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ON July 1, 1971, Colorado joined the ranks of an increasing number of states which have adopted "comparative negligence" as a means of ascertaining liability and damages in negligence cases. On that date, the provisions of Colorado's Comparative Negligence Act[1] became effective and all legal actions based upon torts occuring in Colorado on or after that day are no longer subject to the common law contributory negligence bar.

While the "comparative negligence" concept is certainly not new, its introduction into Colorado practice has brought about a relatively abrupt change. The purpose of this article is to present an overview of the Colorado Comparative Negligence Act of 1971, to examine its inner workings, and to consider the ways in which selected areas of law may be affected by its enactment. An appendix is included which contains several forms designed to assist in the practical application of the Act to specific cases.

I. BACKGROUND

Legislative enactments dealing with comparative negligence in other American jurisdictions have varied in scope and content from extremely liberal applications of the comparative negligence concept to greatly restricted interpretations of that theory. To fully appreciate the impact of the Colorado Act, some consideration of the evolution and present status of this body of law is necessary.

A. *Historical Development*

The doctrine of contributory negligence was first pronounced in 1809 with the English case of *Butterfield v. Forrester*,[2] wherein the plaintiff was denied recovery for injuries

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[1] COLO. REV. STAT. ANN. § 41-2-14 (Supp. 1971).

[2] 11 East 60, 103 Eng. Rep. 926 (1809).

sustained in a horse riding accident because he was found to be partially responsible for the mishap. From that case evolved a legal precept which denied recovery to one who was even slightly negligent. This idea found ready acceptance in England and in the United States.

In a system that emphasized proprietary over social values there seemed to be an element of justification in refusing to allow recovery to one who himself was at fault. This was particularly true in cases where the plaintiff's conduct was as culpable as the defendant's. However, where the level of culpability was disproportionate, the harshness of the doctrine soon became apparent. As a consequence there has developed increasing dissatisfaction among 20th century American legal scholars with the absolute defense of contributory negligence.[3] Courts have become more reluctant to rule that a plaintiff's conduct was negligent as a matter of law, and juries are notoriously inclined to overlook the plaintiff's minimal negligence or to make a haphazard reduction of plaintiff's damage in proportion to his fault, when necessary to avoid an unjust result.

It was this dissatisfaction which led to a number of attempts within the various states to find some substitute method of dealing with cases where there existed negligence on the part of both parties. The makeshift doctrine of "last clear chance," which evolved in England,[4] was adopted by a majority of jurisdictions in the United States in an attempt to soften the effect of the strict rule of contributory negligence. Illinois and Kansas at one time attempted to modify the harshness of contributory negligence by classifying negligence into "degrees" and providing that if the plaintiff's negligence was "ordinary" while that of the defendant was "gross" the plaintiff might recover.[5] The experiment was ultimately abandoned in both states.[6]

In 1861, Georgia became the first state to seek a remedy for the inequities of the contributory negligence bar by legislative enactment when it adopted a number of regulations which permitted the application of comparative negligence principles in tort claims.[7] In 1910, Mississippi enacted a "pure" comparative

[3] 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.1 (1956); Pound, *Comparative Negligence*, 13 NACCA L.J. 195 (1954); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Turk, *Comparative Negligence on the March*, 28 CHI-KENT L. REV. 189 (1950).

[4] Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842).

[5] Galena & Union R.R. v. Jacobs, 20 Ill. 478 (1858); Wichita & W.R.R. v. Davis, 37 Kan. 743, 16 P. 78 (1887).

[6] Lanark v. Daugherty, 153 Ill. 163, 38 N.E. 892 (1894); Chicago, K. & N.R.R. v. Brown, 44 Kan. 384, 24 P. 497 (1890).

[7] Goodrich, *Origin of the Georgia Rule of Comparative Negligence and Apportionment of Damages*, 1940 GA. B.J. 174.

negligence statute.[8] This was followed in 1913 by the enactment of the Nebraska Act which classifies the parties' negligence as "slight" or "gross."[9] In 1931, Wisconsin passed a statute which permitted comparison of the plaintiff's and the defendant's respective liabilities, but which barred recovery when both parties were equally at fault.[10] South Dakota followed in 1941 with a bill similar to that of Nebraska;[11] and Arkansas, in 1955, enacted a "pure" comparative negligence act much like Mississippi's, but repealed it in 1957 in favor of a statute which greatly resembles the Wisconsin law.[12]

To date 15 states have adopted some form of comparative negligence and have thus eliminated contributory negligence as a complete bar to tort recovery. They are: Arkansas, Georgia, Hawaii, Idaho, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, Rhode Island, South Dakota, Vermont, Wisconsin, and, most recently, Colorado.

Various federal statutes have provided for a similar apportionment of damages according to fault, including the Federal Employer's Liability Act, [13] the Jones Act,[14] and the Death on the High Seas Act.[15] Also, many state railway and labor acts contain provisions which reduce the awards payable to injured workmen in proportion to their negligence in industrial mishaps.

B. *Current Legislative Variations*

As the above discussion indicates, comparative negligence legislation in the United States has generally taken three forms. Statutes in Nebraska and South Dakota typify the first variety wherein the plaintiff's recovery is limited to situations in which his negligence has been "slight" while that of the defendant "gross," when compared. The determination of degree is, of course, left to the jury. The net effect of these acts seems to have been to revive the unsatisfactory experience at Illinois and Kansas.[16]

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[8] Shell & Bufkin, *Comparative Negligence in Mississippi*, 27 MISS. L.J. 105 (1956).

[9] Johnson, *Comparative Negligence — The Nebraska View*, 36 NEB. L. REV. 240 (1957).

[10] *See* C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 3.570 (1971) [hereinafter cited as HEFT]; Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289.

[11] *See* Comment, 7 S.D.L. REV. 114 (1962).

[12] Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959).

[13] 45 U.S.C. § 53 (1970).

[14] 46 U.S.C. § 688 (1970).

[15] *Id.* § 766.

[16] Lanark v. Daugherty, 153 Ill. 163, 38 N.E. 892 (1894); Galena & Union R.R. v. Jacobs, 20 Ill. 478 (1858); Chicago K. & N.R.R. v. Brown, 44 Kan. 384, 24 P. 497 (1890); Wichita & W.R.R. v. Davis, 37 Kan. 743, 16 P. 78 (1887). *See* HEFT, §§ 3.340, 3.490.

The second form of statutory enactment applies "pure" comparative negligence to the effect that a plaintiff may recover his damages less the percentage of negligence attributable to him without regard to a maximum percentage. Thus a plaintiff who is adjudged to have been 90 percent responsible for his own injuries may still recover 10 percent of his damages from the party who is found to have been 10 percent at fault. Only Mississippi presently employs this extreme apportionment scheme.[17]

The third variation is the "modified" or "equal to or greater than" rule which reduces the plaintiff's recovery by the percentage of his own negligence and denies recovery if the plaintiff's negligence exceeds that of the defendant.[18] This was the form taken by the Wisconsin Act[19] and has been the most popular among those states which have recently enacted comparative negligence statutes.

II. THE COLORADO ACT

Colorado's statute[20] was patterned after an act adopted in Hawaii in 1969,[21] which, in turn, was modeled after Wisconsin's "modified" comparative negligence legislation. Thus Wisconsin, which has operated under its statute for a number of years,

[17] MISS. CODE ANN. § 1454 (1942).

[18] Pfankuah, *Comparative Negligence v. Contributory Negligence*, 1968 INS. L.J. 725.

[19] WIS. STAT. ANN. § 895.045 (1966) (The statute was originally enacted in 1931). Wisconsin amended its statute in June 1971 to bar recovery by a plaintiff only if plaintiff's negligence was greater than defendant's. WIS. STAT. ANN. § 895.045 (Supp. 1971).

[20] COLO. REV. STAT. ANN. § 41-2-14 (Supp. 1971). The actual text of the Colorado Comparative Negligence Statute is as follows:

> *Negligence cases — comparative negligence as measure of damages.* (1) Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made.
>
> (2) (a) In any action to subsection which (1) of this section applies, the court in a nonjury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict which shall state:
>
> (b) The amount of damages which would have been recoverable if there had been no contributory negligence; and
>
> (c) The degree of negligence of each party, expressed as a percentage.
>
> (3) Upon the making of the finding of fact or the return of a special verdict, as is required by subsection (2) of the section, the court shall reduce the amount of the verdict in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made; but if the said proportion is equal to or greater than the negligence of the person against whom recovery is sought, then, in such event, the court will enter a judgment for the defendant.

[21] HAWAII REV. STAT. ch. 663 (1969).

can be looked to by Colorado practitioners for interpretive case law. Hawaii has, in the two years since passage of its act, produced no appellate decisions of reference significance. In attempting to utilize Wisconsin case law, however, one should be aware that certain procedural systems such as a direct action statute, non-unanimous jury verdicts, and common law contribution among tort-feasors are employed in Wisconsin but not in Colorado. Also, Wisconsin has abolished all full or partial immunities including its guest statute.[22] Fortunately, within the next several years, there should be a body of law developing in the various other states having the "modified" form.[23]

The Colorado statute requires, as do the statutes in Hawaii and Wisconsin, that the jury record percentage allocations on a special verdict form.[24] The statute also requires that a jury make a finding as to the total damages incurred.[25] The trial judge then makes the mathematical computation to reduce damages by the extent of the plaintiff's percentage of negligence or dismisses the case against a particular defendant if the plaintiff's negligence exceeds that defendant's allocable fault.[26]

The highest court of Wisconsin has ruled that it is reversible error to inform the jury as to the operation of the statute or the effect of its percentage findings.[27] As a consequence, the members of the jury theoretically do not know what effect, if any, their percentages have on the amount awarded. Nor is the jury informed that the plaintiff will not recover if his negligence is found to be equal to or greater than that of the defendant.[28]

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[22] These procedural differences should be borne in mind when considering Wisconsin authorities. Permitted "direct action" and non-unanimous jury verdicts probably have little effect. Contribution and abolishment of immunities are considered elsewhere in this paper.

[23] Ark., Hawaii, Idaho, Me., Mass., N.H., Wis.

[24] COLO. REV. STAT. ANN. § 41-2-14 (Supp. 1971). Specific legislative intent is expressed by the special verdict requirement. The jury's function is clearly limited to special findings. There is obviously no necessity to tell the jury the effect of their findings and it would seem violative of the spirit of the clear legislative mandate to possibly prejudice their function or encourage speculation by unneeded knowledge of judicial implementation of the statute.

[25] *Id.*

[26] *Id.*

[27] Mutual Auto. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 268 Wis. 6, 66 N.W.2d 697 (1954) (attempted reading of pleading which would also inform jury of the effect of its findings); DeGroot v. Van Akkeren, 225 Wis. 105, 273 N.W. 725 (1937) (reading statute to jury). Arkansas has no special verdict requirement, so that its procedure is not helpful to Colorado practice.

[28] *See generally* the discussion on why the jury is not to be informed of the result of their special findings. HEFT § 7.40.

As to the special verdict form itself, the Colorado statute requires only an ultimate fact determination as to percentage allocations and total damages incurred. The jury is not required to list the types or degrees of negligence involved. Originally, Wisconsin jurors were given interrogatories which required them to decide whether litigants were negligent with regard to such factors as lookout, speed, control, and yielding of right-of-way.[29] Because of a great deal of confusion which resulted from these specific findings, Wisconsin changed its procedure so at present there are usually no specific findings, but only an ultimate fact determination whether the litigants' acts, undefined by detailed interrogatories, were causally connected to the occurrence.[30]

Appropriate jury instructions and special verdict forms have been developed by the Colorado Supreme Court Civil Jury Instruction Committee and approved by the Colorado Supreme Court.[31] Because the Colorado statute applies only to accidents occurring on or after July 1, 1971, there will be a period of time during which a dual system will be in force.

To summarize, the Colorado Comparative Negligence Act has four basic features: (1) the comparison of negligence determines liability of the person against whom recovery is sought since a plaintiff cannot recover unless his negligence is of a lesser degree than the negligence of that person against whom he seeks recovery; (2) a comparison of negligence also serves the purpose of reducing damages in proportion to the causal negligence of the person seeking recovery; (3) the jury theoretically does not know the results of its findings as in a general verdict; and (4) the court applies the doctrine upon facts found by the jury in terms of percentages of negligence attributed to each person contributing to the injury for which recovery is sought. Apparently this is so even though such person may not be a party in the suit. These features also apply to counterclaims, cross-claims, and third party claims by and between defendants.

[29] It is not the kind, character, or number of negligent acts that are compared, but rather the degree of causality attributable to the persons involved. Grana v. Summerford, 12 Wis. 2d 517, 107 N.W.2d 463 (1961). Hence, detailed interrogatories really serve no purpose.

[30] Baierl v. Hinshaw, 32 Wis. 2d 593, 146 N.W.2d 433 (1966). See the present form of special verdicts used in Wisconsin. HEFT § 8.20. By statute, the more detailed form may still be used in that state on a voluntary basis, or at the discretion of the trial court. WIS. STAT. ANN. § 270.27 (1966).

[31] The instructions and forms were approved by the Colorado Supreme Court on Jan. 28, 1972 and are included as an appendix to this article. The Colorado Supreme Court has already ruled that the statute will not be given retrospective effect. Heafer v. Denver-Boulder Bus Co., 489 P.2d 315 (Colo. 1971).

III. Application of the Statute

A. *One Plaintiff v. One Defendant*

Application of the statute in this context is fairly simple. Consider the following illustrative examples:

Example (1)

P	51% negligent
D	49% negligent
	100%
Damages if there had been no contributory negligence	$10,000
Result:	Defendant not liable.

Example (2)

P	49% negligent
D	51% negligent
	100%
Damages if there had been no contributory negligence	$10,000
Result:	Plaintiff recovers 51% of his damages or $5,100.

Example (3)

P	50% negligent
D	50% negligent
	100%
Damages if there had been no contributory negligence	$10,000
Result:	Defendant not liable.

It can be seen that what seems to be an anomaly exists under the "modified" comparative negligence rule. If a plaintiff is 50 percent negligent or more he recovers nothing, whereas if the plaintiff is only 49 percent negligent as against a particular defendant, he recovers 51 percent of his damages. For those who would criticize this feature, however, it should be remembered that comparative negligence is a compromise amelioration of strict contributory negligence, which denied recovery to a plaintiff who was even 1 percent negligent, with retention of the concept that one who is equally at fault should not be entitled to recover.

B. *One Plaintiff v. Multiple Defendants*

When multiple defendants are joined, the question arises as to whether the plaintiff's negligence is to be compared with the negligent conduct of each defendant or with the defendants' negligence as a unit. It appears clear from a reading of the Colorado statute that the plaintiff's conduct is subject to comparison only with the actions of each defendant against whom

recovery is sought rather than against the combined negligence of the defendants.[32] This has been the Wisconsin interpretation,[33] and, in point of fact, individual comparison appears to be the established procedure in all comparative negligence states except Arkansas.[34]

Under the Arkansas view, a plaintiff has been allowed to compare his negligence with that of the sum negligence of the defendants and thus to recover damages from a defendant whose negligence was judged to be less than the plaintiff's.[35] This result seems not only to represent a strained construction of the Arkansas Act, but appears to also seriously imperil the effectiveness of the statute itself by allowing the plaintiff to control the substantive result simply through procedural joinder. With the orthodox Wisconsin interpretation, this latter problem is avoided and the outcome is the same whether defendants are sued separately or as a unit.

The following examples are illustrative of the multiple defendant consideration under the Colorado statute:

Example (4)

P	10% negligent
D^1	5% negligent
D^2	85% negligent
	100%
Damages if there had been no contributory negligence	$10,000
Result:	D^1 dismissed; *P* recovers $9,000 from D^2.

Example (5)

P	45% negligent
D^1	40% negligent
D^2	15% negligent
	100%
Damages if there had been no contributory negligence	$10,000
Result:	Neither D^1 or D^2 is liable, because plaintiff's negligence,

[32] The Colorado statute provides that comparison is made with "the person against whom recovery is sought." Had the legislature intended a group comparison it could easily have made such provision. *See* discussion by James Smith concerning interpretation of an identical Massachusetts Comparative Negligence Statute: Smith, *Comparative Negligence in Massachusetts*, 54 MASS. L.Q. 140, 145 (1969).

[33] Schwenn v. Loraine Hotel Co., 14 Wis. 2d 601, 111 N.W.2d 495 (1961); Kirchen v. Tisler, 255 Wis. 208, 38 N.W.2d 514 (1949); Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).

[34] 57 AM. JUR. 2D *Negligence* § 434 (1971).

[35] Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20 (1962).

though not as great as the combined negligence of defendants, was greater than each of the defendant's individual negligence.

Another question which arises under the comparative negligence act is that of the disposition of the absent tort-feasor who either cannot be found or is not joined for litigation of the dispute. The Colorado statute requires that the court's finding of fact or the jury's special verdict state the degree of negligence of each party, expressed as a percentage.[36] The Wisconsin special verdict form and the recently adopted Supreme Court Instruction Committee verdict form require that all causal negligence be accounted for so that the allocations of negligence of the involved parties total 100 percent. It therefore becomes apparent that if the jury is to make an accurate apportionment of negligent involvement in a multi-party accident case where all parties are not joined, some accounting for the absent causative element must be made. This could easily be done by including an "other" category on the special verdict form.

This consideration is illustrated by the following example:

Example (6)

P	10% negligent
D^1	9% negligent
D^2	11% negligent
Phantom or immune *D* (party involved in collision but could not be found or joined in lawsuit)	70% negligent
	100%
Damages if there had been no contributory negligence	$10,000
Result:	D^1 dismissed; P recovers $9,000 from D^2.

The example seems somewhat harsh on D^2. However, in defense of this apparently inequitable result, it may be positively stated that the defendant's negligence *was* a proximate cause of the plaintiff's injury and the plaintiff's negligence *was* of a lesser degree. The same seemingly harsh result obtained prior to comparative negligence when only one of several negligent parties was sued.[37] Plaintiff could proceed to judgment against both as a unit, against each separately, or against only

[36] COLO. REV. STAT. ANN. § 41-2-14 (Supp. 1971).

[37] The reason for nonjoinder of defendants may be immunity, insolvency, unavailability, or plaintiff's choice. *See generally* W. PROSSER, LAW OF TORTS §§ 46, 47 (4th ed. 1971) [hereinafter cited as PROSSER].

one if desired. Although plaintiff could have two separate judgments, he could have but one satisfaction.[38] The only change with the advent of comparative negligence is that strict contributory negligence is now abrogated and plaintiff's negligence is compared with that of the defendant against whom he proceeds.

1. Multiple Defendants — Agency

Where an agency or quasi-agency relationship exists between defendants joined in an action, with one defendant vicariously liable only by reason of the relationship, defendants are considered as a unit for the comparison with plaintiff's conduct.[39] This is the necessary result because there is really only the agent's conduct to consider. If the principal is guilty of negligent conduct apart from his agent, then each would be compared with plaintiff's conduct, with the principal also being vicariously responsible for his agent's neglect.[40]

2. Multiple Defendants — Contribution

As has been observed, where there are multiple defendants, the sum of their negligence is not compared to the plaintiff's negligence, except when defendants are or may be deemed to be acting as agents for each other. The jury makes the determination of the percentage of fault on the part of each party, and percentages of fault on the part of individual defendants may differ markedly.

It would seem that if a determination and apportionment of damages based upon the degree of negligence attributable to each party is to be made, then the amount each defendant will actually pay should be based on those same percentage determinations. However, this would amount to "contribution" between joint, concurrent or successive tort-feasors and such is not permitted in Colorado.[41] The reason for refusing contribution in this situation is largely historical and developed out of situations involving "intentional" torts as distinguished from matters of mere inadvertence.[42] As with the concept of strict contributory negligence, if the parties are *in pari delicto,* the law grants no relief but leaves the parties as it finds them.

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[38] *Id.* at § 47.

[39] COLO. JURY INST. 8:1-7.

[40] It is the court that groups parties together for the comparison, if applicable. It is the jury's function only to find course and scope of employment, if that is disputed, and the percentage of causal negligence of the agent/employee and possibly also the principal if he is guilty of conduct separate from his agent/employee.

[41] Hamm v. Thompson, 143 Colo. 298, 304, 353 P.2d 73, 76 (1960).

[42] PROSSER § 50.

Such is the present state of law in Colorado today and the statute on its face does not alter it.

Wisconsin has recently adopted, by judicial decision, a "comparative contribution" rule.[43] It provides that each defendant should bear that portion of the amount owed to the plaintiff in the ratio of his negligence to the total amount of the negligence found attributable to defendants liable to the plaintiff.[44] It would seem that some form of contribution or comparative contribution would be a logical extension to the law of comparative negligence in Colorado. This, together with the liberal joinder rules provided by existing rules of procedure, would make a fair and relatively uncomplicated assignment of the loss. Until that occurs, however, no contribution between defendants as to a particular plaintiff's loss will be permitted. Without contribution, those defendants who are found to have been individually at fault to a greater extent than the plaintiff will be held jointly and severally responsible for such damage regardless of their individual proportions of fault.

3. Multiple Defendants — Res Judicata

In situations where the plaintiff is unable or unwilling to join all parties potentially responsible for the claimed injury, a question arises as to the res judicata effect of a jury determination against only those defendants joined in the suit. We have observed that the jury is required to assign a percentage of fault to parties involved in the claimed injury at least so far as such parties are before the court in a particular action. If two of three party defendants are joined, the relative proportion of the absent defendant will be determined. The questions then become whether this determination would be binding on the plaintiff in a subsequent action against that absent defendant and whether such determination would be binding upon the absent defendant in a subsequent determination.

The law relating to res judicata is well-established in this state and it does not appear that the comparative negligence statute will substantially affect existing precedents.[45] Generally, a plaintiff who sues one of two or more joint tort-feasors and is unsuccessful in his effort, is not precluded or bound by the previous result in a subsequent action against one who

[43] Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).
[44] *Id.* at 2, 114 N.W.2d at 107.
[45] City of Westminster v. Church, 167 Colo. 1, 445 P.2d 52 (1968).

was not a party to the first suit.[46] Similarly, a defendant subsequently joined in an action is not bound by a judgment to which he was not a party, and he is entitled to a complete and separate determination of relative fault.[47] This would appear to create the opportunity for successive individual lawsuits with varying results, but the same is true under the present system. A plaintiff is entitled to but one satisfaction and can enforce a judgment only against the individual defendant against whom it was obtained. There are therefore no additional problems presented.

C. *Multiple Plaintiffs*

Where multiple plaintiffs bring an action jointly, the principles previously discussed will apply to each plaintiff. Ordinarily, each plaintiff's conduct is considered and compared on an individual basis. There will be relationships, however, which will bring about group-plaintiff comparisons.[48]

1. Multiple Plaintiffs — Death Statute

In death cases prior to comparative negligence, contributory negligence on the part of either the party claiming damages or of the decedent himself was a bar to recovery.[49] It would appear that consideration of negligent conduct by both beneficiary and decedent will remain under the comparative negligence statute in that it provides that any damages allowed shall be diminished "in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made."[50] By this provision, a beneficiary would be a "person for whose damage recovery is made," and the decedent would be "the person for whose death recovery is made." The recently approved Pattern Jury Instructions on comparative negligence retain the consideration of negligence by both decedent and beneficiary.[51]

With this feature of Colorado law remaining, the next question becomes whether the negligent actions of the decedent and beneficiary, if both were causally negligent, are to be con-

[46] The test of res judicata is set out in Newby v. Bock, 120 Colo. 454, 210 P.2d 986 (1949): "For the plea to be a complete defense, there must be 'identity of subject matter, identity of cause of action, identity of persons to the action and identity of capacity in the persons for or against whom the claim is made.' "

[47] 46 AM. JUR. 2D *Judgments* § 519 (1969). *But see* Presser v. United States, 218 F. Supp. 108, 111 (S.D. Ill. 1963).

[48] *See* notes 51, 53, 54, 55 *infra*.

[49] COLO. JURY INST. 10:1, 2 and cases cited therein. *See* recently approved changes in appendix p. 492 *infra*.

[50] COLO. REV. STAT. ANN. § 41-2-14 (Supp. 1971).

[51] *See* revised COLO. JURY INST. 10:1, 2, appendix P. 500 *infra*.

sidered individually with each defendant or whether their conduct is to be lumped together for comparison. This question has been answered by the Wisconsin Supreme Court in *Western Casualty & Surety Co. v. Dairyland Mutual Insurance Co.*,[52] which held that a widow's negligence would have to be added to that of the decedent in making a statutory comparison with the negligence of the defendant.

It seems obvious that if only the decedent or the beneficiary is negligent, then it is only his negligence which is compared with the defendant's negligent conduct. Where only one of several beneficiaries is negligent, his negligence is compared with that of the defendant for a determination of that beneficiary's recovery of his proportionate share of the damages resulting from the decedent's death.[53]

The following example is illustrative of the application of the comparative negligence statute in death cases:

Example.. (7)

P^1 (beneficiary)	6% negligent
P^2 (beneficiary)	30% negligent
Decedent	7% negligent
D^1	8% negligent
D^2	49% negligent
	100%
Damages if there had been no contributory negligence:	P^1 $10,000
	P^2 $10,000
Result:	D^1 dismissed (because P^1 and decedent's combined negligence exceeds that of D^1); P^1 recovers $8,700 from D^2; P^2 recovers $7,300 from D^2. If negligence of P^2 is imputable[54] to decedent or P^1, the result would be D^1 dismissed; P^1 recovers $5,700 from D^2; P^2 recovers $6,300 from D^2.

2. Multiple Plaintiffs — Loss of Consortium, Loss of Services and Medical Expenses

It would appear that consortium loss claims will be con-

[52] 273 Wis. 349, 77 N.W.2d 599 (1956); *See also* Reber v. Hanson, 260 Wis. 632, 51 N.W.2d 205 (1952).

[53] Happy Valley Farms v. Wilson, 192 Ga. 830, 16 S.E.2d 270 (1941); Hansberry v. Dunn, 230 Wis. 626, 284 N.W. 556 (1939).

[54] *See* Multiple Plaintiffs — Imputed Contributory Negligence, p. 482 *infra*.

sidered in a manner similar to death claims, since loss of consortium is essentially derivative in nature. Where only the injured spouse is negligent, that negligence is used as the basis for comparison on a consortium claim. If both the injured spouse and the party entitled to services are causally negligent, their combined negligence is considered as a unit for comparison with the conduct of the individual defendants.[55] This same basis would be used in parent/child claims for loss of services and medical expenses.[56]

3. Multiple Plaintiffs — Imputed Contributory Negligence

Under the present state of the law, certain persons may be found contributorily negligent by imputation of another's conduct to them; these include joint venturers, heads of household who allow household members to use the "family car," employers, and joint owners of automobiles who are passengers in their own vehicles.[57] This is so because the law presumes some degree of inherent right of control. Comparative negligence will not change this aspect of the law, but the effect of any imputed contributory negligence will be to bring about a comparison and reduction of damages, or the "50 percent bar," according to the degree of culpability attributable to the party whose conduct is to be imputed.[58]

III. THE RELATIONSHIP OF COMPARATIVE NEGLIGENCE TO OTHER AREAS OF COLORADO TORT LAW

A. *Differing Standards of Care*

An important question which might arise under the statute concerns the effect upon the negligence comparison process of a differing standard of care between the plaintiff and defendant. Although the courts have consistently stated that the standard of care is always reasonable care under the circumstances,[59] on occasion a defendant, such as a common carrier, will be held to the "highest degree" of care.[60] Jury instructions in Wisconsin recognize different levels or standards of care in such cases without describing how this differentiation should affect apportionment.[61]

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[55] As in death cases, it is the court that groups parties together for the comparison, if applicable, rather than a jury function. *See* revised COLO. JURY INST. 9:16, appendix p. 492 *infra*.

[56] *See* revised COLO. JURY INST. 9:17, appendix P. 493 *infra*.

[57] COLO. JURY INST. 11:23 and cases cited therein.

[58] *See* Example (7), p. 481 *supra*.

[59] *See generally*, PROSSER § 72.

[60] COLO. JURY INST. 12:23.

[61] WIS. JURY INST. Civil No. 1532. *But see* Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962), wherein the concept of "gross negligence" was abolished.

Apportionment might reasonably be made by comparing the degree of relative deviation by each party from his own standard of care. As an example, in a personal injury suit involving an 8-year-old plaintiff pedestrian and an adult defendant automobile driver, the acts of the child would be compared with others of his age, intelligence, and experience, and the degree of any deviation from this standard would then be compared with the degree of deviation of the adult driver from his standard of care.[62] While it appears that a jury might have difficulty in attempting to assign percentages of fault where there are two varying standards of care applicable, in an ultimate fact verdict jurisdiction such as Colorado, weight to be given to a particular type of negligent conduct can be left to jury determination upon proper instruction of the legal standard involved.[63] Comparative negligence, therefore, actually effects no change from existing practice in this regard.

B. *Differing Degrees of Negligence*

An additional problem presents itself when the parties to a tort action have each been negligent to a different degree, as in cases arising under the Colorado Guest Statute, wherein a defendant's liability is predicated upon a finding of "willful and wanton" negligence.[64] In those circumstances, the Colorado Supreme Court has distinguished this type of conduct from ordinary negligence.[65] "Willful and wanton" or "reckless" acts have been grouped together as an aggravated form of negligence, differing in quality rather than in degree from ordinary lack of care. There presently exists an imposing body of law which holds that contributory negligence is not a defense to willful, wanton, or reckless conduct unless such contributory negligence was also willful, wanton, and reckless.[66] It is unclear whether contributory negligence is a defense to willful, wanton, or reckless conduct in this jurisdiction, since Colorado pattern jury instruction are silent on the question and the applicable cases are old and somewhat vague.[67]

Until recently, Wisconsin did not compare negligence where

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[62] COLO. JURY INST. 9:4.

[63] *See generally* COLO. JURY INST., with Supreme Court Jury Instruction Committee amendments for comparative negligence cases in appendix P. 492 *infra.*

[64] COLO. REV. STAT. ANN. § 13-9-1 (1963).

[65] COLO. JURY INST. 11:16 and cases annotated therein.

[66] PROSSER § 65.

[67] Denver & R.G.R.R. v. Spencer, 25 Colo. 9, 52 P. 211 (1898); Chicago R.I. & Pac. R.R. v. Nuney, 19 Colo. 36, 34 P. 288 (1893); Missouri Pac. R.R. v. Atkinson, 23 Colo. App. 357, 129 P. 566 (1913).

each of the parties was found to have been negligent to a different degree. Thus plaintiff's ordinary negligence, for example, was not compared to defendant's gross negligence. However, the Wisconsin Supreme Court now permits such a comparison to be made and although it has provided no guidelines to facilitate the comparison, it seems to retain in theory at least, the distinction in degree.[68]

Analogous to this problem is the question of whether "active" and "passive" negligence should be compared.[69] In this regard the Wisconsin Supreme Court has reversed a trial court which permitted a verdict form to be submitted to a jury comparing the passive negligence of co-guests with that of the host.[70]

As to standards of care, qualities and kinds of negligence, it would seem then that the uncertainty which now exists will probably remain, leaving ultimate weight and negligence comparison to jury determination.

C. *Assumption of Risk and Last Clear Chance*

Among Colorado's trial bar, there will certainly be an interest in the probable influence of the comparative negligence statute on the well-known doctrines of assumption of risk and last clear chance. The former doctrine would seem to remain unaltered;[71] that is, assumption of risk by a plaintiff will still be an absolute defense. This is so primarily because the theory behind it had its origin in contract and was but a form of consent.[72] It can thus be applied without any form of fault. When both contributory negligence and assumption of risk barred recovery, the distinction was academic and there were often factual situations wherein assumption of risk and contributory negligence were one and the same.[73] But when comparative negligence becomes the rule, the distinction between assumption of risk and contributory negligence becomes extremely important.

The accepted Colorado definition of assumption of risk is as follows: "A person assumes the risk of injury or damage resulting from the negligence of another if he voluntarily and unreasonably exposes himself to injury or damage with

[68] Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

[69] *See* discussion of "active/passive" negligence considerations in indemnity, p. 489 *infra*.

[70] Vroman v. Kempe, 34 Wis. 2d 680, 150 N.W.2d 423 (1967).

[71] The statute makes no reference to assumption of risk.

[72] PROSSER § 68.

[73] *Id.*

knowledge and appreciation of the danger and risk involved."[74] As defined, assumption of risk is not necessarily incompatible with comparative, contributory negligence.[75] However, Wisconsin has blended the two defenses into one so that assumption of risk as a separate legal entity has been abolished.[76] Nevertheless it would seem that Colorado's rather clear and orthodox definition of assumption of risk makes the defense a distinctly different consideration from contributory negligence and applies only where plaintiff's assumption was "unreasonable." Without clear legislative intent, the concept should not be abolished for the sake of expediency. The recently adopted revisions of the Colorado Pattern Jury Instructions have retained assumption of risk in a comparative negligence context.[77]

As to the doctrine of last clear chance, it developed as a rule designed to soften the harsh effect of contributory negligence.[78] Thus, it would seem that the necessity for such a rule is eliminated when comparative negligence becomes applicable. Looking to other comparative negligence states for interpretive insight, it may be seen that Nebraska has retained the doctrine of last clear chance and has thereby virtually eliminated the slight/gross negligence standards of comparison, so as to apply last clear chance in all cases unless the plaintiff's negligence was active and continuing until the very moment of the accident.[79] South Dakota has also retained the doctrine of last clear chance, and has determined it to be compatible with comparative negligence.[80] Arkansas, Mississippi, Maine, and Wisconsin have apparently abrogated the last clear chance rule and simply use the apportionment, comparison, and reduction features of their comparative negligence statutes in its stead.[81]

No reason seems to exist for preserving last clear chance

[74] COLO. JURY INST. 9:21.

[75] Hass v. Kessell, 245 Ark. 361, 432 S.W.2d 842 (1968); Wade v. Roberts, 118 Ga. App. 284, 163 S.E.2d 343 (1968); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947); Brackman v. Brackman, 169 Neb. 650, 100 N.W.2d 774 (1960).

[76] Gilson v. Drees Bros., 19 Wis. 2d 252, 120 N.W.2d 63 (1963).

[77] The Supreme Court Jury Instruction Committee has not deleted assumption of risk from revised Instructions in comparative negligence cases.

[78] MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940).

[79] Bezdek v. Patrick, 120 Neb. 522, 103 N.W.2d 318 (1960).

[80] Vlack v. Wyman, 78 S.D. 504, 104 N.W.2d 817 (1960).

[81] Reppeto v. Raymond, 172 F. Supp. 786 (W.D. Ark. 1959); Cusman v. Perkins, 245 A.2d 846 (Me. 1968); Switzer v. Detroit Inv. Co., 188 Wis. 330, 206 N.W. 407 (1925); Price, *Applicability of the Last Clear Chance Doctrine in Mississippi*, 29 MISS. L.J. 247 (1958); Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 12 ARK. L. REV. 89 (1959).

either under a proximate cause consideration or a mitigation of contributory negligence theory. Even prior to comparative negligence, the courts were hesitant to apply the doctrine except in clearly applicable cases, and it now appears that this doctrine will be one of the first laid to rest. The revised Colorado Pattern Jury Instructions eliminate last clear chance instructions in actions where comparative negligence is applicable.[82]

D. *Res Ipsa Loquitur*

The elements of res ipsa loquitur are generally acknowledged to be: (1) under the facts and circumstances the type of accident does not occur in the absence of negligence; (2) the injury must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the injury must not have been due to any voluntary action or contributory action on the part of the plaintiff.[83] When these elements are established, an inference or presumption arises that the negligence must have been that of the defendant and the doctrine operates as a substitute for actual proof of negligence.

In Wisconsin, in the case of *Turk v. H.C. Prange, Co.*,[84] the court held that the third element was dispensed with by operation of the comparative negligence statute. Thus, in Wisconsin at least, the negligence of the plaintiff does not bar application of res ipsa loquitur in a comparative negligence context, but is considered in the overall comparison.

The Colorado Pattern Jury Instruction on res ipsa loquitur does not include freedom from contributory negligence as an element necessary to the application of the doctrine.[85] The instruction does speak of "exclusive" control, however, and if a plaintiff is deemed partially in control of the particular instrumentality, then his conduct may become a consideration in determining the statute's applicability.

E. *Proximate Cause*

Considerations of proximate cause under comparative negligence should theoretically remain as they existed before the Act. Colorado Pattern Jury Instructions on causation need not be changed,[86] and the Supreme Court Pattern Jury Instruction Committee's revisions do not incorporate such a change.

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[82] Revised COLO. JURY INST. 9:18, appendix P. 493 *infra*.

[83] PROSSER § 39; 4 WIGMORE, EVIDENCE § 2509 (1st ed. 1905).

[84] 18 Wis. 2d 547, 119 N.W.2d 365 (1963). *See also* Welch v. Neisius, 35 Wis. 2d 682, 151 N.W.2d 735 (1967).

[85] COLO. JURY INST. 9:14.

[86] COLO. JURY INST. 9:24-28.

A comparative negligence statute does not eliminate contributory negligence as a defense in a negligence action, but rather merely modifies the common law rule to the extent that contributory negligence is no longer an inexorable bar to recovery in every case. Hence the same causal connection must be shown in a comparative negligence context as would have been necessary if common law contributory negligence had been in effect.

F. *Intentional Torts and Strict Liability*

As for tort actions based on intentional acts, the comparative negligence statute will simply not operate.[87] Nor will it generally apply where strict liability governs. The latter is actually outside a consideration of contributory negligence because negligent conduct by either party is not the basis for recovery. However, in the Wisconsin case of *Dippel v. Sciano*,[88] section 402A of the *Restatement of Torts (Second)* was deemed applicable notwithstanding comparative negligence, and the rule of strict liability in tort was adopted for product liability cases. Commenting that the defense of contributory negligence was nonetheless available to the seller, the court likened the basis of the seller's liability to negligence per se and permitted the defense.[89]

IV. Pleading and Evaluation Under the Statute

The style and substance of pleading a complaint need not materially change under the statute. Since comparative negligence is but a statutory refinement of the affirmative defense of contributory negligence, plaintiff need not plead freedom from, or a lesser degree of negligence than defendant to state a claim.[90] There should, therefore, be no change in the rule that a claiming party need not anticipate a defense in his pleading.[91]

Contributory negligence under the comparative negligence statute is an "affirmative defense." Its difference from the previous contributory negligence rule has been noted as operating either to reduce plaintiff's damages, or, if of appropriate degree, to completely bar the plaintiff's action. This difference should be reflected in defendant's answer.

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87 F. Harper & F. James, *supra* note 3 § 22.6; Prosser § 65.

88 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

89 *Id.* at 452, 155 N.W.2d at 64.

90 Stevens v. Strauss, 147 Colo. 547, 364 P.2d 382 (1961); Schwenn v. Lorraine Hotel Co., 14 Wis. 2d 601, 111 N.W.2d 495 (1961).

91 Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

Notice pleading is sufficient in Colorado,[92] and simplicity of pleading is preferred under the rules.[93] Since the comparative negligence defense is based upon statute, an allegation that plaintiff was contributorily negligent together with an incorporation of the statute by reference, should adequately state all features of the defense.[94]

Evaluations of claims under the statute will change less materially than might be thought. Some degree of percentage allocation to relative fault was being made in most evaluations anyway. Very seldom were even undisputed liability cases absolute. Therefore, the same method employed in the special jury verdict would probably be a useful technique in evaluating a liability case. After a reasonable factual investigation, a determination should be possible as to relative percentages of fault attributable to the involved parties. From a knowledge of the nature and extent of injury, a determination of damages can be approximated, and chances for dismissal based on the estimated degree of plaintiff's negligence, or the potential amount of any judgment can be calculated.

It seems that for years jurors have been applying a degree of comparative negligence to their awards in liability cases anyway. Now that the thought processes of the jury are harnessed and directed along specified lines, results should be less difficult to predict and the evaluation process facilitated.[95]

Wisconsin attorneys have developed a table of "suggested comparisons" of negligence between drivers in ordinary motor vehicle cases.[96] That table is as follows:

"SUGGESTED COMPARISONS OF NEGLIGENCE BETWEEN DRIVERS IN ORDINARY CASES"

	Defendant	Plaintiff
Rear End	100%	

[92] Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950).

[93] "A party shall state in short and plain terms his defenses to each claim asserted." COLO. R. CIV. P. 8(b). "Each averment of a pleading shall be simple, concise and direct." COLO. R. CIV. P. 8(e)(1). *See* Ripple & Howe, Inc., v. Fensten, 156 Colo. 322, 399 P.2d 97 (1965).

[94] COLO. R. CIV. P. 9(i) provides that when pleading a statute of Colorado, it need not be set forth at length but can be referred to by appropriate designation or otherwise identified, and the court will take judicial notice thereof. *See* 3 V. DITTMAN, COLORADO PRACTICE § 9.6 at 261 (1965). Simple comparative negligence pleading forms are set forth in HEFT, app. at 20-47.

[95] Pfankuch, *Comparative Negligence v. Contributory Negligence*, 1968 INS. L.J. 725; Note, *Comparative Negligence — A Survey of the Arkansas Experience*, 22 ARK. L. REV. 692 (1969).

[96] HEFT § 450 (1971). It should be observed that this table is based upon Wisconsin experience where "direct action" against insurance companies is permitted.

Intersection		
Uncontrolled	60%	40%
Stop Sign	85%	15%
Signal Light	90%	10%
Left Turn		
Oncoming	80%	20%
Failure to Yield	70%	30%
Improper Passing	75%	25%
Wrong Side of Road	90%	10%
Improper Turn	80%	20%

While this type of table may be helpful, each case will obviously differ as to its own facts,[97] so that any sort of mechanical analysis will be of limited value.

Where the liability of one of several defendants is based upon negligence which was "secondary" and "passive," whereas the other defendant or defendants' negligence was "active," "primary" and "proximate," a right of indemnity between defendants arises which permits recovery not only for any amount the secondary/passive defendant was obligated to pay plaintiff, but also for defense expenditures incurred in his defense of the plaintiff's action.[98] It is unlikely that this doctrine will change through comparative negligence. Even now, for the doctrine to apply, one party's negligence must be different in kind. If that difference in the quality of conduct exists, full reimbursement results. If the difference in kinds of negligence does not exist, then the doctrine is inapplicable because at that point the recovery would be one of "contribution," which Colorado courts do not allow.[99] There should therefore be no change in the concept of indemnity other than the possibility of increased usage resulting from an increase in the number of multiple-party actions.

The statute may alter present patterns of pleading and evaluation in a variety of other ways. For example, a claiming party in a counterclaim, cross-claim or third party claim is treated as a plaintiff and thus he is subject to the comparative negligence considerations previously discussed. For this reason the special

[97] For example, defendants are not always 100% negligent in rear-end accident cases. Gaulin v. Templin, 162 Colo. 55, 424 P.2d 377 (1967); Hickman v. Hock, 486 P.2d 442 (Colo. Ct. App. 1971) (not selected for official publication); Varcoe v. Form & Pour Co., 480 P.2d 591 (Colo. Ct. App. 1971) (not selected for official publication).

[98] Jacobson v. Dahlberg, 108 Colo. 42, 464 P.2d 298 (1970); Parrish v. DeRemer, 117 Colo. 256, 187 P.2d 597 (1947); Otis Elevator Co. v. Maryland Cas. Co., 95 Colo. 99, 33 P.2d 974 (1934); Colorado & S. Ry. v. Western Light & Power Co., 73 Colo. 107, 214 P. 30 (1923).

[99] Hamm v. Thompson, 143 Colo. 298, 353 P.2d 73 (1960).

verdict arrangement with judicial implementation of the result should greatly simplify a jury trial involving counterclaims, cross-claims or third party claims.

Comparative negligence may also encourage more ancillary actions of this nature. Defendants who are only slightly negligent may be more inclined to counterclaim if joined by a potentially more negligent plaintiff or to cross-claim when joined with more negligent co-defendants. Cross-claims and third party actions may become more prevalent as defense devices where actual percentages of negligent involvement are being determined by a jury with implementation by the court.

Additionally, it would seem that courts will become considerably more reluctant to direct a verdict based on the contributory negligence of the plaintiff. Before comparative negligence, the test was whether reasonable minds could differ as to whether plaintiff was contributorily negligent in the cause of plaintiff's claimed injury.[100] Under comparative negligence, that test would only be a starting place with a determination of the degree of involvement to follow. It would seem that even where plaintiff's negligence is patent, unless the evidence of degree is overwhelming, the courts will be extremely reticent to direct a verdict against the plaintiff based on his negligent conduct alone.

Comparative negligence should apply to all disputes arising out of the claimed negligence of the parties where the issue of contributory negligence is raised. The statute contemplates both trials to the jury and the court.[101] An arbitration proceeding would be handled in a manner similar to that of a trial to the court. The arbitrator, as the trier of fact, would simply determine the percentage of negligence on the part of the involved parties and make his award accordingly.

It may be worth noting one specific situation wherein the statute will probably have wide application. This is in the area of auto accidents and the seatbelt defense. Recent emphasis on automobile design safety has brought about correlative emphasis upon the use of safety equipment in motor vehicles. Failure to use available safety equipment, which would have prevented or lessened the claimed injury, falls squarely within orthodox

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[100] Commercial Carriers, Inc. v. Driscoll Truck Lines, Inc., 158 Colo. 552, 408 P.2d 445 (1965); Nygren v. Dimond, 472 P.2d 169 (Colo. Ct. App. 1970) (not selected for official publication).

[101] COLO. REV. STAT. ANN. § 41-2-14(2)(a) (Supp. 1971).

definitions of contributory negligence and proximate cause.[102] Such neglect on the part of a claiming party, however, was usually slight as compared with the conduct of the party causing the collision so that application of strict contributory negligence principles seemed unduly severe. As a result, many strict contributory negligence states treated plaintiff's omission only as a matter of "mitigation."

Comparative negligence eliminates the harshness and provides for mitigation so that failure to use an available safety device may now be recognized for what it really is—simply another form of failure to exercise reasonable care. The seatbelt defense as a type of comparative contributory negligence is well-recognized in Wisconsin.[103]

Conclusion

The Colorado comparative negligence system, which incorporates the "less-than" rule, has retained the basic legal precept that one should not recover if he is equally at fault, and yet has allowed the harsh barriers of strict contributory negligence to be lowered somewhat. In this manner the jury, as the proper social and legal instrument of the community, may fairly measure proportionate individual fault and assess damages as they are proved by the evidence. When used with a special verdict procedure, comparative negligence harnesses and directs the juror's thought processes toward specific findings which are then implemented by the court. The system appears to be quite workable, and seems to fairly compromise the interests of all parties. While the adoption of comparative negligence will surely entail a period of transition, experience in those states presently operating under such a system indicates that it can be adopted with minimal disruption and change.

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[102] Colo. Jury Inst. 9:15, 24, 26; Carlson v. Millisack, 82 Colo. 491, 261 P. 657 (1927); Deep Mining & Drainage Co. v. Fitzgerald, 21 Colo. 533, 43 P. 210 (1895). The injured party does not sue for the happening of an accident; he sues for injury and claims that defendant proximately caused the injury. If that injury was partly caused by the plaintiff's own omission, his conduct falls within the definition of contributory negligence. *See* Mays v. Dealers Transit, Inc., 441 F.2d 1344 (7th Cir. 1971).

[103] Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

APPENDIX

Order

WHEREAS, the Colorado Supreme Court Committee on Civil Jury Instructions has formulated instructions concerning comparative negligence, necessitated by the enactment by the General Assembly of an Act Concerning Comparative Negligence As A Means Of Ascertaining Damages in Negligence Cases, which amended Article 2 of Chapter 41 of Colorado Revised Statutes, 1963, as amended, by the addition of a new section, C.R.S. 1963, 41-2-14, effective July 1, 1971, and

WHEREAS, this Court has considered the comparative negligence instructions and notes on use prepared and submitted by the jury instructions committee for approval by the Court, numbered as follow: 4:16, 4:17, 9:1, 9:16, 9:17, 9:18, 9:31, 9:32, 9:33, 9:34, 9:35, 9:36, 9:37, 10:1, 10:2 and 14:1,

NOW, THEREFORE, it is ORDERED that the foregoing jury instructions and notes on use are approved by this Court for use in jury trials in the State of Colorado, subject to the following qualification.

These instructions are merely intended as guidelines. Since the comparative negligence statute has not been tested in an adversary proceeding, the Supreme Court cannot pass upon the propriety or necessity for other instructions, and corrections, or additions that may necessarily have to be made in the future concerning these instructions. Until the instructions are tested in an adversary proceeding, they are approved only in principle, and shall be used where applicable in accordance with C.R.C.P. 51.1.

BY THE COURT, EN BANC, this 28 day of January, 1972.

Edward E. Pringle
Chief Justice

4:16 Special Verdict—Mechanics for Submitting

Notes on Use: Add as the first pa..agraph:

For the appropriate special verdict instruction to be used in comparative negligence cases, see Instructions 9:32, 9:34 and 9:36.

4:17 Special Verdict Form

Notes on Use: Add as the first paragraph:

For the appropriate special verdict form to be used in comparative negligence cases, see Instructions 9:33, 9:35 and 9:37.

9:1 Elements of Liability

Change last paragraph of instruction to read:

On the other hand, if you find all of these (*number*) propositions have been established by a preponderance of the evidence, then your verdict must be for the plaintiff (unless you should also find that the defendant's affirmative defense of [*insert any affirmative defense other than contributory negligence*] has been established by a preponderance of the evidence, in which event your verdict must be for the defendant).

Notes on Use: Change to read:

In actions arising out of events occurring prior to July 1, 1971, the former instruction and Notes on Use are applicable. The present instruction and following Notes on Use apply to actions arising out of events occurring on or after July 1, 1971.

Omit any numbered paragraphs, the facts of which are not in dispute.

Use whichever parenthesized words are most appropriate and omit the parenthesized

clause of the last paragraph if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

Whenever the defense of contributory negligence has been properly raised, the applicable comparative negligence instructions (see Instructions 9:31 through 9:37) should be used rather than this instruction.

Other appropriate instructions defining the terms used in this instruction, *e.g.*, Instruction 9:2, defining "negligence," must be given with this instruction.

This instruction should not be used when liability has been admitted (see Instruction 2:4) or when the court has directed a verdict as to liability (see Instruction 2:6).

Source and Authority: Change to read:

The basic elements of a negligence case are set out in Independent Lumber Co. v. Leatherwood, 102 Colo. 460, 79 P.2d 1052 (1938). Also in general support of this instruction, see Instructions approved in Folck v. Haser, 164 Colo. 11, 432 P.2d 245 (1967).

9:16 Negligence of Spouse as Bar to His Claim for Loss of Consortium or for Injuries to Spouse

Instruction not to be used in actions arising out of events occurring on or after July 1, 1971.

Notes on Use: While the negligence of one spouse in proximately causing injuries to the other spouse is a defense to the former's claim for loss of consortium, Prosser, Torts §125, at 893-94 (4th ed. 1971), it is not necessarily a complete bar under C.R.S. §41-2-14 (Colo. Laws 1971, ch. 125, section 1 at 496). For that reason the former instruction should not be used in actions arising out of events occurring on or after July 1, 1971. Instead the applicable comparative negligence instructions (see Instructions 9:31 through 9:37), appropriately modified, should be used.

9:17 Parents' Negligence as Bar to Parents' Claim for Injuries to Child

Instruction not to be used in actions arising out of events occurring on or after July 1, 1971.

Notes on Use: While the negligence of a parent in proximately causing injuries to his child is a defense to that parent's claim for loss of services, expenses, etc. Prosser, Torts §125, at 893-94 (4th ed. 1971), it is not necessarily a complete bar under C.R.S. §41-2-14 (Colo. Laws 1971, ch. 125, section 1 at 496). For that reason the former instruction should not be used in actions arising out of events occurring on or after July 1, 1971. Instead the applicable comparative negligence instructions (see Instructions 9:31 through 9:37), appropriately modified, should be used.

In the absence of some basis such as master and servant, the contributory negligence of one parent in causing injuries to his child is not imputable to the other parent. See Phillips v. Denver City Tramway Co., 53 Colo. 458, 128 Pac. 460 (1912).

9:18 Last Clear Chance

Instruction not to be used in actions arising out of events occurring on or after July 1, 1971.

Notes on Use: The applicable comparative negligence instructions (see Instructions 9:31 through 9:37), based on C.R.S. §41-2-14 (Colo. Laws 1971, ch. 125, section 1 at 496), should be used rather than the former instruction in actions arising out of events occurring on or after July 1, 1971.

Source and Authority: The doctrine of last clear chance is logically subsumed under a comparative negligence statute such as Colorado's. Prosser, Torts §67, at 438-39 nn 7 & 8 (4th ed. 1971). See also Heft & Heft, Comparative Negligence Manual §1.220 (1971) and 2 Harper & James, Torts §22.14 (1956).

F. Comparative Negligence

9:31 Comparative Negligence—Elements

If you find the claimed damages were proximately caused by both the negligence of the plaintiff, (*name*), and the defendant, (*name*), then you must determine to what extent

the negligent conduct of each contributed to the damages of the plaintiff, expressed as a percentage of 100 percent.

Notes on Use: This instruction applies only in actions arising out of events occurring on or after July 1, 1971. It must be given whenever Instructions 9:32 or 9:33 are given or when, after it has been appropriately modified, Instructions 9:34 and 9:35 or Instructions 9:36 and 9:37 are given.

This instruction should be appropriately modified in cases where the negligence of another would be available as a defense to the plaintiff's claim, for example, the negligence of a decedent in a wrongful death action; the negligence of a child in a suit by a parent for medical expenses, etc.; the negligence of an injured spouse in a suit by the other spouse for loss of consortium, or the negligence of an employee in a suit by an employer against a third person who jointly with the servant negligently injured the employer.

Source and Authority: This instruction is based on C.R.S. §41-2-14 (Colo. Laws 1971, ch. 125, section 1 at 496).

9:32 Comparative Negligence—Special Verdict—Mechanics for Submitting—No Counterclaim—Single Defendant

The court instructs you to answer the following questions which present the ultimate issues of fact in this case, and which will be on a form for Special Verdict:

1. Was the defendant, (*name*), negligent?

2. Was the defendant's negligence, if any, a proximate cause of the plaintiff's, (*name*), claimed (injuries) (damages) (losses)?

3. Was the plaintiff contributorily negligent?

4. Was the plaintiff's contributory negligence, if any, a proximate cause of (his) (her) claimed (injuries) (damages) (losses)?

5. If you answer all the four foregoing questions "yes," then you are to answer this question:

Taking the combined negligence that proximately caused the (injuries) (damages) (losses) as 100 percent, what percentage of that negligence was attributable to the defendant and what percentage was attributable to the plaintiff?

6. If you answer questions 1. and 2. "yes," then state the amount of damages, if any, you find were sustained by the plaintiff and proximately caused by the (accident) (occurrence), without regard to the contributory negligence of the plaintiff, if any.

[*Insert any other questions which may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of the defendant.*]

Before you return the Special Verdict answering these questions, you must unanimously agree upon your answers to each question for which an answer is required. Upon arriving at such agreement, the foreman will insert each such answer in the verdict and then sign it, upon the completion of all such answers.

Notes on Use: This instruction is applicable only in actions arising out of events occurring on or after July 1, 1971.

Use whichever parenthesized words are most appropriate.

This instruction should be used "in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property" and in which the defense of contributory negligence has been raised and sufficient evidence presented to warrant submitting that issue to the jury.

Whenever this instruction is given, Instructions 9:31 and 9:33 must also be given as well as such other instructions relating to negligence, contributory negligence, proximate cause, damages, etc., as are appropriate to the case.

This instruction should be appropriately modified in cases where the negligence of another would be available as a defense to the plaintiff's claim, for example, the negligence of a decedent in a wrongful death action; the negligence of a child in a suit by a parent for medical expenses, etc.; the negligence of an injured spouse in a suit by the other spouse for loss of consortium; or the negligence of an employee in a suit by the

employer against a third person who jointly with the employee negligently injured the employer.

If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority, pursuant to C.R.C.P. 48 (Rev. 1970), this instruction should be modified accordingly.

Source and Authority: This instruction is based on C.R.S. §41-2-14 (Colo. Laws 1971, ch. 125, section 1 at 496).

To be effective as a defense, any contributory negligence must have been a proximate cause of the claimed injuries or losses. Roberts v. Fisher, 169 Colo. 288, 455 P.2d 871 (1969); Matt Skorey Packard Co. v. Canino, 142 Colo. 411, 350 P.2d 1069 (1960).

Contributory negligence is an affirmative defense on which the party asserting the defense has the burden of pleading and the burden of proof. C.R.C.P. 8(c) (Rev. 1970); Stevens v. Strauss, 147 Colo. 547, 364 P.2d 382 (1961) (citing earlier cases).

9:33 Comparative Negligence—Special Verdict Form—No Counterclaim

IN THE ____ COURT IN AND FOR THE
COUNTY OF ____, STATE OF COLORADO
Civil Action No. _____

_____
Plaintiff,

SPECIAL VERDICT

v.

_____
Defendant,

We, the jury, present our Answers to Questions submitted by the court, to which we have unanimously agreed:

QUESTION NO. 1: Was the defendant, (*name*), negligent? (yes or no)

ANSWER NO. 1:

QUESTION NO. 2: Was the defendant's negligence, if any, a proximate cause of the plaintiff's (*name*), claimed (injuries) (damages) (losses)? (yes or no)

ANSWER NO. 2:

QUESTION NO. 3: Was the plaintiff, (*name*), contributorily negligent? (yes or no)

ANSWER NO. 3:

QUESTION NO. 4: Was the plaintiff's contributory negligence, if any, a proximate cause of (his) (her) claimed (injuries) (damages) (losses) (yes or no)

ANSWER NO. 4:

QUESTION NO. 5: If you have answered all the four foregoing questions "yes," then you are to answer this question:

Taking the combined negligence that proximately caused the (injuries) (damages) (losses) as 100 percent, what percentage of that negligence was attributable to the defendant and what percentage was attributable to the plaintiff?

ANSWER NO. 5:

Percentage of combined negligence attributable to defendant, (*name*): ____%
Percentage of combined negligence attributable to plaintiff, (*name*): ____%
Total: 100%

QUESTION NO. 6: If you have answered Questions 1 and 2 "yes," state the amount of damages, if any, sustained by the plaintiff and proximately caused by the (accident) (occurrence), without regard to the contributory negligence of the plaintiff, if any?

ANSWER NO. 6: $_____

[*Insert any other questions and appropriate answer forms which may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of the defendant.*]

Notes on Use: This instruction is to be used in conjunction with Instruction 9:32. Notes on Use to Instruction 9:32 are also applicable to this instruction.

Source and Authority: See Source and Authority to Instruction 9:32.

9:34 Comparative Negligence—Special Verdict—Mechanics for Submitting—Counterclaim

The court instructs you to answer the following questions which present the ultimate issues of fact in this case, and which will be on a form for special verdict.

1. Was the defendant, (*name*), negligent?

2. Was the defendant's negligence, if any, a proximate cause of the plaintiff's, (*name*), claimed (injuries) (damages) (losses)?

3. Was the defendant's negligence, if any, a proximate cause of (his) (her) own claimed (injuries) (damages) (losses)?

4. Was the plaintiff, (*name*), negligent?

5. Was the plaintiff's negligence, if any, a proximate cause of the defendant's claimed (injuries) (damages) (losses)?

6. Was the plaintiff's negligence, if any, a proximate cause of (his) (her) own claimed (injuries) (damages) (losses)?

7. If you answer all the six foregoing questions "yes," or if you answer Question 1 and either Questions 2 or 3 "yes" and also answer Question 4 and either Question 5 or 6 "yes," then you are to answer this question:

Taking the combined negligence that proximately caused (injuries) (damages) (losses) to either or both the plaintiff and the defendant as 100 percent, what percentage of that combined negligence was attributable to the defendant and what percentage was attributable to the plaintiff?

8. If you answer Questions 1 and 2 "yes," then state the amount of damages, if any, you find were sustained by the plaintiff and proximately caused by the (accident) (occurrence), without regard to the negligence of the plaintiff, if any.

9. If you answer Questions 4 and 5 "yes," then state the amount of damages, if any, you find were sustained by the defendant and proximately caused by the (accident) (occurrence), without regard to the negligence of the defendant, if any.

[*Insert any other questions which may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of the defendant.*]

Before you return the Special Verdict answering these questions, you must unanimously agree upon your answers to each question for which an answer is required. Upon arriving at such agreement, the foreman will insert each such answer in the verdict and then sign it, upon the completion of all such answers.

Notes on Use: This instruction is applicable only in actions arising out of events occurring on or after July 1, 1971.

Use whichever parenthesized words are most appropriate.

This instruction should be used "in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property" and in which the defense of contributory negligence has been raised as a counterclaim and sufficient evidence presented to warrant submitting that issue to the jury.

Whenever this instruction is given, Instruction 9:31, appropriately modified, and Instruction 9:35 should also be given as well as such other instructions relating to negligence, proximate cause, damages, etc., as are appropriate to the case.

This instruction should be appropriately modified when the alleged negligence constituting the basis of the plaintiff's claim or the defendant's counterclaim is that of a third person imputable to the defendant or the plaintiff. Similarly appropriate modifications should be made when the defendant has alleged the personal negligence of the plaintiff as the basis for the counterclaim and, separately, the negligence of a third person as a defense to the plaintiff's claim, for example, a suit by a parent for medical expenses for injuries to his child in which the defendant has claimed damages based on

the negligence of the parent in causing the accident and, separately, the contributory negligence of the child in also causing the accident.

If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority, pursuant to C.R.C.P. 48 (Rev. 1970), this instruction should be modified accordingly.

Source and Authority: In addition to the Source and Authority to Instruction 9:32, see C.R.C.P. 13 (Rev. 1970).

9:35 Comparative Negligence—Special Verdict Form—Counterclaim

IN THE___ COURT IN AND FOR THE
COUNTY OF___, STATE OF COLORADO
Civil Action No._____

_____
Plaintiff,

SPECIAL VERDICT

v.

_____
Defendant,

We, the jury, present our Answers to Questions submitted by the court to which we have unanimously agreed:

QUESTION NO. 1: Was the defendant, (*name*), negligent? (yes or no)

ANSWER NO. 1:

QUESTION NO. 2: Was the defendant's negligence, if any, a proximate cause of the plaintiff's, (*name*), claimed (injuries) (damages) (losses)? (yes or no)

ANSWER NO. 2:

QUESTION NO. 3: Was the defendant's negligence, if any, a proximate cause of (his) (her) own claimed (injuries) (damages) (losses)? (yes or no)

ANSWER NO. 3:

QUESTION NO. 4: Was the plaintiff, (*name*), negligent? (yes or no)

ANSWER NO. 4:

QUESTION NO. 5: Was the plaintiff's negligence, if any, a proximate cause of the defendant's claimed (injuries) (damages) (losses)? (yes or no)

ANSWER NO. 5:

QUESTION NO. 6: Was the plaintiff's negligence, if any, a proximate cause of (his) (her) own claimed (injuries) (damages) (losses)? (yes or no)

ANSWER NO. 6:

QUESTION NO. 7: If you have answered all the six foregoing questions "yes," or if you have answered Question 1 and either Question 2 or 3 "yes," and you have also answered Question 4 and either Question 5 or 6 "yes," then you are to answer this question:

Taking the combined negligence that proximately caused (injuries) (damages) (loss) to either or both the plaintiff and the defendant as 100 percent, what percentage of that combined negligence was attributable to the defendant and what percentage was attributable to the plaintiff?

ANSWER NO. 7:

Percentage of combined negligence attributable to the defendant, (*name*): ___%
Percentage of combined negligence attributable to the plaintiff, (*name*): ___%
Total: 100%

QUESTION NO. 8: If you have answered Questions 1 and 2 "yes," state the amount of

damages, if any, you find were sustained by the plaintiff and proximately caused by the (accident) (occurrence), without regard to the negligence of the plaintiff, if any?

ANSWER NO. 8: $_____

QUESTION NO. 9: If you have answered questions 4 and 5 "yes," state the amount of damages, if any, you find were sustained by the defendant and proximately caused by the (accident) (occurrence), without regard to the negligence of the defendant, if any.

ANSWER NO. 9: $_____

[*Insert any other questions and appropriate answer forms which may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of the defendant.*]

_____

Foreman

Notes on Use: This instruction is to be used in conjunction with Instruction 9:34. The Notes on Use to Instruction 9:34 are also applicable to this instruction.

Source and Authority: See Source and Authority to Instructions 9:32 and 9:34.

9:36 Comparative Negligence—Special Verdict—Mechanics for Submitting—Multiple Defendants

The court instructs you to answer the following questions which present the ultimate issues of fact in this case, and which will be on a form for Special Verdict.

1. Was the defendant, (*name of first defendant*), negligent?

2. Was the defendant's, (*same name*), negligence, if any, a proximate cause of the plaintiff's, (*name*), claimed (injuries) (damages) (losses)?

3. Was the defendant, (*name of second defendant*), negligent?

4. Was the defendant's, (*same name*), negligence, if any, a proximate cause of the plaintiff's claimed (injuries) (damages) (losses)?

5. Was the plaintiff contributorily negligent?

6. Was the plaintiff's contributory negligence, if any, a proximate cause of (his) (her) claimed (injuries) (damages) (losses)?

7. If you answer all the six foregoing questions "yes," or if you answer questions 1 and 2 or questions 3 and 4 "yes" and also answer questions 5 and 6 "yes," then you are to answer this question:

Taking as 100 percent the combined negligence of those parties whom you may have found to be negligent and whose negligence you may have found was a proximate cause of the plaintiff's claimed (injuries) (damages) (losses), what percentage of that combined negligence was attributable to defendant, (*name of first defendant*), if any; what percentage was attributable to the defendant, (*name of second defendant*), if any, and what percentage was attributable to the plaintiff (*name*)?

8. If you answer questions 1 and 2 "yes" or questions 3 and 4 "yes," then state the amount of damages, if any, you find were sustained by the plaintiff and proximately caused by the (accident) (occurrence), without regard to the contributory negligence of the plaintiff, if any.

[*Insert any other questions which may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of either of the defendants.*]

Before you return the Special Verdict answering these questions, you must unanimously agree upon your answers to each question for which an answer is required. Upon arriving at such agreement, the foreman will insert each such answer in the verdict and then sign it, upon the completion of all such answers.

Notes on Use: This instruction is applicable only in actions arising out of events occurring on or after July 1, 1971.

Use whichever parenthesized words are most appropriate.

This instruction should be used "in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property," in which the defense of contributory negligence has been raised and there is sufficient evidence presented to warrant submitting that issue to the jury, and in which the

defendants would each be liable as joint tortfeasors, if at all, for all the damages claimed by the plaintiff. If one defendant might be liable for having negligently and proximately caused all the plaintiff's injuries, while the other defendant might be liable only for a part of such injuries, this instruction must be appropriately modified.

Whenever this instruction is given, Instruction 9:31, appropriately modified, and Instruction 9:37 should also be given as well as such other instructions relating to negligence, contributory negligence, proximate cause, damages, etc., as are appropriate to the case.

This instruction should also be appropriately modified in cases where the negligence of another would be available as a defense to the plaintiff's claim, for example, the negligence of a decedent in a wrongful death action; the negligence of a child in a suit by a parent for medical expenses, etc.; the negligence of an injured spouse in a suit by the other spouse for loss of consortium; or the negligence of an employee in a suit by the employer against a third person who jointly with the employee negligently injured the employer.

If, in a district court case, parties have stipulated to a verdict or finding by some stated majority, pursuant to C.R.C.P. 48 (Rev. 1970), this instruction should be modified accordingly.

Source and Authority: See Source and Authority to Instruction 9:32.

9:37 Comparative Negligence—Special Verdict Form—Multiple Defendants

IN THE ____COURT IN AND FOR THE
COUNTY OF ___, STATE OF COLORADO
Civil Action No. _____

_____
Plaintiff,

v.

SPECIAL VERDICT

_____
Defendant,

We, the jury, present our Answers to Questions submitted by the court, to which we have unanimously agreed:

QUESTION NO. 1: Was the defendant, (*name of first defendant*), negligent (yes or no)

ANSWER NO. 1:

QUESTION NO. 2: Was the defendant's, (*same name*), negligence, if any, a proximate cause of the plaintiff's, (*name*), claimed (injuries) (damages) (losses)? (yes or no)

ANSWER NO. 2:

QUESTION NO. 3: Was the defendant, (*name of second defendant*), negligent? (yes or no)

ANSWER NO. 3:

QUESTION NO. 4: Was the defendant's (*same name*), negligence, if any, a proximate cause of the plaintiff's (*name*), claimed (injuries) (damages) (losses)? (yes or no)

ANSWER NO. 4:

QUESTION NO. 5: Was the plaintiff, (*name*), contributorily negligent? (yes or no)

ANSWER NO. 5:

QUESTION NO. 6: Was the plaintiff's contributory negligence, if any, a proximate cause of (his) (her) claimed (injuries) (damages) (losses)? (yes or no)

ANSWER NO. 6:

QUESTION NO. 7: If you have answered all six foregoing questions "yes," or if you have answered questions 1 and 2 or questions 3 and 4 "yes" and you have also answered questions 5 and 6 "yes," then you are to answer this question:

Taking as 100 percent the combined negligence of those parties whom you found to be negligent and whose negligence you found was a proximate cause of the plaintiff's claimed (injuries) (damages) (losses), what percentage of that negligence was attributable to the defendant, (*name of first defendant*), if any; what percentage was attributable to the defendant, (*name of second defendant*), if any, and what percentage was attributable to the plaintiff?

ANSWER NO. 7:

Percentage, if any, of combined negligence attributable to defendant, (*name of first defendant*): ____%

Percentage, if any, of combined negligence, attributable to defendant, (*name of second defendant*): ____%

Percentage of combined negligence attributable to plaintiff, (*name*): ____%

Total: 100%

QUESTION NO. 8: If you have answered questions 1 and 2 "yes" or questions 3 and 4 "yes," state the amount of damages, if any, sustained by the plaintiff and proximately caused by the (accident) (occurrence), without regard to the contributory negligence of the plaintiff, if any?

ANSWER NO. 8: $_____

[*Insert any other questions and appropriate answer forms which may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of either of the defendants.*]

_____

Foreman

Notes on Use: This instruction is to be used in conjunction with Instruction 9:36. Notes on Use to Instruction 9:36 are also applicable to this instruction.

Source and Authority: See Source and Authority to Instruction 9:32.

10:1 Contributory Negligence of Decedent

Instruction not to be used in actions arising out of events occurring on or after July 1, 1971.

Notes on Use: While the contributory negligence of a decedent is a defense in a wrongful death action, Willy v. Atchison, T.&S.F. Ry., 115 Colo. 306, 172 P.2d 958 (1946) (construing what is now C.R.S. §41-1-2 (1963)); Restatement 2d, Torts §494 (1965), and Prosser, Torts §127, at 910 (4th ed. 1971), it is not necessarily a complete bar under C.R.S. §41-2-14 (Colo. Laws 1971, ch. 125, section 1 at 496). For that reason, the former instruction should not be used in actions arising out of events occurring on or after July 1, 1971. Instead the applicable comparative negligence instructions (see Instructions 9:31 through 9:37), appropriately modified, should be used.

Source and Authority: See sources and authority above.

10:2 Contributory Negligence of a Plaintiff

Instruction not to be used in actions arising out of events occurring on or after July 1, 1971.

Notes on Use; While the contributory negligence of a plaintiff is a defense in a wrongful death action as to that plaintiff's claim, Phillips v. Denver City Tramway Co., 53 Colo. 458, 128 Pac. 460 (1912); Prosser, Torts §127, at 913 (4th ed. 1971), it is not necessarily a complete bar under C.R.S. §41-2-14 (Colo. Laws 1971, ch. 125, section 1 at 496). For that reason, the former instruction should not be used in actions arising out of events occurring on or after July 1, 1971. Instead the applicable comparative negligence instructions (see Instructions 9:31 through 9:37), appropriately modified, if necessary, should be used.

Source and Authority: See sources and authority above.

14:1 Manufacturer's Liability Based on Negligence—Elements of Liability

Notes on Use; Add as first paragraph:

In actions arising out of events occurring on or after July 1, 1971, in which the defense

of contributory negligence has been properly raised, the applicable comparative negligence instructions (see Instructions 9:31 through 9:37), appropriately modified, should be used rather than this instruction.