³⁶ or states that there are no cars coming from his direction at an intersection,³⁷ he may be barred by his contributory negligence, although in the particular cases involving these issues, the defendant could not establish sufficient facts to get the defense to the jury.

A guest does not have to warn of bushes along the side of the road even though they may obstruct view, for they are equally apparent to the host,³⁸ and similar reasoning was applied to a case where the driver of the car ahead of host's suddenly stopped to pick up two women hitchhikers.³⁹ The guest does not have to watch for cars at an intersection,⁴⁰ or street markers,⁴¹ or pay attention to traffic.⁴² It is not sufficient contributory negligence to go to a jury to show that plaintiff sat sidewise⁴³ or slumped over⁴⁴ in the seat, failed to see a pile of gravel on a road, around which there were no barricades or markers,⁴⁵ or was "somewhat drowsy."⁴⁶ It was error to instruct that as a matter of law the guest had a duty to object to a speed of 85 to 90 miles per hour.⁴⁷ And a jury found no contributory negligence where, after an accident, the car hit a culvert, stopped, tilted on a ledge, and then toppled over on plaintiff as he attempted to get out.⁴⁸

Also, it was held that there was no negligence sufficient to go to a jury upon the mere showing that when host's car stalled in a lane of traffic, the guest failed to get out after seeing defendant's car a block and a half away,⁴⁹ or that the guest stayed in the car for about a minute after it stopped on a country road at night.⁵⁰

If any *ratio decidendi* may be drawn from these cases, it is that there are many ways in which the court has stated that a guest may

³⁶ See *Kovar v. Bekius*, 133 Neb. 487, 275 N.W. 670 (1937) (Someone in car said "O.K." in answer to driver's question. Held: since it was not shown that plaintiff had made the statement, and since the time lag had not been over five seconds, plaintiff had not acquiesced in the negligent conduct of the driver.).

³⁷ *Costello v. Hild*, 152 Neb. 1, 40 N.W. 2d 228 (1949).

³⁸ *Erickson v. Morrison*, 152 Neb. 133, 40 N.W.2d 413 (1950).

³⁹ *O'Brien v. Case Co.*, 140 Neb. 847, 2 N.W.2d 107 (1942).

⁴⁰ *Erickson v. Morrison*, 152 Neb. 133, 40 N.W.2d 413 (1950).

⁴¹ *Erickson v. Morrison*, 152 Neb. 133, 40 N.W.2d 413 (1950).

⁴² *Hendrix v. Vana*, 153 Neb. 531, 45 N.W.2d 429 (1951). See *Gleason v. Baack*, 137 Neb. 272, 289 N.W. 349 (1939).

⁴³ *Hendrix v. Vana*, 153 Neb. 531, 45 N.W.2d 429 (1951).

⁴⁴ *Gleason v. Baack*, 137 Neb. 272, 289 N.W. 349 (1939).

⁴⁵ *Kuska v. Nichols Construction Co.*, 154 Neb. 580, 48 N.W.2d 682 (1951).

⁴⁶ *Gleason v. Baack*, 137 Neb. 272, 289 N.W. 349 (1939).

⁴⁷ *Sautter v. Poss*, 155 Neb. 62, 50 N.W.2d 547 (1951).

⁴⁸ *Glick v. Poska*, 122 Neb. 102, 239 N.W. 626 (1931).

⁴⁹ *Allen v. Clark*, 148 Neb. 627, 28 N.W.2d 439 (1947).

⁵⁰ *Remmenga v. Selk*, 150 Neb. 401, 34 N.W.2d 757 (1948). See *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943) (not negligence as a matter of law to fail to get out at filling station when driver stopped for gas; but, under the circumstances, sufficient facts shown to go to the jury).

be contributorily negligent, but as a practical matter, at least in the appellate court, it has been an extremely difficult burden to specifically pinpoint conduct which constitutes contributory negligence of a guest in any given situation. And the more recent cases seem to have been much more stringent in applying the law to the facts. While the court has talked in terms of placing a duty of "reasonable care" on the guest, as a practical matter the duty has been rather insignificant. As a result, under the present status of Nebraska law, to invoke the defense of contributory negligence against an automobile guest would seem to require a greater showing of "fault" than to effectively set up the defense against other plaintiffs generally.

Apportionment of Damages of a Contributorily Negligent Automobile Guest

Even though the guest may not have been contributorily negligent, still to maintain a suit against his host, the motorist's guest statute requires him to show "gross negligence"⁵¹ on the part of the host.⁵² The host may utilize the defense of contributory negligence,⁵³ however, if he can show specific non-reasonable acts by the guest.⁵⁴

Where a suit is maintainable by a guest against the host, with no third party drivers involved in the accident, there is an issue as to whether the negligence of the guest is compared to the total amount of accident contributing negligence of the parties, or merely to the negligence of the host. Actually, two different comparisons seem to be

⁵¹ Under this statute, "Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty." *Montgomery v. Ross*, 156 Neb. 875, 58 N.W.2d 340 (1953); *Bishop v. Schofield*, 156 Neb. 830, 58 N.W.2d 207 (1953). But under the comparative negligence statute, "The words 'slight' and 'gross' are comparative terms and the intent of the statute is that the negligence of the parties shall be compared one with the other. . . ." *Andelt v. County of Seward*, 157 Neb. 527, 60 N.W.2d 604 (1953). *Quaere*: Is "gross as compared with" a greater, smaller, or the same degree of negligence as just plain "gross" negligence?

⁵² Neb. Rev. Stat. § 39-740 (Reissue 1952); *Gohlinghorst v. Ruess*, 146 Neb. 470, 20 N.W.2d 381 (1945); *James v. Krebeck*, 142 Neb. 757, 7 N.W.2d 637 (1943); *Holberg v. McDonald*, 137 Neb. 405, 289 N.W. 542 (1940); *Munsell v. Gardner*, 136 Neb. 214, 285 N.W. 555 (1939).

⁵³ *Sautter v. Poss*, 155 Neb. 62, 50 N.W.2d 547 (1951); *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943), overruling *Sheely v. Abboud*, 126 Neb. 554, 253 N.W. 683 (1934).

⁵⁴ The initial burden of proof of negligence is on the plaintiff; but the burden of proving contributory negligence is on the defendant. However, "After the parties establish and the jury, under proper instructions, finds the respective parties guilty of actionable negligence and contributory negligence the responsibility is then on the jury to make the comparison as contemplated by the statute. This comparison is to determine the rights of the parties to recover, if at all, and the extent thereof. In this respect there is no burden of proof on either party but solely a duty on the part of the jury to make the proper comparisons on the evidence before them." See *Murray v. Pearson Appliance Store*, 155 Neb. 860, 875, 54 N.W.2d 250, 259 (1952).

involved. First, as to whether the statute is applicable to the specific facts or not, it appears settled that the comparison is simply one of plaintiff's negligence to that of the defendant.⁵⁵ But, second, *once it is determined that the statute does have application to the facts*, the comparison used to *allocate the damages* is one between plaintiff's negligence and the total accident contributing negligence of the parties. This difference in the type of the comparison required for the different purposes seems substantiated by the particular wording of the statutes as respects its application,⁵⁶ and the apportionment of damages after it is determined that the provisions do apply.⁵⁷ This article deals only with the second of these comparisons—that used for the allocation of damages.

In one Nebraska case, a Supreme Court Justice stated that if defendant was four times as negligent as plaintiff, then plaintiff was entitled to a recovery of 4/5ths (rather than 3/4ths) of his total damages.⁵⁸ But in another opinion, another Justice stated that if the defendant is six times as negligent as plaintiff, the recovery should be diminished by 1/6th (rather than 1/7th).⁵⁹ The wording of the comparative negligence statute, "... the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff ...," would seem equally susceptible to either interpretation.

But in the recent decision in *Murray v. Pearson Appliance Store*,⁶⁰ the court cited *both* of these cases for the proposition that the comparison is between plaintiff's and the combined negligence of the parties:

⁵⁵ *Andelt v. County of Seward*, 157 Neb. 527, 60 N.W.2d 604 (1953); *Murray v. Pearson Appliance Store*, 155 Neb. 860, 54 N.W.2d 250 (1952); *Roby v. Auker*, 151 Neb. 421, 37 N.W.2d 799 (1949).

⁵⁶ Neb. Rev. Stat. § 25-1151 (Reissue 1948) ("...when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison..."); *Andelt v. County of Seward*, 157 Neb. 527, 530, 60 N.W.2d 604, 606 (1953), quoting from *Roby v. Auker*, 151 Neb. 421, 37 N.W.2d 799 (1949) (The legislature "... clearly intended the words 'in comparison' as qualifying both of the clauses immediately preceding. The words 'slight' and 'gross' as used in the statute are comparative terms and the intent of the statute is that the negligence of the parties shall be compared one with the other in determining questions of slight and gross negligence.'").

⁵⁷ Neb. Rev. Stat. § 25-1151 (Reissue 1948) ("...the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff...").

⁵⁸ *Sgroi v. Yellow Cab & Baggage Co.*, 124 Neb. 525, 528, 247 N.W. 355, 356 (1933) ("The combined negligence of the two causes the total damage sustained. It is plain in such a case that plaintiff's own negligence caused one-fifth of her injury and defendant's four-fifths..."). See *Morrison v. Scotts Bluff County*, 104 Neb. 254, 177 N.W. 158 (1920). Accord: *Prosser, Comparative Negligence*, 51 Mich. L. Rev. 465, 481-482 (1953).

⁵⁹ *Patterson v. Kerr*, 127 Neb. 73, 79, 254 N.W. 704, 707 (1934). Accord: *Grubb, Comparative Negligence*, 32 Neb. L. Rev. 234, 238-239 (1953).

⁶⁰ 155 Neb. 860, 868, 54 N.W.2d 250, 259 (1952).

When plaintiff is entitled to recover under this rule it then becomes the duty of the jury to deduct from the total amount of any damages which it determines he has sustained such an amount as his contributory negligence bears to the entire negligence of the parties which contributed thereto.

The Federal Employer's Liability Act⁶¹ has served as the basis for a number of state acts, both in the labor and other fields,⁶² and the Nebraska comparative negligence statute seems to have been closely tailored along the pattern of its wording, with the addition of the slight-gross comparison. In a long line of cases in the United States Supreme Court,⁶³ lower federal courts,⁶⁴ and state courts,⁶⁵ under the act, the wording, "... the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee ...," has specifically been held to require a comparison of the negligence of the injured workman with the combined negligence of defendant and himself. However, under this statute,⁶⁶ as under Mississippi,⁶⁷ Georgia,⁶⁸ Nebraska,⁶⁹ and possibly South Dakota,⁷⁰ statutes, an instruction using simply the wording of the statute without a more

⁶¹ 35 Stat. 66 (1908), 45 U.S.C. § 53 (1946): "... the fact that the employee may have been guilty of contributory negligence 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"

⁶² See Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 478-480 (1953).

⁶³ *Seaboard Air Line R.R. v. Tilghman*, 237 U.S. 499 (1915); *Norfolk & W. R.R. v. Earnest*, 299 U.S. 114, 121-122 (1913). See *Grand Trunk Ry. v. Lindsay*, 233 U.S. 42, 49 (1914).

⁶⁴ *Keith v. Wheeling & L.E. Ry.*, 160 F.2d 654 (6th Cir.), cert. denied, 332 U.S. 763 (1947); *Buchanan v. Chicago, B. & Q. Ry.*, 159 F.2d 576 (7th Cir. 1947); *Katila v. B. & O. R.R.*, 104 F.2d 842, 843 (6th Cir. 1939).

⁶⁵ *Sprickerhoff v. B. & O. R.R.*, 323 Ill. App. 340, 55 N.E.2d 532 (1944); *Cliff v. S.L.-S.F. Ry.*, 320 Mo. 791, 9 S.W.2d 972 (1928); *Lierness v. L.I. R.R.*, 217 App. Div. 301, 216 N.Y. Supp. 656 (2d Dep't 1926); *McAuliffe v. N.Y. Cent. R.R.*, 172 App. Div. 597, 158 N.Y. Supp. 922 (2d Dep't 1916); *Koofos v. G. N. Ry.*, 41 N.D. 176, 170 N.W. 859 (1918); *Chadwick v. Oregon-Washington Ry. & Navigation Co.*, 74 Ore. 19, 144 Pac. 1165 (1914); *Waina v. Penn. Co.*, 251 Pa. 213, 96 Atl. 461 (1915).

⁶⁶ See *Warren v. Jackson*, 204 Ill. App. 576, 589 (1917); *Kippenbrock v. Wabash Ry.*, 270 Mo. 479, 194 S.W. 50 (1917); *Western & A. R.R.*, 36 Ga. App. 70, 135 S.E. 439 (1926); *Cent. of Georgia Ry. v. Lindsay*, 28 Ga. App. 198, 110 S.E. 636 (1922). Contra: *Cincinnati N.O. & T.P. Ry.*, 163 Ky. 60, 173 S.W. 329 (1915) (citing other Kentucky cases); *Chesapeake & O. Ry.*, 168 Ky. 137, 181 S.W. 933 (1916).

⁶⁷ See *Clary v. Breyer*, 194 Miss. 612, 13 So.2d 633 (1943); *Watson v. Holimon*, 169 Miss. 585, 153 So. 669 (1934); *Illinois Cent. R.R. v. Archer*, 113 Miss. 158, 74 So. 135 (1917).

⁶⁸ See *Southern Ry. v. Reed*, 40 Ga. App. 332, 149 S.E. 582 (1929); *Augusta-Aiken Ry. & Elec. Corp. v. Burdshaw*, 27 Ga. App. 657, 109 S.E. 530 (1921).

⁶⁹ See *Patterson v. Kerr*, 127 Neb. 73, 254 N.W. 704 (1934); *Kelso v. Seward County*, 117 Neb. 136, 219 N.W. 843 (1928); *Morrison v. Scotts Bluff County*, 104 Neb. 254, 177 N.W. 158 (1920). Also see, e.g., *Transcript of Record*, p. 17, *Nat. Fire Ins. Co. v. Everton*, 157 Neb. 540, 60 N.W.2d. 638 (1953).

⁷⁰ See *Foland v. Dugon*, 57 N.W.2d 166 (S.D. 1953). That South Dakota will follow Nebraska comparative negligence decisions as a guide, has been

precise explanation of the mathematical allocation has been permitted. Early language inadvertently used in a Wisconsin opinion indicating that the comparison might be only the ratio of plaintiff's negligence to defendant's negligence⁷¹ was withdrawn in later decisions.⁷²

If the underlying policy behind the comparative negligence statute is an attempt to base liability upon fault,⁷³ then it would seem that a defendant six times as much at fault as the plaintiff should bear six times the liability, that is 6/7ths of the loss, and not merely five times the amount, or 5/6ths of the loss. And the instructions normally given in the Nebraska trial courts,⁷⁴ and which have received at least implied if not express approval by the Supreme Court,⁷⁵ set up the comparison as between plaintiff's and total negligence. It would seem probable that if a case with the issue squarely framed were put to the Supreme Court as the law stands today, especially the language of the opinion in *Murray v. Pearson Appliance Store*, the ruling would be to compare the negligence of plaintiff with the total accident contributing negligence of the parties.

But in the three party situation, the problem becomes more complex because of the rule that each joint tortfeasor is generally liable for the entire indivisible damages suffered by plaintiff, even though the other tortfeasor may have a complete defense,⁷⁶ and even though he, himself, without the other tortfeasor, could not possibly have caused

settled in a long line of cases, see *Stone v. Hinsvark*, 57 N.W.2d 669 (S.D. 1953); *Roberts v. Brown*, 72 S.D. 479, 36 N.W.2d 665 (1949); *Friese v. Gulbrandson*, 69 S.D. 179, 8 N.W.2d 438 (1943); *Audiss v. Peter Kiewitt Sons*, 190 F.2d 238 (8th Cir. 1951).

⁷¹ *Paluczak v. Jones*, 209 Wis. 640, 245 N.W. 655 (1932).

⁷² *Cameron v. Union Automobile Ins. Co.*, 210 Wis. 659, 247 N.W. 454 (1933); *Engbrecht v. Bradley*, 211 Wis. 1, 247 N.W. 451 (1933).

⁷³ See *Gregory*, *Legislative Loss Distribution In Negligence Actions* cc. VII, IX (1936).

⁷⁴ See *Standardized Jury Instructions, Adopted By the Association of District Judges of Nebraska*, Nos. 63-65, pp. 56-68 (1949) (...deduct from the whole amount of the damages, if any, sustained by the plaintiff such proportion thereof as the negligence chargeable to him bears to the entire negligence as shown by the evidence...").

⁷⁵ See, e.g., *Murray v. Pearson Appliance Store*, 155 Neb. 860, 54 N.W.2d 250 (1952) (Instruction: "To establish the amount of such reduction, you will first determine the proportion which the amount of plaintiff's negligence bears to the total amount of negligence of both parties, and express such proportion either in a fractional or percentage form. Such fraction or percentage is then applied to the total amount of damages previously found by you, to determine the part of such damage which was caused by plaintiff's own negligence. The sum thus determined is then deducted from plaintiff's total damages, and your verdict should be for the amount remaining.").

⁷⁶ *Segebart v. Gregory*, 156 Neb. 261, 55 N.W.2d 678 (1952); *Huston v. Robinson*, 144 Neb. 553, 13 N.W.2d 885 (1944); *Andrews v. Clapper*, 133 Neb. 110, 274 N.W. 209 (1937); *Robertson v. Chicago, B. & Q. R.R.*, 108 Neb. 569, 188 N.W. 190 (1922).

all of the damage.⁷⁷ The rule is stated that one joint tortfeasor is liable for the *damage* caused by the other, although he is not responsible for the *negligence* of the other tortfeasor.⁷⁸ In other words, even though one tortfeasor is not legally responsible for the *act* of the other (as, for example, being in a position to control), still he is legally liable for the total *damage* suffered by the injured party. The apparent reason for this rule is that as between two parties, one of whom was "at fault" and the other not, the one who caused the harm should pay for it. The criterion here is a basing of the loss upon the fault of the parties insofar as there is fault or non-fault. "Fault" is defined as the deviation from the standard norm of so-called reasonable human conduct.⁷⁹

Presumably this is the same type of philosophy which underlies the comparative negligence theory. As between two parties who are both "at fault," to the extent that one has made a "gross" deviation from the standard norm and the other merely a "slight" deviation by comparison, the incidence of the loss should be allocated in the same proportion as the deviation.

This same reasoning would appear to justify contribution among joint tortfeasors to the extent of the "fault" of each.⁸⁰ But it seems to be both the judicial⁸¹ as well as the legislative policy⁸² of the state to refuse such contribution, although there is an indication to the contrary in a few decisions.⁸³ Thus, the Nebraska rule is apparently one

⁷⁷ *Stark v. Turner*, 154 Neb. 268, 47 N.W.2d 569 (1951); *Umberger v. Sankey*, 151 Neb. 488, 38 N.W.2d 21 (1949); *Whitney v. Penrod*, 149 Neb. 636, 32 N.W.2d 131 (1948); *Huston v. Robinson*, 144 Neb. 553, 13 N.W.2d 885 (1944); *McClelland v. Interstate Transit Lines*, 142 Neb. 439, 6 N.W.2d 384 (1942); *Bergendahl v. Rabaler*, 133 Neb. 699, 276 N.W. 673 (1937); *Andrews v. Clapper*, 133 Neb. 110, 274, N.W. 209 (1937); *Rogers v. Brown*, 129 Neb. 9, 260 N.W. 794 (1935) (where host grossly negligent, he is liable for whole of guest's damage); *Zielinski v. Dolan*, 127 Neb. 153, 254 N.W. 695 (1934); *Andromidas v. Theisen Bros.*, 94 F. Supp. 150 (D. Neb. 1950).

⁷⁸ "Where the independent tortious act of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage—not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury." *Davis v. Spindler*, 156 Neb. 276, 56 N.W.2d 107 (1952); *Stark v. Turner*, 154 Neb. 268, 47 N.W.2d 569 (1951); *Husky Refining Co. v. Barnes*, 119 F.2d 715 (9th Cir. 1941).

⁷⁹ See *Prosser, Torts* 226, 428 (1941).

⁸⁰ See *Gregory, Legislative Loss Distribution In Negligence Actions* 72 et seq. (1936).

⁸¹ For a comprehensive collection and analysis of the Nebraska decisions, see *Andromidas v. Theisen Bros.*, 94 F. Supp. 150 (D. Neb. 1950).

⁸² A number of bills have been proposed in recent sessions of the Nebraska Legislature, but have not been passed. The Nebraska State Bar Association has been behind the effort to secure such legislation.

⁸³ See *First Nat. Bank v. Avery Planter Co.*, 69 Neb. 329, 95 N.W. 622 (1903); *George's Radio v. Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942). But cf. *Andromidas v. Theisen Bros.*, 94 F. Supp. 150 (D. Neb. 1950) (factually distinguishing these cases). Also see *Note, When May A Defendant Bring In A Third Party In Nebraska*, 32 Neb. L. Rev. 407, 412-413 (1953).

of comparative fault as between plaintiff and defendants, but as between the defendants themselves, the all-or-nothing view of the common law still prevails,⁸⁴ and it is error for a jury to attempt to apportion the damages as between the joint tortfeasors.⁸⁵

A number of writers have suggested that the logical solution in the three party situation is simply to bring all the parties before the court and apportion the total losses on the basis of comparative fault.⁸⁶ Granted that this might be a theoretically desirable concept, still as a practical matter in a jurisdiction not having any of these rules or procedures available, the problem of an action against less than all of the joint tortfeasors is an actual and important practical situation in securing the rights of the parties involved. And one or more phases of such a problem would be present in every guest suit wherein it is alleged that the guest has been contributorily negligent.

The precise issue of whether, in such a suit against only one of the joint tortfeasors, the comparison is between plaintiff's negligence and the negligence of (1) all of the parties, (2) the joint tortfeasors, (3) plaintiff and defendant before the court, or (4) defendant before the court, has not yet been answered by any Nebraska appellate decision. Dean Prosser in a comprehensive analysis of comparative negligence cases has recently noted that there were "... astonishingly few cases in which the question of multiple parties has reached the appellate courts under any 'comparative negligence' act."⁸⁷ Dean Prosser cites only four cases⁸⁸ in which one defendant was liable to the plaintiff while the other joint tortfeasor had a complete defense. In all of these, it was held that the recovery against the single defendant to the suit should be reduced by a comparison of plaintiff's negligence to the total negligence of all of the parties (number (1) above).

⁸⁴ See Gregory, *Legislative Loss Distribution In Negligence Actions* 72-73 (1936).

⁸⁵ *Forslund v. Swenson*, 110 Neb. 188, 192 N.W. 649 (1923); *Olson v. Neb. Tel. Co.*, 87 Neb. 593, 127 N.W. 916 (1910).

⁸⁶ See Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 503-504 (1953); Gregory, *Legislative Loss Distribution In Negligence Actions* 80 et seq., 114-115 (1936); Philbrick, *Loss Apportionment In Negligence Cases*, 99 U. of Pa. L. Rev. 766, 811 (1951). See Whelan, *Comparative Negligence*, 1938 Wis. L. Rev. 465, 487-490. Also see Prosser, *Torts* 407 (1941); Gregory, *Loss Distribution By Comparative Negligence*, 21 Minn. L. Rev. 1 (1936).

⁸⁷ Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 507 (1953).

⁸⁸ *Walker v. Kroger Groc. & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934) ("... inasmuch as that provision does clearly limit the one term of the proportion to 'the negligence attributable to the person recovering,' the language of the statute does not admit of including in that term of the proportion [of] causal negligence which is attributable solely to some other participant, and not to the person recovering. As a result, the causal negligence of all the other participants in the transaction must be deemed to constitute the other term of the proportion."); *Quady v. Sickl*, 260 Wis. 348, 51 N.W.2d 3 (1952); *Smith v. Am. Oil Co.*, 77 Ga. App. 463, 49 S.E.2d 90 (1948); *Mishoe v. Davis*, 64 Ga. App. 700, 14 S.E.2d 187 (1941).

A similar problem is presented under state statutes and the Federal Employer's Liability Act, where it is the rule that contributory negligence will bar an action against a fellow servant. The cases still allow a contributorily negligent worker to recover the full amount from the employer, diminished only by a comparison of his negligence to the total amount of accident contributing negligence, including that of the fellow servants.⁸⁹ Other cases seem to have reached the same result without considering the comparative fault apportionment problem.⁹⁰ However, in two cases where the host was not made a party to the suit, it was held error to compare the negligence of plaintiff merely with that of the parties to the suit rather than the total of all three acting parties, but the error was not prejudicial to the third party driver defendant since it worked in his favor.⁹¹

The same general approach is apparently being followed in those Nebraska trial courts utilizing the Standardized Jury Instructions adopted by the Association of District Judges.⁹² The instruction states:

NEGLIGENCE OF PERSON NOT PARTY TO THE ACTION

... If you find that AB was negligent and that his negligence was a part of the proximate cause of said accident and plaintiff's damage, then you should consider the negligence of AB and compare the negligence of the plaintiff with the combined negligence of all the negligent persons and deduct from the whole amount of damages, if any, sustained by the plaintiff such proportion thereof as the contributory negligence chargeable to the plaintiff bears to the entire negligence as shown by the evidence and return a verdict for the balance only.

If the theory behind the comparative negligence statute is one of allocating the loss on the basis of comparative fault of the parties—even within the narrow limits of the slight-gross comparison—then it would seem that the comparison under the Nebraska statute should involve only those parties actually before the court in the particular action.⁹³ The statements made by the court in joint tortfeasor cases where no contributory negligence is involved, that each is liable for the *damage* but not the *negligence* of the other tortfeasor, would seem to mean that although one tortfeasor has to pay for the total damage

⁸⁹ *Katila v. B. & O. R.R.*, 104 F.2d 842, 843 (6th Cir. 1939).

⁹⁰ See Note, 92 A.L.R. 691 (1934).

⁹¹ *Patterson v. Edgerton Sand & Gravel Co.*, 227 Wis. 11, 277 N.W. 636 (1938); *Ross v. Koberstein*, 220 Wis. 73, 264 N.W. 642 (1936).

⁹² Standardized Instructions To Juries—1953 Cumulative Supplement, No. 21, *infra* p. 125.

⁹³ But cf. *Katila v. B. & O. R.R.*, 104 F.2d 842, 843 (6th Cir. 1939) ("But once there is introduced into the law, as here, the doctrine of comparative negligence, then there may not be adequate assay of total negligence unless all negligence supported by evidence is given consideration."). To the same effect is 3 Ont. Rev. Stat. c. 252, § 2(2) (1950), specifically dealing with the automobile guest problem. The Ontario statute is the most complete comparative negligence statute.

of plaintiff, still as a matter of comparative negligence or comparative fault he is not responsible for the other's negligence. Thus, a more proper method of allocation would appear to be to make the third party driver initially liable for all of the guest's damage, and then to mitigate such recovery by a comparison of the guest's negligence to the combined negligence of only the guest and the defendant to the suit.

Following through on this type of a solution would mean, however, that plaintiff's recovery would be for a different amount depending upon whether or not he could get both of the tortfeasors before the court. The more parties-defendant which the guest could bring in, the smaller would be the comparative percentage of his own negligence. Referring back to the example used above, where the guest's negligence contributed 10% to the accident, the hosts's 50% and the third party driver's 40%, the guest would receive an 80% recovery in an action against the third party driver alone (the ratio of 10% to the total negligence of plaintiff and defendant), but a 90% recovery in an action against both the host and third party driver.

At first it might seem as if the third party driver is being made liable for the host's *negligence* as well as the *damage* since he is made jointly and severally liable for an added 10% in damages above that which in an action against him alone he could be forced to pay. But, actually it is merely the *damage* for which the third party driver is being made liable under the joint tortfeasor rules. It is true that the third party driver is being forced to pay an amount which is more than the comparative percentage of his fault in the over-all accident. This is the very same problem which is involved in a suit by a non-negligent guest against one joint tortfeasor and not the other, and is simply a corollary of the rule that in a suit by a non-negligent plaintiff, the third party driver is liable for all the damages, even those caused by another joint tortfeasor having a complete defense to an action by the plaintiff. It is this precise type of situation which the contribution among joint tortfeasors-statutes and decisions have been designed to remedy in an effort to balance liability with fault.⁹⁴ But Nebraska does not have such a rule at present, and until the Legislature acts to correct this situation by more liberal contribution and impleader devices, there will be this apparent inequity as between defendants.

Also, the trial court has the duty to instruct the jury on how the allocation of damages is to be made; and the failure to do so is reversible error.⁹⁵ Under the above rules, the following instruction would seem to embody at least a technically accurate statement of the law in a suit by the guest against the third party driver alone:

⁹⁴ See Gregory, Legislative Loss Distribution In Negligence Actions 72 (1936).

⁹⁵ Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N.W.2d 250 (1952).

COMPUTATION OF THE DAMAGES

You are instructed that if the negligence of the defendant, if you find there was any, caused or proximately contributed to the collision, then you should:

First: Determine the total amount of the damages which the plaintiff suffered in the collision from all causes.

Second: Determine whether or not the plaintiff was contributorily negligent. If the plaintiff was not contributorily negligent, then your verdict should be for the total amount of the damages suffered by him.

*Third:*⁹⁶ If you find that the plaintiff was contributorily negligent, then you should compare the negligence of the plaintiff and defendant and by this comparison determine whether the negligence of the plaintiff was slight and that of the defendant was gross. This is a matter of comparison involving only the plaintiff and the defendant to this suit. If you find from all the evidence in the case that, by such a comparison, the negligence of the plaintiff was slight and the negligence of the defendant was gross, then the plaintiff is entitled to recover, but his recovery is to be reduced by the proportionate amount which his negligence bears to the total amount of negligence of both the plaintiff and defendant.

If you find from the evidence that both parties were negligent, the plaintiff cannot recover in this case if you find from the evidence that by comparing the negligence of the plaintiff with the negligence of the defendant, the negligence of the plaintiff was *more than* "slight" or the negligence of the defendant was *less than* "gross."

If you find from the evidence that the defendant was not negligent, then you should return a verdict for the defendant.

Of course, the instruction would need to be supported with the normal definitions and supplementary rules dealing with negligence, as well as the other law applicable to the case such as last clear chance, the emergency doctrine, intoxication, and assumption of risk.

To aid somewhat in lessening the complexity of such a computation of damages, it has been highly recommended that the device of the special interrogatory⁹⁷ be used in these situations.⁹⁸ This would not

⁹⁶ See *Andelt v. County of Seward*, 157 Neb. 527, 60 N.W.2d 604 (1953); *Murray v. Pearson Appliance Store*, 155 Neb. 860, 54 N.W.2d 250 (1952); *Roby v. Auker*, 151 Neb. 421, 37 N.W.2d 799 (1949).

⁹⁷ Neb. Rev. Stat. §§ 25-1120 to 25-1122 (Reissue 1948).

⁹⁸ Gregory, *Legislative Loss Distribution In Negligence Actions* 121-124 (1936); Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 497 et seq.

only assist a jury in threading through the maze of complex rules, but might correct an error in computation without the cost of a second trial, since the special finding would control the general verdict.⁹⁹ Error cannot normally be predicated upon the failure to give these instructions to the jury, however, unless there is an abuse of discretion of the same type as that in refusing to give instructions generally.¹⁰⁰

If a lower court were to submit special interrogatories to the jury, then these illustrate the type which might be used:¹⁰¹

QUESTION 1: Was the defendant,, negligent in any of the following respects:

A. With respect to the speed at which he operated his automobile?

Answer:

Dissenting:

B. With respect to keeping a proper lookout?

Answer:

Dissenting:

C. With respect to the control of his automobile?

Answer:

Dissenting:

QUESTION 2: If you answer any subdivision of Question 1 "Yes," then answer the corresponding subdivisions of this question:

Was such negligence on the part of the defendant,, a contributing cause in fact of the collision?

A. Answer:

Dissenting:

B. Answer:

Dissenting:

C. Answer:

Dissenting:

(1953); Grubb, Comparative Negligence, 32 Neb. L. Rev. 234, 242-243 (1953). See McAuliffe v. N.Y. Cent. R.R., 172 App. Div. 597, 158 N.Y. Supp. 922 (2d Dep't 1916); Schumacher v. Wolf, 247 Wis. 607, 20 N.W.2d 579 (1945).

⁹⁹Neb. Rev. Stat. § 25-1120 (Reissue 1948); Sohler v. Chistensen, 151 Neb. 843, 39 N.W.2d 837 (1949); Culbertson Irrigating & Water Power Co. v. Olander, 51 Neb. 539, 71 N.W. 298 (1897).

¹⁰⁰Buel v. Chicago, R.I. & P. Ry., 81 Neb. 430, 166 N.W. 299 (1908); Am. Fire Ins. Co. v. Landfare, 56 Neb. 482, 75 N.W. 1068 (1898); Phoenix Ins. Co. v. King, 52 Neb. 562, 72 N.W. 855 (1897). See other cases noted under Neb. Rev. Stat. § 25-1121 (Reissue 1948).

¹⁰¹See Augustin v. Milwaukee Elec. Ry. & Transp. Co., 259 Wis. 625, 49 N.W.2d 730 (1951); Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N.W.2d 250 (1952); Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 497-500 (1953); Grubb, Comparative Negligence, 32 Neb. L. Rev. 234, 242-243 (1953). Also see Andelt v. County of Seward, 157 Neb. 427, 60 N.W.2d 604 (1953); Waina v. Penn. Co., 251 Pa. 213, 96 Atl. 461 (1915). But cf. Foemmel v. Mueller, 255 Wis. 277, 38 N.W.2d 510 (1949); Schumacher v. Wolf, 247 Wis. 607, 20 N.W.2d 579 (1945).

QUESTION 3: Was the plaintiff,, negligent in any of the following respects:

A. With respect to keeping a proper lookout?

Answer:

Dissenting:

B. With respect to warning the driver of the vehicle in which he was riding?

Answer:

Dissenting:

C. With respect to advising in the management of the vehicle in which he was riding?

Answer:

Dissenting:

QUESTION 4: If you answer any subdivision of Question 3 "Yes," then answer the corresponding subdivision of this question:

Was such negligence on the part of the plaintiff,, a contributing cause in fact of the collision?

A. Answer:

Dissenting:

B. Answer:

Dissenting:

C. Answer:

Dissenting:

QUESTION 5: If you have answered "Yes" to any subdivision of *each* of the preceding four questions, then answer the following question:

When comparing the negligence of the plaintiff,, with the negligence of the defendant,, was the negligence of the plaintiff slight and the negligence of the defendant gross?

Answer:

Dissenting:

QUESTION 6: If you have answered "Yes" to Question 5 (the preceding question), then answer the following question:

What proportion of the negligence, if any, which caused or proximately contributed to the collision was attributable to:

A. The defendant,

Answer:

Dissenting:

B. The plaintiff,

Answer:

Dissenting:

QUESTION 7: What is the *total amount of injuries and damages* which plaintiff,, has suffered as a direct and proximate result of the collision?

Answer:

Dissenting:

Conclusion

For a defendant to invoke the defense of contributory negligence against an automobile guest, he must specifically establish certain negligent acts or conduct on the part of the guest. There seems to have been somewhat of a judicial reluctance to actually impose a substantial duty to act upon the automobile guest.

But once such a degree of socially reprehensible conduct is shown, it would seem that to solve the problems in the examples stated at the beginning of this note, there are three basic problems which would need to be answered with respect to the apportionment:

(1) In a two party accident and suit, should the comparison of negligence be the ratio between that of plaintiff and the total of the parties, or merely the ratio of plaintiff's negligence to that of defendant?

(2) In a multiple party accident where less than all of the joint tortfeasors are made parties-defendant, should the comparison be made solely with respect to the negligence of the parties to the suit, or the total amount of all of the acting parties in the accident?

(3) In a multiple party accident where all the tortfeasors are parties to the suit, how shall the comparison be made?

On none of these issues is there any sort of a definitive answer in the Nebraska statutes or decisions.

Although the two cases specifically decided in answer to the first question are diametrically opposing, it would seem that the Nebraska court would rule that the comparison should be made between plaintiff's negligence and the total amount of both of the parties involved.

In a suit of the type discussed in the examples set out above where the plaintiff sues one joint tortfeasor and the other has a complete defense to an action by the plaintiff, the proper method of resolving the problem under existing Nebraska law would seem to be to: (1) initially make the defendant-joint-tortfeasor liable for all of plaintiff's damage, and then (2) mitigate such damage by a comparison of plaintiff's negligence to the total amount of accident contributing negligence by both the plaintiff and defendant, without regard to the negligent acts of others not a party to the suit.

In the suit where all of the parties are brought before the court, the comparison under Nebraska law should be made between the plaintiff's negligence and the total amount of accident contributing negligence of all of the parties.

While these rules seem to produce desirable results under current Nebraska law, it is possible that still further advances, such as contribution among joint tortfeasors¹⁰² and more liberal procedures for impleader,¹⁰³ could draw Nebraska law even closer to the stated "goal" of basing liability upon the "fault" of the acting parties.

¹⁰² The Committee on Legislation of the Nebraska State Bar Association has recommended: "That continued efforts be made to secure legislation dealing with contributions by joint tort-feasors, with a specification that the contribution be enforced by a separate action, rather than by a provision enabling the joint tort-feasor to be made a third-party defendant." Program of the Fifty-Fourth Annual Meeting of the Nebraska State Bar Ass'n 38-39 (1953). See Gregory, *Legislative Loss Distribution In Negligence Actions* c. IX (1936).

¹⁰³ See Note, *When May A Defendant Bring In A Third Party In Nebraska*, 32 Neb. L. Rev. 407, 412-413 (1953); Gregory, *Legislative Loss Distribution In Negligence Actions* cc. V, X, XII (1936). The most comprehensive comparative negligence statute is that of Ontario, 3 Ont. Rev. Stat. c. 252 (1950), which is just slightly more than two pages in length.