§ 13-21-111. 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) In any action to which subsection (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:

(a) The amount of the damages which would have been recoverable if there had been no contributory negligence; and

(b) 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 this 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 shall enter a judgment for the defendant.

(3.5) and (4) Repealed.

History:

L. 71: p. 496, § 1. C.R.S. 1963: § 41-2-14. L. 75: (4) added, p. 570, § 1, effective July 1. L. 85: (3.5) added, p. 575, § 1, effective July 1. L. 86: (3.5) repealed, p. 682, § 6, effective July 1; (4) repealed, p. 679, § 5, effective July 1.

Case Note:

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Colorado Comparative Negligence and Assumption of Risk", see 46 U. Colo. L. Rev. 509 (1974-75). For note, "The Seat Belt Defense: Should Coloradoans Buckle up for Safety?", see 50 U.

Colo. L. Rev. 375 (1979). For article, "Immunity to Direct Action: Is it a Defense to a Contribution Claim?", see 52 U. Colo. L. Rev. 151 (1980). For note, "Res Ipsa Loquitur -- The Effect of Comparative Negligence", see 53 U. Colo. L. Rev. 777 (1982). For article "Application of Comparative Negligence and Contribution Statutes to Third-Party Defendants", see 13 Colo. Law. 626 (1984). For article, "Indemnification or Contribution Among Counsel in Legal Malpractice Actions", see 14 Colo. Law. 563 (1985). For article, "The Apportionment of Tort Responsibility", see 14 Colo. Law. 741 (1985). For comment, "Multiple Defendants in Negligence Actions: Mountain Mobile Mix, Inc. v. Gifford", see 56 U. Colo. L. Rev. 303 (1985). For article, "Colorado Mandatory Seatbelt Act Revives the Seatbelt Defense", see 16 Colo. Law. 1210 (1987). For article, "Joint and Several Liability: A Case for Reform", see 64 Den. U. L. Rev. 651 (1988). For article, "Allocation of the Risks of Skiing: A Call for the Reapplication of Fundamental Common Law Principles", see 67 Den. U. L. Rev. 165 (1990). For article, "Application of the Pro Rata Liability, Comparative Negligence and Contribution Statutes", see 23 Colo. Law. 1717 (1994). For article, "Overview of Comparative Fault", see 29 Colo. Law. 95 (July 2000). For article, "Application of the Pro Rata Liability Statute to 'Tort Claims in a Contractual Wrapper'", see 45 Colo. Law. 37 (June 2016).

Traditional theories of loss allocation in tort altered. The general assembly has altered traditional theories of loss allocation in tort with the passage of the uniform contribution among tortfeasors act, §§13-50.5-101 to 13-50.5-106, and with the introduction of a comparative negligence scheme into Colorado law by this section. Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

General assembly has decided that comparative negligence rule is more just. By the enactment of this act, the general assembly has given legislative recognition to the argument that the comparative negligence rule is superior to the contributory negligence rule in tending to effect more just results in negligence actions. Heafer v. Denver-Boulder Bus Co., 176 Colo. 157, 489 P.2d 315 (1971).

Ameliorates harsh results of contributory negligence doctrine. Comparative negligence statutes have been enacted to ameliorate the harsh results which sometimes occur under the doctrine of contributory negligence. Darnell Photographs, Inc. v. Great Am. Ins. Co., 33 Colo. App. 256, 519 P.2d 1225 (1974).

This section eliminates the requirement that the plaintiff be free from contributory negligence in a suit based on res ipsa loquitur. Montgomery Elevator Co. v. Gordon, 619 P.2d 66 (Colo. 1980).

This section precludes the plaintiff's recovery if his negligence was as great as or greater than the defendant's. Graf v. Tracy, 194 Colo. 1, 568 P.2d 467 (1977).

Applicability to res ipsa doctrine. Even if the jury were to find that plaintiff was negligent and that his negligence contributed to his injury, plaintiff's negligence does not preclude the operation of the res ipsa doctrine because, under the comparative negligence system, the jury could infer from the circumstances that the defendant's negligence exceeded the plaintiff's negligence, thus permitting plaintiff to recover in spite of his contributing negligence. Gordon v. Westinghouse Elec. Corp., 42 Colo. App. 426, 599 P.2d 953 (1979), aff'd sub nom. Montgomery Elevator Co. v. Gordon, 619 P.2d 66 (Colo. 1980).

This section eliminates the requirements that the plaintiff be free from contributory negligence in a suit based on res ipsa loquitur. Montgomery Elevator Co. v. Gordon, 619 P.2d 66 (Colo. 1980).

Choice of laws analysis. In applying the particular interests and policies of Colorado to comparative negligence controversies, and in endeavoring to minimize a case-by-case, ad hoc, approach for the solution of comparative negligence conflicts questions, the specific approach to applying the choice of law rule should be that the domicile, residence, nationality, place of incorporation and place of business of the parties, and the place where the relationship, if any, between the parties is centered, are to be weighed more heavily and are to be given more importance in such a choice of law determination, than the contacts of the place where the injury occurred, and the place where the conduct causing the injury occurred. Sabell v. Pacific Intermountain Express Co., 36 Colo. App. 60, 536 P.2d 1160 (1975).

Although there are no Colorado cases holding that the comparative negligence statute is applicable to accidents occurring outside of the state of Colorado, neither are there any cases requiring the Colorado courts to follow the public policy of another state in determining the relative quanta of negligent conduct between the parties as it relates to the recovery of damages. Sabell v. Pacific Intermountain Express Co., 36 Colo. App. 60, 536 P.2d 1160 (1975).

Imputed comparative negligence is based upon a legal fiction in direct opposition to valid policy considerations. Comparative negligence applies to an owner-passenger of a vehicle only when the owner-passenger is negligent and such negligence is the proximate cause of owner-passenger's injuries. Watson v. Reg'l Transp. Dist., 762 P.2d 133 (Colo. 1988) (overruling Moore v. Skiles, 130 Colo. 191, 274 P.2d 311 (1954), and the cases following the Moore holding).

Doctrine of momentary forgetfulness or justifiable distraction no longer applicable. Comparative negligence statute did away with need for doctrine that was used under former contributory negligence law. Rodriguez v. Morgan County R.E.A., Inc., 878 P.2d 77 (Colo. App. 1994).

Doctrine of sudden emergency abolished. The doctrine is minimally useful because it is duplicative and adds virtually nothing to the corpus of negligence jury instructions. Additionally, the doctrine could seriously mislead the jury because it: (1) fails to instruct the jury to find two important facts before applying the doctrine; (2) does not define the term "sudden emergency"; (3) implies that sudden emergency situations require a reduced standard of care; and (4) focuses the jury's attention on events that transpired during and after the emergency rather than the totality of the circumstances. Bedor v. Johnson, 2013 CO 4, 292 P.3d 924.

Applied in Hover v. Clamp, 40 Colo. App. 410, 579 P.2d 1181 (1978); Bloxsom v. San Luis Valley Crop Care, Inc., 198 Colo. 113, 596 P.2d 1189 (1979); Rael v. Motor Vehicle Div., 42 Colo. App. 66, 589 P.2d 515 (1979); Huydts v. Dixon, 199 Colo. 260, 606 P.2d 1303 (1980); Padilla v. Warren, 44 Colo. App. 189, 610 P.2d 1352 (1980); Fay v. Kroblin Refrigerated Xpress, Inc., 644 P.2d 68 (Colo. App. 1981); Welch v. F.R. Stokes, Inc., 555 F. Supp. 1054 (D. Colo. 1983); Conlin v. Hutcheon, 560 F. Supp. 934 (D. Colo. 1983); Colo. Flying Acad., Inc. v. United States, 724 F.2d 871 (10th Cir. 1984); Cruz v. Union Pacific R. Co., 707 P.2d 360 (Colo. App. 1985); Tex-Ark Joist Co. v. Derr & Gruenewald Const., 719 P.2d 384 (Colo. App. 1986); Williams v. White Mtn. Const. Co., 749 P.2d 423 (Colo. 1988); Inland/Riggle Oil Co. v. Painter, 925 P.2d 1083 (Colo. 1996); Huntoon v. TCI Cablevision of Colo., 969 P.2d 681 (Colo. 1998); McCall v. Meyers, 94 P.3d 1271 (Colo. App. 2004).

II. APPLICABILITY.

Law reviews. For article, "Health Care Litigation in Colorado: A Survey of Recent Decisions", see 30 Colo. Law. 91 (Aug. 2001).

Evidence must substantiate that both parties are at fault before comparative negligence rule is used. Comparative negligence rules are applicable only where there is evidence presented which would substantiate a finding that both parties are at fault, and the inability to prove any negligence on the part of plaintiff eliminates the operation of the rule. Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973); Gordon v. Benson, 925 P.2d 775 (Colo. 1996).

Contributory negligence principles apply to the recipient of a negligent misrepresentation. Robinson v. Poudre Valley Fed. Credit Union, 654 P.2d 861 (Colo. App. 1982).

And to negligence resulting in pecuniary loss. Comparative negligence principles set forth in this section also apply to negligence which results in pecuniary loss. Robinson v. Poudre Valley Fed. Credit Union, 654 P.2d 861 (Colo. App. 1982).

In an action arising out of a rear-end automobile collision, evidence that the plaintiff negligently backed her car into defendant's vehicle was sufficient to entitle defendant to an instruction on comparative negligence. Gordon v. Benson, 925 P.2d 775 (Colo. 1996).

The comparative negligence statute is inapplicable where no negligence on the part of the plaintiff can be proven. Dunham v. Kampman, 37 Colo. App. 233, 547 P.2d 263 (1975), aff'd, 192 Colo. 448, 560 P.2d 91 (1977).

This section has no application where an innocent party seeks recovery from a party adjudged negligent. Kampman v. Dunham, 192 Colo. 448, 560 P.2d 91 (1977).

Section inapplicable to products liability cases. Comparative negligence as embodied in this section has no application to products liability cases under restatement (second) of torts § 402A. Kinard v. Coats Co., 37 Colo. App. 555, 553 P.2d 835 (1976).

Section inapplicable to exemplary damages. Bodah v. Montgomery Ward & Co., Inc., 724 P.2d 102 (Colo. App. 1986).

And finding of intentional wrongdoing on part of defendant renders statute inapplicable. Carman v. Heber, 43 Colo. App. 5, 601 P.2d 646 (1979).

This section does not apply to a claim for breach of contract even when the claim is for a willful and wanton breach of contract. Core-Mark Midcontinent v. Sonitrol Corp., 2012 COA 120, 300 P.3d 963.

This section does not deal with relationship between tortfeasors but only provides for the reduction of the amount of damages owed by the tortfeasor to the injured party in proportion to the percentage of fault attributed to the injured party by the jury. Bass v. United States, 379 F. Supp. 1208 (D. Colo. 1974).

This section has no relation to the apportionment of damages among joint tortfeasors. Bass v. United States, 379 F. Supp. 1208 (D. Colo. 1974).

Joint and several liability still viable. The common-law doctrine of joint and several liability is not inconsistent with this section's system of comparative negligence, but rather, the doctrine of joint and several liability in the context of comparative negligence continues to ensure that negligently injured persons will be able to obtain adequate compensation for their injuries from those tortfeasors who have negligently inflicted the harm. Martinez v. Stefanich, 195 Colo. 341, 577 P.2d 1099 (1978).

Liability of joint tortfeasors remains joint and several with respect to a third party injured by their actions. Kampman v. Dunham, 192 Colo. 448, 560 P.2d 91 (1977).

Judgment against joint tortfeasors is enforced jointly and severally, rather than apportioned according to percentage of fault attributed to each tortfeasor. Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 645 P.2d 1321 (Colo. App. 1981).

An innocent plaintiff can recover the entirety of the damages suffered from any of the individuals whose negligent acts resulted in a single indivisible injury. Dunham v. Kampman, 37 Colo. App. 233, 547 P.2d 263 (1975), aff'd, 192 Colo. 448, 560 P.2d 91 (1977).

Comparative negligence rule inapplicable where plaintiff is not negligent. Issue of minor counselee's comparative negligence as a defense to claim that church was negligent in hiring and supervising church counselor should not have been submitted to the jury because the evidence failed to establish, as a matter of law, any negligence on the minor's part. DeBose v. Bear Valley Church of Christ, 890 P.2d 214 (Colo. App. 1994), rev'd on other grounds, 928 P.2d 1315 (Colo. 1996).

When the evidence would support a finding that both parties are at fault, the court must instruct the jury on comparative negligence and allow the jury to assess the relative degrees of the parties' fault. Gordon v. Benson, 925 P.2d 775 (Colo. 1996).

Patient who is treated by health-care providers for suicidal ideations, and who commits suicide after being discharged, may be found comparatively negligent or at fault in a subsequent wrongful death action based upon that treatment. Sheron v. Lutheran Med. Ctr., 18 P.3d 796 (Colo. App. 2000).

As a matter of law, if a hospital assumes a duty to protect and treat a patient for a specific condition and the patient is injured by a foreseeable event directly related to that condition while in the hospital's custody, then the hospital cannot assert a comparative negligence defense. P.W. v. Children's Hosp. Colo., 2016 CO 6, 364 P.3d 891.

Defendant hospital admitted patient with a specific duty to protect him from self-destructive acts. The hospital's assumed duty to use reasonable care in preventing the patient from harming himself while in the hospital's custody subsumes, as a matter of law, any fault attributable to the patient for any harm suffered as a result of those self-destructive acts. P.W. v. Children's Hosp. Colo., 2016 CO 6, 364 P.3d 891.

Where common-law claim was permitted against tavern owner for serving intoxicated person who injures himself, comparative negligence principles may be asserted as a defense by tavern owner, and the issue of comparative negligence should, absent extraordinary circumstances, be submitted to a jury. Lyons v. Nasby, 770 P.2d 1250 (Colo. 1989).

The degree of the parties' fault is to be determined by the fact-finder and only in the clearest of cases, when the facts are undisputed and reasonable minds can draw but one inference, should relative degrees of fault be determined as a matter of law. Bennett v. Greeley Gas Co., 969 P.2d 754 (Colo. App. 1998).

A passenger in an automobile driven by an intoxicated person may be negligent for having entered the automobile in the first place. Thus, an instruction on comparative negligence is proper when a plaintiff is injured while a passenger in an automobile driven by someone who the plaintiff has reason to know is intoxicated. Wark v. McClellan, 68 P.3d 574 (Colo. App. 2003).

This section applies to tort actions based on all forms of negligent conduct. Failure of the general assembly to preclude application of this section in cases involving willful and wanton negligence leads to the conclusion that this section requires the comparison of each party's fault irrespective of whether such fault is attributable to simple negligence, gross negligence, or willful and reckless negligence. G.E.C. Minerals v. Harrison Western, 781 P.2d 115 (Colo. App. 1989); White v. Hansen, 813 P.2d 750 (Colo. App. 1990).

Exemplary damages are not directly subject to reduction under this section. Reduction of award under this section is based on plaintiff's own conduct, whereas an award of exemplary damages under §13-21-102 is

based on the defendant's misconduct and different principles apply. However, interplay among this section, §13-21-102, and §13-21-111.5 may produce a similar result. Lira v. Davis, 832 P.2d 240 (Colo. 1992).

Exemplary damages are not subject to reduction by application of the comparative negligence statute. Lira v. Davis, 832 P.2d 240 (Colo. 1992).

The solatium award of $50,000 pursuant to §13-21-203.5 is exempt from reduction by operation of the comparative fault statute. Dewey v. Hardy, 917 P.2d 305 (Colo. App. 1995); B.G.'s Inc. v. Gross, 23 P.3d 691 (Colo. 2001).

III. DEGREE OF NEGLIGENCE.

"Negligence" construed. Negligence is a deviation by the defendant from the reasonable standards of care owed to the plaintiff, which naturally and foreseeably results in injury to the plaintiff; it is failure to act as a reasonably prudent person would under the same or similar circumstances. McCormick v. United States, 539 F. Supp. 1179 (D. Colo. 1982).

Violation of statute is negligence as matter of law. The violation of a statute or ordinance regulating the use of roadways, proximately resulting in injury to one for whom the statute was designed to protect, is negligence as a matter of law. McCormick v. United States, 539 F. Supp. 1179 (D. Colo. 1982).

Injury to property defined. "Injury to property" in this section is not necessarily limited to a physical injury to tangible property, but rather includes any damage resulting from invasion of one's property rights by actionable negligence. Darnell Photographs, Inc. v. Great Am. Ins. Co., 33 Colo. App. 256, 519 P.2d 1225 (1974).

Where a landlord has actual knowledge of the vicious actions of a tenant's animal prior to entering into a rental agreement, and where the animal's vicious actions have created a clear potential for injury, the landlord has a duty to take reasonable precautions to protect third persons from the animal. Vigil v. Payne, 725 P.2d 1155 (Colo. App. 1986).

The negligence of multiple defendants or designated nonparties must be combined and compared with the plaintiff's negligence. Painter v. Inland/Riggle Oil Co., 911 P.2d 716 (Colo. App. 1995).

Comparison of negligence only between parties. Colorado's comparative negligence statute contemplates that the comparison of negligence be made only between parties to the tort action. Nat'l Farmers

Union Prop. & Cas. Co. v. Frackelton, 645 P.2d 1321 (Colo. App. 1981); Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 650 P.2d 571 (Colo. App. 1981), aff'd, 662 P.2d 1056 (Colo. 1983).

The interrelation of this section and §13-50.5-101 et seq., does not allow an insurer of a tortfeasor found liable in a prior action to recover contribution from a nonparty to that prior action. Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 650 P.2d 571 (Colo. App. 1981), aff'd, 662 P.2d 1056 (Colo. 1983).

This section precludes consideration of the negligence of absent tortfeasors by the trier of fact. Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983).

Degree of fault of multiple defendants combined for comparison with plaintiff's negligence. In cases where there are multiple defendants who proximately cause the injury, the degree of fault of each defendant will be combined and compared with the degree of fault of the plaintiff. If the plaintiff is less than 50 percent at fault, each defendant will be jointly and severally liable for the plaintiff's damages even if the degree of fault of a particular defendant is less than that of the plaintiff. Mtn. Mobile Mix, Inc. v. Gifford, 660 P.2d 883 (Colo. 1983).

Seat belt defense is not available for purposes of determining degree of plaintiff's negligence under this section. Churning v. Staples, 628 P.2d 180 (Colo. App. 1981).

Evidence of motorcyclist's failure to wear helmet inadmissible. In a wrongful death suit, evidence of plaintiff's failure to wear a protective helmet while riding a motorcycle is inadmissible to show negligence on the part of the injured party or to mitigate damages. Dare v. Sobule, 674 P.2d 960 (Colo. 1984).

This section applies only to the degree of negligence of the parties to the suit, and therefore it does not require allocation of negligence to nonparties not properly designated. Thompson v. Colo. and E. R.R. Co., 852 P.2d 1328 (Colo. App. 1993).

IV. AWARD.

An award of zero damages is consistent with the view that the jury intended that plaintiffs recover no award because jury found that plaintiff's negligence was at least equal to that of the defendant. Lonardo v. Litvak Meat Co., 676 P.2d 1229 (Colo. App. 1983).

Trial court's failure to determine degree of negligence of parties not error where trial court concluded that plaintiff's negligence was equal to that of defendant. Comcast v. Express Concrete, Inc., 196 P.3d 269 (Colo. App. 2007).

Fact that jury found plaintiff 70 percent at fault would have precluded his recovery under this section. Graf v. Tracy, 194 Colo. 1, 568 P.2d 467 (1977).

Verdict held inadequate. Where the damages set by the jury were no greater than the special damages, in light of the undisputed evidence of pain, suffering, and permanent disability, the verdict was manifestly inadequate and indicates that the jury disregarded the court's instruction on damages. Reynolds v. Farber, 40 Colo. App. 467, 577 P.2d 318 (1978).

Consortium claim is derivative for purposes of determining recovery under comparative negligence. Lee v. Colo. Dept. of Health, 718 P.2d 221 (Colo. 1986).

Juries are required to fix the precise, mathematical degree of fault under this comparative negligence statute. Zimmerman v. Baca, 346 F. Supp. 172 (D. Colo. 1972).

"Person against whom recovery is sought" includes a settling non-party defendant. Wong v. Sharp, 734 F. Supp. 943 (D. Colo. 1990).

V. PROCEDURE.

Responsibility for result divided between jury and judge. The general assembly, when it enacted this section, intended to establish a system in negligence cases which divides the responsibility for a fair and good result between the jury and the judge. Avery v. Wadlington, 186 Colo. 158, 526 P.2d 295 (1974).

Percentage of negligence issue for jury, usually. The issue of percentage of negligence is one for the jury, and only in the clearest of cases where the facts are undisputed and reasonable minds can draw but one inference from them should such issues be determined as a matter of law. Transamerica Ins. Co. v. Pueblo Gas & Fuel Co., 33 Colo. App. 92, 519 P.2d 1201 (1973).

Once the trial court rules that the doctrine is of res ipsa loquitur is applicable, the jury must then compare any evidence of negligency of the plaintiff with the inferred negligence of the defendant and decide what percentage of negligence is attributable to each party. Montgomery Elevator Co. v. Gordon, 619 P.2d 66 (Colo. 1980).

The issue of relative fault is one for the jury and only in the clearest of cases where the facts are undisputed and reasonable minds can draw only one inference from them should relative fault be determined as a matter of law. Whitlock v. Univ. of Denver, 712 P.2d 1072 (Colo. App. 1985), rev'd on other grounds in Univ. of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987); Gordon v. Benson, 925 P.2d 775 (Colo. 1996).

Stipulation of total damages substitute for jury determination. Where the total damages are stipulated, the stipulation operates as a substitute for the jury's determination of damages under subsection (2)(b). Darnell Photographs, Inc. v. Great Am. Ins. Co., 33 Colo. App. 256, 519 P.2d 1225 (1974).

Effect of 1975 amendment. The 1975 amendment, which added subsection (4), imposes an independent duty upon the court to instruct the jury on the statute's effect. Use of the word "shall" is mandatory in effect. Appelgren v. Agri Chem, Inc., 39 Colo. App. 158, 562 P.2d 766 (1977).

It is now incumbent upon the trial court in a comparative negligence case to give instructions that apprise the jury on the effects of its findings. Loup-Miller v. Brauer & Associates-Rocky Mt., 40 Colo. App. 67, 572 P.2d 845 (1977).

The failure of a party's attorney to request an instruction on the effects of the comparative negligence statute does not waive this right which the statute requires the court to protect -- the right to an informed jury. Appelgren v. Agri Chem, Inc., 39 Colo. App. 158, 562 P.2d 766 (1977).

Defendant's failure to assert a contributory negligence defense in the theory of the case instruction and his failure to object to the theory of the case instruction did not constitute a waiver of his contributory negligence defense where defendant properly requested the trial court to submit a contributory negligence instruction to the jury. Gordon v. Benson, 925 P.2d 775 (Colo. 1996).

It is improper to instruct the jury on assumption of risk in a case tried under this section. Loup-Miller v. Brauer & Associates-Rocky Mt., 40 Colo. App. 67, 572 P.2d 845 (1977).

Special verdict form not required in FELA cases. In Federal Employers Liability Act cases brought in Colorado, a special verdict form is not required by either statute or necessity. Felder v. Union Pac. R.R., 660 P.2d 911 (Colo. App. 1982).

Defendant is not required to present evidence of his or her own negligence or to argue that he or she was negligent in order to avoid a finding of abandonment of a comparative negligence defense. Gordon v. Benson, 925 P.2d 775 (Colo. 1996).

VI. SCOPE OF REVIEW.

Scope of review. The scope of review is limited to a determination as to whether the jury acted capriciously or arbitrarily, or was swayed by emotion in assessing the damages incurred. Dunham v. Kampman, 37 Colo. App. 233, 547 P.2d 263 (1975), aff'd, 192 Colo. 448, 560 P.2d 91 (1977); Robinson v. Poudre Valley Fed. Credit Union, 680 P.2d 241 (Colo. App. 1984).

Jury determination on appeal. An appeal court may only overturn the jury's allocation where reasonable minds could not have apportioned the negligence of the parties in the manner in which it was done. Dunham v. Kampman, 37 Colo. App. 233, 547 P.2d 263 (1975), aff'd, 192 Colo. 448, 560 P.2d 91 (1977).

The issue of the percentage of negligence is for the jury's determination and is not to be disturbed in the absence of a clear showing of passion or prejudice. Dunham v. Kampman, 37 Colo. App. 233, 547 P.2d 263 (1975), aff'd, 192 Colo. 448, 560 P.2d 91 (1977).

In comparative negligence cases, a jury's verdict can be set aside on the ground of inadequate damages. Reynolds v. Farber, 40 Colo. App. 467, 577 P.2d 318 (1978).