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COMPARATIVE NEGLIGENCE*

William L. Prosser†

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IN these days the ordinary legislature¹ is likely to find on its calendar a bill, sometimes approved and sponsored by the state bar association, which does away with contributory negligence as a complete defense in any negligence action, and substitutes instead something commonly miscalled "comparative negligence,"² which involves some method of dividing the damages between the parties. Such a bill is of course no novelty, as the ample literature on the subject indicates.³

* This article is one of the Thomas M. Cooley lectures delivered by Dean Prosser at the University of Michigan Law School, February 2-6, 1953. The series, "Selected Topics on the Law of Torts," will eventually be published in book form by the University of Michigan Law School.—Ed.

† Boalt Professor of Law and Dean of the Law School, University of California, Berkeley.—Ed.

¹ "We understand that legislation of this type was introduced this year [1951] in the following 16 states: Arizona, Arkansas, California, Colorado, Kansas, Massachusetts, Michigan, Missouri, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah and Washington." Lipscomb, "Comparative Negligence," *INS. L.J.* No. 344, 667 at 674 (Sept. 1951).

² "Comparative negligence" properly refers only to a comparison of the fault of the plaintiff with that of the defendant. It does not necessarily result in any division of the damages, but may permit full recovery by the plaintiff notwithstanding his contributory negligence. Traditionally, because of the origin of the term and its early history in Illinois (*infra*, text at notes 110-119), it has been associated with the idea of degrees of negligence, and a comparison of "slight," "ordinary," and "gross." In the interest of clarity the term should be avoided, and the statutes here in question should be called "damage apportionment" or "comparative damages" acts. See note, 12 *CORN. L.Q.* 113 (1926). "Comparative negligence" is, however, in much too general use to permit much hope of its elimination.

³ The classic article on the subject is Mole and Wilson, "A Study of Comparative Negligence," 17 *CORN. L.Q.* 333, 604 (1932). Two recent discussions, both excellent and exhaustive, are Turk, "Comparative Negligence on the March," 28 *CIN-KENT L. REV.* 189, 304 (1950), and Philbrick, "Loss Apportionment in Negligence Cases," 99 *UNIV. PA. L. REV.* 572, 766 (1951). A very thorough study, going into all the complications, especially of the multiple-party problem, is the book by Gregory, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* (1936). See also Gregory, "Loss Distribution by Comparative Negligence," 21 *MINN. L. REV.* 1 (1936); Berg, "Comparative Negligence—A Substitute for the Rule of Contributory Negligence," 9 *S. D. B. J.* 200 (1941); comment, 22 *SO. CAL. L. REV.* 276 (1949). Numerous other articles bearing on particular statutes are cited in the succeeding notes.

Similar bills⁴ began to multiply in the legislatures during the decade before the last war, when the pressure of the increasing automobile accident rate compelled consideration of the problem of the uncompensated victim. It led even to proposals for an automobile accident compensation plan, analogous to the workmen's compensation acts and to be administered by some board or commission.⁵ In at least one instance a "comparative negligence" act was adopted under threat of such a compensation plan, and after a bill establishing it had passed one house of the legislature at the preceding session.⁶ During the war, when gasoline rationing reduced the accident rate, the agitation fell off; but with the slaughter on the highways resumed and accelerated, it has been revived in full vigor. A conservative prophet would have no difficulty in predicting the adoption of damage apportionment acts in several additional states within the next few years.

The United States is virtually the last stronghold of contributory negligence. The last vestige of the complete defense disappeared long since from all of continental Europe, which divides the damages.⁷

⁴In addition to the statutes adopted, the following unsuccessful bills have received mention in print:

New York, 1930. See Mole and Wilson, "A Study of Comparative Negligence," 17 *CORN. L.Q.* 333, 604 at 643 (1932); GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* 59 (1936).

Minnesota, 1940. See *PROCEEDINGS OF MINNESOTA STATE BAR ASSN.*, 12-17 (1940).

Pennsylvania, 1943. See note, 17 *TEMPLE L.Q.* 276 (1943).

New York, 1947. See note, 22 *N.Y. UNIV. L.Q. REV.* 458 (1947).

Michigan, 1947. See Neef, "Comparative Negligence," 27 *MICH. S. B. J.* 34 (May, 1948).

Illinois, 1949. See 30 *CHICAGO BAR REC.* 391, 394 (1949).

⁵Such a compensation plan is now in effect in Saskatchewan. *Sask. Stats.* (1947) c. 15.

⁶"Yet that very theory prevailed in Wisconsin when the legislature passed our comparative negligence law in 1931, which followed the introduction into our 1929 legislature of a bill placing the entire field of compensation for accidents under the jurisdiction of a commission, which bill passed the Wisconsin senate but did not reach the house for action before the termination of the legislature. It has been fairly stated, I believe, that were it not for the comparative negligence doctrine, adopted by the Wisconsin legislature in 1931, there is little question but that serious effort would have been made in the succeeding legislature of 1933 to put the entire field of damages, arising as the result of an accident, under the jurisdiction of a commission, and it was aptly said by the author of Wisconsin's comparative negligence law that: 'With comparative negligence as the rule applicable to automobile litigation in Wisconsin, there was no immediate need, if any, for the adoption of any commission form of administration of automobile legislation.'" Hayes, "Rule of Comparative Negligence and Its Operation in Wisconsin," 23 *OHIO STATE BAR ASSN. REP.* 233 at 234 (1950).

⁷The European history is well reviewed in Turk, "Comparative Negligence on the March," 28 *CIN-CENT L. REV.* 189 at 238-244 (1950).

Great Britain,⁸ all of Western Australia¹¹ and a little of the British Empire in the United States than is generally realized in books, and apparently that there are about 100 applied. Almost nothing they represent a body a procedure over which been put into practice far as possible, into the statutes, and to offer of act for any legislative uncharted seas.

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The defense of contributory negligence in the case of *Butterfield* and his house, had left and the plaintiff, riding not see the pole, rode injured. Lord Ellenborough the statement that "A which has been made

⁸Law Reform Act of 1945, *CONTRIBUTORY NEGLIGENCE (Contributory Negligence) Act*

⁹Most of the Canadian provinces. Their latest form is found in *BRUNSWICK REV. STAT.* (1927) (1937) c. 115; *PRINCE EDWARD ISLAND REV. STAT.* (1937) c. 115; *QUEBEC, WITH ITS CIVIL LAW HISTORY* *CHEMICAL CO. v. LEFEBVRE*, 42 *QUE. K.B.* 459 (1915).

¹⁰New Zealand Stat. (1947) c. 115.

¹¹Western Australia Statutes and Apportionment Statutes,"

¹²The Report of the Commission on the Law of Negligence, which contains a useful review of contribution, omits any reference to comparative negligence.

¹³11 East 60, 103 Eng. L. & Eq. 103.

Great Britain,⁸ all of the Canadian provinces,⁹ New Zealand¹⁰ and Western Australia¹¹ now have come to the same result, so that very little of the British Empire is left with the common law rule. Even in the United States there is far more in the way of division of damages than is generally realized. There are some forty statutes¹² on the books, and apparently in successful operation; and it is a fair estimate that there are about twelve hundred cases in which they have been applied. Almost nothing has been written about these decisions; but they represent a body of law of considerable importance, in which a procedure over which there has been much theoretical dispute has been put into practice. It is the purpose of this article to inquire, so far as possible, into the actual operation of the damage apportionment statutes, and to offer some conclusions as to the most desirable form of act for any legislature about to set forth upon these relatively uncharted seas.

The State of the Common Law

The defense of contributory negligence originated in 1809 with the case of *Butterfield v. Forrester*.¹³ The defendant, who was repairing his house, had left a pole projecting across part of the highway; and the plaintiff, riding home from a public house in the dusk, did not see the pole, rode into it, and was thrown from his horse and injured. Lord Ellenborough disposed of the matter very briefly with the statement that "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it,

⁸ Law Reform Act of 1945, 8 & 9 Geo. 6, c. 28. See WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* 533-535, and c. 13 (1951); Williams, "The Law Reform (Contributory Negligence) Act, 1945," 9 *MOD. L. REV.* 105 (1945).

⁹ Most of the Canadian statutes have been amended since their original enactment. Their latest form is found in Alberta Rev. Stat. (1942) c. 116; British Columbia Rev. Stat. (1930) c. 52, amended by Rev. Stat. (1948) c. 68; Manitoba R.S.M. (1940) c. 215; New Brunswick Rev. Stat. (1927) c. 143; Nova Scotia Stat. (1926) c. 3; Ontario Rev. Stat. (1937) c. 11; Prince Edward Island Stat. (1938) c. 5; Saskatchewan Stat. (1944) c. 23. Quebec, with its civil law heritage, divides the damages without a statute. See *Nichols Chemical Co. v. Lefebvre*, 42 Can. S.C. Rep. 402 (1909); *Canadian Pac. Ry. v. Frechette*, 23 Que. K.B. 459 (1915).

¹⁰ New Zealand Stat. (1947) No. 3, p. 29. See 23 *N.Z. L.J.* 215 at 229 (1947).

¹¹ Western Australia Stat. (1947) No. 23. See Shatwell, "Contributory Negligence and Apportionment Statutes," 1 *W. AUSTR. ANN. L. REV.* 145 (1949).

¹² The Report of the Casualty Committee in 18 *INSURANCE COUNSEL J.* 374 (1951), which contains a useful review of the law of the various states on contributory negligence and contribution, omits any reference to a number of these statutes.

¹³ 11 East 60, 103 Eng. Rep. 926 (1809).

if he did not himself use common and ordinary caution to be in the right."¹⁴

There has been much speculation as to why the rule thus declared found such ready acceptance in later decisions, both in England and in the United States.¹⁵ The explanations given by the courts themselves never have carried much conviction. Most of the decisions have talked about "proximate cause," saying that the plaintiff's negligence is an intervening, insulating cause between the defendant's negligence and the injury.¹⁶ But this cannot be supported unless a meaning is assigned to proximate cause which is found nowhere else. If two automobiles collide and injure a bystander, the negligence of one driver is not held to be a superseding cause which relieves the other of liability; and there is no visible reason for any different conclusion when the action is by one driver against the other. It has been said that the defense has a penal basis, and is intended to punish the plaintiff for his own misconduct,¹⁷ or that the court will not aid one who is himself at fault, and he must come into court with clean hands.¹⁸ But this is no explanation of the many cases, particularly those of the last clear chance, in which a plaintiff clearly at fault is permitted to recover. It has been said that the rule is intended to discourage accidents, by denying recovery to those who fail to use proper care for their own safety; but the assumption that the speeding motorist is, or should be, meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant. Probably the true explanation lies merely in the highly individualistic attitude of the common law of the early nineteenth century. The period of development of contributory negligence was that of the industrial revolution, and there is reason to think that the courts found in this

¹⁴ Continuing: "In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorise another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." 11 East 60, 61, 103 Eng. Rep. 926, 927 (1809).

¹⁵ See Bohlen, "Contributory Negligence," 21 *HARV. L. REV.* 233 (1908); Lowndes, "Contributory Negligence," 22 *GEORGETOWN L.J.* 674 (1934); Green, "Contributory Negligence and Proximate Cause," 6 *N.C. L. REV.* 3 (1927).

¹⁶ Bowen, L.J., in *Thomas v. Quartermaine*, 18 *Q.B.D.* 685 at 697 (1897); *Gilman v. Central Vermont R. Co.*, 93 *Vt.* 340, 107 *A.* 122 (1919); *Ware v. Sautley*, 194 *Ky.* 53, 237 *S.W.* 1060 (1922); *Exum v. Atlantic Coast Line R. Co.*, 154 *N.C.* 408, 70 *S.E.* 845 (1911); *Chesapeake & Ohio R. Co. v. Wills*, 111 *Va.* 32, 68 *S.E.* 395 (1910).

¹⁷ Lord Halsbury, L.C., in *Wakelin v. London & S.W. R. Co.*, 12 *A.C.* 41, 45 (1886).

¹⁸ Owen, C.J., in *Davis v. Guarnieri*, 45 *Ohio St.* 470, 15 *N.E.* 350 (1887).

defense, along with the venient instrument of of rapidly growing indu

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To some limited ext jury. Every trial lawyer recovery in cases of cont in the jury room does res of the plaintiff's fault.²¹ most unsatisfactory one. respect the court's instruc are other juries which th to reduce the recovery by directed verdict cases wh may be in comparison w dispute, and the court ha A striking illustration is t ing an intersection failed assumption that the speed the supreme court uttere

¹⁹ Malone, "The Formative (1946); Malone, "Comparative *Rev.* 125 (1945).

²⁰ One of the best stateme Green, "Illinois Negligence Law,"

²¹ "We but blind our eyes t in many cases juries apply it Sprague, Warner & Co., 202 *MIR A JUDGE TAKES THE STAND* 30-3-

defense, along with the concepts of duty and proximate cause, a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds.¹⁹

Criticism of the denial of all recovery was not slow in coming, and it has been with us for more than a century.²⁰ The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free. No one ever has succeeded in justifying that as a policy, and no one ever will. Its outrageousness became especially apparent in the cases of injuries to employees, where a momentary lapse of caution after a lifetime of care in the face of the employer's negligence might wreck a man's life and leave him uncompensated as a charge upon society; and the demand for some modification of the rule became an integral part of the movement which finally led to the workmen's compensation acts.

To some limited extent the remedy has been in the hands of the jury. Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff's fault.²¹ But the process is at best a haphazard and most unsatisfactory one. There are still juries which understand and respect the court's instructions on contributory negligence, just as there are other juries which throw them out of the window and refuse even to reduce the recovery by so much as a dime. Above all there are many directed verdict cases where the plaintiff's negligence, however slight it may be in comparison with that of the defendant, is still clear beyond dispute, and the court has no choice but to declare it as a matter of law. A striking illustration is the Minnesota case in which a motorist entering an intersection failed to yield the right of way on the mistaken assumption that the speeding defendant would slow down for him, and the supreme court uttered an almost pathetic appeal to a legislature,

¹⁹ Malone, "The Formative Era of Comparative Negligence," 41 ILL. L. REV. 151 (1946); Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 LA. L. REV. 125 (1945).

²⁰ One of the best statements of the attack on contributory negligence is found in Green, "Illinois Negligence Law," 39 ILL. L. REV. 36, 116, 197 (1944).

²¹ "We but blind our eyes to obvious reality to the extent that we ignore the fact that in many cases juries apply it [apportionment] in spite of us." Holt, J., in *Haeg v. Sprague, Warner & Co.*, 202 Minn. 425 at 430, 281 N.W. 261 (1938). See also ULMAN, *A JUDGE TAKES THE STAND* 30-34 (1933).

is construed as intended to place the entire responsibility on the defendant, and to protect the plaintiff even against the consequences of his own fault.²⁸ The reason given is the obvious one, that otherwise the intent of the legislature would be defeated. Such acts are, however, few in number and clearly of a special character; and as to the violation of all other statutes, contributory negligence remains effective as a complete defense.²⁹

The most important common law modification is that which bears the name of the last clear chance.³⁰ It originated in 1842 in the case of *Davies v. Mann*,³¹ where the plaintiff left his ass fettered in the highway and the defendant drove into it. The doctrine found ready acceptance in the United States;³² but from its origin it has acquired

Terry Dairy Co. v. Nalley, 146 Ark. 448, 225 S.W. 887 (1920); *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509, 73 N.E. 766 (1905).

²⁸ Prohibiting the sale of dangerous articles to minors: *Pizzo v. Wiemann*, 149 Wis. 235, 134 N.W. 899 (1912); *McMillen v. Steele*, 275 Pa. 584, 119 A. 721 (1923).

Protection of intoxicated persons: *Davies v. McKnight*, 146 Pa. 610, 23 A. 320 (1892); *Hauth v. Sampo*, 100 Neb. 160, 158 N.W. 1036 (1916). Cf. *Mayes v. Byers*, 214 Minn. 54, 7 N.W. (2d) 403 (1943) (requiring stairways in "on sale" liquor establishments to be well lighted); *Bennett Drug Stores v. Mosely*, 67 Ga. App. 347, 20 S.E. (2d) 208 (1942) (sale of poison to person who does not know its character).

Factory acts and other statutes for the protection of workmen: *Osborne v. Salvation Army*, (2d Cir. 1939) 107 F. (2d) 929; *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N.E. 131 (1899); *Caspar v. Lewin*, 82 Kan. 604, 109 P. 657 (1910); *Chicago-Coulterville Coal Co. v. Fidelity & Cas. Co.*, (D.C. Mo. 1904) 130 F. 957.

Railway fencing acts: *Flint & Pere Marquette R. Co. v. Lull*, 28 Mich. 510 (1874); *Congdon v. Central Vermont R. Co.*, 56 Vt. 390, 48 Am. Rep. 793 (1883); *Welty v. Indianapolis & V. R. Co.*, 105 Ind. 55, 4 N.E. 410 (1885); *Atchison, T. & S.F. R. Co. v. Paxton*, 75 Kan. 197, 88 P. 1082 (1907); *Quackenbush v. Wisconsin & M. R. Co.*, 71 Wis. 472, 37 N.W. 834 (1888).

Statutes making railways liable for fires: *West v. Chicago & N. W. R. Co.*, 77 Iowa 654, 35 N.W. 479 (1887); *Bowen v. Boston & A. R. Co.*, 179 Mass. 524, 61 N.E. 141 (1901); *Matthews v. Missouri Pac. R. Co.*, 142 Mo. 645, 44 S.W. 802 (1897); *Peter v. Chicago & N.W. R. Co.*, 121 Mich. 324, 80 N.W. 295 (1899).

²⁹ *Dart v. Pure Oil Co.*, 223 Minn. 526, 27 N.W. (2d) 555 (1947); *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226, 60 N.E. 815 (1901); *Keenan v. Edison Electric Ill. Co.*, 159 Mass. 379, 34 N.E. 366 (1893); *Narramore v. Cleveland, C.C. & St. L. R. Co.*, (6th Cir. 1899) 96 F. 298; *Payne v. Vance*, 103 Ohio St. 59, 133 N.E. 85 (1921); *Smith v. Central of Ga. R. Co.*, 165 Ala. 407, 51 S. 792 (1910); *Cartin v. Meredith*, 153 Ind. 16, 53 N.E. 936 (1899); *Gipson v. Southern R. Co.*, (C.C. Ala. 1905) 140 F. 410; *Brown v. Chicago & N.W. R. Co.*, 109 Wis. 384, 85 N.W. 271 (1901). See Prosser, "Contributory Negligence as Defense to Violation of Statute," 32 MINN. L. REV. 105 (1948).

³⁰ See Schofield, "Davies v. Mann: Theory of Contributory Negligence," 3 HARV. L. REV. 263 (1890); Bohlen, "Contributory Negligence," 21 HARV. L. REV. 233 (1908); Smith, "Last Clear Chance," 82 CENT. L.J. 425, 55 AM. L. REV. 897 (1916); Lowndes, "Contributory Negligence," 22 GEORGETOWN L.J. 674 (1934); James, "Last Clear Chance: A Transitional Doctrine," 47 YALE L.J. 704 (1938); MacIntyre, "The Rationale of Last Clear Chance," 53 HARV. L. REV. 1225 (1940).

³¹ 10 M. & W. 546, 152 Eng. Rep. 588 (1842).

³² "The groans, ineffably and mournfully sad, of Davies' dying donkey, have resounded around the earth. The last lingering gaze from the soft, mild eyes of this docile animal, like the last parting sunbeams of the softest day in spring, has appealed to and

forever the name of the "jackass doctrine," with whatever implications that may carry. In its original form, it was stated to be that where the defendant had the last, and therefore the better, opportunity to avoid the accident, his negligence superseded that of the plaintiff, and contributory negligence was no defense. As in the case of contributory negligence itself, the explanations given are not at all convincing. It is sometimes said³³ that the later negligence of the defendant must necessarily be the greater negligence, and that it is a rule of comparative fault which is being applied. This may be true in some instances where the defendant discovers the plaintiff's helpless situation and his conduct displays reckless disregard of it; but it can scarcely account for many others in which the negligence consists merely of failure to discover the situation at all,³⁴ or of slowness, clumsiness, inadvertence or an error in judgment in dealing with it.³⁵ Most of the courts have talked of proximate cause, which makes no sense at all. If the negligence of the two parties injures a third, as where a collision injures a bystander, it never has been held that the party whose fault is prior in point of time is relieved of responsibility by the mere fact that the negligence of the other is later;³⁶ and no one ever has offered any reason for a different result where the action is between the negligent parties.

The real explanation would appear to be nothing more than a dislike for the defense of contributory negligence, and a rebellion against its application in a group of cases where its hardship is most apparent. The last clear chance has been called a "transitional doctrine,"³⁷ a way

touched the hearts of men. There has girdled the globe a band of sympathy for Davies' immortal 'critter.' Its ghost, like Banquo's ghost, will not down at the behests of the people who are charged with inflicting injuries, nor can its groanings be silenced by the rantings and exhortations of carping critics. The law as enunciated in that case has come to stay." McLain, J., in *Fuller v. Illinois Central R. Co.*, 100 Miss. 705 at 717, 56 S. 783 (1911).

³³ *Wilson v. Southern Traction Co.*, 111 Tex. 361, 234 S.W. 663 (1921); *Rawitzer v. St. Paul City R. Co.*, 93 Minn. 84, 100 N.W. 664 (1904); *Moreno v. Los Angeles Transfer Co.*, 44 Cal. App. 551, 186 P. 800 (1920); *Dildine v. Flynn*, 116 Kan. 563, 227 P. 340 (1924).

³⁴ *Nicol v. Oregon-Washington R. & N. Co.*, 71 Wash. 469, 128 P. 628 (1912); *Pickett v. Wilmington & W. R. Co.*, 117 N.C. 616, 23 S.E. 264 (1895); *Leinbach v. Pickwick Greyhound Lines*, 138 Kan. 50, 23 P. (2d) 449 (1933); *Independent Lumber Co. v. Leatherwood*, 102 Colo. 460, 79 P. (2d) 1052 (1938); *Teakle v. San Pedro, L.A. & S.L. R. Co.*, 32 Utah 276, 90 P. 402 (1907).

³⁵ As for example in *Smith v. Connecticut R. & L. Co.*, 80 Conn. 268, 67 A. 888 (1907); *Clark v. Wilmington & W.R. Co.*, 109 N.C. 430, 14 S.E. 43 (1891).

³⁶ *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 400, 91 P. 436 (1907); *Tet-reault v. Gould*, 83 N.H. 99, 138 A. 544 (1927); *Austin Electric R. Co. v. Faust*, 63 Tex. Civ. App. 91, 133 S.W. 449 (1910).

³⁷ James, "Last Clear Chance: A Transitional Doctrine," 47 Yale L.J. 704 (1938).

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³⁸ *Storr v. New York Central R. Co. v. Masterson*, 126 Ohio S. Watts, 110 Tex. 106, 216 S.W.

³⁹ *Nicol v. Oregon-Washing Pickett v. Wilmington & W. R. Pedro, L.A. & S.L. R. Co.*, 32 U Leatherwood, 102 Colo. 460, 79 Lines, 138 Kan. 50, 23 P. (2d)

⁴⁰ *Indianapolis Traction & (1911); Darling v. Pacific Electr Webster City*, 222 Iowa 849, 270 N.H. 320, 91 A. 179 (1914); *Y (1927).*

⁴¹ *British Columbia Elec. R & R. R. Co.*, 118 N.C. 1010, 2 Morrison, 69 Ark. 289, 62 S.W. Vt. 523, 116 A. 83 (1922).

⁴² See DeMuth, "Derogation 7 Rocky Mt. L. Rev. 161 (193

⁴³ See Gaines, "The Human (1935); Becker, "The Humanita

station on the road to apportionment of damages; but its effect has been to freeze the transition rather than to speed it. Actually the last clear chance cases present one of the worst tangles known to the law. In some jurisdictions the application of the rule has been limited to cases where the plaintiff is helpless and the defendant has in fact discovered the situation;³⁸ in others it is extended to cases where the defendant might have discovered it by the exercise of reasonable care.³⁹ In still others it is applied to situations where the plaintiff is not helpless at all and continues to be negligent, but is unaware of his danger, while the defendant has discovered it.⁴⁰ In still others it is applied to cases where the defendant's antecedent negligence, as in driving a car with defective brakes, has rendered him unable to take advantage of the "last clear chance" he would otherwise have had.⁴¹

Intermingled with these rules there is so much in the way of disagreement over the effect to be given to circumstantial evidence, and whether "ought to have seen" is equivalent to "saw," that there are almost literally forty-eight sets of rules in as many states. There is often the greatest confusion in a single state;⁴² and in many jurisdictions, as the defendant's negligence increases the less his liability will be—the man who looks and discovers the danger but is slow in applying his brakes may be liable, where the man who never looks at all or who has no brakes to apply is not. Missouri has developed a fearful and wonderful "humanitarian doctrine," which seems to be comprehensible only in Missouri, if there;⁴³ and three or four states, such as Illinois,

³⁸ *Storr v. New York Central R. Co.*, 261 N.Y. 348, 185 N.E. 407 (1933); *Cleveland R. Co. v. Masterson*, 126 Ohio St. 42, 183 N.E. 873 (1932); *St. Louis S.W. R. Co. v. Watts*, 110 Tex. 106, 216 S.W. 391 (1919).

³⁹ *Nicol v. Oregon-Washington R. & N. Co.*, 71 Wash. 409, 128 P. 628 (1912); *Pickett v. Wilmington & W. R. Co.*, 117 N.C. 616, 23 S.E. 264 (1895); *Teakle v. San Pedro, L.A. & S.L. R. Co.*, 32 Utah 276, 90 P. 402 (1907); *Independent Lumber Co. v. Leatherwood*, 102 Colo. 460, 79 P. (2d) 1052 (1938); *Leinbach v. Pickwick Greyhound Lines*, 138 Kan. 50, 23 P. (2d) 449 (1933).

⁴⁰ *Indianapolis Traction & Term. Co. v. Croly*, 54 Ind. App. 566, 96 N.E. 973 (1911); *Darling v. Pacific Electric R. Co.*, 197 Cal. 702, 242 P. 703 (1925); *Groves v. Webster City*, 222 Iowa 849, 270 N.W. 329 (1936); *Tyrrell v. Boston & Me. R. Co.*, 77 N.H. 320, 91 A. 179 (1914); *Yazoo & M.V. R. Co. v. Lee*, 148 Miss. 809, 114 S. 866 (1927).

⁴¹ *British Columbia Elec. R. Co. v. Loach*, [1916] 1 A.C. 719; *Lloyd v. Albemarle & R. R. Co.*, 118 N.C. 1010, 24 S.E. 805 (1898); *Little Rock Traction & Elec. Co. v. Morrison*, 69 Ark. 289, 62 S.W. 1045 (1901); *Dent v. Bellows Falls & S.R. St. R. Co.*, 95 Vt. 523, 116 A. 83 (1922).

⁴² See DeMuth, "Derogation of the Common Law Rule of Contributory Negligence," 7 *Rocky Mt. L. Rev.* 161 (1935).

⁴³ See Gaines, "The Humanitarian Doctrine in Missouri," 20 *St. Louis L. Rev.* 113 (1935); Becker, "The Humanitarian Doctrine," 3 *Mo. L. Rev.* 392 (1938).

Minnesota and South Carolina,⁴⁴ repudiate the whole "last clear chance" by name, and then proceed to apply it in cases of discovered peril by miscalling it "wilful negligence," or "proximate cause." It is really a most amazing structure, which could be the work of no one but lawyers.

Quite apart from all this confusion, the real objection to the last clear chance is that it seeks to alleviate the hardships of contributory negligence by shifting the entire loss due to the fault of both parties from the plaintiff to the defendant. It is still no more reasonable to charge the defendant with the plaintiff's share of the consequences of his fault than to charge the plaintiff with the defendant's; and it is no better policy to relieve the negligent plaintiff of all responsibility for his injury than it is to relieve the negligent defendant. The whole floundering, haphazard, makeshift device operates in favor of some plaintiffs by inflicting obvious injustice upon some defendants; but it leaves untouched the greater number of contributory negligence cases in which the necessary time interval or element of discovery does not appear and the last clear chance cannot apply.

When actuaries sit down to calculate liability insurance rates for automobile drivers and other defendants, they must, under the existing state of the law, take into account the certainty that in many cases the insured who negligently injures another will escape all liability; that in others, juries, in partial defiance of the court's instructions, will diminish the damages by some uncertain amount and to that extent divide the loss between the parties; and that in still others, where the last clear chance applies or the instructions are jettisoned completely, the entire loss resulting from the fault of both parties will fall upon the insured. From an actuarial point of view these possibilities undoubtedly, in some unknown degree, balance one another; but as a pattern for the operation of courts and the administration of justice they leave much to be desired.

Apart from the inevitable self-interest of defendants who find an advantage in the present state of the law, proposals for division of the damages meet with two objections. One is that it is impossible to compare fault with fault, and that any apportionment of the loss on the basis of such a comparison can be nothing more than the wildest guess. Obviously any estimate that 40 per cent of the total fault rests with the pedestrian who walks out into the street in the path of an

⁴⁴ *Walldren Express & Van Co. v. Krug*, 291 Ill. 472, 126 N.E. 97 (1928); *Anderson v. Minneapolis, St. P. & S.S.M. R. Co.*, 103 Minn. 224, 114 N.W. 1123 (1908); *Clyde v. Southern Public Utilities Co.*, 109 S.C. 290, 96 S.E. 116 (1918).

automobile, and 60 per cent runs him down, represent a demonstrable fact. The estimate between 25-75 and 75-25 for the plaintiff's damages on an average is one based on the arbitrary assumption that liability rests with the plaintiff, or, if the last clear chance doctrine is applied, and none with the plaintiff. Nor is such an estimate more reasonable than the one which assigns the pain of a broken leg, or the loss of nothing of estimates based on the plaintiff's earnings or permanent disability. The estimate is being made

The other objection has been that the plaintiff is not to be trusted to follow an insurance policy; that their well-known lawyers in the courtroom and their proverbial greed lead them now to plead contributory negligence and return a full verdict, and now to propose to change merely to divide the loss. The proposed change merely robs the plaintiff of a verdict without any guarantee of recovery. This uneasy distrust of the jury has bulked large in the history of the last clear chance doctrine. The fact that damage apportionment is the best, in courts where here the objection has, and why it should be considered.

Appor

The simplest possible method is to divide the damages equally. This is the method developed, in some courts,⁴⁵ which of course has

⁴⁵ Early admiralty cases, around 1800, where the defendant's ship was at fault. *MARSHALL v. GLENN*, 8th ed., 135 (1923).

⁴⁶ *Backham v. Chapman*, Ad. C. File 128, No. 350, Ass. Book (June 1908), 8th ed., 19.

automobile, and 60 per cent with the driver who is not looking and runs him down, represents nothing resembling accuracy based on demonstrable fact. The estimate might quite as well be anywhere between 25-75 and 75-25. Yet it is equally clear that a division of the plaintiff's damages on any such basis is at least more accurate than one based on the arbitrary conclusion that 100 per cent of the responsibility rests with the plaintiff and none whatever with the defendant, or, if the last clear chance is applicable, 100 per cent with the defendant and none with the plaintiff—both of which are demonstrably wrong. Nor is such an estimate in itself any more foolish, or more difficult, than the one which assigns \$2,000 as fair value and compensation for the pain of a broken leg, or the humiliation of a disfigured nose, to say nothing of estimates based on a prognosis of speed of recovery, future earnings or permanent disability. At least the host of cases show that the estimate is being made in practice every day.

The other objection has more substance. It is that juries cannot be trusted to follow an instruction to divide the damages according to fault; that their well-known sympathy for the man on crutches in the courtroom and their proverbial bias against corporations and insurance companies lead them now to ignore convincing evidence of contributory negligence and return a full verdict for the plaintiff, and they will continue to do the same under any apportionment law; and that the proposed change merely robs the defendant of all possibility of a directed verdict without any guarantee that the apportionment will in fact be made. This uneasy distrust of the twelve men, and now women, in the box has bulked large in American negligence law; and it is significant that damage apportionment developed first, and has succeeded best, in courts where there is no jury to contend with. What validity the objection has, and what may be done to meet it, remains to be considered.

Apportionment by the Jury

The simplest possible method of apportionment, and the oldest,⁴⁵ is to divide the damages equally between the negligent parties. This is the method developed, around 1700, by the English admiralty courts,⁴⁶ which of course had no jury, and were strongly influenced

⁴⁵ Early admiralty cases, around 1614, divided the loss evenly where only the defendant's ship was at fault. MARSDEN, *A TREATISE ON THE LAW OF COLLISIONS AT SEA*, 8th ed., 135 (1923).

⁴⁶ *Backham v. Chapman*, Ad. Ct. Ass. Book (Jan. 20, 1695); *Noden v. Ashton*, Libels, File 128, No. 350, Ass. Book (June 20, 1706). See MARSDEN, *A TREATISE ON THE LAW OF COLLISIONS AT SEA*, 8th ed., 195 (1923).

by international rules derived from the civil law. It is still followed by the American courts of admiralty in collision cases.⁴⁷ Crude as it is, it probably results, in most instances, in a closer approximation of substantial justice than a denial of all recovery. England continued to adhere to the same rule⁴⁸ until 1911, when it conformed to the Brussels Maritime Convention⁴⁹ of 1909 by adopting a statute providing for a division of the damages "in proportion to the degree in which each vessel was at fault."⁵⁰

There has been an undercurrent of dissatisfaction with the arbitrary American rule, and several of the lower federal courts have uttered complaints about it where the fault of the two parties was out of all proportion.⁵¹ It has been proposed from time to time⁵² that the United

⁴⁷ *The Schooner Catherine*, 17 How. (58 U.S.) 170 (1855); *The Atlas*, 93 U.S. 302, 23 L. Ed. 963 (1876); *The North Star*, 106 U.S. 17, 1 S.Ct. 41 (1882); *Belden v. Chase*, 150 U.S. 674, 14 S.Ct. 264 (1893); *Ralli v. Throop*, 157 U.S. 386, 15 S.Ct. 647 (1895); *The Chattanooga*, 173 U.S. 540, 19 S.Ct. 491 (1899); *The New York*, 175 U.S. 187, 20 S.Ct. 57 (1899); *The Albert Dumois*, 177 U.S. 250, 20 S.Ct. 595 (1900); *Erie R. Co. v. Erie & W. Transp. Co.*, 204 U.S. 220, 27 S.Ct. 246 (1906); *The Eugene F. Moran*, 212 U.S. 466, 29 S.Ct. 339 (1909); *White Oak Transp. Co. v. Boston, Cape Cod & N.Y.C. Co.*, 258 U.S. 341, 42 S.Ct. 338 (1922); *United States v. Norwegian Bark Thekla*, 266 U.S. 328, 45 S.Ct. 112 (1924); *Aktieselskabet Cuzco v. The Sucarisco*, 294 U.S. 394, 55 S.Ct. 467 (1935). See Huger, "Proportional Damage Rule in Collisions at Sea," 13 *CONN. L.Q.* 531 (1927); Sprague, "Divided Damages," 6 *N.Y. UNIV. L.Q.* 15 (1928); Mole and Wilson, "A Study of Comparative Negligence," 17 *CONN. L.Q.* 333 at 339-359 (1932); Derby, "Divided Damages in Maritime Cases," 33 *VA. L. REV.* 389 (1947); Dickinson and Andrews, "A Decade of Admiralty," 36 *CALIF. L. REV.* 169 (1948); Turk, "Comparative Negligence on the March," 28 *CHICAGO L. REV.* 189, 218-238 (1950).

⁴⁸ *Huy v. La Neve*, 2 Shaw Sc. App. Cas. 395 (1824); *Cayzer v. Cartor*, 9 App. Cas. 873 (1884).

⁴⁹ See 6 *BENEDICT, AMERICAN ADMIRALTY*, 6th ed., 4 (1941).

⁵⁰ The English Maritime Conventions Act of 1911, 1 & 2 Geo. V, c. 57, §1 provides that: "(1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault: Provided that (a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and (b) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed. . . ."

⁵¹ "We reach this conclusion with regret. The [libellant's] fault was far more egregious. This is a case where the Continental rule of comparative negligence would produce a more just result." *Luckenbach S.S. Co. v. United States*, (2d Cir. 1946) 157 F. (2d) 250 at 252. See also *The City of Chattanooga*, (2d Cir. 1935) 79 F. (2d) 23 at 23; *The Margaret*, (3d Cir. 1929) 30 F. (2d) 923 at 928; *Postal S.S. Corp. v. Southern Pac. Co.*, (2d Cir. 1940) 112 F. (2d) 297 at 298.

⁵² The American delegation to the Convention signed the final draft. The President and the Secretary of State proposed legislation, but discontinued their efforts when many protests were raised. In 1922 the Maritime Law Association of the United States apparently favored adoption of the English statute, but reversed its stand in 1927. In 1925 the Committee on Admiralty of the American Bar Association approved the change; but in 1929 the Executive Committee of the Association reported that, as the existing law had operated satisfactorily for so many years, no change should be made. The history is well reviewed

States should adopt the received a favorable reportations,⁵³ but World War development in the admir question arose in cases w injuries to maritime emp plied, and the libellant's estimated fault.⁵⁴ These in the labor agitation wh

Apart from admiralty rule before 1908. Illinois ments with "degrees" worked out the general i restrictions later to be c liability section of the Ge ment rule applicable to in two counties in the st enacted in 1825 by lawye appeared clearly to call fo and might well have led Louisiana courts, under th the persuasive authority desire for uniformity, ign and it has remained a dea

in short space in Turk, "Compar 189, 234-236 (1950).

⁵³ Executive Report No. 4, S

⁵⁴ 4 *BENEDICT, AMERICAN A*

⁵⁵ The apportionment rule Morris, 137 U.S. 1, 11 S.Ct. 29 (

⁵⁶ *The Explorer*, (D.C. La. 18 477; *The Mystic*, (D.C. N.Y. 189 263 F. 523.

⁵⁷ See text infra at notes 11

⁵⁸ See text infra at notes 120

⁵⁹ See text infra at notes 124

⁶⁰ See text infra at notes 140

⁶¹ Fla. Stat. Ann. (1944) §74

⁶² Md. Acts 1902, c. 412.

⁶³ Now La. Civ. Code (Dart estimated at the exact value of the to circumstances, if the owner of

⁶⁴ *Fleytas v. Pontchartrain R.* (1846); *Belle Alliance Co. v. Tex lano v. Morgan's L. & T. R. & S.* 126 La. 787, 52 S. 1025 (1910);

States should adopt the English rule, and in 1937 the proposal received a favorable report from the Senate Committee on Foreign Relations,⁵³ but World War II prevented any action.⁵⁴ One important development in the admiralty courts, however, was that when the question arose in cases which did not involve collisions,⁵⁵ but negligent injuries to maritime employees, the rule of equal division was not applied, and the libellant's recovery was reduced in proportion to his estimated fault.⁵⁶ These admiralty decisions played a significant part in the labor agitation which finally led to legislation.

Apart from admiralty there was little change in the common law rule before 1908. Illinois⁵⁷ and Kansas⁵⁸ tried, and abandoned, experiments with "degrees" of negligence. Tennessee⁵⁹ and Georgia⁶⁰ worked out the general idea of apportionment of damages, subject to restrictions later to be considered, and Florida⁶¹ copied the railroad liability section of the Georgia code. Maryland⁶² made the apportionment rule applicable to cases of miners and clay workers employed in two counties in the state. Louisiana had a provision in its code,⁶³ enacted in 1825 by lawyers at least familiar with the civil law, which appeared clearly to call for apportionment in cases of property damage, and might well have led to a general apportionment rule; but the Louisiana courts, under the pressure of expanding industry, as well as the persuasive authority of cases from adjoining jurisdictions and a desire for uniformity, ignored the provision or construed it away,⁶⁴ and it has remained a dead letter on the books.

in short space in Turk, "Comparative Negligence on the March," 28 *CUM-KENT L. REV.* 189, 234-236 (1950).

⁵³ Executive Report No. 4, Senate, 76th Cong., 1st sess. (1939).

⁵⁴ 4 BENDICT, *AMERICAN ADMIRALTY*, 6th ed., 4, 49, 262 (1941).

⁵⁵ The apportionment rule was not limited to collision cases. *The Steamer Max Morris*, 137 U.S. 1, 11 S.Ct. 29 (1890); *The Scandanavia*, (D.C. Me. 1907) 156 F. 403.

⁵⁶ *The Explorer*, (D.C. La. 1884) 20 F. 135; *Olson v. Flavel*, (D.C. Ore. 1888) 34 F. 477; *The Mystic*, (D.C. N.Y. 1890) 44 F. 398; *Cricket S.S. Co. v. Parry*, (2d Cir. 1920) 263 F. 523.

⁵⁷ See text infra at notes 110-119.

⁵⁸ See text infra at notes 120-121.

⁵⁹ See text infra at notes 124, 189-190.

⁶⁰ See text infra at notes 146-151, 191-192.

⁶¹ Fla. Stat. Ann. (1944) §768.06, enacted in 1887.

⁶² Md. Acts 1902, c. 412.

⁶³ Now La. Civ. Code (Dart. 1945), art. 2323: "The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently."

⁶⁴ *Fleytas v. Pontchartrain R. Co.*, 18 La. 339 (1841); *Myers v. Perry*, 1 La. Ann. 372 (1846); *Belle Alliance Co. v. Texas & Pac. R. Co.*, 125 La. 777, 51 S. 846 (1910); *Ortolano v. Morgan's L. & T. R. & S. Co.*, 109 La. 902, 33 S. 914 (1903); *Burvant v. Wolfe*, 126 La. 787, 52 S. 1025 (1910); *Legendre v. Consumers' Seltzer & M.W. Co.*, 147 La.

The apportionment of damages was first brought home to most of the country in 1908 by the Federal Employers' Liability Act,⁶⁶ which applied to all negligence actions, in the federal or state courts, for injuries to railroad employees engaged in interstate commerce.⁶⁶ It was, of course, an outcome of the prolonged labor agitation, and it preceded by only a few years the wave of workmen's compensation acts. It contained the following provision:⁶⁷

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The example of the Federal Employers' Liability Act set off a flood of labor legislation of the same general kind. The apportionment provision was incorporated by reference⁶⁸ into the Jones Act and the Merchant Marine Act, enacted in 1915 and 1920,⁶⁹ and applicable to injuries to maritime employees. The provision was repeated in substance in a series of state "employers' liability acts," covering rail-

120, 84 S. 517 (1920); *Inman v. Silver Fleet of Memphis*, (La. App. 1937) 17 S. 435; *Mason v. Price*, (La. App. 1947) 32 S. (2d) 853. See Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 LA. L. REV. 125 (1945); Hillyer, "Comparative Negligence in Louisiana," 11 TULANE L. REV. 112 (1936).

⁶⁵ 35 Stat. L. 66 (1908), now 45 U.S.C. (1946) §§51-60.

⁶⁶ The first statute passed, in 1906, was held unconstitutional because it included railroad employees engaged in intrastate commerce. *Employers' Liability Cases*, 207 U.S. 463, 28 S.Ct. 141 (1908). With the change made, the second statute was held constitutional in the *Second Employers' Liability Cases*, 223 U.S. 1, 32 S.Ct. 169 (1912).

⁶⁷ 35 Stat. L. 66 (1908), 45 U.S.C. (1946) §53.

⁶⁸ The history of the act is reviewed in *The Arizona v. Anelich*, 298 U.S. 110, 56 S.Ct. 707 (1936).

⁶⁹ March 4, 1915, c. 153, §20. 38 Stat. L. 1185; June 5, 1920, c. 250, §33, 41 Stat. L. 1007; now 46 U.S.C. (1946) §688. Applied in *Stewart v. United States Shipping Board E.F. Corp.*, (D.C. N.Y. 1925) 7 F. (2d) 676; *Johnson v. United States*, (D.C. N.Y. 1934) 7 F. Supp. 133; *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S.Ct. 262 (1939); *Beadle v. Spencer*, 298 U.S. 124, 56 S.Ct. 712 (1936); *Cleveland-Cliffs Iron Co. v. Martini*, (6th Cir. 1938) 96 F. (2d) 632; *Destrochers v. United States*, (2d Cir. 1939) 105 F. (2d) 919; *McCauley v. Pacific Atlantic S.S. Co.*, 167 Ore. 80, 115 P. (2d) 307 (1941); *Brown v. Interconatal Fisheries*, 34 Wash. (2d) 48, 207 P. (2d) 1205 (1949); *Alexander v. Philadelphia Ceiling & Stevedoring Co.*, (D.C. Pa. 1951) 99 F. Supp. 178.

road employees engaged in in Colorado,⁷⁰ Iowa,⁷¹ Kansas,⁷² North Carolina,⁷³ North Texas,⁷⁴ Virginia,⁷⁵ and West Virginia,⁷⁶ were made applicable to occupations, usually hazardous, in Florida,⁷⁷ Iowa,⁷⁸ and Oklahoma,⁷⁹ and corporations in Arkansas.⁸⁰

⁷⁰ Colo. Stat. Ann. (1935) c.

⁷¹ Iowa Code Ann. (1949) (1950).

⁷² Kan. Gen. Stat. Ann. (1935)

⁷³ Ky. Rev. Stat. (1950) §277 300 Ky. 835, 190 S.W. (2d) 542

⁷⁴ Minn. Stat. Ann. (1949) §

⁷⁵ Mont. Rev. Laws (1947) §

(9th Cir. 1940) 112 F. (2d) 609, 68, 170 P. (2d) 768 (1946). The cars or defects in cars or other equ

⁷⁶ N.C. Gen. Stat. (1943) c. and tramroads. Applied in *Stewart*

385 (1927); *Stamey v. Suncrest L. Lean v. Andrews Hardwood Co.*, 2

apply unless the employee is engaged Co., 204 N.C. 525, 168 S.E. 833 (1933)

⁷⁷ N.D. Rev. Laws (1943) §

⁷⁸ S.C. Code (1942) §8367. 7 44 S.E. (2d) 537 (1947).

⁷⁹ S.D. Code (1939) §52.0945

⁸⁰ Tex. Civ. Stat. Ann. (Vern S.F.&T. R. Co. v. Jenkins, (Tex. C

T. R. Co. v. Bright, (Tex. Civ. App. (Tex. Civ. App. 1914) 166 S.W. 9

Civ. App. 1916) 185 S.W. 901; *Lar*

⁸¹ Va. Code Ann. (1942) §57

⁸² Wyo. Comp. Stat. Ann. (19 Chambers, 20 Ariz. 54, 176 P. 83

199, 196 P. 167 (1920).

⁸³ Fla. Stat. (1941) §769.03. 7 91 S. 559 (1922); *Tampa Electric*

Key West Electric Co. v. Higgs, 11

⁸⁴ Iowa Code Ann. (1949) §8 Coal Co., 192 Iowa 1280, 184 N.W.

N.W. 229 (1931); *Lang v. Hedrick McNeill*, 237 Iowa 1120, 24 N.W.

⁸⁵ Ore. Comp. Laws Ann. (194 Co., 71 Ore. 249, 142 P. 578 (191

Kuntz v. Emerson Hardwood Co., 9 Washington R. & N. Co., 141 Ore.

⁸⁶ Ark. Stat. Ann. (1947) §81 492, 60 S.W. (2d) 572 (1933); L.

83 (1922); *Hartman-Clark Bros. Co.* (1935); *Gookin v. Boyd-Sieard Co.* *Dierks Lumber & Coal Co. v. Noles*

The legislation soon spread beyond the labor field. The apportionment provision was repeated in a 1920 federal statute⁸⁸ covering any death on the high seas. In Florida⁸⁹ and Iowa⁹⁰ the provision was made applicable to any injury inflicted by a railroad. In Virginia⁹¹ it has been applied to accidents at crossings arising out of the railroad's failure to give the required signals; and an old Tennessee statute⁹² has been given the same effect by construction. Several other states⁹³ have enacted apportionment provisions which apply to labor or to railroad cases with limitations as to the extent of the plaintiff's negligence, to be considered below. Finally, Mississippi adopted in 1910 a general act⁹⁴ applying apportionment to all actions for personal injuries, and expanded it in 1920 to include damages to property.⁹⁵ Mississippi thus became the first, and is still the only, state to establish apportionment as a general rule. A similar general act is now in force in the Canal Zone.⁹⁶

⁸⁸ March 30, 1920, c. 111, §6, 41 Stat. L. 537, now 46 U.S.C. (1946) 766.

⁸⁹ Fla. Stat. Ann. (1944) §768.06. Applied in *Dina v. Seaboard Air Line R. Co.*, 90 Fla. 558, 106 S. 416 (1926); *Florida East Coast R. Co. v. Townsend*, 104 Fla. 362, 140 S. 196 (1932), on rehearing 104 Fla. 371, 142 S. 909 (1932); *Atlantic Coast Line R. Co. v. Britton*, 109 Fla. 212, 146 S. 842 (1933); *Atlantic Coast Line R. Co. v. Pidd*, (5th Cir. 1952) 197 F. (2d) 153.

⁹⁰ Iowa Code (1946) vol 2, p. 1843, Civil Proc. Rule 97.

⁹¹ Va. Code Ann. (1942) §3959. Applied in *State & City Bank & Trust Co. v. Norfolk & W. R. Co.*, 144 Va. 185, 131 S.E. 331 (1926); *Southern R. Co. v. Johnson*, 151 Va. 345, 146 S.E. 363 (1929); *Norfolk & W. R. Co. v. Hardy*, 152 Va. 783, 148 S.E. 839 (1929); *Norfolk & W. R. Co. v. White*, 158 Va. 243, 163 S.E. 530 (1931); *Southern R. Co. v. Whetzel*, 159 Va. 796, 167 S.E. 427 (1933); *Chesapeake & O. R. Co. v. Pulliam*, 185 Va. 908, 41 S.E. (2d) 54 (1947). This has no application when the signals are given. *Norfolk & W. R. Co. v. Epling*, 189 Va. 551, 53 S.E. (2d) 817 (1949).

⁹² Tenn. Code Ann. (Williams, 1934) §2628-30, enacted in 1855. It was construed and applied to *Railroad v. Walker*, 11 Heisk. (58 Tenn.) 383 (1872); *Nashville & C. R. Co. v. Nowlin*, 1 Lea (69 Tenn.) 523 (1878); *Tennessee Central R. Co. v. Page*, 153 Tenn. 84, 282 S.W. 376 (1926); *Tennessee Central R. Co. v. Binklev*, 127 Tenn. 77, 153 S.W. 59 (1912); *Illinois Central R. Co. v. Sigler*, (6th Cir. 1941) 122 F. (2d) 279; *Southern R. Co. v. Koger*, (6th Cir. 1915) 219 F. 702.

⁹³ See text *infra* at notes 108-173.

⁹⁴ Miss. Laws (1910) c. 135. Held not applicable to property damage in *Krebs v. Pascagoula St. R. & P. Co.*, 117 Miss. 771, 78 S. 753 (1918).

⁹⁵ Miss. Laws (1920) c. 312. The amended act is now Miss. Code Ann. (1942) §1454, reading as follows: "In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

Applied in *Natchez & S.R. Co. v. Crawford*, 99 Miss. 697, 55 S. 596 (1911); *Yazoo & M.V. R. Co. v. Carroll*, 103 Miss. 830, 60 S. 1013 (1913); *Yazoo & M.V. R. Co. v. Williams*, 114 Miss. 236, 74 S. 835 (1917); *Tallahala Lumber Co. v. Holliman*, 126 Miss. 308, 87 S. 661 (1921); *Seifferman v. Leach*, 161 Miss. 853, 138 S. 563 (1932); *Illinois Cent. R. Co. v. Humphries*, 174 Miss. 459, 164 S. 22 (1935).

⁹⁶ Canal Zone Civ. Code (1934) §977. Applied in *Panama R. Co. v. Davis*, (5th Cir. 1936) 82 F. (2d) 123.

Except where the statute acts are held to require apportionment plaintiff's negligence is equal to and even though the one is contributory. The apportionment must be made and it is error not to instruct that it is a great deal of rather casual apportionment the plaintiff's recovery must be reduced if negligence has been "causal," or has been contributory. It seems to be little doubt that, on apportionment must be made on the basis of comparative contribution.¹⁰⁰ It is g

⁹⁷ *Yazoo & M.V. R. Co. v. Carroll*, 103 Miss. 830, 60 S. 1013 (1913); *N. R. Co. v. Wene*, (7th Cir. 1913) 202 F. (6th Cir. 1914) 214 F. 952; *Pennsylvania Templeton v. Charleston & W.C. R. Co.*, 28 Wyo. 281, 201 P. 165 (1921); *Sweeney*, 28 Wyo. 57, 201 P. 165 (1921); *Humphreys v. Crosby Lumber & Mfg. Co. v. Du*, 750, 128 S.E. 272 (1925); *also Yazoo & M.V. R. Co. v. Williams*, 114 Miss. 236, 74 S. 835 (1917); *of \$12,000 was reduced to \$5,000 by way of*

⁹⁸ *Norfolk & Western R. Co. v. Earnest*, 237 U.S. 499 (1915); *Air Line R. Co. v. Tilghman*, 237 U.S. 499 (1915); *Co. v. Ballard*, (5th Cir. 1940) 108 F. (2d) 439, 290 N.Y.S. 17 (1936).

"In cases of this character, where the defendant and plaintiff were guilty of negligence contributed to the accident, and the jury has carefully instructed concerning the rule of comparative negligence, it is the duty of the jury first to determine whether the negligence of the defendant is a proximate cause of the injury, and if that issue is in dispute, the jury should consider whether the negligence of the plaintiff, then the jury should consider whether the negligence of the plaintiff, then, looking at the combined negligence of both parties, the jury should determine the amount of recovery, and using their best judgment based on the facts, the jury should determine the amount of recovery. The subject for the jury to consider is in what proportion the blame, or fault, should be apportioned, of the whole blame, or fault, should be apportioned, the jury must determine the amount of recovery, and deduct therefrom a proportionate share of the negligence charged by them against the plaintiff. We do not mean to say that the method by which the jury may proceed to reach its conclusions in such cases, but rather simply to indicate an order of procedure in such cases." *Wain v. Pennsylvania Co.*, 251 Pa. 378, 100 A. 228 (1918).

This is the best statement of the instruction.

⁹⁹ See for example *Waterford Lumber Co. v. Solomon*, 172 Miss. 188, 188 Miss. 207, 194 S. 506 (1940); *Engelbrecht*, (1933).

¹⁰⁰ See cases cited *infra*: note 112.

Except where the statute itself provides some limitation, these acts are held to require apportionment of the damages even though the plaintiff's negligence is equal to or greater than that of the defendant, and even though the one is considered "gross" and the other "slight."⁹⁷ The apportionment must be made if negligence of both parties is found, and it is error not to instruct the jury to make it.⁹⁸ Although there is a great deal of rather casual and careless language to the effect that the plaintiff's recovery must be diminished to the extent that his negligence has been "causal," or has "contributed" to his injury,⁹⁹ there seems to be little doubt that, once causation is found, the apportionment must be made on the basis of comparative fault rather than comparative contribution.¹⁰⁰ It is generally agreed, except for two de-

⁹⁷ *Yazoo & M.V. R. Co. v. Carroll*, 103 Miss. 830, 60 S. 1013 (1913); *Louisville & N. R. Co. v. Wenc*, (7th Cir. 1913) 202 F. 887; *New York C. & St. L. R. Co. v. Niebel*, (6th Cir. 1914) 214 F. 952; *Pennsylvania Co. v. Cole*, (6th Cir. 1914) 214 F. 948; *Templeton v. Charleston & W.C. R. Co.*, 117 S.C. 44, 108 S.E. 363 (1921); *Hines v. Sweeney*, 28 Wyo. 57, 201 P. 165 (1921); *Gregory v. Seaboard Air Line R. Co.*, 142 Va. 750, 128 S.E. 272 (1925); *Humphreys v. East St. L. & S. R. Co.*, 253 Ill. App. 450 (1929); *Crosby Lumber & Mfg. Co. v. Durham*, 181 Miss. 559, 179 S. 285 (1938). See also *Yazoo & M.V. R. Co. v. Williams*, 114 Miss. 236, 74 S. 835 (1917), where a verdict of \$12,000 was reduced to \$5,000 by way of apportionment.

⁹⁸ *Norfolk & Western R. Co. v. Earnest*, 229 U.S. 114, 33 S.Ct. 654 (1913); *Seaboard Air Line R. Co. v. Tilghman*, 237 U.S. 499, 35 S.Ct. 653 (1915); *Atchison, T. & S.F. R. Co. v. Ballard*, (5th Cir. 1940) 108 F. (2d) 768; *Sherry v. Pennsylvania R. Co.*, 248 App. Div. 439, 290 N.Y.S. 17 (1936).

"In cases of this character, where the evidence justifies a finding that both defendant and plaintiff were guilty of negligence contributing to the accident, the jury should be carefully instructed concerning the rule of comparative negligence established by the Federal Statute. It is the duty of the jury first to determine whether or not the defendant was guilty of causal negligence, for if that issue is determined against the plaintiff there can be no recovery. If the issue of the defendant's negligence is determined in favor of the plaintiff, then the jury should consider whether or not he, too, was guilty of negligence directly contributing to the happening of the accident, and, if they decide that issue against the plaintiff, then, looking at the combined negligence of the plaintiff and defendant as a whole, and using their best judgment based on the evidence before them, the next material subject for the jury to consider is in what ratio should this combined negligence be distributed between the parties to the accident; in other words, how much, or what proportion, of the whole blame, or fault, should be attributable to each. After this problem is solved, the jury must determine the amount of the damages suffered through the combined negligence, and deduct therefrom a proportion corresponding with the share of negligence charged by them against the plaintiff, . . . to be awarded as damages to the plaintiff. We do not mean to say that the method just outlined is the only way in which a jury may proceed to reach its conclusions in the trial of causes involving comparative negligence, but rather simply to indicate an orderly manner for considering and determining such cases." *Waina v. Pennsylvania Co.*, 251 Pa. 213 at 221, 96 A. 461 (1915).

This is the best statement of the instruction to the jury the writer has found.

⁹⁹ See for example *Waterford Lumber Co. v. Jacobs*, 132 Miss. 638, 97 S. 187 (1923); *Solomon v. Continental Baking Co.*, 172 Miss. 388, 160 S. 732 (1935); *Avent v. Tucker*, 188 Miss. 207, 194 S. 596 (1940); *Engebrecht v. Bradley*, 211 Wis. 1, 247 N.W. 451 (1933).

¹⁰⁰ See cases cited *infra* note 112.

cisions that obviously blundered,¹⁰¹ that the recoverable damages must be reduced in the proportion which the plaintiff's fault, or the extent of his departure from the required standard of conduct, bears to the total fault of plaintiff and defendant; and not in the proportion which the one bears to the other, or to the extent of the difference between them. Thus where the plaintiff's estimated negligence is found to be 20% of the total, and the defendant's 80%, the plaintiff must recover 80% of his damages, and not 75% or 60%.¹⁰²

When one seeks to discover from the appellate decisions some clue as to what juries actually do under the instruction to divide the damages, the information to be gleaned is disappointingly meagre. The cases are rather dismal reading. Normally there are a number of assignments of error, and the one relating to apportionment complains of some alleged vice in the instruction, which is corrected, or found not to exist, or not to be prejudicial. Where the amount of the award is challenged directly, the court often decides that contributory negligence was not so clearly established that it can say as a matter of law that the jury was wrong in failing to apportion at all;¹⁰³ or that the figure found is not so clearly the maximum justified by the evidence of damages as to indicate that the jury did not follow the instruction.¹⁰⁴

¹⁰¹ In *Paluczek v. Jones*, 209 Wis. 640 at 643, 245 N.W. 655 (1932), it was said that the plaintiff's damages must be diminished . . . "in such ratio as his negligence bears to the other's." In *Cameron v. Union Automobile Ins. Co.*, 210 Wis. 659, 246 N.W. 420, 247 N.W. 453 (1933), this statement was withdrawn, and it was made clear that the reduction must be in proportion to the combined negligence. *Accord*, *Engelbrecht v. Bradley*, 211 Wis. 1, 247 N.W. 451 (1933).

In *Patterson v. Kerr*, 127 Neb. 73, 254 N.W. 704 (1934), where the ratio was found to be 1 to 6, it was said that the damages must be reduced by $\frac{1}{6}$. The case is out of line with *Morrison v. Scotts Bluff County*, 104 Neb. 254, 177 N.W. 158 (1920), and *Sgroi v. Yellow Cab & Baggage Co.*, 124 Neb. 525, 247 N.W. 355 (1933), which make it clear that the reduction must be by $\frac{1}{6}$.

¹⁰² *Norfolk & Western R. Co. v. Earnest*, 229 U.S. 114, 33 S.Ct. 654 (1913); *Wains v. Pennsylvania R. Co.*, 251 Pa. 215, 96 A. 461 (1915); *Anest v. Columbin & P.S. R. Co.*, 89 Wash. 609, 154 P. 1100 (1916); *Newkirk v. Pryor*, (Mo. App. 1916) 183 S.W. 682; *Payne v. Lind*, 106 Ohio St. 14, 138 N.E. 366 (1922); *Louisville & N. R. Co. v. Beck*, 196 Ind. 238, 145 N.E. 886, 147 N.E. 776 (1925); *Cameron v. Union Automobile Ins. Co.*, 210 Wis. 659, 246 N.W. 420, 247 N.W. 453 (1933); *Sgroi v. Yellow Cab & Baggage Co.*, 124 Neb. 525, 247 N.W. 355 (1933); *Goodman v. Chicago, B. & Q. R. Co.*, 288 Ill. App. 320, 7 N.E. (2d) 393 (1937); *Buchanan v. Chicago & N.W. R. Co.*, (7th Cir. 1947) 159 F. (2d) 576.

¹⁰³ See, for example, among many cases, *Jackson v. Rutledge*, 188 Ind. 415, 122 N.E. 579 (1917); *Union Pac. R. Co. v. Hadley*, 246 U.S. 330, 38 S.Ct. 318 (1918); *Matthews v. Atchison, T. & S.F. R. Co.*, 54 Cal. App. (2d) 549, 129 P. (2d) 435 (1942); *Missouri Pac. R. Co. v. Zolliecoffer*, 209 Ark. 559, 191 S.W. (2d) 587 (1946); *Ericksen v. Southern Pac. R. Co.*, 234 P. (2d) 279 (Cal. 1951); *Price v. McNeill*, 237 Iowa 1120, 24 N.W. (2d) 464 (1946); *Ericksen v. Southern Pacific Co.*, (Cal. 1952) 246 P. (2d) 642.

¹⁰⁴ See for example, among many cases, *Louisville & N. R. Co. v. Wene*, (7th Cir. 1913) 202 F. 887; *Burke v. Chicago & N.W. R. Co.*, 131 Minn. 209, 154 N.W. 960 (1915); *Godby v. Wilson*, 203 Ill. App. 612 (1916); *Ruppell v. New York Central R.*

In these cases it is quite clear that the jury did, and in some

There are, however, a few cases where negligence has been clear and the damages definitely equal to the maximum that there could be no doubt about. Occasionally a new rule is a remittitur.¹⁰⁷ It is difficult to say that of these cases is disproportionate to what normally to be expected of a jury. It is to lend a great deal of support to the jury to be trusted, with an injunction to divide the damages, even if the result is not. They suggest that there might be a remittitur should have been

Co., 171 App. Div. 832, 157 N.Y.S. 2d 78, 227 P. 1009 (1924); *New York & N.O. R. Co. v. McGinnis*, (Tex. Civ. App. 1935) 81 S.W. (2d) 190 S. 478 (1939); *Katela v. Baltimore & Ohio R. Co.*, 842; *Powell v. Proctor*, 143 Fla. 100, (Cal. 1942) 124 P. (2d) 670.

¹⁰⁵ See for example *New York & N.O. R. Co. v. Leach*, 161 Miss. 853, 138 S.W. (2d) 152 Va. 783, 148 S.E. 839 (1929).

¹⁰⁶ *Atlantic Coast Line R. Co. v. Leach*, 161 Miss. 853, 138 S.W. (2d) 152 Va. 783, 148 S.E. 839 (1929).

¹⁰⁷ See, for example, among many cases, *New York & N.O. R. Co. v. Leach*, 161 Miss. 853, 138 S.W. (2d) 152 Va. 783, 148 S.E. 839 (1929); *Atlantic Coast Line R. Co. v. Leach*, 161 Miss. 853, 138 S.W. (2d) 152 Va. 783, 148 S.E. 839 (1929); *Williams v. Williams*, 114 Miss. 236, 74 S. 8 (1920); *Tallahala Lumber Co. v. & N. R. Co. v. Harrison*, 84 Fla. 83 Fla. 537, 91 S. 559 (1922); *Jefferson v. Edward Hines Yellow*, 140 (1923); *Tampa Electric Co. v. Kn*, (1926); *Tampa Electric Co. v. Kn*, Line R. Co. v. Watkins, 97 Fla. Watson, 103 Fla. 477, 137 S. 719 (1931); *Tampa Electric Florida East Coast R. Co. v. Town*, 371, 142 S. 909 (1932); *Atlantic Gulf & S.I. R. Co. v. Bond*, 181 N. Co. v. Bramlett, (Miss. 1939) 188 49, 189 S. 203 (1939); *Fegan v. L*, Missouri Pac. R. Co. v. Haigler, 2 ing Co. v. Brown, 196 Miss. 131, dell, 209 Ark. 569, 191 S.W. (2d) 250 Ala. 431, 34 S. (2d) 848 (19

In these cases it is quite clear that the court simply does not know what the jury did, and in some instances it has said so frankly.¹⁰⁵

There are, however, a good many cases in which the contributory negligence has been clear as a matter of law, and the sum awarded so definitely equal to the maximum which the evidence would justify that there could be no doubt that the jury did not make the apportionment. Occasionally a new trial has been ordered;¹⁰⁶ more commonly a remittitur.¹⁰⁷ It is difficult to escape the impression that the number of these cases is disproportionately large, and greatly exceeds what is normally to be expected on the issue of damages alone. They appear to lend a great deal of support to the assertion that the jury is not always to be trusted, with an injured man before it, to follow instructions and divide the damages, even where the plaintiff is undoubtedly at fault. They suggest that there must be many more cases in which the apportionment should have been made but was not in fact made, and the

Co., 171 App. Div. 832, 157 N.Y.S. 1095 (1916); *Ames v. Western Pac. R. Co.*, 48 Nev. 78, 227 P. 1009 (1924); *Norfolk & W. R. Co. v. White*, (Va. 1931) 160 S.E. 218; *Texas & N.O. R. Co. v. McGinnis*, 130 Tex. 338, 109 S.W. (2d) 160 (1937) affirming (Tex. Civ. App. 1935) 81 S.W. (2d) 200; *Tampa Electric R. Co. v. Hardy*, 139 Fla. 142, 190 S. 478 (1939); *Katela v. Baltimore & Ohio R. Co.*, (6th Cir. 1939) 104 F. (2d) 842; *Powell v. Proctor*, 143 Fla. 153, 196 S. 419 (1940); *Metz v. Southern Pac. Co.*, (Cal. 1942) 124 P. (2d) 670.

¹⁰⁵ See for example *New York Central & H.R. R. Co. v. Banker*, (2d Cir. 1915) 224 F. 351; *Katela v. Baltimore & Ohio R. Co.*, (6th Cir. 1939) 104 F. (2d) 842.

¹⁰⁶ *Atlantic Coast Line R. Co. v. Hobbs*, 71 Fla. 109, 70 S. 939 (1916); *Seifferman v. Leach*, 161 Miss. 853, 138 S. 563 (1932). See also *Norfolk & W. R. Co. v. Hardy*, 152 Va. 783, 148 S.E. 839 (1929), where there was testimony of jurymen that they did not apportion.

¹⁰⁷ See, for example, among many cases, *Cain v. Southern R. Co.*, (D.C. Tenn. 1911) 199 F. 211; *Atlantic Coast Line R. Co. v. Weir*, 63 Fla. 69, 58 S. 641 (1912); *Pyles v. Atchison, T. & S.F. R. Co.*, 97 Kan. 455, 155 P. 788 (1916); *Yazoo & M.V. R. Co. v. Williams*, 114 Miss. 236, 74 S. 835 (1917); *Florida East Coast R. Co. v. Mencham*, 77 Fla. 701, 82 S. 232 (1919); *Atlantic Coast Line R. Co. v. Conant*, 79 Fla. 668, 84 S. 688 (1920); *Tallahala Lumber Co. v. Holliman*, 125 Miss. 308, 87 S. 661 (1921); *Louisville & N. R. Co. v. Harrison*, 84 Fla. 497, 94 S. 382 (1922); *Tampa Electric Co. v. Limpus*, 83 Fla. 537, 91 S. 559 (1922); *Johnson v. Union Pac. R. Co.*, 111 Neb. 196, 196 N.W. 140 (1923); *Edward Hines Yellow Pine Trustees v. Holley*, 142 Miss. 241, 106 S. 822 (1926); *Tampa Electric Co. v. Knowles*, 91 Fla. 1032, 109 S. 219 (1926); *Atlantic Coast Line R. Co. v. Watkins*, 97 Fla. 350, 121 S. 95 (1929); *Seaboard Air Line R. Co. v. Watson*, 103 Fla. 477, 137 S. 719 (1931); *Key West Electric Co. v. Higgs*, 118 Fla. 11, 136 S. 639 (1931); *Tampa Electric Co. v. Bryant*, 101 Fla. 204, 133 S. 887 (1931); *Florida East Coast R. Co. v. Townsend*, 104 Fla. 362, 140 S. 196, on rehearing 104 Fla. 371, 142 S. 909 (1932); *Atlantic Coast Line R. Co. v. Fogleman*, (Fla. 1934) 158 S. 108; *Gulf & S.I. R. Co. v. Bond*, 181 Miss. 254, 179 S. 355, 181 S. 741 (1938); *E. L. Bruce Co. v. Bramlett*, (Miss. 1939) 188 S. 532; *Louisville & N. R. Co. v. Grizzard*, 238 Ala. 49, 189 S. 203 (1939); *Fegan v. Lykes Bros. S.S. Co.*, 198 La. 312, 3 S. (2d) 632 (1941); *Missouri Pac. R. Co. v. Haigler*, 263 Ark. 804, 158 S.W. (2d) 703 (1944); *Gulf Refining Co. v. Brown*, 196 Miss. 131, 16 S. (2d) 765 (1944); *Missouri Pac. R. Co. v. Yandell*, 209 Ark. 569, 191 S.W. (2d) 592 (1946); *Atlantic Coast Line R. Co. v. Mangum*, 250 Ala. 431, 34 S. (2d) 848 (1948).

court is powerless to interfere because it does not know or cannot prove what has happened. At least the confessed ignorance, in so many cases, of what the jury has done gives a great deal of color to that claim.

The fear of such misbehavior of the jury has played a considerable part in the limitations which a number of the states have placed upon the application of their apportionment acts. They are all more or less obvious compromises between contesting groups in the legislature, which go part of the way along the road to apportionment, but endeavor to stop short at some point where the distrust of the jury becomes acute, or where agreement can be reached. They are, in other words, political in character; and like most political compromises, they are remarkable neither for soundness in principle nor success in operation.

"Slight" and "Gross" Negligence

The oldest of these restrictions is that the damages shall be divided only where the negligence of the plaintiff is found to be "slight," and that of the defendant greater in comparison. The limitation traces back to the old idea that there are "degrees" of negligence, which developed in England in the law of bailments,¹⁰⁸ and still is applied in bailment cases by a number of American courts.¹⁰⁹ Shortly after the middle of the nineteenth century the Supreme Court of Illinois extended this idea to a case of personal injury at the hands of a railroad,¹¹⁰ and from that decision developed the doctrine that the negligence of the plaintiff would not bar his recovery if it was "slight," in the sense of "a degree of negligence less than a failure to exercise ordinary care,"¹¹¹ while the negligence of the defendant was "gross" in comparison.¹¹² No attempt was made to divide the damages under this "comparative negligence" rule, and where it was applied the effect was full recovery by the plaintiff.

¹⁰⁸ *Coggs v. Bernard*, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1704); JONES, *ESSAY ON THE LAW OF BAILMENTS*, 3d ed., 1-36 (1828). See Elliott, "Degrees of Negligence," 6 So. CAL. L. REV. 91 at 107-122 (1932).

¹⁰⁹ See, for example, *Altman v. Aronson*, 231 Mass. 588, 121 N.E. 506 (1919); *Lyons First Nat. Bank v. Ocean Nat. Bank*, 60 N.Y. 278, 19 Am. Rep. 181 (1875); *Dudley v. Camden & P.F. R. Co.*, 42 N.J.L. 25, 36 Am. Rep. 501 (1880); *Cadwell v. Peninsular State Bank*, 195 Mich. 407, 162 N.W. 89 (1917).

¹¹⁰ *Galena & Chicago Union R. Co. v. Jacobs*, 20 Ill. 478 (1858).

¹¹¹ *Wabash, St. L. & P. R. Co. v. Moran*, 13 Ill. App. 72 at 76 (1833). Recovery was denied if the plaintiff had failed to exercise "ordinary care." *City of Chicago v. Stearns*, 105 Ill. 554 (1883); *Schmidt v. Chicago & N.W. R. Co.*, 83 Ill. 405 (1876); *Hund v. Geier*, 72 Ill. 393 (1874); *Grand Tower M. & T. Co. v. Hawkins*, 72 Ill. 386 (1874); *St. Louis & S.E. R. Co. v. Britz*, 72 Ill. 256 (1874).

¹¹² Recovery was also denied if the plaintiff's negligence was found to equal that of the defendant. *Indianapolis & St. L. R. Co. v. Evans*, 88 Ill. 63 (1878).

The result was that were filled with cases v "gross,"¹¹³ in the midst of definition the distinct down under the sheer weight rule to the complications of appeals, and the high pro the trial court.¹¹⁶ Finally, ceeded to whittle away th entirely.¹¹⁸ No trace of it eighties, followed exactly ment with "slight" and the same way.¹²¹ Early v Wisconsin,¹²³ and Tennes

¹¹³ See, among many other (1865); *Chicago, B. & Q. R. Co. v. Cragin*, 71 Ill. 177 (1873); *Illinois A. R. Co. v. Mock*, 72 Ill. 141 (1874); *Illinois Cent. R. Co. v. G. R. Co.*, 83 Ill. 405 (1876); *Illinois R. Co. v. Hens*, 91 Ill. 406 (187

¹¹⁴ Described in *Chicago, B. R.I. & P. R. Co. v. Hamler*, 215 Ill.

¹¹⁶ Green, "Illinois Negligence further reason that the great incre in heavier liability on employers th of Negligence," 6 So. CAL. L. REV. tion of the Illinois doctrine at th excellent review of the whole his Negligence," 41 ILL. L. REV. 151

¹¹⁸ An extended, but incom Steel Co. v. Martin, 115 Ill. 358,

¹¹⁷ *Calumet Iron & Steel Co. E.I. R. Co. v. O'Connor*, 119 Ill. Warner, 123 Ill. 38, 14 N.E. 206 16 N.E. 246 (1888).

¹¹⁸ *Lake Shore & M.S. R. Co. City of Lanark v. Doughe Co. v. Meixner*, 160 Ill. 320, 43 N 643, 69 N.E. 79 (1903); *Chicago, (1905); Krieger v. Aurora, E. & C.*

¹²⁰ *Sawyer v. Sauer*, 10 Kan. (1873); *Union Pac. R. Co. v. He Co. v. Davis*, 37 Kan. 743, 16 P. 7

¹²¹ *Atchison, T. & S.F. R. Co. Missouri Pac. R. Co. v. Walters*, 7 Co. v. Henry, 57 Kan. 154, 45 P. 156 Kan. 65, 131 P. (2d) 648 (1

¹²² *Bequette v. People's Transp R. Co.*, 8 Ore. 163 (1879). But (1900), without reference to the es tory negligence rule, which has been

¹²³ In *Stucke v. Milwaukee &*

The result was that for some thirty years the courts of Illinois were filled with cases which fought out the issue of "slight" and "gross,"¹¹³ in the midst of a turmoil of confusion.¹¹⁴ As a mere matter of definition the distinction proved to be unworkable, and it broke down under the sheer weight of the difficulty of applying the bailment rule to the complications of other negligence cases,¹¹⁵ the multitudinous appeals, and the high proportion of reversals because of some error of the trial court.¹¹⁶ Finally the Illinois court lost all patience, and proceeded to whittle away the doctrine,¹¹⁷ and at last to do away with it entirely.¹¹⁸ No trace of it remains in that state.¹¹⁹ Kansas, in the eighties, followed exactly the same path, attempting the same experiment with "slight" and "gross" negligence,¹²⁰ and repudiating it in the same way.¹²¹ Early ventures in the same direction in Oregon,¹²² Wisconsin,¹²³ and Tennessee¹²⁴ died more or less by default.

¹¹³ See, among many other cases, *St. Louis A. & T.H. R. Co. v. Todd*, 36 Ill. 409 (1865); *Chicago, B. & Q. R. Co. v. Payne*, 59 Ill. 534 (1871); *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177 (1873); *Illinois Cent. R. Co. v. Hall*, 72 Ill. 222 (1874); *Chicago & A. R. Co. v. Mock*, 72 Ill. 141 (1874); *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347 (1874); *Illinois Cent. R. Co. v. Goddard*, 72 Ill. 567 (1874); *Schmidt v. Chicago & N.W. R. Co.*, 83 Ill. 405 (1876); *Illinois Cent. R. Co. v. Hammer*, 85 Ill. 526 (1877); *Wabash R. Co. v. Henks*, 91 Ill. 406 (1879).

¹¹⁴ Described in *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512 (1882); *Chicago, R.I. & P. R. Co. v. Hamler*, 215 Ill. 525, 74 N.E. 705 (1905).

¹¹⁵ Green, "Illinois Negligence Law," 39 *ILL. L. REV.* 36 at 51 (1944), suggests the further reason that the great increase in cases of injuries to employees would have resulted in heavier liability on employers than the courts were willing to impose. Elliott, "Degrees of Negligence," 6 *SO. CAL. L. REV.* 91 at 136 (1933), suggests also the very hostile reception of the Illinois doctrine at the hands of other courts and text writers. There is an excellent review of the whole history in Malone, "The Formative Era of Contributory Negligence," 41 *ILL. L. REV.* 151 (1946).

¹¹⁶ An extended, but incomplete, list of such reversals is found in *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N.E. 456 (1885).

¹¹⁷ *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N.E. 456 (1885); *Chicago & E.I. R. Co. v. O'Connor*, 119 Ill. 586, 9 N.E. 263 (1887); *Chicago, B. & Q. R. Co. v. Warner*, 123 Ill. 38, 14 N.E. 206 (1887); *Village of Mansfield v. Moore*, 124 Ill. 133, 16 N.E. 246 (1888).

¹¹⁸ *Lake Shore & M.S. R. Co. v. Hessions*, 150 Ill. 546, 37 N.E. 905 (1894).

¹¹⁹ *City of Lanark v. Dougherty*, 153 Ill. 163, 38 N.E. 892 (1894); *Cicero St. R. Co. v. Meixner*, 160 Ill. 320, 43 N.E. 823 (1896); *City of Macomb v. Holcomb*, 205 Ill. 643, 69 N.E. 79 (1903); *Chicago, R.I. & P. R. Co. v. Hamler*, 215 Ill. 525, 74 N.E. 705 (1905); *Krieger v. Aurora, E. & C. R. Co.*, 242 Ill. 544, 90 N.E. 266 (1909).

¹²⁰ *Sawyer v. Sauer*, 10 Kan. 466 (1872); *Pacific R. Co. v. Houts*, 12 Kan. 328 (1873); *Union Pac. R. Co. v. Henry*, 36 Kan. 565, 14 P. 1 (1883); *Wichita & W. R. Co. v. Davis*, 37 Kan. 743, 16 P. 78 (1887).

¹²¹ *Atchison, T. & S.F. R. Co. v. Morgan*, 31 Kan. 77 at 80, 1 P. 298 (1883); *Missouri Pac. R. Co. v. Walters*, 78 Kan. 39, 96 P. 346 (1908); *Atchison, T. & S.F. R. Co. v. Henry*, 57 Kan. 154, 45 P. 576 (1896); *Sayeg v. Kansas City Gas & Electric Co.*, 156 Kan. 65, 131 P. (2d) 648 (1942).

¹²² *Bequette v. People's Transp. Co.*, 2 Ore. 200 (1867); *Holstine v. Oregon & Cal. R. Co.*, 8 Ore. 163 (1879). But in *Hamerlynck v. Banfield*, 36 Ore. 436, 59 P. 712 (1900), without reference to the earlier cases, the court stated the common law contributory negligence rule, which has been followed ever since.

¹²³ In *Stucke v. Milwaukee & Miss. R. Co.*, 9 Wis. 202 (1859); *Dreher v. Town of*

Nevertheless, when proposals for the apportionment of damages reached the legislatures, the memory of these old common law fiascoes remained to suggest a possible basis for compromise. As a result the railroad employers' liability acts of the District of Columbia,¹²⁵ Nebraska,¹²⁶ and Ohio,¹²⁷ as well as broader labor acts in Alaska,¹²⁸ California¹²⁹ and Ohio,¹³⁰ carry provisions for apportionment only if the plaintiff's negligence is found to be "slight," so that the defendant's is "gross" in comparison. The same was true of a Wisconsin statute,¹³¹ now repealed,¹³² which covered injuries inflicted by a railroad. In 1913

Fitchburg, 22 Wis. 643 (1868); Hammond v. Town of Mukwa, 40 Wis. 35 (1876); Griffin v. Town of Willow, 43 Wis. 509 (1878); and Ditberner v. Chicago, M. & St. P. R. Co., 47 Wis. 138, 2 N.W. 69 (1879), it was said that slight negligence, defined as want of extraordinary care, would not bar the plaintiff's recovery. But in Potter v. Chicago & N.W. R. Co., 21 Wis. 377, 94 Am. Dec. 548 (1867), and Cunningham v. Lyness, 22 Wis. 236 (1867), it was held that any way of ordinary care, however slight, would be a bar; and in Bolin v. Chicago, St. P. M. & O. R. Co., 108 Wis. 333, 84 N.W. 446 (1900), the court, after reviewing the cases, rejected the whole idea of comparative negligence.

¹²⁴ Whirley v. Whiteman, 1 Head (38 Tenn.) 610 at 623 (1858); East Tenn. R. Co. v. Fain, 12 Lea (80 Tenn.) 35 at 40 (1883); East Tenn. R. Co. v. Gurley, 12 Lea (80 Tenn.) 46 at 55 (1883). In East Tenn. V. & G. R. Co. v. Hull, 88 Tenn. 33, 12 S.W. 419 (1889), the court expressly repudiated the idea of comparative negligence, and explained that it had been talking about "remote" negligence and proximate cause. See text *infra* at notes 189-192.

¹²⁵ D.C. Code (1940) tit. 44, §402.

¹²⁶ Neb. Rev. Stat. (1943) §74-704. Applied in Missouri Pac. R. Co. v. Castle, (8th Cir. 1909) 172 F. 841, affirmed and held constitutional in 224 U.S. 541, 32 S.Ct. 606 (1912). See Jackson v. Chicago, R.I. & P. R. Co., (8th Cir. 1910) 178 F. 432; Chicago, R.I. & P. R. Co. v. Wright, 239 U.S. 548, 36 S.Ct. 185 (1915).

¹²⁷ Ohio Gen. Code Ann. (Page, 1945) §9018. Applied in Baltimore & Ohio R. Co. v. McTeer, 55 Ohio App. 217, 9 N.E. (2d) 627 (1936); Detroit & T.S.L. R. Co. v. Seigel, (Ohio App. 1926) 153 N.E. 870; Ross v. Hocking Valley R. Co., 40 Ohio App. 447, 178 N.E. 852 (1931); Norfolk & W. R. Co. v. Riggs, (6th Cir. 1938) 98 F. (2d) 612; Eric R. Co. v. White, (6th Cir. 1911) 187 F. 556.

¹²⁸ Alaska Comp. Laws Ann. (1949) §43-2-52, applicable to certain hazardous occupations.

¹²⁹ Cal. Labor Code (1937) §2801, applicable to all employees. Applied in Lassen v. Southern Pac. Co., 173 Cal. 71, 159 P. 143 (1916); Tubbs v. Stone & Webster Const. Co., 30 Cal. App. 705, 159 P. 242 (1916); Bruce v. Western Pipe & Steel Co., 177 Cal. 25, 169 P. 660 (1917); Scherer v. Danziger, 178 Cal. 253, 173 P. 85 (1918). See Mantonya v. Bratlie, (Cal. App. 1948) 190 P. (2d) 996, reversed on other grounds in 33 Cal. (2d) 120, 199 P. (2d) 677 (1948); Edwards v. Hollywood Canteen, 27 Cal. (2d) 802, 167 P. (2d) 729 (1945).

¹³⁰ Ohio Gen. Code Ann. (Page, 1945) §6245-1, applicable to all employees. Applied in Standard Steel Tube Co. v. Prusakiewicz, 33 Ohio C.C. 133 (1911), affirmed in 87 Ohio St. 472, 102 N.E. 1131 (1911); McKee v. New Idea, Inc., (Ohio App. 1942) 44 N.E. (2d) 697; Zeis v. Kaechele, 29 Ohio App. 54, 163 N.E. 42 (1927); see McMyler Mfg. Co. v. Mchnke, (6th Cir. 1913) 209 F. 5; Bartson v. Craig, 121 Ohio St. 371, 169 N.E. 291 (1929).

¹³¹ Wis. Stat. (1949) §192.29(6). Applied in Gordon v. Illinois Cent. R. Co., 168 Wis. 244, 169 N.W. 570 (1918); Clark v. Chicago, M., St. P. & P. R. Co., 214 Wis. 295, 252 N.W. 685 (1934).

¹³² In 1951, as in conflict with Wisconsin's broader apportionment act (*infra*, text at note 156). See Lipscomb, "Comparative Negligence," *INS. L.J.* No. 344, 667 at 674

Nebraska¹³³ extended limitation, in all acts and in 1941 the Neb

The result of the repetition of the Illinois the court is asked to do is, under the circumstances the key word, since to meet that qualification will not permit any to define the term, say slight negligence act negligence means just and South Dakota has means merely "ordin

Counsel have no issue. The great matter that the contributory recovery was barred if greater of the two; so ing apportionment t

(Sept. 1951). It has been where the negligence of the P. & S.S.M. R. Co., 216 V

¹³³ Neb. Rev. Stat. (1943) §74-704, applicable to a person or to his property may have been guilty of contributory negligence of the gross in comparison, but by the jury in the mitigation negligence attributable to

See Wiebusch, "Comparative Negligence," 134 S.D. Laws 1941, c

¹³⁶ Morrison v. Scotts v. Missouri Pac. R. Co., 1 Neb. 871, 252 N.W. 411 N.W. (2d) 252 (1949); Gulbrandson, 69 S.D. 179 36 N.W. (2d) 665 (1945) the plaintiff's negligence "gross" in itself, but only 151 Neb. 421, 37 N.W.

The Nebraska act has "gross" within the autono (2d) 82 (1943), overruli

¹³⁰ Monasmith v. Cos 137 Friese v. Gulbrand

Nebraska¹³³ extended this to divide the damages, subject to the same limitation, in all actions for personal injuries or damage to property; and in 1941 the Nebraska act was copied in South Dakota.¹³⁴

The result of the limitation has been to a considerable extent a repetition of the Illinois experience. Appeals have multiplied, in which the court is asked to decide whether particular conduct of the plaintiff is, under the circumstances, more than "slight" negligence. "Slight" is the key word, since it is agreed that if the plaintiff's fault does not meet that qualification, the greater negligence of the defendant still will not permit any recovery.¹³⁵ The Nebraska court has refused to define the term, saying that "any one of common sense knows that slight negligence actually means small or little negligence, and gross negligence means just what it indicates, gross or great negligence";¹³⁶ and South Dakota has done little better, saying that slight negligence means merely "ordinary negligence, small in quantum."¹³⁷

Counsel have not been slow to accept this invitation to argue the issue. The great majority of the appeals have resulted in a decision that the contributory negligence was more than "slight," and all recovery was barred even though the defendant's negligence was the greater of the two; so that the limitation has had the effect of restricting apportionment to a relatively small number of cases. Recovery

(Sept. 1951). It has been held that the railroad act was superseded by the broader statute where the negligence of the plaintiff was more than slight. *Hammer v. Minneapolis, St. P. & S.S.M. R. Co.*, 216 Wis. 7, 255 N.W. 124 (1934).

¹³³ Neb. Rev. Stat. (1943) §25-1151: "In all actions brought to recover damages to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of the contributory negligence attributable to the plaintiff."

See *Wiebusch*, "Comparative Negligence in Nebraska," 17 NEB. L.B. 68 (1938); *Baylor*, "Comparative Negligence in Nebraska," 10 S.D. B.J. 146 (1942).

¹³⁴ S.D. Laws 1941, c. 160, p. 184.

¹³⁵ *Morrison v. Scotts Bluff County*, 104 Neb. 254, 177 N.W. 158 (1920); *Mitchell v. Missouri Pac. R. Co.*, 114 Neb. 72, 206 N.W. 12 (1925); *McDonald v. Wright*, 125 Neb. 871, 252 N.W. 411 (1934); *Krepsik v. Interstate Transit Lines*, 152 Neb. 39, 40 N.W. (2d) 252 (1949), affirmed in 153 Neb. 98, 43 N.W. (2d) 609 (1950); *Friese v. Gulbrandson*, 69 S.D. 179, 8 N.W. (2d) 438 (1943); *Roberts v. Brown*, 72 S.D. 479, 36 N.W. (2d) 665 (1949); *Will v. Marquette*, (S.D. 1949) 40 N.W. (2d) 396. Once the plaintiff's negligence is found to be slight, the defendant's negligence need not be "gross" in itself, but only greater in comparison with that of the plaintiff. *Roby v. Anker*, 151 Neb. 421, 37 N.W. (2d) 799 (1949).

The Nebraska act has been held to apply where the defendant's negligence was "gross" within the automobile guest statute. *Landrum v. Roddy*, 143 Neb. 934, 12 N.W. (2d) 82 (1943), overruling *Sheehy v. Abboud*, 126 Neb. 554, 253 N.W. 683 (1934).

¹³⁶ *Monasmith v. Cosden Oil Co.*, 124 Neb. 327, 246 N.W. 623 (1933).

¹³⁷ *Friese v. Gulbrandson*, 69 S.D. 179, 8 N.W. (2d) 438 (1943).

as in many other instances of rather ordinary negligence.¹⁴⁴ At the same time it is clear that "slight" is a matter of all the circumstances of the particular case, so that there can be no definite rules; and there are other cases¹⁴⁵ in which conduct of the same kind is held to present a question for the jury. It is, of course, not at all surprising that the appeals continue.

The Nebraska system does not inspire confidence in a stranger to the state. It seems quite apparent that it leads to confusion, and to excessive appeals; and that it results in apportionment in only a relatively small fraction of the cases in which it should be made.

Plaintiff's Negligence "Less" Than Defendant's

A second type of limitation is that there can be apportionment only when the plaintiff's negligence is found to be "less" than that of the defendant, and that if it is equal or greater all recovery is barred. This first appeared in Georgia. After some early language at common law looking in the direction of apportionment,¹⁴⁶ the Georgia Code of 1860-62 introduced a provision, applicable only to personal injuries or damage to property inflicted by a railroad,¹⁴⁷ which required division

¹⁴⁴ *Wertz v. Lincoln Liberty Life Ins. Co.*, 152 Neb. 451, 41 N.W. (2d) 740 (1950) (window washer failing to fasten safety belt); *Sokolka v. Cudahy Packing Co.*, 101 Neb. 448, 163 N.W. 809 (1917) (backing into elevator shaft); *Kulrna v. Sarpy County*, 125 Neb. 83, 249 N.W. 87 (1933) (riding with inexperienced driver); *Tomjack v. Chicago & N.W. R. Co.*, 116 Neb. 413, 217 N.W. 944 (1928) (passenger failing to warn driver of missing culvert); *Frye v. Omaha & C.B. St. R. Co.*, 106 Neb. 333, 183 N.W. 567 (1921) (skating with improper skates and straps); *Haase v. Willers Truck Service*, 72 S.D. 353, 34 N.W. (2d) 313 (1948) (obstructing highway with truck); *Roger Wurmser, Inc. v. Interstate Hotel Co.*, 148 Neb. 660, 28 N.W. (2d) 405 (1947) (failure to inform hotel of \$200,000 value of jewels); *Bixby v. Ayers*, 139 Neb. 652, 298 N.W. 533 (1941) (boy turning bicycle into path of car); *Gardner v. Metropolitan Utilities District*, 134 Neb. 163, 278 N.W. 137 (1938) (falling into open stairway); *Eaton v. Merritt*, 135 Neb. 363, 281 N.W. 620 (1938) (standing behind truck in excavation); *Wentink v. Trapbagen*, 138 Neb. 41, 291 N.W. 884 (1940) (proceeding in dark basement); *Groat v. Clausen*, 139 Neb. 689, 298 N.W. 563 (1941) (getting too close to ensilage cutter).

The following were held to be for the jury: *La Fleur v. Poesch*, 126 Neb. 263, 252 N.W. 902 (1934) (standing in front of stalled truck on highway without required red light); *Disher v. Chicago, R.I. & P. R. Co.*, 93 Neb. 224, 140 N.W. 135 (1913) (attempting to remove handcar from track in path of train); *McCarthy v. Village of Ravenna*, 99 Neb. 674, 157 N.W. 629 (1916) (using short handled brush around machinery in motion).

¹⁴⁵ See cases cited in notes 146-152.

¹⁴⁶ *In Macon & Western R. Co. v. Winn*, 26 Ga. 250 at 254 (1858); *Macon & W. R. Co. v. Davis*, 27 Ga. 113 at 119 (1859); *Flanders v. Meath*, 27 Ga. 358 at 362 (1859). The history is well traced in Turk, "Comparative Negligence on the March," 28 *Cm-Kent L. Rev.* 189, 304, 326-333 (1950).

¹⁴⁷ Ga. Code Ann. (1936) §94-703: "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him."

of the damages. By a rather remarkable process of construction, not justified by anything appearing in the provision itself,¹⁴⁸ it was first of all extended to actions against other defendants than railroads,¹⁴⁹ and then limited to cases where the plaintiff's negligence was "less."¹⁵⁰ One looks in vain for any explanation of the limitation,¹⁵¹ and it appears to have arisen from nothing more than timidity in the application of the statute.

Half a century of Georgia history suggested this compromise too to other legislatures, and it was adopted in the railroad employers' liability acts of Arkansas,¹⁵² Michigan¹⁵³ and Wisconsin,¹⁵⁴ in which "slight" negligence does not even go to reduce the damages; and in an apportionment act in Arkansas¹⁵⁵ which covers all personal injuries inflicted by a railroad. In 1913 Wisconsin carried the limitation over into its general statute providing for apportionment in all cases of negligent personal injury or property damage.¹⁵⁶

¹⁴⁸ When Florida copied the Georgia act, it refused to accept the limitation. *Florida, C. & P. R. Co. v. Foxworth*, 41 Fla. 1, 25 S. 338 (1899).

¹⁴⁹ *Berry v. Jowers*, 59 Ga. App. 24, 200 S.E. 195 (1938); *Elk Cotton Mills v. Grant*, 140 Ga. 727, 79 S.E. 836 (1913); *Wynne v. Southern Bell Tel. Co.*, 159 Ga. 623, 126 S.E. 388 (1925); *Moore v. Sears, Roebuck & Co.*, 48 Ga. App. 185, 172 S.E. 680 (1934); *Lamon v. Perry*, 33 Ga. App. 248, 125 S.E. 907 (1924); *City of Ocilla v. Luke*, 28 Ga. App. 234, 110 S.E. 757 (1922).

¹⁵⁰ *Christian v. Macon R. Co.*, 120 Ga. 314, 47 S.E. 923 (1904); *Brunswick R. Co. v. Wiggins*, 113 Ga. 842, 39 S.E. 551 (1901); *Southern Stages, Inc. v. Clements*, 71 Ga. App. 169, 30 S.E. (2d) 429 (1944); *Whatley v. Henry*, 65 Ga. App. 668, 16 S.E. (2d) 214 (1941); *Southern R. Co. v. Parkman*, 61 Ga. App. 62, 5 S.E. (2d) 685 (1939); *Pollard v. Heard*, 53 Ga. App. 623, 186 S.E. 894 (1936); *Central of Ga. R. Co. v. Larsen*, 19 Ga. App. 413, 91 S.E. 517 (1917).

¹⁵¹ The limitation appears to have originated in *Central R. & B. Co. v. Newman*, 94 Ga. 560, 21 S.E. 219 (1894), where the facts were stated, and the court reversed without an opinion. This case was relied on, and the rule first stated, in *Southern R. Co. v. Watson*, 104 Ga. 243, 30 S.E. 818 (1898), where the only reason given was that the rule was established. Both cases were followed, with no better explanation, in *Brunswick R. Co. v. Wiggins*, 113 Ga. 842, 39 S.E. 501 (1901).

¹⁵² Ark. Stat. Ann. (1942) §73-916. Applied in *Missouri Pac. R. Co. v. Brown*, 195 Ark. 1060, 115 S.W. (2d) 1083 (1938); *Kansas City & M. R. Co. v. Huff*, 116 Ark. 461, 173 S.W. 419 (1915).

¹⁵³ Mich. Comp. Laws (1948) §419.52. Applied in *Bruce v. Michigan Cent. R. Co.*, 172 Mich. 441, 138 N.W. 362 (1912); *English v. Michigan Cent. R. Co.*, 188 Mich. 286, 154 N.W. 98 (1915).

¹⁵⁴ Wis. Stat. (1949) §192.50 (3). Applied in *Zeratsky v. Chicago, M. & St. P. R. Co.*, 141 Wis. 423, 123 N.W. 904 (1909); *Jensen v. Wisconsin Cent. R. Co.*, 145 Wis. 326, 128 N.W. 982 (1910); *Tidmarsh v. Chicago, M. & St. P. R. Co.*, 149 Wis. 590, 136 N.W. 337 (1912).

¹⁵⁵ Ark. Stat. Ann. (1947) §73-1004. Applied in *St. Louis-San Francisco R. Co. v. Kirkpatrick*, 155 Ark. 632, 245 S.W. 35 (1922); *St. Louis-San Francisco R. Co. v. Howley*, 199 Ark. 853, 137 S.W. (2d) 231 (1940); *Phillips v. Kurn*, (8th Cir. 1944) 145 F. (2d) 908. The act has no application to property damage. *Baldwin v. Waters*, 191 Ark. 377, 86 S.W. (2d) 172 (1935); *Missouri Pac. R. Co. v. Binkley*, 208 Ark. 933, 188 S.W. (2d) 291 (1945).

¹⁵⁶ Wis. Stat. (1949) §331.045: "Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence re-

The practical effect of "gross" negligence. Against is asked to determine whether is fault at least "equal" to depend not only upon all the conduct of both parties, but it is obvious that each decides that either the losing defendant's courage to raise the semblance of consistency type. In about half of the railroad crossing without or seeing a visible train, as a matter of law to the warning.¹⁵⁷ In about as many find that the plaintiff's neg-

sulting in death or in injury to the negligence of the person against shall be diminished in the proportion of recovering."

See Padway, "Comparative Negligence in Wisconsin's Comparative Negligence Statute," 20 *Wis. L. Rev.* 4 [1938] *Wis. L. Rev.* 4 [1941] *Wis. L. Rev.* 289; Hayes, "Wisconsin," 23 *Ohio S.B.A. Rev.* Negligence," 23 *Ohio S.B.A. Rev.*

¹⁵⁷ *Bradley v. Missouri Pac. R. Co.*, 178 Ark. 578, 11 S.W. 2d 830, 125 S.W. (2d) 785 (1939); *McGlothlin v. Thompson*, 347 Mo. 63 (1940); *Evanich v. Milwaukee & St. Paul R. Co.*, 207 Ark. 154 (1942); *Missouri Pac. R. Co. v. Dawson*, 205 Ark. 183 (1949); *Missouri Pac. R. Co. v. Binkley*, 208 Ark. 933, 188 S.W. (2d) 291 (1945).

¹⁵⁸ *Memphis, D. & G. R. Co. v. Powell v. Jonesboro, L.C. & E. R. Co.*, 170 Ark. 6 (1940); *French*, 181 Ark. 777, 27 S.W. (2d) 424; *Missouri Pac. R. Co. v. Dotson*, 194 Ark. 834, 110 S.W. (2d) 51

The practical effect has been very similar to that of "slight" and "gross" negligence. Again appeals have multiplied, in which the court is asked to determine whether the particular conduct of the plaintiff is fault at least "equal" to that of the defendant. Since this must depend not only upon all the circumstances of the case as they affect the conduct of both parties, but upon a comparison of one with the other, it is obvious that each decision must be upon the individual facts, and that either the losing defendant or the losing plaintiff has ample encouragement to raise the issue. It is not surprising that there is no semblance of consistency to be discerned in cases of the same general type. In about half of the cases in which the plaintiff has driven onto a railroad crossing without stopping, looking, listening, reducing speed or seeing a visible train, his negligence has been held at least equal as a matter of law to that of the railroad in failing to give proper warning.¹⁵⁷ In about as many cases it has been held that the jury may find that the plaintiff's negligence is the lesser of the two.¹⁵⁸ The same

sulting 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 the proportion to the amount of negligence attributable to the person recovering."

See Padway, "Comparative Negligence," 16 *MANQ. L. REV.* 3 (1931); Campbell, "Wisconsin's Comparative Negligence Law," 7 *WIS. L. REV.* 222 (1932); Whelan, "Comparative Negligence Statute," 20 *MANQ. L. REV.* 189 (1936); Whelan, "Comparative Negligence," [1938] *WIS. L. REV.* 465; Campbell, "Ten Years of Comparative Negligence," [1941] *WIS. L. REV.* 289; Hayes, "Rule of Comparative Negligence and its Operation in Wisconsin," 23 *OHIO S.B.A. REP.* 233 (1950); Grubb, "Observations on Comparative Negligence," 23 *OHIO S.B.A. REP.* 237 (1950).

¹⁵⁷ *Bradley v. Missouri Pac. R. Co.*, (8th Cir. 1923) 288 F. 484; *Jemell v. St. Louis S.W. R. Co.*, 178 Ark. 578, 11 S.W. (2d) 449 (1928); *Zenner v. Chicago, St. P., M. & O. R. Co.*, 219 Wis. 124, 262 N.W. 581 (1935); *Missouri Pac. R. Co. v. Davis*, 197 Ark. 830, 125 S.W. (2d) 785 (1939); *Missouri Pac. R. Co. v. Price*, 199 Ark. 346, 133 S.W. (2d) 645 (1939); *Patterson v. Chicago, St. P., M. & O. R. Co.*, 236 Wis. 205, 294 N.W. 63 (1940); *Evanich v. Milwaukee Elec. R. & L. Co.*, 237 Wis. 111, 295 N.W. 44 (1941); *McGlothlin v. Thompson*, 347 Mo. 708, 148 S.W. (2d) 558 (1941) (reviewing the confusion in the Arkansas cases); *Missouri Pac. R. Co. v. Carruthers*, 204 Ark. 419, 162 S.W. (2d) 912 (1942); *Missouri Pac. R. Co. v. Howard*, 204 Ark. 253, 161 S.W. (2d) 759 (1942); *Missouri Pac. R. Co. v. Dennis*, 205 Ark. 28, 166 S.W. (2d) 886 (1942); *Missouri Pac. R. Co. v. Dawson*, 205 Ark. 404, 168 S.W. (2d) 1105 (1943); *Lloyd v. St. Louis S.W. R. Co.*, 207 Ark. 15, 166 S.W. (2d) 651 (1944); *Snyder v. Missouri Pac. R. Co.*, 183 Tenn. 471, 192 S.W. (2d) 1008 (1946); *Tepel v. Thompson*, 359 Mo. 1, 220 S.W. (2d) 23 (1949).

¹⁵⁸ *Memphis, D. & G. R. Co. v. Thompson*, 138 Ark. 175, 210 S.W. 346 (1919); *Powell v. Jonesboro, L.C. & E. R. Co.*, 166 Ark. 252, 266 S.W. 78 (1924); *Huff v. Missouri Pac. R. Co.*, 170 Ark. 665, 280 S.W. 648 (1926); *Chicago, R.I. & P. Co. v. French*, 181 Ark. 777, 27 S.W. (2d) 1021 (1930); *Southern R. Co. v. Wilbanks*, (5th Cir. 1933) 67 F. (2d) 424; *Missouri Pac. R. Co. v. Brown*, 187 Ark. 1163, 59 S.W. (2d) 34 (1933); *Missouri Pac. R. Co. v. Westerfield*, 192 Ark. 558, 92 S.W. (2d) 862 (1936); *Missouri Pac. R. Co. v. Dotson*, 195 Ark. 286, 101 S.W. (2d) 785 (1937); *Thomas v. Southern R. Co.*, (5th Cir. 1937) 92 F. (2d) 445; *Missouri Pac. R. Co. v. Henderson*, 194 Ark. 884, 110 S.W. (2d) 516 (1937) (passenger failing to warn driver); *St. Louis-*

kind of variation is found in cases of a pedestrian walking into the path of a train,¹⁵⁰ or a vehicle whose driver has failed in his duty as to speed, warning or lookout;¹⁶⁰ a trespasser on the right of way struck by a train;¹⁶¹ the various kinds of negligence of drivers colliding at intersections;¹⁶² and miscellaneous other situations.¹⁶³ The Georgia courts have displayed a remarkable tendency to leave the issue to the

San Francisco R. Co. v. Hovley, 199 Ark. 853, 137 S.W. (2d) 231 (1940); St. Louis-San Francisco R. Co. v. Beasley, 205 Ark. 688, 170 S.W. (2d) 667 (1943); Missouri Pac. R. Co. v. Walden, 207 Ark. 437, 181 S.W. (2d) 24 (1944); Missouri Pac. R. Co. v. Shell, 208 Ark. 70, 185 S.W. (2d) 81 (1945); Smith v. Missouri Pac. R. Co., 208 Ark. 40, 184 S.W. (2d) 951 (1945); Webster v. Roth, 246 Wis. 535, 18 N.W. (2d) 1 (1945).

¹⁵⁰ Held at least equal as a matter of law in Southern R. Co. v. Parkman, 61 Ga. App. 62, 5 S.E. (2d) 685 (1939); Allnutt v. Missouri Pac. R. Co., (8th Cir. 1925) 8 F. (2d) 604. Held for the jury in Missouri Pac. R. v. Trotter, 184 Ark. 790, 43 S.W. (2d) 762 (1931); Missouri Pac. R. Co. v. Rogers, 184 Ark. 725, 43 S.W. (2d) 757 (1931).

¹⁶⁰ Held equal as a matter of law in Burant v. Studzinski, 200 Wis. 455, 282 N.W. 3 (1938); Hustad v. Evetts, 230 Wis. 292, 282 N.W. 595 (1938); Naves v. Milwaukee Elec. R. & L. Co., 237 Wis. 141, 294 N.W. 812 (1940); Post v. Thomas, 240 Wis. 519, 3 N.W. (2d) 344 (1942); Crawley v. Hill, 253 Wis. 294, 34 N.W. (2d) 123 (1948); Ninneman v. Schwede, 258 Wis. 408, 46 N.W. (2d) 230 (1951).

Held for the jury in De Goey v. Hermsen, 233 Wis. 69, 288 N.W. 770 (1939); Wilson v. Pollard, 62 Ga. App. 781, 10 S.E. (2d) 407 (1940); Doepke v. Reimer, 217 Wis. 49, 258 N.W. 345 (1935); Schwandt v. Milwaukee Elec. R. & T. Co., 244 Wis. 251, 12 N.W. (2d) 18 (1943); Kleiner v. Johnson, 249 Wis. 148, 23 N.W. (2d) 467 (1946); Baggett v. Jackson, 79 Ga. App. 460, 54 S.E. (2d) 146 (1949).

¹⁶¹ Held equal as a matter of law in St. Louis-San Francisco R. Co. v. Williams, 180 Ark. 413, 21 S.W. (2d) 611 (1929). Held for the jury in Hunt v. Western & A. R. Co., 49 Ga. App. 33, 174 S.E. 222 (1934).

¹⁶² Held equal as a matter of law in Kilcoyne v. Trausch, 222 Wis. 528, 269 N.W. 276 (1936); Grasser v. Anderson, 224 Wis. 654, 273 N.W. 63 (1937); Langworthy v. Reisinger, 249 Wis. 24, 23 N.W. (2d) 482 (1946); Geyer v. Milwaukee Elec. R. & L. Co., 230 Wis. 347, 284 N.W. 1 (1939); Campanelli v. Milwaukee Elec. R. & T. Co., 212 Wis. 505, 8 N.W. (2d) 390 (1943); J. W. Cartage Co. v. Laufenberg, 251 Wis. 301, 28 N.W. (2d) 925 (1947); Kloss v. American Indemnity Co., 253 Wis. 476, 34 N.W. (2d) 816 (1948); Dinger v. McCoy Transp. Co., 254 Wis. 447, 37 N.W. (2d) 26 (1949).

Held for the jury in Paluczak v. Jones, 209 Wis. 640, 245 N.W. 655 (1932); Head v. Georgia Power Co., 70 Ga. App. 32, 27 S.E. (2d) 339 (1943).

¹⁶³ Held equal as a matter of law: Manitowoc Trust Co. v. Boutil, 220 Wis. 627, 265 N.W. 572 (1936) (plaintiff on running board of defendant's automobile); Schulz v. General Cas. Co., 233 Wis. 118, 288 N.W. 803 (1939) (two motorists approaching top of hill in middle of road; plaintiff reduced speed and defendant did not); Konow v. Gruenwald, 241 Wis. 453, 6 N.W. (2d) 208 (1942) (head-on collision, plaintiff on wrong side); Piesik v. Deuster, 243 Wis. 598, 11 N.W. (2d) 358 (1943) (head-on collision, both drivers over center line); Saley v. Hardware Mut. Cas. Co., 246 Wis. 647, 18 N.W. (2d) 342 (1945) (plaintiff on wrong side, defendant driving at excessive speed); McCord v. Atlantic Coast Line R. Co., (5th Cir. 1950) 185 F. (2d) 603 (riding with intoxicated driver, collision with train); Phillips v. Haring, (Wis. 1952) 54 N.W. (2d) 200 (rear end collision).

Held for the jury: Hansberry v. Dunn, 230 Wis. 626, 284 N.W. 556 (1939) (both drivers on wrong side, too fast and no lookout); Atlantic Greyhound Corp. v. Loudermilk, (5th Cir. 1940) 110 F. (2d) 596 (turning into path of speeding bus); United States v. Fleming, (5th Cir. 1940) 115 F. (2d) 314 (unable to stop within range of vision, collision with unlighted vehicle parked on highway); McDowall Transport, Inc. v. Gault, 80 Ga. App. 445, 56 S.E. (2d) 161 (1949) (same); Engebrecht v. Bradley, 211 Wis. 1, 247 N.W. 451 (1933) (same).

jury in all cases,¹⁶⁴ and as an element of the ins

Wisconsin at one time saying that negligence of the parties were at fault and the issue must be left to the jury. In *Head v. Georgia Power Co.*,¹⁷⁰ the court said that negligence of the plaintiff has been negligent in three, it has been held that the plaintiff has failed in two and the jury has been permitted to find fault.¹⁷⁰

It is obvious that a slight negligence should permit a recovery;¹⁷¹ and the

¹⁶⁴ As, for example, in *Lewis v. Milwaukee Elec. R. & T. Co.*, where the plaintiff drove into the side of the defendant's car.

¹⁶⁵ *Evanich v. Milwaukee Elec. R. & T. Co.*, 249 Wis. 217, 23 N.W. (2d) 358 (1943).

¹⁶⁶ *Langworthy v. Reisinger*, 249 Wis. 24, 23 N.W. (2d) 482 (1946); *Geyer v. Milwaukee Elec. R. & L. Co.*, 230 Wis. 347, 284 N.W. 1 (1939); *Campanelli v. Milwaukee Elec. R. & T. Co.*, 212 Wis. 505, 8 N.W. (2d) 390 (1943); *J. W. Cartage Co. v. Laufenberg*, 251 Wis. 301, 28 N.W. (2d) 925 (1947); *Kloss v. American Indemnity Co.*, 253 Wis. 476, 34 N.W. (2d) 816 (1948); *Dinger v. McCoy Transp. Co.*, 254 Wis. 447, 37 N.W. (2d) 26 (1949).

¹⁶⁷ *Hansberry v. Dunn*, 230 Wis. 626, 284 N.W. 556 (1939).

¹⁶⁸ *Geyer v. Milwaukee Elec. R. & L. Co.*, 230 Wis. 347, 284 N.W. 1 (1939).

¹⁶⁹ *Grasser v. Anderson*, 224 Wis. 654, 273 N.W. 63 (1937).

¹⁷⁰ *Head v. Georgia Power Co.*, 70 Ga. App. 32, 27 S.E. (2d) 339 (1943).

¹⁷¹ *Schmidt v. Leary*, 213 Wis. 58, 18 N.W. (2d) 514 (1949).

¹⁷² *Kilcoyne v. Trausch*, 222 Wis. 528, 269 N.W. 276 (1936).

¹⁷³ *Hunt v. Western & A. R. Co.*, 49 Ga. App. 33, 174 S.E. 222 (1934).

¹⁷⁴ *Central of Georgia R. Co.*, 38 Ga. App. 1, 21 S.E. 2d 1 (1949).

¹⁷⁵ *Head v. Georgia Power Co.*, 70 Ga. App. 32, 27 S.E. (2d) 339 (1943).

jury in all cases,¹⁶⁴ and in effect have nullified the limitation except as an element of the instructions.

Wisconsin at one time attempted to state some kind of rule by saying that negligence of the same kind, as where both parties failed to keep a proper lookout, would be treated as equal,¹⁶⁵ but that where the parties were at fault in different respects, as where failure to look out must be balanced against excessive speed, the court could not rule and the issue must be left to the jury.¹⁶⁶ It has been compelled to retreat from that position, and to recognize not only that juries may find that negligence of the same kind differs in degree,¹⁶⁷ but also that the plaintiff's negligence of a different kind may be as a matter of law at least equal to that of the defendant.¹⁶⁸ Likewise where the plaintiff has been negligent in one respect and the defendant in two or three, it has been held that the fault is at least equal,¹⁶⁹ and where the plaintiff has failed in two or three respects and the defendant in one the jury has been permitted to find that the plaintiff is still less at fault.¹⁷⁰

It is obvious that a slight difference in the proportionate fault may permit a recovery;¹⁷¹ and there has been much quite justified criticism

¹⁶⁴ As, for example, in *Lewis v. Powell*, 51 Ga. App. 129, 179 S.E. 865 (1935), where the plaintiff drove into the side of a train.

¹⁶⁵ *Evanich v. Milwaukee Elec. R. & L. Co.*, 237 Wis. 111, 295 N.W. 44 (1941); *Langworthy v. Reisinger*, 249 Wis. 24, 23 N.W. (2d) 482 (1946); *Piesik v. Deuster*, 243 Wis. 598, 11 N.W. (2d) 358 (1943).

¹⁶⁶ *McGuiggan v. Hiller Bros.*, 209 Wis. 402, 245 N.W. 97 (1932); *Brown v. Haertel*, 210 Wis. 345, 244 N.W. 630 (1932); *Engbrecht v. Bradley*, 211 Wis. 1, 247 N.W. 451 (1933); *Doepke v. Reimer*, 217 Wis. 49, 258 N.W. 345 (1935); *Callaway v. Kryzen*, 228 Wis. 53, 279 N.W. 702 (1938).

¹⁶⁷ *Hansberry v. Dunn*, 230 Wis. 626, 284 N.W. 556 (1939); *Fronczek v. Sink*, 235 Wis. 398, 291 N.W. 850, 293 N.W. 153 (1940).

¹⁶⁸ *Geyer v. Milwaukee Elec. R. & L. Co.*, 230 Wis. 347, 284 N.W. 1 (1939); *Saley v. Hardware Mut. Cas. Co.*, 246 Wis. 647, 18 N.W. (2d) 342 (1945); *Dinger v. McCoy Transp. Co.*, 254 Wis. 447, 37 N.W. (2d) 26 (1949).

¹⁶⁹ *Grasser v. Anderson*, 224 Wis. 654, 273 N.W. 63 (1937); *Hustad v. Evetts*, 230 Wis. 292, 282 N.W. 595 (1938); *Rosenow v. Schmidt*, 232 Wis. 1, 285 N.W. 755 (1939). But such facts may justify a jury's conclusion that the plaintiff's fault is less in exact proportion to the number of elements of negligence. *Horn v. Snow White Laundry & D.C. Co.*, 240 Wis. 312, 3 N.W. (2d) 380 (1942).

¹⁷⁰ *Schmidt v. Leary*, 213 Wis. 587, 252 N.W. 151 (1934); *Kirchen v. Tisler*, 255 Wis. 208, 38 N.W. (2d) 514 (1949). But the fact that plaintiff has been negligent in more respects than defendant has been held to require the conclusion that his fault was at least equal. *Kilcoyne v. Trausch*, 222 Wis. 528, 269 N.W. 276 (1936); *Burant v. Studzinski*, 230 Wis. 455, 282 N.W. 3, 128 (1938); *Konow v. Gruenwald*, 241 Wis. 453, 6 N.W. (2d) 208 (1943).

¹⁷¹ In *Head v. Georgia Power Co.*, 70 Ga. App. 32, 27 S.E. (2d) 339 (1943), and *Hunt v. Western & A. R. Co.*, 49 Ga. App. 33, 174 S.E. 222 (1934), it was said that a slight difference in fault would justify recovery of "a small amount"; and in *Evans v. Central of Georgia R. Co.*, 38 Ga. App. 146, 142 S.E. 909 (1928), a verdict for 12 cents was upheld on this basis. The Georgia courts evidently were following some unstated theory of allowing the plaintiff the difference between the proportions of fault.

of a rule under which a plaintiff who is charged with 49 per cent of the total negligence recovers 51 per cent of his damages, while one who is charged with 50 per cent recovers nothing at all.¹⁷² Actually, of course, juries almost never indulge in such refined hair-splitting,¹⁷³ and the criticism really goes to the directed verdict. It has been said that the restriction is necessary to prevent the jury from giving the plaintiff something in every case, even where the defendant may not be negligent at all, or is at fault to the extent of only 1% of the total. But this ignores the fact that the court still has control over an unjustified apportionment, and that a 1% recovery will be insignificant, and less than the nuisance value of the suit. Actually the writer has found no such cases. It appears impossible to justify the rule on any basis except one of pure political compromise. It is difficult to be happy about the Wisconsin cases, or to escape the conclusion that at the cost of many appeals they have succeeded merely in denying apportionment in many cases where it should have been made.

Proximate Cause

"Proximate cause" has been something of a problem under the apportionment statutes. The Federal Employers' Liability Act, when it was first enacted, said nothing about assumption of risk,¹⁷⁴ and it was held that that defense remained available to the defendant as a complete bar to recovery,¹⁷⁵ until the act was amended in 1939 to eliminate it entirely.¹⁷⁶ Quite apart from this, the Supreme Court quite unexpectedly held¹⁷⁷ in 1916 that a railroad employee who had violated a company rule or order was charged with the "primary duty," and could not recover, on the ground that his own negligence was

¹⁷² See in particular the articles cited in note 156.

¹⁷³ In special verdict cases the juries, with rare exceptions, have found percentages of fault in even multiples of 5 or 10, or else in simple fractions, such as $\frac{1}{2}$ or the like.

¹⁷⁴ See Peterson, "The Joker in the Federal Employers' Liability Act," 80 *CENT. L.J.* 5 (1915); Buford, "Assumption of Risk Under the Federal Employers' Liability Act," 28 *HARV. L. REV.* 163 (1914); notes, 32 *COL. L. REV.* 1384 (1932); 6 *TULANE L. REV.* 315 (1932).

¹⁷⁵ *Seaboard Air Line R. Co. v. Horton*, 233 U.S. 492, 34 S.Ct. 635 (1914).

¹⁷⁶ "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 53 Stat. L. 1404 (1939), 45 U.S.C. (1946) §54. First applied in *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S.Ct. 444 (1943).

¹⁷⁷ *Great Northern R. Co. v. Wiles*, 240 U.S. 444, 36 S.Ct. 406 (1916).

the "sole proximate cause" of the defendant was not to be regarded as a series of decisions refusing to remedy such violations. In one case the negligent conduct of a fellow employee was not to be a bar to recovery,¹⁷⁸ but in others he was held to have a duty of his own,¹⁷⁹ or to obey

In 1943 the Supreme Court held that the "primary duty" rule was not a risk, which it never had been, and that the amendment had eliminated it. A stay of certiorari was denied, and to which certiorari was denied there are still decisions which are on such intellectual gymnastics something of a puzzle to future courts. It appears to be neither required by statute, and its abolition equ

The very questionable "clear chance"¹⁸³ has resulted in the abolition of apportionment acts, on the t

¹⁷⁸ *Unadilla Valley R. Co. v. C.*
¹⁷⁹ *Frese v. Chicago, B. & Q. R.*
M. & O. R. Co. v. Arnold, (8th Cir. (4th Cir. 1915) 230 F. 88; *Unadilla* 239; *Hayes v. Chicago, B. & Q. R. Chicago, R.I. & P. R. Co.*, 178 *Mich.*

¹⁸⁰ *Davis v. Kennedy*, 266 U.S. blood, 286 U.S. 313, 52 S.Ct. 518 346, 52 S.Ct. 520 (1932); *Bradley* (2d) 683; *Van Derveer v. Delaware Southern R. Co. v. Hylton*, (6th Cir. R. Co., (6th Cir. 1937) 87 F. (2d) 43 F. (2d) 908.

¹⁸¹ "One of these [problems] was contributory negligence through violation of the Unadilla Valley Ry. Co. v. Caldine. It was this maze of law which Congress amended to the Employers' Liability Act, assumption of risk by whatever name. *Atlantic Coast Line R. Co.*, 318 U.S. 54 at

¹⁸² *Keith v. Wheeling & L.E. R.* U.S. 763, 68 S.Ct. 67 (1947). *Acc.* 431, 34 S. (2d) 84 (1948); *Miss.* 1950) 229 S.W. (2d) 204; *Le.* (2d) 37 (1943). *Contra:* *Chicago*, 160 F. (2d) 1002; *Walker v. Lyke* *Kum v. Reese*, 192 *Okla.* 78, 133 P.

¹⁸³ See text supra at note 36.

the "sole proximate cause" of his injury, so that the negligence of the defendant was not to be regarded as contributing at all. The result was a series of decisions refusing to apportion the damages in the case of such violations. In one of them the plaintiff had himself ordered the negligent conduct of a fellow servant for which he was seeking to recover,¹⁷⁸ but in others he had merely failed to perform a specific duty of his own,¹⁷⁹ or to obey a specific order.¹⁸⁰

In 1943 the Supreme Court, quite as unexpectedly, declared¹⁸¹ that the "primary duty" rule was in reality a form of assumption of risk, which it never had been called before, and that the 1939 amendment had eliminated it. A subsequent decision of the Sixth Circuit,¹⁸² to which certiorari was denied, has confirmed this conclusion, although there are still decisions which refuse to accept it. It is idle to comment on such intellectual gymnastics; but the whole thing is likely to prove something of a puzzle to future historians, since the rule itself would appear to be neither required nor justified by anything in the original statute, and its abolition equally uncalled for by the amendment.

The very questionable "proximate cause" explanation of the last clear chance¹⁸³ has resulted in the survival of that doctrine under the apportionment acts, on the theory that its effect is that the plaintiff's

¹⁷⁸ *Unadilla Valley R. Co. v. Caldine*, 278 U.S. 139, 49 S.Ct. 91 (1928).

¹⁷⁹ *Frese v. Chicago, B. & Q. R. Co.*, 263 U.S. 1, 44 S.Ct. 1 (1923); *Chicago St. P., M. & O. R. Co. v. Arnold*, (8th Cir. 1947) 160 F. (2d) 1002; *Virginian R. Co. v. Linkous*, (4th Cir. 1915) 230 F. 88; *Unadilla Valley R. Co. v. Dibble*, (2d Cir. 1929) 31 F. (2d) 239; *Hayes v. Chicago, B. & Q. R. Co.*, 131 Neb. 687, 269 N.W. 623 (1936); *Feurt v. Chicago, R.I. & P. R. Co.*, 178 Minn. 395, 227 N.W. 212 (1929).

¹⁸⁰ *Davis v. Kennedy*, 266 U.S. 147, 45 S.Ct. 33 (1924); *Southern R. Co. v. Youngblood*, 286 U.S. 313, 52 S.Ct. 518 (1932); *St. Louis S.W. R. Co. v. Simpson*, 286 U.S. 346, 52 S.Ct. 520 (1932); *Bradley v. Northwestern Pac. R. Co.*, (9th Cir. 1930), 44 F. (2d) 683; *Van Derveer v. Delaware, L. & W. R. Co.*, (2d Cir. 1936) 84 F. (2d) 979; *Southern R. Co. v. Hylton*, (6th Cir. 1930) 37 F. (2d) 843, *affd.* in *Hylton v. Southern R. Co.*, (6th Cir. 1937) 87 F. (2d) 393; *Paster v. Pennsylvania R. Co.*, (2d Cir. 1930) 43 F. (2d) 908.

¹⁸¹ "One of these [problems] was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk. *Unadilla Valley Ry. Co. v. Caldine*, 278 U.S. 139; *Davis v. Kennedy*, 266 U.S. 147. . . . It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called." Justice Black, in *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 at 63-64, 63 S.Ct. 444 (1943).

¹⁸² *Keith v. Wheeling & L.E. R. Co.*, (6th Cir. 1947) 160 F. (2d) 654, *cert. den.* 332 U.S. 763, 68 S.Ct. 67 (1947). *Accord:* *Atlantic Coast Line R. Co. v. Mangum*, 250 Ala. 431, 34 S. (2d) 848 (1941); *Missouri-Kansas-Texas R. Co. v. Webb*, (Tex. Civ. App. 1950) 229 S.W. (2d) 204; *Leet v. Union Pac. R. Co.*, 60 Cal. App. (2d) 814, 142 P. (2d) 37 (1943). *Contra:* *Chicago, St. P. M. & O. R. Co. v. Arnold*, (8th Cir. 1947) 160 F. (2d) 1002; *Walker v. Lykes Bros. S.S. Co.*, (2d Cir. 1952) 193 F. (2d) 772; *Kurn v. Reese*, 192 Okla. 78, 133 P. (2d) 880 (1943). See note, 62 Yale L.J. 111 (1952).

¹⁸³ See text *supra* at note 36.

negligence has not contributed "proximately" at all. This has been true under the Federal Employers' Liability Act,¹⁸⁴ the various state statutes where the question has been considered,¹⁸⁵ and most of the Canadian apportionment acts.¹⁸⁶ The decisions may perhaps be justified, on the ground that the statutes all are silent on the last clear chance, and the common law stands until it is clearly changed. But the very probable reason for the silence is that the question simply never occurred to the legislatures at all;¹⁸⁷ and the result is that the system of apportionment breaks down in an important group of cases, where a loss from the fault of two parties still is visited entirely upon one. Any necessity for the last clear chance as a palliation of the hardships of contributory negligence obviously disappears when the loss can be apportioned; and the statute becomes jug-handled in favor of the plaintiff, allowing the cases of injustice to the defendant to stand.¹⁸⁸ This windfall to the plaintiff must inevitably be reflected in liability insurance rates. At least, in any future statutes there should be specific provision one way or the other as to the last clear chance, and it should not be allowed, as in the past, to go by default.

Tennessee has developed, at common law, a peculiar rule under which negligence of the plaintiff which contributes concurrently, or

¹⁸⁴ *Gray v. Southern R. Co.*, 167 N.C. 433, 83 S.E. 849 (1914), reversed on other grounds in 241 U.S. 333, 36 S.Ct. 558 (1916); *Soles v. Atlantic Coast Line R. Co.*, 184 N.C. 283, 114 S.E. 305 (1922); *Washington & O.D. R. Co. v. Weakley*, 140 Va. 796, 125 S.E. 672 (1924); *Barnes v. Red River & G. R. Co.*, 14 La. App. 188, 128 S. 724 (1930); *Hamilton v. Chicago, B. & Q. R. Co.*, 211 Iowa 924, 234 N.W. 810 (1931); *St. Louis & S.W. R. Co. v. Simpson*, 184 Ark. 633, 43 S.W. (2d) 251 (1931), reversed on other grounds in 286 U.S. 346, 52 S.Ct. 520 (1931); *Chicago, R.I. & P. R. Co. v. Adams*, 187 Ark. 816, 62 S.W. (2d) 947 (1933).

¹⁸⁵ *Sciffert v. Hines*, 108 Neb. 62, 187 N.W. 108 (1922); *Stanley v. Chicago, R.I. & P. R. Co.*, 113 Neb. 280, 202 N.W. 864 (1925); *Wilfong v. Omaha & C.B. R. Co.*, 129 Neb. 600, 262 N.W. 537 (1935); *Wilson's Admx. v. Virginia Portland R. Co.*, 122 Va. 160, 94 S.E. 347 (1917). An exception is Wisconsin, which did not recognize the last clear chance. *Switzer v. Detroit Investment Co.*, 188 Wis. 330, 206 N.W. 407 (1925).

¹⁸⁶ *Walker v. Forbes*, 27 O.W.N. 459, 56 Ont. L. Rep. 532, [1925] 2 D.L.R. 725; *Farber v. Toronto Transp. Co.*, 20 O.W.N. 464, 56 Ont. L. Rep. 537, [1925] 2 D.L.R. 729; *Key v. British Columbia Elec. R. Co.*, 43 B.C. Rep. 288 (1930); *Chambers v. Sampson*, 44 B.C. Rep. 134 (1931); *McLaughlin v. Long*, [1927] Can. S.C. Rep. 303, [1927] 2 D.L.R. 186; *Foster v. Kerr*, [1940] 2 D.L.R. 47; *Wilson v. Cline*, [1946] 3 W.W.R. 353; *Carter v. Van Camp*, [1930] Can. S.C. Rep. 156; *McDonald v. Thomas*, 41 Man. Rep. 657 (1933).

¹⁸⁷ An exception is the British Act, where a Law Revision Commission reported recommending retention of the last clear chance. See Williams, "The Law Reform (Contributory Negligence) Act," 9 *Mod. L. Rev.* 105 at 126-130 (1946).

¹⁸⁸ See Weir, "Davies v. Mann and Contributory Negligence Statutes," 9 *CAN. B. Rev.* 470 (1931); MacDonald, "The Negligence Action and the Legislature," 13 *CAN. B. Rev.* 535 (1935); MacLutyr, "The Rationale of the Last Clear Chance," 53 *HARV. L. Rev.* 1225 (1940); Williams, "The Law Reform (Contributory Negligence) Act," 9 *Mod. L. Rev.* 105 (1946); Wright, "The Law of Torts," 26 *CAN. B. Rev.* 46 at 70 (1948); GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 126-133 (1936).

"proximately" or "directly" his negligence is "remote" to it.¹⁹⁰ In its practical operation only in cases where the defendant has a statute¹⁹¹ providing that he have avoided the consequences of his negligence, he is not entitled to the apportionment rule this has received under the last clear chance, to the plaintiff.

All of these limitations mean that the jury is without going at all to the root of the irresponsible jury. A more serious problem is the procedure which requires the use of interrogatories,¹⁹³ bearing on the last clear chance procedure is applied to the last clear chance. For example, the jury is not asked to assess the plaintiff with assessment of the defendant, but is asked instead a series of questions, their answers, might run in a

1. In operating his automobile preceding the collision, was the plaintiff negligent with respect to the speed of his car?

¹⁹⁰ *Bejach v. Colby*, 141 *Tenn.* 68, 163 S.W. 804 (1913); *Memphis Street R. Co. v. Bejach*, 141 *Tenn.* 68, 163 S.W. 804 (1913); *Hansard v. Ferguson*, 23 *Tenn.* 118, 118 S.W. 118 (1904); *Hansard v. Ferguson*, 23 *Tenn.* 118, 118 S.W. 118 (1904). However, a special rule apportioning liability to the defendant in the case of precautions of railroads. See *supra*, note 190.

¹⁹¹ *Dush v. Fitzhugh*, 2 *Lea* (70 *Tenn.*) 35 at 40 (1888); *Fain*, 12 *Lea* (80 *Tenn.*) 35 at 40 (1888) (2d) 505 (1950); *Bejach v. Colby*, 141 *Tenn.* 68, 163 S.W. 804 (1913); *Carter*, 22 *Tenn.* App. 118, 118 S.W. (2d) 118 (1933).

¹⁹² *Ga. Code Ann.* (1936) §105-603. ¹⁹³ *Western & A. R. Co. v. Ferguson*, 87 *Ga.* 6, 13 S.E. 105 (1894); *R. Co. v. Luckie*, 87 *Ga.* 6, 13 S.E. 105 (1894) (1936); *Georgia R. & B. Co. v. Central of Ga. R. Co. v. Larsen*, 19 *Ga.* 118, 118 S.W. 118 (1904); *Larsen v. Wilbanks*, (5th Cir. 1933) 67 *F.* (2d) 115 *F.* (2d) 314.

¹⁹⁴ Technically a special verdict requires the jury to answer specific issues, without any general verdict for plaintiff or defendant. It is asked in addition to the instruction to return a verdict for plaintiff or defendant, jury's conclusions. Either may be appropriate.

"proximately" or "directly" to his injury will bar all recovery,¹⁸⁹ but if his negligence is "remote" the damages will be reduced in proportion to it.¹⁹⁰ In its practical operation this has resulted in apportionment only in cases where the defendant has the last clear chance. Georgia has a statute¹⁹¹ providing that "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover"; and under the Georgia apportionment rule this has resulted in a reverse application of the last clear chance, to the plaintiff instead of the defendant.¹⁹²

Special Verdicts

All of these limitations merely cut down the scope of apportionment, without going at all to the root of the difficulty, the unreliable and irresponsible jury. A more realistic approach to that basic problem is the procedure which requires a special verdict, or answers to special interrogatories,¹⁹³ bearing on the apportionment of damages. As this procedure is applied to the apportionment issue in Wisconsin, for example, the jury is not asked to return a general verdict for the plaintiff with assessment of the recoverable damages, or for the defendant, but is asked instead a series of specific questions, which, with their answers, might run in a typical case as follows:

1. In operating his automobile at the time of and immediately preceding the collision, was the defendant Smith negligent with respect to the speed of his car? Yes.

¹⁸⁹ *Bejach v. Colby*, 141 Tenn. 686, 214 S.W. 869 (1919); *Anderson v. Carter*, 22 Tenn. App. 118, 118 S.W. (2d) 891 (1938); *Grigsby & Co. v. Bratton*, 128 Tenn. 597, 163 S.W. 804 (1913); *Memphis Street R. Co. v. Haynes*, 112 Tenn. 712, 81 S.W. 374 (1904); *Hansard v. Ferguson*, 23 Tenn. App. 306, 132 S.W. (2d) 221 (1939). There is, however, a special rule apportioning the damages under the statute requiring certain precautions of railroads. See *supra*, note 92.

¹⁹⁰ *Dush v. Fitzhugh*, 2 Lea (70 Tenn.) 307 at 309 (1879); *East Tenn. R. Co. v. Fain*, 12 Lea (80 Tenn.) 35 at 40 (1883); *McClard v. Reid*, 190 Tenn. 337, 229 S.W. (2d) 505 (1950); *Bejach v. Colby*, 141 Tenn. 686, 214 S.W. 869 (1919); *Anderson v. Carter*, 22 Tenn. App. 118, 118 S.W. (2d) 891 (1938).

¹⁹¹ Ga. Code Ann. (1936) §105-603.

¹⁹² *Western & A. R. Co. v. Ferguson*, 113 Ga. 708, 39 S.E. 306 (1901); *Americus R. Co. v. Luckie*, 87 Ga. 6, 13 S.E. 105 (1891); *Pollard v. Heard*, 53 Ga. App. 623, 186 S.E. 894 (1936); *Georgia R. & B. Co. v. Stanley*, 38 Ga. App. 773, 145 S.E. 530 (1928); *Central of Ga. R. Co. v. Larse*, 9 Ga. App. 413, 91 S.E. 517 (1917); *Southern R. Co. v. Wilbanks*, (5th Cir. 1933) 67 F. (2d) 424; *United States v. Fleming*, (5th Cir. 1940) 115 F. (2d) 314.

¹⁹³ Technically a special verdict requires answers to specific questions only on the issues, without any general verdict for plaintiff or defendant. Special interrogatories are asked in addition to the instruction to return a general verdict, and as a check upon the jury's conclusions. Either may be appropriate to the apportionment of damages.

2. If you answer Question 1 "Yes," then answer this: Was the defendant Smith's negligence a cause of the collision? Yes.

3. In operating his automobile at the time of and immediately preceding the collision, was the plaintiff Jones negligent with respect to failure to stop before entering the intersection? Yes.

4. If you answer Question 3 "Yes," then answer this: Was the plaintiff Jones's negligence a cause of the collision? Yes.

5. If you answer all of Questions 1, 2, 3 and 4 "Yes," then answer this: What percentage of the total negligence was attributable to the defendant Smith? 60%. To the plaintiff Jones? 40%.

6. What is the amount of the damages plaintiff Jones has sustained? \$10,000.

With the information thus given, the court is in a position to make the apportionment itself, and proceeds to enter judgment for the plaintiff Jones in the amount of 60% of the damages found, or \$6,000. The jury are not told the effect of the answers, although they may well understand what it will be; and it has been held to be error to permit counsel to read the apportionment statute to the jury in order to let them know.¹⁹⁴

Such is the Wisconsin procedure, which calls for a special verdict, with the court making the final entry. Obviously, however, the same questions would serve equally well as special interrogatories, put, along with full instructions as to the law, as a check upon the jury's conclusions under the ordinary general verdict. And if, as has often been the case in jurisdictions where all this is entirely unfamiliar, new and alarming, even these few and simple questions appear unduly complicated and confusing, they might be made even simpler still. For special interrogatories on the issue of division of damages, Questions 5 and 6 above are all that are really needed. Or the whole matter might be reduced to the lowest possible terms, as follows:

Q. What is the full amount of the damages sustained by the plaintiff? A. \$10,000.

¹⁹⁴ *De Groot v. Akkeren*, 225 Wis. 105, 273 N.W. 725 (1937). General instructions are not given where the special verdict is used, and instructions on the special issues are limited to those necessary or appropriate to enable the jury to understand the questions. *Connelley v. Nees*, (Tex. Civ. App. 1924) 266 S.W. 502; *Robertson & Mueller v. Holden*, (Tex. Comm. App. 1928) 1 S.W. (2d) 570; *Tidal Western Oil Co. v. Blair*, (Tex. Civ. App. 1931) 39 S.W. (2d) 1103; *Texas Pipe Lin. Co. v. Bridges*, (Tex. Civ. App. 1931) 39 S.W. (2d) 1109; *Byington v. City of Merrill*, 112 Wis. 211, 88 N.W. 26 (1901); *Banderob v. Wisconsin Cen. R. Co.*, 133 Wis. 249, 113 N.W. 738 (1907); *Gendler v. Cleveland R. Co.*, 18 Ohio App. 48 (1924).

Q. What is the by reason of any neg

Both special verdicts authorized and permissible law, in nearly all of our with the trial court, and requested by counsel, and has been the traditional procedure. Another way of special verdicts, that must be taken to be for proof.¹⁹⁷ Because of this to swamp the jury with became so unwieldy, com-voiced by the courts.¹⁹⁸ record where thirty to f It was only when it was

¹⁹⁶ This was done under 247 N.W. 335 (1933), and 16 MICH. L. REV. 1 at 16-17 percentages under the Wisconsin are used almost universally in

¹⁹⁸ See generally, as to special verdicts, General and Special, 29 *Special Verdicts and Special Interrogatories to Juries in Civil Development in Jury Trial*, 13 *Aid to the Jury*, 13 *J. AM. J. Lipscomb*, "Special Verdicts Under Dooley," *The Use of Special Verdicts*, 32 (1941); *Nordbye*, 2 F.R.D. 138 (1943); *McCormick*, 2 F.R.D. 176 (1943); *Hyde*, 144 (1941); *Rossman*, "The Jury (1944); *Frank*, "The Case for

¹⁹⁷ *Barnes v. Williams*, 24 49 U.S. 470, 12 L. Ed. 1160 (1855); *Hodges v. Easton*, 106 many states, in the absence of 132 N.W. 873 (1911); *Boulger* (1918); *Wilson v. Commercial man v. Phillips*, 106 Wis. 611,

¹⁹⁸ See *Ward v. Busack*, 4 Co. v. Anderson, (Tex. Civ. App. questions); *Oriental Inv. Co. v. tions*; *St. Louis, B. & M. R. Co. questions*).

²⁰⁰ As in Wis. Stat. (194 Federal Rules of Civil Procedure

Q. What is the amount of plaintiff's damages as diminished by reason of any negligence attributable to him? A. \$6,000.¹⁰⁵

Both special verdicts and special interrogatories have long been authorized and permissible, either by statute or under the common law, in nearly all of our jurisdictions.¹⁰⁶ They have been discretionary with the trial court, and actually they have been little used—seldom requested by counsel, and more seldom given when asked. One reason has been the traditional inertia of the bar toward any innovation in procedure. Another was the unfortunate holding, in a few early cases of special verdicts, that all controverted facts not found specifically must be taken to be found against the party having the burden of proof.¹⁰⁷ Because of this, counsel, out of an excess of caution, began to swamp the jury with detailed questions; and the special verdict became so unwieldy, confusing and unworkable that complaints were voiced by the courts.¹⁰⁸ There were instances¹⁰⁹ of appeals on a record where thirty to fifty questions had been asked in a single case. It was only when it was provided²⁰⁰ or held that facts not found spe-

¹⁰⁵ This was done under the Wisconsin statute in *Honore v. Ludwig*, 211 Wis. 354, 247 N.W. 335 (1933), and was held to be proper. Padway, "Comparative Negligence," 16 *MANQ. L. REV.* 1 at 16-17, 23-24 (1941), gives this form of verdict and objects to percentages under the Wisconsin act; but as the case cited indicates, percentage questions are used almost universally in Wisconsin.

¹⁰⁶ See generally, as to special verdicts and special interrogatories, Sunderland, "Verdicts, General and Special," 29 *YALE L.J.* 253 (1920); Morgan, "A Brief History of Special Verdicts and Special Interrogatories," 32 *YALE L.J.* 575 (1923); Wicker, "Special Interrogatories to Juries in Civil Cases," 35 *YALE L.J.* 296 (1926); Green, "A New Development in Jury Trial," 13 *A.B.A.J.* 715 (1927); Staton, "The Special Verdict as an Aid to the Jury," 13 *J. AM. JUR. SOC.* 176 (1930); note, 34 *ILL. L. REV.* 96 (1939); Lipscomb, "Special Verdicts Under the Federal Rules," 25 *WASH. UNIV. L.Q.* 185 (1940); Dooley, "The Use of Special Issues Under the New State and Federal Rules," 20 *TEX. L. REV.* 32 (1941); Nordbye, "Use of Special Verdicts Under Rules of Civil Procedure," 2 *F.R.D.* 138 (1943); McCormick, "Jury Verdicts Upon Special Questions in Civil Cases," 2 *F.R.D.* 176 (1943); Hyde, "Fact Finding by Special Verdict," 24 *J. AM. JUR. SOC.* 144 (1941); Rossman, "The Judge-Jury Relationship in the State Courts," 3 *F.R.D.* 98 (1944); Frank, "The Case for the Special Verdict," 32 *J. AM. JUR. SOC.* 142 (1949).

¹⁰⁷ *Barnes v. Williams*, 24 U.S. 415, 6 L. Ed. 508 (1826); *Prentice v. Zane's Admrs.*, 49 U.S. 470, 12 L. Ed. 1160 (1850); *Graham v. Bayne*, 59 U.S. 60, 15 L. Ed. 265 (1855); *Hodges v. Easton*, 106 U.S. 408, 1 S.Ct. 307 (1882). This remains the rule in many states, in the absence of special provision. *Mulvaney v. Burroughs*, 152 Iowa 439, 132 N.W. 873 (1911); *Boulger v. Northern Pac. R. Co.*, 41 N.D. 316, 171 N.W. 632 (1918); *Wilson v. Commercial Union Ins. Co.*, 15 S.D. 322, 89 N.W. 649 (1902); *Hildman v. Phillips*, 106 Wis. 611, 82 N.W. 566 (1900).

¹⁰⁸ See *Ward v. Busack*, 46 Wis. 407, 1 N.W. 107 (1879); *Texas Electric Service Co. v. Anderson*, (Tex. Civ. App. 1932) 55 S.W. (2d) 142.

¹⁰⁹ See *Hartford Fire Ins. Co. v. Post*, (Tex. Civ. App. 1900) 62 S.W. 140 (50 questions); *Oriental Inv. Co. v. Barclay*, (Tex. Civ. App. 1901) 64 S.W. 80 (32 questions); *St. Louis, B. & M. R. Co. v. Jenkins*, (Tex. Civ. App. 1915) 172 S.W. 984 (35 questions).

²⁰⁰ As in Wis. Stat. (1949) §270.28; Tex. Rev. Stat. (Vernon, 1936) art. 2190; Federal Rules of Civil Procedure, Rule 49(a).

cifically must be deemed to support the judgment if there was any evidence to sustain it, that simplicity was restored and the special verdict gave satisfaction. Statutes in a few states now provide that the court must submit special verdicts²⁰¹ or special interrogatories²⁰² at the request of either party. In Wisconsin, North Carolina and Texas the special issue has become standard procedure;²⁰³ and there is a history of more than twenty years of its application to the Wisconsin general apportionment act.²⁰⁴

When the apportionment provision of the Federal Employers' Liability Act first reached the courts, some of them strongly recommended²⁰⁵ that the issue of the division of damages be put specially to the jury, as a control upon the verdict and a remedy for the court's ignorance of what the jury might do. In a few instances this was done;²⁰⁶ but it remained discretionary with the trial court,²⁰⁷ and for

²⁰¹ Ohio Gen. Code Ann. (Page, 1926) §11460; R.I. Laws (1938) c. 534, §2; Tex. Rev. Stat. (Vernon, 1936) art. 2189; Wis. Stat. (1949) §270.27.

²⁰² Ill. Rev. Stat. (Smith-Hurd, 1923) c. 110, §79; Ind. Stat. Ann. (Burns, 1914) §572; Iowa Comp. Code (1919) §7253; Kan. Rev. Stat. (1923) c. 60, §2918; Mich. Comp. L. (1915) §12611; Ohio Gen. Code Ann. (Page, 1926) §11463; R.I. Gen. Laws (1923) §4983.

²⁰³ The Texas procedure still has the reputation of creating confusion because of the tendency of Texas attorneys to put complicated questions on over-refined niceties. See Dooley, "The Use of Special Issues Under the State and Federal Rules," 20 TEX. L. REV. 32 (1941); McCormick, "Jury Verdicts Upon Special Questions in Civil Cases," 2 F. R. D. 176 at 180 (1943); Rossman, "The Judge-Jury Relationship in the State Courts," 3 F.R.D. 98 at 109 (1944). McCormick says (p. 179) that in North Carolina "simplicity and directness in the submission by questions to the jury is the key to the success of the method," and that in Wisconsin the questions, although more numerous than in North Carolina, "are apparently held within reasonable limits."

²⁰⁴ See, for example, Schulz v. General Cas. Co., 233 Wis. 118, 288 N.W. 803 (1939); Tomany v. Camozzi, 238 Wis. 611, 300 N.W. 508 (1941); Horn v. Snow-White Laundry & Dry Cleaning Co., 240 Wis. 312, 3 N.W. (2d) 380 (1942); Campanelli v. Milwaukee Elec. R. & T. Co., 242 Wis. 505, 8 N.W. (2d) 390 (1943); Webster v. Roth, 246 Wis. 535, 18 N.W. (2d) 1 (1945).

²⁰⁵ New York Cent. & H.R. R. Co. v. Banker, (2d Cir. 1915) 224 F. 351; McAuliffe v. New York Cent. & H.R. R. Co., 172 App. Div. 597, 158 N.Y.S. 922 (1916). In the last named case the court refers to this as "the more recently adopted method of returning verdicts under this statute in the United States District Courts." (158 N.Y.S. at 927). See also Wolf v. Baltimore & Ohio R. Co., 239 App. Div. 95, 267 N.Y.S. 199 (1933).

²⁰⁶ Saar v. Atchison, T. & S.F. R. Co., 97 Kan. 441, 155 P. 954 (1916); Kalashian v. Hines, 171 Wis. 429, 177 N.W. 602 (1920); Richter v. Chicago, M. & St. P. R. Co., 176 Wis. 188, 186 N.W. 616 (1922); Hanley v. Erie R. Co., 273 App. Div. 257, 77 N.Y.S. (2d) 153 (1948); Texas & Pac. R. Co. v. Mix, (Tex. Civ. App. 1946) 193 S.W. (2d) 542; Bennett v. Denver & R.G.W. R. Co., (Utah 1950) 213 P. (2d) 325. See also Missouri, K. & T. R. Co. of Texas v. Pace, (Tex. Civ. App. 1916) 184 S.W. 1051, under the Texas state railroad employers' liability act.

²⁰⁷ Refusal to put the special issue was held not to be error in Fried v. New York, N.H. & H.R. R. Co., 183 App. Div. 115, 170 N.Y.S. 697 (1918), *aff'd.* in 230 N.Y. 619, 130 N.E. 917 (1921); Wolf v. Baltimore & Ohio R. Co., 239 App. Div. 95, 267 N.Y.S. 199 (1933); Dallas Ry. & Term. Co. v. Sullivan, (5th Cir. 1940) 108 F. (2d) 581; Goodman v. Chicago, B. & Q. R. Co., 289 Ill. App. 320, 7 N.E. (2d) 393 (1937). In the last named case the refusal was justified on the remarkable ground that the special answer could not control the general verdict.

no discernible reason other than its popularity. When the Federal Rules²⁰⁸ left both special verdicts²⁰⁹ and special interrogatories²¹⁰ to the discretion of the trial court, the effect upon cases arising under the Federal Rules was characteristic opinion,²¹¹ and the courts have not vigorously and at length the issue, but there is as yet no indication that it has been no written opposition to the Federal Rules,²¹² and the issue is left to the discretion of the trial court in apportionment cases.

The advantages claimed for special verdicts as far as they are pertinent to

²⁰⁸ Rule 49 (a): "Special Verdicts. In a civil action the court may direct the jury to return a special verdict in the form of a special answer to the pleadings. The court may submit to the jury a brief answer or may submit written questions to be answered properly by the jury. The court may direct the jury to return a special verdict if the court is satisfied that the issues and questions are proper. The court shall give to the jury the questions and the matter thus submitted as may be appropriate. The court shall give to the jury the questions on each issue. If in so doing the court is satisfied that the evidence, each party waives his right to a general verdict before the jury retires he demand a special verdict without such demand the court may direct the jury to return a special verdict to have made a finding in accord with the evidence." (2d Cir. 1948) 167 F. (2d) 108 F. (2d) 581.

²⁰⁹ Rule 49 (b): "General Verdicts. In a civil action the court may submit to the jury, together with the questions and interrogatories upon one or more issues, a general verdict. The court shall give such instructions as enable the jury both to make answers to the questions and the court shall direct the jury to return a general verdict. When the general verdict and the entry of the appropriate judgment are consistent with each other and the answers are consistent with each other and the verdict, the court may direct the entry of judgment notwithstanding the general verdict, or the court may direct the entry of judgment and verdict or may order a new trial. When the general verdict and one or more is likewise inconsistent the court may direct the entry of judgment but may not direct the entry of judgment and verdict or may order a new trial." (2d Cir. 1948) 167 F. (2d) 108 F. (2d) 581.

²¹⁰ The special interrogatory procedure was first adopted in R. Co., (2d Cir. 1948) 167 F. (2d) 108 F. (2d) 581. See also Skidmore v. Baltimore & Ohio R. Co., (2d Cir. 1948) 167 F. (2d) 108 F. (2d) 581.

²¹¹ Skidmore v. Baltimore & Ohio R. Co., (2d Cir. 1948) 167 F. (2d) 108 F. (2d) 581. Learned Hand concurred briefly, as did the majority.

²¹² Driver, "A More Extended View of the Special Verdict," 108 F. (2d) 581.

²¹³ See Sunderland, "Verdicts, Special Interrogatories to Jurors," 108 F. (2d) 581. See also Wicker, "Special Interrogatories to Jurors," 108 F. (2d) 581. See also "The Special Verdict as an Aid to the Jury," 108 F. (2d) 581. See also "The Case for the Special Verdict," 108 F. (2d) 581. See also more & Ohio R. Co., (2d Cir. 1948) 167 F. (2d) 108 F. (2d) 581.

no discernible reason other than pure inertia the practice never became popular. When the Federal Rules of Civil Procedure provided for both special verdicts²⁰⁸ and special interrogatories,²⁰⁹ they were still left to the discretion of the judge, and they have had no apparent effect upon cases arising under the act.²¹⁰ In 1948 Judge Frank, in a characteristic opinion,²¹¹ copiously ornamented with footnotes, urged vigorously and at length the use of the special issue in all such cases; but there is as yet no indication that he has made many converts. There has been no written opposition whatever to the procedure under the Federal Rules,²¹² and the failure of the federal courts to make use of it in apportionment cases remains something of a mystery.

The advantages claimed for the special issue are many.²¹³ So far as they are pertinent to the apportionment of damages, the most

²⁰⁸ Rule 49 (a): "Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

²⁰⁹ Rule 49 (b): "General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and the answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

²¹⁰ The special interrogatory procedure was used and upheld in *Bolen v. Lehigh Valley R. Co.*, (2d Cir. 1948) 167 F. (2d) 934. Refusal to put the special issue was held not to be error in *Skidmore v. Baltimore & Ohio R. Co.*, (2d Cir. 1948) 167 F. (2d) 54.

²¹¹ *Skidmore v. Baltimore & Ohio R. Co.*, (2d Cir. 1948) 167 F. (2d) 54. Judge Learned Hand concurred briefly, as to the desirability of putting the special issue.

²¹² Driver, "A More Extended Use of the Special Verdict," 9 F.R.D. 495 (1950).

²¹³ See Sunderland, "Verdicts, General and Special," 29 YALE L.J. 253 (1920); Wicker, "Special Interrogatories to Juries in Civil Cases," 35 YALE L.J. 296 (1926); Staton, "The Special Verdict as an Aid to the Jury," 13 J. AM. JUR. SOC. 176 (1930); Frank, "The Case for the Special Verdict," 32 J. AM. JUR. SOC. 142 (1949); *Skidmore v. Baltimore & Ohio R. Co.*, (2d Cir. 1948) 167 F. (2d) 54.

important is of course that the jury is no longer given a free hand in a cloak of secrecy, and the court is informed as to what it has done. If the instructions have been thrown out of the window, if they have been misunderstood, if there has been error in applying them, even in arithmetic, it may be corrected rather than allowed to stand. The court is told whether the jury has found contributory negligence at all, whether it has divided the damages, and if so, in what proportion. If the process or the result is wrong, a remittitur may save a complete new trial. Beyond this, the jury is forced to give detailed consideration to the issue, rather than to jump at a general conclusion without paying any attention to it. A jury which on general principles would return a large verdict in favor of a pretty woman and against a railroad company may well hesitate to return special findings which it knows to be against the evidence. Finally, the special verdict may, in many cases, avoid the necessity of long and complicated instructions,²¹⁴ incomprehensible to anyone but a lawyer, and in themselves a fertile source of error.

All of these advantages clearly operate in favor of the defendant in the majority of apportionment cases, and the proposal for compulsory special verdicts or special interrogatories has met with no enthusiasm at all on the part of the plaintiffs' attorneys who usually introduce the apportionment bills into the legislature. Yet the report of the Wisconsin

²¹⁴ Staton, "The Special Verdict as an Aid to the Jury," 13 J. Am. Jur. Soc. 176 at 181 (1930), gives the following horrible example, which was one of several involved instructions given in *Payne v. Healey*, 139 Md. 86, 114 A. 693 (1921): "The defendant prays the court to instruct the jury that it was the duty of the plaintiff to look and listen for approaching trains, as he approached the tracks of the defendant on the occasion of the injuries complained of and to continue to look and listen until the said tracks were reached and to further instruct the jury that if they shall find from the evidence that the view of plaintiff of said tracks, as he then and there approached the same, was in either direction in any way obstructed, then it was the duty of the plaintiff to stop, look and listen for the approaching train or trains before attempting to cross the said tracks; and to further instruct the jury that if they shall further find that the plaintiff did not so look and listen, or did not stop, look and listen, if they shall find that the view of the plaintiff of said tracks was in either direction obstructed and shall further find that his failure to so look and listen or to so stop, look and listen, directly contributed to the collision between the engine and the defendant and the automobile which the plaintiff was then and there driving, then the plaintiff is not entitled to recover, unless the jury shall further find from the evidence that the defendant, its agents or employees, in charge of the engine and train which collided with the automobile of the plaintiff could have by the exercise of reasonable care and caution on his or their part, after he or they or any of them became aware of the peril, the plaintiff had by his negligence, if the jury shall so find, placed himself, avoided the consequences of the plaintiff's said negligence and prevented the injuries complained of or unless they further find that the engineer in charge of said engine could by the exercise of reasonable care have discovered the position or peril of the plaintiff while the plaintiff was upon the Antietam street crossing and that the said engineer could by the exercise of reasonable care have avoided injury to the plaintiff or his property after he ought to have discovered the peril of the plaintiff if the jury so find."

lawyers, for both plain from drafting committee combination of the special worked very well in Wisconsin able to the successful operation like to see a return to the been that the increase in ably result from the abrupt considerable extent balance size of verdicts, as juries find contributory negligence have remained within compromises, this seems and effective.

Complications arise v Where, for example, the and injure the plaintiff, the cars, it is obvious that done to the situation by a tiff and one driver alone parties. There remain the fault of one who is not a him in which the first is a very different conclusion joint tortfeasors. The on

²¹⁵ The writer has seen so drafting committees in Minnesota.

"Another difficulty in the do not have special verdicts, but it can be known, for instance, \$1,000, that the plaintiff himself jury awarded \$750 for this reason in dealing with pleas of excessive

"An automobile damage suit no way of knowing whether the lish that the plaintiff was guilty the court may assume that the jury ut .y negligence where that fact have considered the comparative have not had much experience provision for them in this state, I should go along with a comparative along with the other." Lipscomb, (Sept. 1951).

lawyers, for both plaintiffs and defendants, in response to inquiries from drafting committees,²¹⁵ has been for many years that the combination of the special issue procedure and the apportionment act has worked very well in Wisconsin, that they regard the one as indispensable to the successful operation of the other, and that they would not like to see a return to the common law. In particular, their report has been that the increase in the number of recoveries which must inevitably result from the abrogation of the complete defense has been to a considerable extent balanced and compensated by some reduction in the size of verdicts, as juries apportion the damages instead of refusing to find contributory negligence at all; and that liability insurance rates have remained within reasonable bounds. Of the various possible compromises, this seems to be the only one which is both reasonable and effective.

Multiple Parties

Complications arise when apportionment involves multiple parties. Where, for example, the automobiles of two negligent drivers collide and injure the plaintiff, who is a bystander or a passenger in one of the cars, it is obvious that no complete and substantial justice can be done to the situation by any division of the damages between the plaintiff and one driver alone, in an action to which only those two are parties. There remain the problems of evaluation of the contributing fault of one who is not a party to the action, of the second suit against him in which the first is not *res judicata* and a new jury may come to a very different conclusion, and finally of contribution between the joint tortfeasors. The only completely satisfactory method of dealing

²¹⁵The writer has seen some sixty such letters, in connection with the work of drafting committees in Minnesota in 1939, and California in 1951.

"Another difficulty in the practical operation of the statute in Mississippi is that we do not have special verdicts, but general lump-sum verdicts only. There is no way in which it can be known, for instance, that the jury found that the plaintiff had been damaged \$1,000, that the plaintiff himself was guilty of 25 per cent of the negligence, and that the jury awarded \$750 for this reason. Thus, the appellate court has a most difficult time in dealing with pleas of excessiveness or inadequacy.

"An automobile damage suit is usually a swearing contest. The appellate court has no way of knowing whether the jury believed or disbelieved the testimony offered to establish that the plaintiff was guilty of negligence. If the verdict seems to be unusually large the court may assume that the jury did not believe that the plaintiff was guilty of contributory negligence where that fact is in dispute when, as a matter of fact, the jury might not have considered the comparative negligence statute at all in arriving at the verdict. We have not had much experience with special verdicts, because there never has been any provision for them in this state, but in our humble opinion a provision for special verdicts should go along with a comparative negligence statute as one of the Siamese twins goes along with the other." Lipscomb, "Comparative Negligence," *Ins. L.J.* No. 344, 667 at 673 (Sept. 1951).

with the situation is to bring all the parties into court in a single action, to determine the damages sustained by each, and to require that each bear a proportion of the total loss according to his fault.

The English²¹⁶ and some of the Canadian²¹⁷ acts have proceeded on this basis. With liberal procedure for joinder of parties at the instance of either plaintiff or defendant, as well as for counterclaims and cross-complaints, they have provided for apportionment of all damages among all parties in proportion to their respective faults, including contribution between defendants. Professor Gregory, in a very able book,²¹⁸ has argued convincingly the superiority of these statutes over any other existing acts. There can be no doubt that, from the point of view of pure theory and abstract justice, they achieve a more satisfactory result in cases of multiple parties than ever has been accomplished in the United States.

Practical operation is, however, a very different thing from pure theory; and it may well be questioned whether the very complex Canadian procedure is capable of being adapted to the American jury. The jury has virtually disappeared from tort litigation both in England and in Canada,²¹⁹ and the success of the Canadian method has been due in no small part to its administration by very intelligent judges. The cases of multiple parties can, and do, become extremely involved, as is indicated by the very condensed statements of two of them given by Professor Gregory.²²⁰

1. Collision between I's automobile and M's truck, the truck being parked on a highway at night with rear light on. I and I, Jr. suffer damage of \$283.10 and \$200, respectively, and M's damage was \$35.75. I and I, Jr. sued M, who apparently counterclaimed against I. I was found 25 per cent and M 75 per cent negligent. Appeal by I and cross-appeal by M from judgment of trial court dismissed. Court said damages were added, totaling \$518.85, of which I must bear 25 per cent and M 75 per cent. M pays I, Jr. \$200, and the balance of his share \$189.13 to I, I pay nothing to

M. The court apparently found plus 3/4 of \$283.10, plus 3/4 of in proportion to their negligence not be affected because he was

2. Collision of automobile with HH and LW, respectively crossing. HH and LW, as well as under the Motor Vehicles Act, GH and JW alone were negligent respectively.

FH's and SH's damages they got judgment against which she claimed by court titled to 2/3 thereof, since to her as contributory negligence damages.

LW, under the statute services of his deceased wife. The court held that inasmuch as self, they were to be reduced for JW's negligence, under contributory negligence and as was also entitled to contribution thing he paid to FH and SH.

It appeared that HH had a cross-complaint for damage to judgment for 2/3 of her contribution against LW.

GH and HH neglected anything they might have

Net result:

FH against LW—\$648

SH against LW—\$750

HH against LW and JW

LW against HH and JW

LW against HH and JW
\$648 plus \$750)

If they had requested contribution from JW, \$574.00 this is doubtful in view of involved.²²²

²²¹The case is *Steele v. Ferguson*

²²²The case is *Huines v. William*

²¹⁶ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30; Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28. See WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* (1951).

²¹⁷ In particular the statutes of Ontario, Alberta, British Columbia, Manitoba and Saskatchewan, *supra* note 9.

²¹⁸ GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* (1935). See also Gregory, "Loss Distribution by Comparative Negligence," 21 *MINN. L. REV.* 1 (1936).

²¹⁹ "In 1935, of some 1400 actions tried in the King's Bench in London, it is said that about 300 were tried before juries. I have no Canadian statistics, but it is easy to believe that the percentage of jury trials is even lower in Canada." O'Halloran, "Problems in the Modern Appeal in Civil Cases," 27 *CAN. B. REV.* 259 at 253 (1949).

²²⁰ GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* 181, 186 (1936).

M. The court apparently figured that M's share was $\frac{3}{4}$ of \$200, plus $\frac{3}{4}$ of \$283.10, plus $\frac{3}{4}$ of \$35.75, and I's share $\frac{1}{4}$ of this total, in proportion to their negligence, and that I, Jr.'s recovery should not be affected because he was not negligent at all.²²¹

2. Collision of automobiles given by GH and JW, belonging to HH and LW, respectively, accident occurring at a road crossing. HH and LW, as owners, were responsible vicariously under the Motor Vehicles Act for the negligence of their bailees. GH and JW alone were negligent, being $\frac{1}{3}$ and $\frac{2}{3}$ negligent, respectively.

FH's and SH's damages were \$648 and \$750 each, for which they got judgment against LW. HH suffered \$300 damages, which she claimed by counterclaim against LW, she being entitled to $\frac{2}{3}$ thereof, since the negligence of GH is attributed to her as contributory negligence and as a basis of liability for damages.

LW, under the statute, suffered \$1,000 damages for loss of services of his deceased wife and, in his personal capacity, \$291.80. The court held that inasmuch as the damages were for LW himself, they were to be reduced by $\frac{2}{3}$ because of his responsibility for JW's negligence, under the Motor Vehicles Act, both as contributory negligence and as a basis of liability for damages. LW was also entitled to contribution from HH and GH of $\frac{1}{3}$ of anything he paid to FH and SH.

It appeared that HH had added JW as a third party and filed a cross-complaint for damages to her car. On this she was entitled to judgment for $\frac{2}{3}$ of her damages, just as she was on her contribution against LW.

GH and HH neglected to ask for contribution from JW to anything they might have to pay to LW.

Net result:

FH against LW--\$648

SH against LW--\$750

HH against LW and JW--\$200

LW against HH and GH--\$361.20

LW against HH and GH--\$466 as contribution ($\frac{1}{3}$ of \$648 plus \$750)

If they had requested it, HH and GH might have had, as contribution from JW, \$574.66, although [says Professor Gregory] this is doubtful in view of the close domestic relationship involved.²²²

²²¹The case is *Steele v. Ferguson*, [1931] Ont. L. Rep. 427.

²²²The case is *Haines v. Williams*, 47 B.C. Rep. 69 (1933).

It is one thing to say that a capable Canadian judge, with ample time in chambers and a transcript of the record before him, can work all this out and do what the law requires. It is quite another to say that it can be done in a limited time, and from memory by the twelve housewives, baker's helpers and unemployed individuals who make up the kind of jury we get today in the United States. Even more terrifying is the prospect of the instructions which must be given, under pressure of time, before the jury retires, covering in detail all of the complications and replete with the possibility of reversible error. Even if special issues are to be used, they must run to a number and complexity which may well break the whole process down under its own weight. It has been the writer's experience that the mere attempt to explain to a committee of a legislature, or even a bar association, just how the Canadian method operates in cases of multiple parties, results in something approaching migraine and a general exodus for restoratives. It is not surprising that, even with enthusiastic reports of complete success in Canada for more than a quarter of a century, no American legislature has looked with favor upon such a system.²²³

An additional reason for hesitation here is the history of the Uniform Contribution Among Tortfeasors Act. Since its promulgation by the Commissioners on Uniform Laws in 1939, it has been adopted in only nine jurisdictions;²²⁴ and so much opposition to it has developed that the Commissioners now have withdrawn it for further study and possible redrafting. The chief difficulty has been that of the release of one tortfeasor, which under the terms of the act leaves him still liable for contribution to the other, but credits him with a pro rata share of his settlement. The defendants complain, with apparent justice, that this makes it impossible ever to settle a case, take a release, and close the file.²²⁵ Whatever the fate of the act may be, it is at least a warning that contribution among tortfeasors introduces problems of its own, and that the attempt to combine it with "comparative negligence" may well be the kiss of death to the whole bill.

²²³ The only serious attempt to persuade an American legislature to adopt the Canadian system was made in Minnesota in 1940. See PROCEEDINGS OF MINNESOTA STATE BAR ASSN. 12-17 (1940).

²²⁴ Arkansas, Delaware, Hawaii, Maryland, Michigan, New Mexico, Pennsylvania, Rhode Island and South Dakota. Maryland and Pennsylvania modified or eliminated the procedure provided by the act for joinder of third parties. Delaware, almost immediately after adoption of the act, amended it limiting its application to joint judgment defendants.

²²⁵ See Larson, "A Problem in Contribution—The Tortfeasor with an Individual Defense Against the Injured Party," [1940] Wis. L. Rev. 467; Smith, "Auto Accidents—Contribution and Covenants Not to Sue," [1950] Wis. L. Rev. 684; Barrett, "Release of One Joint Tortfeasor Under Uniform Contribution Among Tortfeasors Act," 18 Ins. Counsel J. 100 (1951).

Actually there are astonishingly few cases in which the negligence of multiple parties has reached the "comparative negligence" act. This is true arising in Georgia and Wisconsin. In Wisconsin, in cases in which the negligence of the defendant. In none of the cases in which the negligence of the defendant. In four of them²²⁶ it is the contribution between joint tortfeasors. A common law rule must be on a basis of fault. In four others²²⁷ it is nothing against one defendant only; and that his recovery is apportioned in the proportion that the negligence of all three, rather than as being where the plaintiff's negligence is 20%, and that of the defendant 20%, and that of the plaintiff could recover 95% of the damages with no apportionment between the plaintiff and the defendant. If the fault of the plaintiff was found to be 25%, the plaintiff was allowed to recover 75% of his damages or more.

It may be observed in passing that if the law be improved, they are at least not to be accomplished without the negligence of the plaintiff leaving the entire loss with the plaintiff. In these cases is not in their imperfection. The explanation does not mention acts covering railroads and one possible defendant, since in Michigan, Georgia and Wisconsin the apportionment of negligence cases. The procedure for joinder of parties, in Wisconsin. The fact appears to be that the negligence is sufficiently few in number, or are not the trial courts, that they have not

²²⁶ *Brown v. Haertel*, 210 Wis. 354, 241 Wis. 365, 251 N.W. 435 (1933); *Homerdir*, 409 (1938); *Wedel v. Klein*, 229 Wis. 419, 227 *Walker v. Kroger Grocery & Baking*, *Quady v. Sickl*, 260 Wis. 348, 51 N.W. (2d) 700, 14 S.E. (2d) 187 (1941); *Smith v. Amer*, 90 (1948).

²²⁷ *Bohlmann v. Penn Electric Corp.*, 232 Wis. 208, 14 S.E. (2d) 187 (1941); *Kirchen v. Tisler*, 255 Wis. 208, 38 S.E. (2d) 187 (1941).

Actually there are astonishingly few cases in which the question of multiple parties has reached the appellate courts under any "comparative negligence" act. The writer has found only ten, all of them arising in Georgia and Wisconsin, where apportionment is restricted to cases in which the negligence of the plaintiff is "less" than that of the defendant. In none of these cases has the result been very satisfactory. In four of them²²⁶ it was held that the statute did not affect contribution between joint tortfeasors, which under the Wisconsin common law rule must be on a basis of equality rather than in proportion to fault. In four others²²⁷ it was held that the plaintiff could recover nothing against one defendant whose fault was no greater than his own; and that his recovery against the other defendant must be reduced in the proportion that the plaintiff's negligence bore to the total of all three, rather than as between the two. In the ninth case,²²⁸ where the plaintiff's negligence was found to be 5%, that of one defendant 20%, and that of the other defendant 75%, it was held that the plaintiff could recover 95% of his damages against both defendants, with no apportionment between the two. In the tenth,²²⁹ where the fault of the plaintiff was found to be 50%, and that of each of two defendants 25%, the plaintiff was denied all recovery, but each defendant recovered 75% of his damages on his counterclaim.

It may be observed in passing that, however these results might be improved, they are at least no worse than the common law would have accomplished without the statute, by denying all recovery and leaving the entire loss with the plaintiff. But the real significance of these cases is not in their imperfections, but in their remarkably small number. The explanation does not lie entirely in the fact that apportionment acts covering railroads and employers usually leave only one possible defendant, since in Mississippi, Nebraska, South Dakota, Georgia and Wisconsin the apportionment applied to automobile accidents and other negligence cases. Nor does it lie in the absence of procedure for joinder of parties, which is available in all these jurisdictions. The fact appears to be that the cases of multiple parties are sufficiently few in number, or are disposed of with so little difficulty in the trial courts, that they have not been a major problem on appeal.

²²⁶ *Brown v. Haertel*, 210 Wis. 354, 244 N.W. 633 (1932); *Zurn v. Whatley*, 213 Wis. 365, 251 N.W. 435 (1933); *Homerding v. Pospychalla*, 228 Wis. 606, 280 N.W. 409 (1938); *Wedel v. Klein*, 229 Wis. 419, 282 N.W. 606 (1933).

²²⁷ *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934); *Quady v. Sickl*, 260 Wis. 348, 51 N.W. (2d) 3 (1952); *Mishoe v. Davis*, 64 Ga. App. 700, 14 S.E. (2d) 187 (1941); *Smith v. American Oil Co.*, 77 Ga. App. 463, 49 S.E. (2d) 90 (1948).

²²⁸ *Bohlmann v. Penn Electric Corp.*, 232 Wis. 232, 286 N.W. 552 (1939).

²²⁹ *Kirchen v. Tisler*, 255 Wis. 208, 38 N.W. (2d) 514 (1949).

Conclusion

No effort has been made in these pages to argue the desirability of the division of damages in contributory negligence cases. It speaks for itself, and the question always has been one of feasibility rather than of justice. It is too late, in the light of the long history, the many statutes, and the multitude of cases, to contend that the thing cannot be done at all. The chief problem is one of some protection for the defendants, and some restraint upon the irresponsible jury, which will keep it within bounds and insure that the apportionment will in fact be made.

If the writer were to attempt to draw an act for a legislature, he would avoid "slight" and "gross" negligence, and the "lesser" negligence of the plaintiff, as the pestilence. They do not strike at the root of the difficulty; they leave the damages undivided in too many cases where the division should be made; and they lead inevitably to many difficult appeals abounding in confusion. He would leave the multiple party apportionment, theoretically perfect as it may be, to the Canadians until the American jury is eliminated or at least improved, for the reason that the game is not worth the candle. He would rely upon the Wisconsin special issue procedure, or something like it, to keep the jury under control.

The following draft, which follows closely a bill approved by the California State Bar Association at its annual meeting in September, 1952, is consistent with these conclusions:

1. In all actions hereafter accruing for negligence resulting in personal injury or wrongful death or injury to property, including those in which the defendant has had the last clear chance to avoid the injury, the contributory negligence of the person injured, or of the deceased, or of the owner of the property, or of the person having control over the property, shall not bar a recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the injured person or to the deceased or to the owner of the property or to the person having control over the property.

2. In any action to which section 1 of this act applies, the court shall make findings of fact or 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 extent to which such damages are diminished by reason of such contributory negligence.

RESTRAINTS ON INTERESTS

IN the Middle Ages a c resulted in a serious loss of land. Corporations never died, but the death of a tenant in fee simple, wardship and marriage of a tenant in fee simple, or the death of a lord to perform military service, could result in the loss of a manor. In the twelfth and thirteenth centuries, the loss of land holdings and consequent loss of military strength led to conveyances to mortgagors and injured overlords. It proved that, if made, the overlord might lose his estate.⁶²⁶

The great Benedictine monasteries, already owned and hurt by the new statute,⁶²⁷ had to pay for licenses from the king. In the Dominican and Franciscan orders, the land passed over to the poor, the modern Salvation Army, and the church. To acquire sites for hospitals and the statute they resorted to the creation of a municipal corporation, which could do it.⁶²⁷ That this palpable loss of land for over a century was pro-

* The writer is indebted to the Law Faculty for guidance and to the writer's earlier article, "Restraints on Interests," 50 MICH. L. REV. 675-731, for notes to notes numbered below 500.

† Member, Michigan Bar; P.

⁶²⁶ Statute of Mortmain, 7 I.

⁶²⁷ The Cistercians, for example, in the century which followed the dissolution of the monasteries under Henry VIII, NICA, 11th ed. (1910). It would have developed some fifty years before the statute.

⁶²⁷ Maitland, EQUITY, 2d ed. known before the statute. See Q.

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The Role of the Courts and Legislatures in the Reform of Tort Law

That the law of torts needs continuous reform is not disputed; but debate does rage over the proper role of the courts and legislature in such law revision. In this Article, Professor Peck asserts that the judiciary should evaluate the comparative abilities of the courts and legislature to make the revision, in the context of the particular case. In setting out the criteria by which this evaluation should be made, he reveals the realities of the legislative process that hinder the reform of tort law: legislators are basically indifferent to tort law-making; legislators lack experience, time, and adequate wages; legislatures fail to hold satisfactory committee and public hearings; legislators are subject to well-organized lobbies and pressure groups. Professor Peck then examines recent catalytic court decisions that have sparked legislative enactments, to show that a creative judicial role does not conflict with the legislature; he concludes that, to overcome legislative inertia, the courts should play a more positive role in the reform of tort law.

Cornelius J. Peck*

The necessity of continuous reform in areas of the private law has long been recognized. More than 40 years ago Mr. Justice Cardozo forcefully argued for a "ministry of justice," which would recommend needed reforms in the law.¹ Following demonstrations of how law changes and the role that judges played in

* Professor of Law, University of Washington.
1. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).

producing that change,² there has been an increased demand for judicial participation in the reform process. Professor Robert Keeton recently commented with approval on "candidly creative" judicial action;³ for example, he calls on the judiciary to establish a comparative negligence scheme to supplant the more prevalent contributory negligence rule.⁴ Professor Seavey, summarizing conclusions based on nearly a half-century of teaching torts, has also urged an active and creative role for the judiciary with respect to many problems of tort law, ranging from the liability of innocent converters and the rule denying contribution to the adoption of comparative negligence and changes in the law of defamation.⁵ Other scholars have also urged an activist role for the judiciary⁶—in fact, Mr. Justice Traynor has publicly stated that the concern for judicial activity should focus on the continuing scarcity of creative opinions rather than on the overabundance of activity.⁷

Not all legal scholars have so enthusiastically approved of an active reform role for the judiciary. Mr. Justice Holmes, in one of his famous phrases, characterized the judicial power to legislate as interstitial—a power confined "from molar to molecular motions."⁸ Even Judge Jerome Frank, a leader of the jurisprudential realists, has urged a modest role for the courts in performing their inescapable function of judicial legislation,⁹ while others have more firmly opposed active judicial reform.¹⁰

Of course, a good part of the battle rages over the substance

2. See, e.g., CARDOZO, *THE GROWTH OF THE LAW* (1924); CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); FRANK, *LAW AND THE MODERN MIND* (1930); LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1919).

3. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

4. *Id.* at 508-09.

5. SEAVEY, *COGITATIONS ON TORTS* 52-72 (1954).

6. E.g., CAHILL, *JUDICIAL LEGISLATION* 149-60 (1952); Green, *The Thrust of Tort Law: Part II Judicial Law Making*, 64 W. VA. L. REV. 115, 121 (1952); James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BERKELEY L. REV. 315, 334 (1959).

7. Traynor, *Comment on Courts and Law Making*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 48, 52 (1959). See also *Reimann v. Monmouth Consol. Water Co.*, 9 N.J. 134, 140, 87 A.2d 325, 328 (1952) (Vanderbilt, C.J., dissenting).

8. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

9. *Aero Spark Plug Co. v. B. G. Corp.*, 130 F.2d 290, 296 (2d Cir. 1943) (Frank, J., concurring).

10. E.g., Cooperrider, *A Comment on "The Law of Torts,"* 53 MICH. L. REV. 1291 (1958).

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11. E.g., *Heltzer v. State*, 153 Colo. 24, 106 A.2d 663 (1954); 87 A.2d 325 (1952); 380, 280 P.2d 301 A.2d 30 (1953); *Me* (1959); cf. *Buck v.* also *Gallick v. Baltir* (senting).

12. *Muskopf v. Co* Rep. 89 (1961); *Har* 1957); *Molitor v. Kar* N.E.2d 89 (1959); *M* (1960); *Collopy v. Ne* (1953); *Battalla v. Sta* (1961); *Witte v. Fuller* *ley Memorial Hosp. As* *City of Milwaukee*, 17 *Hosp.*, 12 Wis. 2d 367, *Consol. Water Co.*, 9 N. *ing*; cf. *Eick v. Peck Dog*
13. Newman, *A Legal*
GAL INSTITUTIONS TODAY

of the proposed reforms. Scholars may easily disagree about the extent to which the law of torts should be reformulated to encompass additional mechanisms of loss distribution. They may likewise disagree, for example, on the opportunity for fraud created by a rule abrogating interspousal immunity in tort cases. But inevitably, debate over the reform of the law of torts involves the question of the proper role of the courts and the legislature in law-making and law revision. The advocate of reform by the judiciary is often informed by the court that the requested revision falls within the peculiar competence of the legislature.¹¹ On the other hand, the defender of the status quo has frequently been told—perhaps more frequently in recent years—that common-law traditions require the judiciary to alter and adapt its decisional law to meet the demands of our rapidly changing society.¹² The conflicting opinions on the proper role of the courts and legislatures in the reform of tort law have unfortunately yielded little, if any, careful analysis of the criteria by which the conflict should be decided. As Dean Frank Newman has said, "it seems inexcusable that we are still so ignorant on the question, 'By whom and how are laws best made?'"¹³

This Article will explore that question with particular reference to the law of torts and present at least a partial evalua-

11. *E.g.*, *Helton v. Sisters of Mercy*, 351 S.W.2d 129 (Ark. 1961); *Faber v. State*, 193 Colo. 219, 353 P.2d 609 (1960); *Levesque v. Levesque*, 99 N.H. 147, 100 A.2d 563 (1954); *Reimann v. Monmouth Consol. Water Co.*, 9 N.J. 134, 87 A.2d 325 (1952); *Laudgraver v. Emanuel Lutheran Charity Bd.*, 203 Ore. 489, 280 P.2d 301 (1955); *Knecht v. Saint Mary's Hosp.*, 392 Pa. 75, 140 A.2d 30 (1958); *Memorial Hosp. Inc. v. Oakes*, 200 Va. 878, 108 S.E.2d 238 (1959); *cf.* *Buck v. McLean*, 115 So. 2d 764 (Fla. Dist. Ct. App. 1959). See also *Gallick v. Baltimore & O.R.R.*, 372 U.S. 108, 123 (1963) (Harlan, J., dissenting).

12. *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rep. 89 (1961); *Hargrove v. Town of Cocoa Beach*, 98 So. 2d 130 (Fla. 1957); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. App. 2d 11, 163 N.E.2d 89 (1959); *McAndrew v. Mularchuk*, 33 N.J. 172, 102 A.2d 820 (1960); *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29, 141 A.2d 276 (1953); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); *Witte v. Fullerton*, 376 P.2d 244 (Okla. 1962); *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 2d 162, 260 P.2d 765 (1953); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 318 (1962); *Kojis v. Doctors Hosp.*, 12 Wis. 2d 367, 107 N.W.2d 191 (1961); see *Reimann v. Monmouth Consol. Water Co.*, 9 N.J. 134, 87 A.2d 325 (1952) (Vanderbilt, C.J., dissenting); *cf.* *Eick v. Perk Dog Food*, 347 Ill. App. 293, 106 N.E.2d 742 (1952).

13. Newman, *A Legal Look at Congress and the State Legislatures*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 67, 83-89 (1959).

tion of the comparative abilities of courts and legislatures to revise the law. In so framing the question, however, one must be cautious of searching for a single answer applicable to all phases of such a comprehensive problem. The major criticism of those who have discussed the creative role of the courts in judicial law-making is that they have failed to differentiate between the varied contexts in which the problem appears. Obviously, the creative role suggested for the courts in the area of contracts and property law or an area dominated by legislation and administrative regulation, such as taxation, is markedly different from the role it should play in the areas of procedure and torts.¹⁴ But even within these categories a more discriminating approach should be taken to avoid label-thinking. Thus, a court may properly refuse to expand the protection given by tort law against certain trade practices because legislation and administrative regulation have established a pattern of legal control.¹⁵ Yet the same court could properly exercise a creative role to expand the protection given by tort law against intentional infliction of emotional harm even though it occurred in a business context.¹⁶

I. LEGISLATIVE INDIFFERENCE

Having issued a warning against generalization, one may now be permitted to make one. It is that as a general proposition, legislatures are indifferent to the problems of reform of tort law. As Professor Cowan has articulated, "legislatures have no stomach for reform in tort law";¹⁷ correspondingly, Professor

14. In reforming the law, a number of courts have considered that the change related to the law of torts as being a significant factor. *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. App. 2d 11, 26, 163 N.E.2d 89, 96 (1959); *Bricker v. Green*, 313 Mich. 218, 21 N.W.2d 105 (1946); *Fussner v. Andert*, 261 Minn. 347, 361, 113 N.W.2d 355, 364 (1961); *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 2d 162, 179, 260 P.2d 765, 774 (1953); *Borst v. Borst*, 41 Wash. 2d 642, 657, 251 P.2d 149, 156 (1952). *But cf.* *Helton v. Sisters of Mercy*, 351 S.W.2d 129 (Ark. 1961). The commentators have also, of course, frequently pointed out the distinction in urging an active reform role in the area of torts. *E.g.*, *SEAVEY, op. cit. supra* note 5, at 60-68.

15. *E.g.*, *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 270 (2d Cir. 1920); see *Chutee, Unfair Competition*, 69 HARV. L. REV. 1289 (1940).

16. *E.g.*, *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. App. 2d 330, 250 P.2d 282 (1952). For a discussion of the propriety of an active role for the courts with respect to this problem, see text accompanying notes 190-93 *infra*.

17. Cowan, *Rule or Standard in Tort Law*, 13 *RUTGERS L. REV.* 141, 159-60 (1953).

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Pedrick has pointed out that the piecemeal legislation adopted is of equal significance to the total picture of legislative inactivity.¹⁸ Moreover, statutorily imposed tort liabilities may be inconsistent with the principles of tort law, as where a statute imposes a limited liability on parents whose children wilfully or maliciously destroy property. The obvious purpose of such legislation is to combat juvenile delinquency rather than to fulfill the compensatory objectives of tort law.¹⁹ Even though a statute is generally consistent with the objectives of tort law, the motivation for enactment may not have been the achievement of those objectives. For example, during the 30 years that proposals to waive the United States' immunity from tort liability were under consideration, Congress must have realized that such a waiver was consistent with both the objectives of the law of torts and valid governmental interests. But apparently the increasing burden of reviewing over 2000 private bills during each session of Congress, rather than an interest in a more symmetrical scheme of tort law, finally produced congressional action.²⁰

If additional proof is needed that legislatures frequently overlook or ignore the problems of tort law, it may be convincingly

18. Pedrick, *On Civilizing the Law of Torts*, 6 J. Soc'y Pub. Teachers L. 2, 8-9 (1951).

19. See Peck, *Parental Liability for Wilful and Malicious Acts of Children*, 38 WASH. L. REV. 327 (1961).

20. See *Dalehite v. United States*, 346 U.S. 15, 24-25 (1952). The Report of the House of Representatives stated in support of the legislation that became the Federal Tort Claims Act:

For many years the present system has been subjected to criticism, both as being unduly burdensome to the Congress and as being unjust to the claimants, in that it does not accord to injured parties a recovery as a matter of right but bases any award that may be made on considerations of grace. Moreover, it does not afford a well-defined continually operating machinery for the consideration of such claims.

The magnitude of the task of considering and disposing of private claims can be gathered from the following statistics:

In the Sixty-eighth Congress about 2,200 private claim bills were introduced, of which 250 became law, then the largest number in the history of the Claims Committee.

In the Seventieth Congress 2,268 private claim bills were introduced, asking more than \$100,000,000. Of these, 336 were enacted, appropriating about \$2,830,000, of which 144, in the amount of \$562,000, were for tort.

In each of the Seventy-fourth and Seventy-fifth Congresses over 2,300 private claim bills were introduced, seeking more than \$100,000,000. In the Seventy-sixth Congress approximately 2,000 bills were introduced, of which 315 were approved for a total of \$620,000.

In the Seventy-seventh Congress, of the 1,829 private claim bills in-

found in the frequency with which legislatures enact criminal statutes that provide no concurrent civil remedies for one injured by the criminal conduct. In some instances the courts have supplemented the statutory language by applying the doctrine of negligence per se to unexcused violations of criminal statutes, but the difficulties encountered in the application of that doctrine warrant the assumption that a legislature concerned with the civil consequences of a violation would have stated them. Perhaps the underlying legislative rationale is that the criminal law, which sets guidelines for future conduct, is worthy of legislative consideration; whereas tort law, which is only a system for distributing fortuitous losses, does not merit the exercise of the planning function of legislation. In any event, the civil consequences of violations are frequently ignored by legislatures.

This legislative indifference to tort law might be considered a delegation knowingly made to an expert body qualified at reformulating particular rules while maintaining consistency of governing principles — much as delegations of power to administrative agencies have been viewed. Indeed, the Supreme Court has characterized the Federal Employers Liability Act as a statute by which Congress created "only a framework within which the courts were left to evolve . . . a system of principles providing compensation for injuries to employees consistent with the changing realities of employment in the railroad industry."²¹ If the question could be raised, such an indefinite delegation might properly be determined constitutional by analogy to delegations of authority to administrative agencies, which have been sustained because experience and custom have made sufficiently explicit standards that otherwise would have been too vague.²² But, tempting as this view of a conscious delegation may be, the truth lies elsewhere.

II. THE MOTIVATIONS, PERSONALITIES, AND WORKING CONDITIONS OF LEGISLATORS

If legislatures were composed of a modern day equivalent of Plato's guardians or philosopher kings — a group selected on

introduced and referred to the Claims Committee, 503 were approved for a total of \$1,000,253.30. . . . So far during the present Congress about 1,279 private claim bills have been introduced. Of these, 225 have been enacted, appropriating about \$905,353.00.

H.R. Rep. No. 1287, 79th Cong., 1st Sess. 2 (1945).

21. *Kernan v. American Dredging Co.*, 355 U.S. 428, 437 (1958), 34 WASH. L. REV. 108 (1959).

22. *Fahey v. Mallonee*, 382 U.S. 245, 250-53 (1947); cf. *NLRB v. Radio Eng'rs*, 364 U.S. 579, 582-83 (1961).

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23. Eulau, *Encyclopedia of State Legislators*, in

24. *Id.* at 300.

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27. AMERICAN STA-
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28. Green, *supra* note

the basis of ability and prepared by a special education to settle affairs dispassionately for the good of the republic — they would undoubtedly undertake periodic, systematic reappraisals of the effectiveness of tort principles in serving society. Without descending to the stereotyped and frequently erroneous characterization of politicians, however, this is clearly not the case. Even at their best, members of state legislatures bear but little resemblance to Plato's guardians.

A recent study of the political socialization of state legislators²³ indicates that, while over half of the state legislators first became interested in politics in the pre-college or equivalent period, a sizeable proportion became interested after college or its equivalent period.²⁴ The fact that almost one-third of state legislators are lawyers by occupation²⁵ suggests that they are qualified to make competent reappraisals of the principles of private law; of course this generalization does not apply to the very large occupation group consisting of farmers.²⁶ Nor is there more than a conjectural hope that any special preparation for the role of lawmaker was included in the formal education of merchants, businessmen, bankers, real estate men, insurance brokers, and professional men who collectively compose the largest category of legislator occupations.²⁷

Professor Leon Green has opined that there are not large numbers of scholarly men in state legislatures, a factor which he believes weighs in favor of judicial reform of tort rules.²⁸ Another writer has expressed the idea that a scholarly approach would only entangle a legislator because his function is to act, to fight, and to seize advantages rather than to meditate on

23. Eulau, Buchanan, Ferguson & Wahlke, *The Political Socialization of State Legislators*, in *LEGISLATIVE BEHAVIOR* 305 (Wahlke & Eulau eds, 1959).

24. *Id.* at 306.

25. During the period 1925 to 1935 lawyers held 28% of the seats in the upper and lower houses of 13 states selected for study. Hyneman, *Who Makes Our Laws*, 55 *POL. SCI. Q.* 556, 557 (1940), reprinted in *LEGISLATIVE BEHAVIOR* 254, 255 (Wahlke & Eulau eds, 1959). A more recent study indicates that the proportion of lawyers in state legislatures has declined to less than 25%. *AMERICAN POLITICAL SCIENCE ASS'N, AMERICAN STATE LEGISLATURES* 71 (Zeller ed. 1954) [hereinafter cited as *AMERICAN STATE LEGISLATURES*].

26. The study by Hyneman, *supra* note 25, at 557, revealed that in the period 1925 to 1935 farmers occupied 21.5% of the membership in the state legislatures studied. A more recent study indicates that in 1949 the proportion was slightly less than 20%. *AMERICAN STATE LEGISLATURES* 71.

27. *AMERICAN STATE LEGISLATURES* 71. See also Hyneman, *supra* note 25, at 557.

28. Green, *supra* note 6, at 117-18.

them.²⁹ While it is improbable that any empirical test can be devised to measure the scholarly attributes of legislators, an abundance of evidence indicates that the legislative environment is not conducive to scholarly or detailed examination which is essential to effective reformulation of a complicated area of private law.

A notoriously inadequate compensation scale³⁰ requires many, if not most, legislators to supplement their incomes through outside employment—they perform their legislative work during time borrowed from their regular full-time employment. Although some legislators can limit the demands of their regular employment during the legislative session, those demands certainly cannot be slighted by all. In short, state legislators are part-time employees whose thoughts are directed substantially to other matters.

Even if legislators could devote all of their legislative time to the study of substantive proposals, the length of legislative sessions would seriously hamper scholarly work.³¹ Most legislatures meet for such limited periods of time that they cannot give the prolonged, detailed, and studious attention necessary for an effective study of any area in which the existing rules are technical, complicated, and frequently stated in a legal jargon

29. Finer, *The Tasks and Functions of the Legislator*, in *LEGISLATIVE BEHAVIOR* 281, 282 (Wahlke & Eulau eds. 1959).

30. At the end of 1961 the range of salaries per biennium was from \$200 in New Hampshire to \$15,000 in New York, while the median salary of the 34 states paying salaries was \$9,900 to \$4,000. For the 10 states employing a daily or weekly pay plan, the pay rate varied from \$5 to \$50 per day, with a median daily pay of \$15. All but five of the daily-pay states and all but 11 of the salary states also paid living expense allowances that sometimes exceeded the basic pay. *THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1962-1963*, at 37 (1962) [hereinafter cited as *BOOK OF THE STATES 1962-1963*]. See generally BARCOCK, *STATE AND LOCAL GOVERNMENT AND POLITICS* 183 (2d ed. 1962).

31. Only 18 state legislatures meet annually; the remaining 32 hold biennial sessions. *BOOK OF THE STATES 1962-1963*, at 35. Fifteen states have regular unlimited sessions; 21 directly limit them to a specified number of days, frequently 60 legislative or calendar days; 11 indirectly limit the length of the session by stopping pay or allowances after a certain number of days; and 3 others have other methods of limitation. *Id.* at 36, 42-43. Special sessions are less restricted: 25 states have no limit; 15 are directly limited; and the remainder are indirectly limited by restrictions on pay or allowances. *Ibid.*

Longer legislative sessions do not necessarily mean more time spent on legislation. In New Jersey, for example, the legislature sits once a week over a five month period, but commuting problems distract attention from legislation. Anton, *The Legislature, Politics and Public Policy: 1959*, 14 *RUTGERS L. REV.* 269, 273 (1960).

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unfamiliar to most non-lawyers. Moreover, a high turnover rate precludes any great accumulation of legislative experience.³² This turnover rate even affects the chairmen of committees, with the result that the average committee head is relatively new at the procedures of law-making.³³

Legislators are limited not only by the lack of legislative experience and the shortness of the legislative session; they must also work under physical conditions that are unsatisfactory for deliberate consideration of complex matters. The provisions for office space,³⁴ committee rooms,³⁵ and secretarial services³⁶ are, in most states, inadequate at best.

32. Almost 50% of the members of state legislatures have very little legislative experience. AMERICAN STATE LEGISLATURES 65, 67, 70. According to another study of ten state legislatures during the six sessions held from 1925 to 1935, an average of 35.4% of the legislators in any given session were attending their first session and another 22.6% were attending their second session; slightly more than 20% had served as many as four sessions. Hyneman, *Tenure and Turnover of Legislative Personnel*, 195 ANNALS 21, 23 (1956); A more recent study indicates that a high level of turnover has continued. See Beckett & Sunderlaud, *Washington State's Lawmakers: Some Personnel Factors in the Washington Legislature*, 10 WESTERN POL. Q. 180, 188 (1957). See also Hyneman & Ricketts, *Tenure and Turnover of the Iowa Legislature*, 24 IOWA L. REV. 673 (1939); Hyneman, *Legislative Experiences of Illinois Lawmakers*, 3 U. CHI. L. REV. 104 (1935).

33. According to the Hyneman study, 17.3% of committee chairmen were serving in their first session of the legislature while another 24.8% were attending their second sessions. Only 28.1% had attended five or more sessions. Hyneman, *supra* note 32, at 25. A similar pattern was shown in a later study of committee chairmen in 1950. AMERICAN STATE LEGISLATURES 68-70.

34. A report published in 1954 indicates that at that time no state provided all its legislators with individual offices. AMERICAN STATE LEGISLATURES 159. Thirty-six states did not provide individual office space for members of either house; three states provided individual office space for senate members; eight provided office space to be shared by varying numbers of senators; and five states provided office space to be shared by varying numbers of representatives. *Id.* at 157. A former Connecticut state senator recently described his working conditions as follows: "I had no office staff and indeed no office except for a corner in my hallway at home, where unsorted and unfiled letters, brochures, notes, and thousands of bills constantly threatened to bury my children under a paper cascade." Lockard, *The Tribulations of a State Senator*, in LEGISLATIVE BEHAVIOR 294, 296 (Wahlke & Eulau eds. 1959).

35. An earlier study of the New Jersey legislature indicates that in 1938 there were no committee rooms for committee meetings, and consequently hearings had to be held in the Assembly Chamber at times when the legislature was not using the space. MCKEAN, *PRESSURE ON THE LEGISLATURE OF NEW JERSEY* 47 (1938).

36. The study of American State Legislatures made in 1954 by the American Political Science Association indicated that at that time fewer than 20

In recent years, however, some legislators have been provided with the assistance of legislative reference and bill drafting services, or legislative councils and law revision commissions have been established to originate law reform. In fact, the members of all state legislatures presently have some such staff services available,³⁷ but these services vary greatly between states, and their significance to the problem at hand will be considered below.

Of course, men have been known to make notable achievements even under adverse conditions, especially where self-interest motivated their labors. The pragmatic nature of American politics, however, is revealed in a survey showing that only a small minority of state legislators entered politics because of political principles.³⁸ Many political scientists have expressed the opinion that party politics is a relatively unimportant factor in the adoption of state legislation;³⁹ instead, most legislators are simply striving to satisfy the organized local interests of their respective constituencies.⁴⁰ A legislator will probably avoid general legislation that has no organized support from his constituents for the double reason that his action will not bring him credit with his electors, and it may alienate other legislators whose votes are important if he is to serve his constituency loyally.⁴¹

In this respect lawyers probably do not differ from other legislators, which partially explains their inactivity in reforming the private law, despite their substantial numbers in state legislatures. A less flattering explanation is that their interest in legislative service is engendered by an opportunity to obtain permissible "advertising" while serving their established clients.⁴²

Finally, the dilution of urban and suburban voting strength states assumed the responsibility for providing individual legislators with stenographic assistance in adequate quantity. In only five states did legislators have individually assigned stenographic or secretarial help, and in another each legislator received \$2,400 a biennium for clerical assistance. However, 29 states did provide clerical and secretarial assistance for their standing committees, and such assistance was available to major committees in seven states. AMERICAN STATE LEGISLATURES 156.

37. BOOK OF THE STATES 1982-1983, at 63.

38. Eulau, Buchanan, Ferguson & Wahlke, *supra* note 23, at 311.

39. AMERICAN STATE LEGISLATURES 192; Anton, *supra* note 31, at 274-75; cf. Silverman, *The Legislators' View of the Legislative Process*, in LEGISLATIVE BEHAVIOR 298, 301 (Wahlke & Eulau eds. 1959).

40. AMERICAN STATE LEGISLATURES 192-93; Anton, *supra* note 31, at 273-74. See also Green, *supra* note 6, at 117.

41. Anton, *supra* note 31, at 273-74.

42. See BARCOCK, *op. cit. supra* note 30, at 183; MCKEAN, *op. cit. supra* note 35, at 52.

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46. AMERICAN STATE
note 35, at 57.

in state legislatures should be considered. That the rural population enjoys a much greater representation than the urban population cannot be denied.⁴³ Legislators from rural areas naturally attempt to satisfy their constituents and tend to lack concern for urban problems. Yet the needed reforms in the law of torts are primarily the result of industrialization, the centralization of commercial activities, and other factors accompanying the development of a highly urbanized society. Rural populations are less claims-conscious than their urban counterparts, perhaps because the rigors of rural life induce an acceptance of hardships that urban residents would find unacceptable.⁴⁴ In short, the problem areas in the law of torts are of less concern to the rural population and its representatives than to the population as a whole, and in many state legislatures, the representatives of rural areas direct the course of legislative affairs.

III. LEGISLATIVE COMMITTEES AND COMMITTEE HEARINGS

Frequently when judges decline to accept the role of reformer or innovator they do so in deference to the superiority which the legislative process supposedly enjoys in its use of committee hearings.⁴⁵ The thought is that through committee hearings the various effects of a change in law may be thoroughly investigated, the competing policy factors critically analyzed, and after extensive consideration and evaluation, a reasoned and well-balanced solution produced. Unfortunately, this idealized view of the legislative process bears little resemblance to what political scientists tell us are the realities of the situation.

For one thing, hearings are not held on all bills, and there is a surprising lack of rules providing for advance notice and scheduling of hearings.⁴⁶ A recent study indicates that in all but 19 states whether or not the hearings will be open to the public

43. Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90 (1963).

44. Peck, *Comparative Negligence and Automobile Liability Insurance*, 68 MICH. L. REV. 689, 711-12 (1960).

45. *International News Serv. v. Associated Press*, 243 U.S. 215, 264-67 (1918) (Brandeis, J., dissenting); *Aero Spark Plug Co. v. R. G. Corp.*, 130 F.2d 290, 296 (2d Cir. 1942) (Frank, J., concurring); *Cheney Bros. v. Doris Silk Corp.*, 95 F.2d 279 (2d Cir. 1939); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 40, 163 N.E.2d 89, 103 (1959) (Davis, J., dissenting); *Reimann v. Mourmouth Consol. Water Co.*, 9 N.J. 134, 87 A.2d 325 (1952).

46. AMERICAN STATE LEGISLATURES 102, 117-18; MCKEAN, *op. cit. supra* note 35, at 47.

is a discretionary matter.⁴⁷ Normally, the crucial decisions are made in executive sessions, from which the press and the public are excluded.⁴⁸ The records of committee hearings are in notoriously bad shape,⁴⁹ and the committee reports to the legislature are frequently summary and uninformative.⁵⁰ As an institution for informing the entire legislative body about the content of proposed legislation and the problems with which it deals, a legislative committee leaves much to be desired.

This assumes, however, that the purpose of legislative committees is one of investigation, accumulation and evaluation of data, and exploration of alternative solutions to various problems. Political scientists indicate, however, that hearings are seldom held for this purpose, and if this result does obtain, it is usually incidental to other purposes.⁵¹ Frequently committee hearings are held to provide an appearance of well-reasoned grounds to support action to which legislators are already committed.⁵² If the matter under investigation is one about which there is a division of commitments, the result is likely to be the development of two fact pictures, each conforming to its adherents' views, rather than a complete and objective portrayal of the situation.⁵³

47. BOOK OF THE STATES 1962-1963, at 49.

48. TRUMAN, *THE GOVERNMENTAL PROCESS* 370 (1951).

49. AMERICAN STATE LEGISLATURES 102.

50. For example, the *Report of the Committee on Judiciary—Civil* of the Washington House of Representatives on a bill, subsequently enacted, to waive the state's immunity to suits in tort stated only:

We, a majority of your Committee on Judiciary—Civil, to whom was referred House Bill No. 333, consenting to suits against state [sic] in tort actions, have had the same under consideration, and we do respectfully report the same back to the House with the recommendation that it do pass.

HOUSE JOURNAL OF THE 37TH LEGISLATURE OF THE STATE OF WASHINGTON 935 (1951). The report of the Senate was equally uncommunicative, using almost identical language. SENATE JOURNAL OF THE 37TH LEGISLATURE OF THE STATE OF WASHINGTON 740 (1951). See also MCKEAN, *op. cit. supra* note 35, at 47.

51. MCKEAN, *op. cit. supra* note 35, at 48; TRUMAN, *op. cit. supra* note 48, at 379; STEINER & GOVE, *LEGISLATIVE POLITICS IN ILLINOIS* 83 (1960); HUIT, *The Congressional Committee: A Case Study*, 48 AM. POL. SCI. REV. 349, 365 (1954). See also Cohen, *Hearing on a Bill: Legislative Folklore*, 37 MINN. L. REV. 84, 37 (1952); Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886, 892 (1950).

52. STEINER & GOVE, *op. cit. supra* note 51, at 83; TRUMAN, *op. cit. supra* note 48, at 370; Cohen, *Hearing on a Bill: Legislative Folklore*, 37 MINN. L. REV. 34, 38 (1952); Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886, 892 (1950).

53. See, e.g., HUIT, *supra* note 51, at 353, 354, 365.

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54. TRUMAN, *op. cit. supra* note 48, at 370; Cohen, *Hearing on a Bill: Legislative Folklore*, 37 MINN. L. REV. 84, 37 (1952).

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56. AMERICAN STATE LEGISLATURES 102 (1952).

57. AMERICAN STATE LEGISLATURES 102 (1952). See note 30, at 189 for a discussion of the committee which has a special relation

A very practical purpose served by the hearings is that of revealing the alignment of various interest groups on the subject, thus providing a gauge of their support or opposition to a bill.⁵⁴ The cathartic value of committee hearings is obvious and may even assist the legislators in their role as mediators between contending pressure groups. In short, while committee hearings may develop some information upon which a well-reasoned policy decision could be made, this is the exception rather than the rule.

Even if legislative committees were organized to conduct objective and scientific investigations of areas in which reform legislation is needed, they are ill-equipped to do so. As mentioned above, near to one-half of the committee chairmen are serving in either their first or second session of the legislature.⁵⁵ Committees frequently lack an adequate staff, and what they have has been chosen, not for professional competence in investigation of technical problems, but for their connections and political competence.⁵⁶ Moreover, insofar as reform in tort law is concerned, the concentration of most legislative work in a few standing committees⁵⁷ goes far to ensure that there will be no organized pool of talent to work on specialized problems. What legislative proposals are made concerning the reform of tort law will probably be referred to the already overworked judiciary committee, with its far-flung interests.

Finally, no empirical data would be available for a substantial number of tort law subjects that a legislative committee might investigate. For other subjects the empirical data is equally available to the courts as to legislative committees. For example, a field study probably could produce no valid and detailed conclusions concerning the effect of an abandonment of charitable immunity from tort liability on charitable donations or the level of charitable operations. The numerous uncontrolled variables affecting donations and charitable operations undermine the scientific approach. The same reasoning applies to the removal of charitable or governmental immunity from educational institutions. The crude fact that liability insur-

54. TRUMAN, *op. cit. supra* note 48; Cohen, *Hearing on a Bill: Legislative Folklore*, 37 *MINN. L. REV.* 34, 39 (1952).

55. See note 33 *supra*.

56. AMERICAN STATE LEGISLATURES 100, 102; Cohen, *supra* note 54, at 37-38 (1952).

57. AMERICAN STATE LEGISLATURES 96. See also BANCROFT, *op. cit. supra* note 30, at 139 for a discussion of the usual standing committees, none of which has a special relationship to tort law.

ance permits the continued operation of charities and schools in nonimmunity jurisdictions can be noted by courts as well as legislatures.⁵⁸

To take another immunity rule as an example, one of the reasons advanced in support of the inter-spousal immunity rule is that abandonment would lead to a substantial number of fraudulent claims, where liability insurance would cover the claim. According to Professor McCurdy, insurers generally have no statistics showing the number or amount of inter-spousal automobile liability claims in states allowing such suits.⁵⁹ That other comprehensive and reliable data would be available to legislative committees seems unlikely. Any legislative estimation of the effect of a change of that immunity rule would probably have to rest, as it does with courts, upon a priori assumptions.

As Judge Magruder has asked,⁶⁰ could a factual survey establish that in a particular state the rule recognizing a privilege for honest, but erroneous, statements concerning candidates for public office had the effect of driving honorable men from politics? Would a more detailed documentation of the effect of modern advertising campaigns on consumer purchasing habits and a more complete account of the dangerous potential of automobiles have provided a sounder basis for the New Jersey Supreme Court's holding that when a manufacturer puts a new automobile in the stream of trade and promotes its purchase, an implied warranty of fitness accompanies it into the hands of the ultimate purchaser?⁶¹

The suggestion is not that legislative committees could never uncover empirical data bearing on a choice of or change in various tort rules, nor that courts have made adequate use of the available data.⁶² Important empirical data relevant to some tort problems might be available to legislative committees. Thus, a

58. See, e.g., *President & Directors of Georgetown College v. Hughes*, 130 F.2d 810, 823 (D.C. Cir. 1942); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959).

59. McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 393, 394 (1959). Professor McCurdy does state, however, that there are indications that premium rates have increased in recent years in states that permit inter-spousal suits, but he does not state exactly what those indications are.

60. Magruder, *Judging in Tort Law: Intuition and Science*, 5 COLUM. L. ALUM. BULL. 31, 34 (1961).

61. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

62. See James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315, 325-28 (1959).

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65. *Id.* at 62-

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68. *Id.* at 64-

69. *Id.* at 65.

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study of the causes of trichinosis, its spread, and methods of control might lead to a conclusion that a warranty of freedom from trichinae should accompany a sale of pork. But courts could make a better appraisal of the comparative abilities of the judiciary and the legislature to deal with a particular problem if consideration were given, on a selective basis, to the probabilities that relevant empirical data would be available to legislative committees but not to the judiciary.⁶³

IV. LEGISLATIVE SERVICE AGENCIES

The handicaps under which state legislatures work have not gone unnoticed. At the present time all state legislatures have some kind of staff services, but the level and quality of these services vary greatly.⁶⁴ Legislative reference services are available in 47 states, although some of their functions are now being assumed by newer forms of service agencies.⁶⁵ Valuable as their research services are to state legislatures, they are library-oriented⁶⁶ and are unlikely to turn up any information not available to judges who look beyond the traditional sources of legal information.

Bill drafting and law revision services are also available in 47 states.⁶⁷ Although these services are important, they are primarily confined to matters of form and style and utilize skills certainly possessed in equal measure by the judiciary. Only a few states provide for systematic revision of the substantive law; California, Louisiana, and North Carolina having followed New York's lead in this direction.⁶⁸

The increasing use of legislative councils has been the most significant development in the reform of substantive law. Thirty-nine states now have established legislative councils,⁶⁹ most of which are super-interim committees of the legislature, formed on a bipartisan and bicameral basis, and assisted by a research staff. Some have broad statutory duties; some have been restricted by statute; and others have imposed their own restrictions.⁷⁰ In 1962,

63. Analysis demonstrating the difficulties of using the scientific method for either judicial or legislative rule-making is contained in Cavers, *Science, Research, and the Law: Bentels' "Experimental Jurisprudence,"* 10 J. LEGAL ED. 102 (1957).

64. BOOK OF THE STATES 1962-1963, at 63.

65. *Id.* at 63-64.

66. AMERICAN STATE LEGISLATURES 132-44.

67. BOOK OF THE STATES 1962-1963, at 64.

68. *Id.* at 64-65.

69. *Id.* at 65.

70. AMERICAN STATE LEGISLATURES 129-30.

budgets for legislative councils ranged from 29,500 to 350,000 dollars, with a median budget between 84,000 and 90,000 dollars.⁷¹ These variations suggest the fallacy of a generalized reliance on the existence of the legislative council as an adequate instrument for the reform of tort law. Not all councils have both the inclination and resources for productive work in the area. New York, with its famous law revision commission, adopted three items of what might be called tort legislation in 1956⁷² and two similar items in 1958,⁷³ but apparently enacted no significant tort legislation in 1955,⁷⁴ 1957,⁷⁵ 1959,⁷⁶ 1960,⁷⁷ or 1961.⁷⁸ A similar situation apparently exists in Pennsylvania and Illinois.⁷⁹ In each jurisdiction the courts could and should examine the record of the legislative council, if one exists, to determine how active and how successful the council has been in a particular field. In the course of doing so a court may find, as did the New York Court of Appeals, a council report gathering dust in legislative files that persuasively supports a court-made reform of tort law.⁸⁰

Other legislative services, such as interim legislative committees, have been provided in recent years. As a general proposition, interim committees are less effective than legislative councils and more limited in duration and scope of activity. The choice of subjects for investigation is determined by the interests of individual members; much effort is wasted in organization; and they lack the experienced staff that legislative councils may develop.⁸¹ Again, a court considering its reform role should properly determine not merely the existence of interim committees, but whether they ever investigate and successfully suggest proposals for the reform of tort law.

Of course, with respect to all of these legislative service agencies the same question should be asked that was asked concerning

71. BOOK OF THE STATES 1962-1963, at 65-66.

72. Note, 28 N.Y.S.B. BULL. 183-227 (1956).

73. Note, 30 N.Y.S.B. BULL. 173-229 (1958).

74. Asch, *New York Legislative Session*, 1 N.Y.U.F. 221-34 (1956).

75. Note, 29 N.Y.S.B. BULL. 193-244 (1957).

76. Note, 31 N.Y.S.B. BULL. 160-91 (1959).

77. Note, 25 ALBANY L. REV. 348-61 (1961).

78. Note, 33 N.Y.S.B. BULL. 218-28 (1961).

79. Pedrick, *On Civilizing the Law of Torts*, 6 J. Soc'y Pub. Teachers L. 2, 8 (1961).

80. *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 726, 210 N.Y.S.2d 34 (1961) (relying upon a 1958 report of the Law Revision Commission that recommended changes in the earlier rule by which there was no recovery for physical or mental injuries caused by negligently induced fright).

81. AMERICAN STATE LEGISLATURES 137-39.

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82. *Id.* at 133.

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legislative committees: Is it probable that empirical data bearing on a particular area in which reform may be desirable exists in a form available to the service agencies but not available to the judiciary? In this respect it might be noted that, according to political scientists, the function of a legislative research staff is not to gather primary data, but rather to collate and synthesize data already culled by administrative agencies and private organizations.⁵²

V. LOBBIES AND PRESSURE GROUPS

Political scientists unanimously assert that lobbies and pressure groups play a tremendously important role in the legislative process. Professor Truman's authoritative work on the governmental process⁵³ consists primarily of a study of pressure groups, their problems of organization, and their tactics of influence. In his judgment, political interest groups are as clearly a part of government as the political parties or the branches established by the constitution.⁵⁴ One scholarly state legislator came to believe after two legislative sessions that outside group pressures accounted for 90 percent of what was done.⁵⁵ The authors of an Illinois study concluded that non-legislators sometimes exert more influence on legislative decisions than do members.⁵⁶ Moreover, the amateur legislators, who make up a considerable part of state legislatures, may find it difficult to identify the various pressure groups,⁵⁷ a fact that may well intensify the significance of these group activities.

The scope of pressure group and lobby activity is, of course, not confined to initiating legislation; of equal importance is their opposition to the passage of legislation deemed inimical to their interests. Since bills that have no organized support may fail to pass even though unopposed,⁵⁸ a pressure group or lobby can

52. *Id.* at 133.

53. TRUMAN, *op. cit. supra* note 48.

54. *Id.* at 502. According to Truman, the unorganized interests of society do play a role in the governmental process, setting the rules or norms of conduct by which the behavior of organized interest groups are judged. This factor, as well as the overlapping of group memberships, serves as a check against activities of organized groups. *Id.* at 512-16.

55. McKEAN, *op. cit. supra* note 35, at 218.

56. STEINER & GOVE, *op. cit. supra* note 51, at 32-57. Included in this powerful group were the governor, the press, private lobbyists, and lobbyists for various governmental units.

57. Garceau & Sullivan, *A Pressure Group and the Pressured: A Case Report*, 48 AM. POL. SCI. REV. 672 (1954).

58. See TRUMAN, *op. cit. supra* note 48, at 362-63.

easily dispatch such legislation to oblivion. Faced with organized resistance on one side and no organized support on the other, the choice is obvious to any legislator whose approval is necessary to obtain release of the bill from committee, particularly where the local legislative rules permit secret votes.⁸⁹

Of course, not all lobbies and pressure groups are equally effective. Groups with lobbying experience tend to be more successful than *ad hoc* groups, partly because of their familiarity with the legislative process.⁹⁰ Moreover, effective action of a lobby or pressure group requires the cooperation of other lobbies and pressure groups.⁹¹ In short, legislative log-rolling techniques are also employed by lobby and pressure groups.

How does this knowledge of the legislative process apply to the problem of reform of tort law? It reveals the incredible naivete of much judicial language. For example, courts have frequently expressed the idea that any reform in the rule granting charitable hospitals immunity from tort liability must be made by the legislature.⁹² Yet the realities of the legislative process render the suggested means of reform as unworkable as the most visionary of utopian schemes. The fortuitous victims of negligence and malpractice of employees of charitable hospitals form no natural or integrated economic, social, or political group. Moreover, legislation oriented toward the consequences of future events will not satisfy their demands for redress of past negligence, and they will not move in an organized fashion along legislative avenues. Alternatively, if an individual legislator should become interested in the matter, either through personal experience or the experience of some friend or relative, his proposals would face opposition from the organized and attentive lobbies of hospitals and insurance companies. Moreover, removal of the immunity of hospitals might initiate similar action affecting other charities, such as some churches, that might therefore intervene in behalf of the

89. In only 11 states are committees required to report on all bills. *BOOK OF THE STATES 1962-1963*, at 50-51. Crucial committee decisions are usually made in executive sessions from which the public and press are excluded. See text accompanying note 43 *supra*. See also *AMERICAN STATE LEGISLATURES* 102.

90. *STEINER & GOVE, op. cit. supra* note 51, at 48.

91. *TRUMAN, op. cit. supra* note 28, at 263; *ZELLER, PRESSURE POLITICS IN NEW YORK* 230 (1937).

92. *E.g.*, *Helton v. Sisters of Mercy*, 351 S.W.2d 129 (Ark. 1961); *Landgraver v. Emanuel Lutheran Charity Bd.*, 203 Ore. 489, 280 P.2d 301 (1955); *Knecht v. Saint Mary's Hosp.*, 392 Pa. 75, 140 A.2d 90 (1958); *Memorial Hosp. v. Oakes*, 200 Va. 873, 103 S.E.2d 339 (1959). *But cf.* *Schute v. Missionaries of La Salette Corp.*, 352 S.W.2d 636 (Mo. 1961).

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hospitals. It would indeed be an unusual legislator who, faced with an organized defense by a group with such immediate appeal, would persist unaided in the battle to remove the immunity. Even if he organized a group to support the proposed legislation, that group would be an *ad hoc* organization unable to engage in the long run cooperative or log-rolling techniques so essential to effective legislative action.

Certainly this is but one example of what has been commented on a number of times: There are no well organized and permanent lobbies which have a comprehensive interest in the reform of tort law.⁹³ Within bar associations, lawyers representing insurance companies are balanced against those representing injured plaintiffs. The National Association of Compensation Claimant Attorneys (NACCA) might be considered a natural lobby group, but a review of the recent volumes of its journal fails to disclose any involvement in legislative reform. On the contrary, the reform emphasis is on case developments, with the courts viewed as the reform agency.⁹⁴ If the NACCA should lobby vigorously for reform, it would undoubtedly suffer not only from a general distrust of lawyer-proposed legislation but also, turning a phrase that had political significance, from a profound distrust of the idea that what is good for the plaintiffs' bar is necessarily good for the law of torts.

What has been said thus far should not suggest that there are no organized pressure groups or lobbies with interests in various problems of tort law. The insurance lobby has been mentioned. Newspapers, radio, television, and other news media have an obvious interest in the law of defamation. The public lobby, consisting of representatives of state agencies, municipal and county

93. E.g., Green, *The Threat of Tort Law: Part II Judicial Law Making*, 64 W. VA. L. REV. 115, 117-18 (1962); James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315, 334 (1959). See also MCKEAN, *PRESSURE ON THE LEGISLATURE OF NEW JERSEY* 52-95 (1933), for a list of 164 interest groups working in the state legislature, none of which would have a general interest, if indeed any interest, in reform of tort law.

94. See the following editorials by the JOURNAL'S Editor-in-Chief, Thomas Lambert: *Goals and Roadblocks in Torts*, 28 NACCA L.J. 27 (1962); *Views and Vistas in Torts*, 26-27 NACCA L.J. 27 (1961); *The Common Law: Steadfast and Charging*, 25 NACCA L.J. 25 (1960); *Touchstones of Tort Liability*, 24 NACCA L.J. 25 (1959); *Landmarks and New Directions*, 23 NACCA L.J. 25 (1959). See also two articles by Dean Pound opposing the establishment of an automobile accident commission and arguing in favor of judicial treatment of problems of accident loss distribution. Pound, *The Proposal of an Automobile Accident Commission*, 25 NACCA L.J. 415 (1960); Pound, *Judicial Trial or Administrative Investigation?*, 24 NACCA L.J. 299 (1959).

governments, and other public bodies, is interested in proposals to use their funds to finance a waiver of immunity. A proposal relating to punitive damages generally can be expected to produce an unusual alliance of the lobbies for organized labor, communication media, and insurance companies. Occasionally the organized interest groups or lobbies may support legislative proposals; but having accommodated themselves to the existing state of affairs, they probably will seek to preserve the status quo by resisting reform.

The record of adoptions of Model and Uniform acts confirms what has been said about the role of pressure groups and lobbies in the legislative process. For example, in 14 years the Uniform Photographic Copies as Evidence Act has been enacted in a total of 35 jurisdictions,⁹⁵ whereas in a considerably longer period the Uniform Joint Tortfeasors Act has been adopted in only eight jurisdictions.⁹⁶ Certainly this disparity cannot be explained solely in terms of draftsmanship or breadth of appeal. The explanation of the difference in reception seems to lie in the existence of organized lobbies for insurance companies, banks, and other businesses that actively sought enactment of the former act for business convenience, and the absence of any organized lobby supporting the latter act. Similar lack of interest has been demonstrated for other uniform laws touching on torts,⁹⁷ while other narrow and technical uniform acts have achieved a much higher level of adoptions.⁹⁸ Indeed, the fact that only four of the 114 uniform and model acts approved by the Commissioners on Uniform Laws are

95. 9A U.L.A. 158 (Supp. 1962).

96. 9 U.L.A. 97 (Supp. 1962). There were some objections to the adoption of § 5 of the act because it was thought to open the way to collusion by an injured plaintiff and one of several defendants. See the Commissioner's note to § 4 of the 1955 Uniform Contribution Among Tortfeasors Act, 9 U.L.A. 113 (Supp. 1962). But correction of this defect has not accelerated its adoption. See note 97 *infra*.

97. The Uniform Single Publication Act, approved in 1952, has had but eight adoptions, 9C U.L.A. 90 (Supp. 1962); the Uniform Contribution Among Tortfeasors Act, approved 1955, has had but two adoptions, 9 U.L.A. 107 (Supp. 1962); and the Model Nuclear Facilities Act, approved in 1961, has had no adoptions, 9B U.L.A. 5 (Supp. 1962).

98. The Uniform Trust Receipts Act, approved in 1933, has had 39 adoptions, 9C U.L.A. 113 (Supp. 1962); the Uniform Common Trust Fund Act, approved in 1938, has had 30 adoptions, 9 U.L.A. 95 (Supp. 1962); the Uniform Simultaneous Death Act, approved in 1910, has had 48 adoptions, 9C U.L.A. 87 (Supp. 1962); the Uniform Gifts to Minors Act, approved in 1956, has had 48 adoptions, 9B U.L.A. 39 (Supp. 1962); and the Uniform Act for Simplification of Fiduciary Security Transfers, approved in 1958, has had 36 adoptions, 9C U.L.A. 71 (Supp. 1962).

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concerned with torts, is itself of some significance in evaluating the legislative and judicial avenues of reform. It also corroborates the fact that lobbies and pressure groups are effective in arrogating the attention of legislative service agencies to their particular fields of interest.⁹⁹ In short, torts more than many other areas of private law is neglected in the legislative process and therefore may more appropriately be considered an area for judicial reform.

VI. THE POSSIBLE CONFLICT WITH THE LEGISLATURE

In considering the propriety of revising or overruling some principle of tort law, should a court give any effect to the factors mentioned in this summary of legislative realities? Would doing so smack too much of the practical political considerations that should be confined to other areas of the governmental process? To put it another way, lest they overplay their creative role, should the judges of the highest court of a state feign ignorance of what any intelligent person can discover about the legislative process within their state? Or should they, summoning their courage, take note that while the Emperor does have clothes, some of which may be beautiful indeed, there are others which are tattered and full of holes?

One of the arguments that might be made against this realistic approach to problems of government is that it conflicts with our democratic faith. In a society dedicated to representative government there is legitimate concern about judicial methods of policy-making. After all, even if elected, judges are not chosen for their abilities to represent or respond to public pressures.

They are, however, men trained by their profession to exercise self restraint. They are certainly capable of distinguishing between the problems that would arise if they acted in conflict with legislative pronouncements and the problems of action in an area in which no such conflict exists. The judge who makes that distinction is as responsive to the electorate as the legislature which enacted the statute. Indeed, to argue that judicial creativity properly confined to areas where no conflict with representational determinations exists is contrary to our democratic traditions is to argue that one of those traditions is itself in conflict with the others. Quite clearly, the common law today is not what it was at

⁹⁹ Cf. Kernochan, *A University Service to Legislation: Columbia's Legislative Drafting Research Fund*, 16 *La. L. Rev.* 623, 635 (1956), commenting on the fund's inability to accommodate all those requesting aid in drafting proposed legislation.

the founding of this nation, and the ability of judges to change and adapt it to different circumstances has been one of the greatest achievements of our judicial system.¹⁰⁰

Where a court makes what appears to be a needed adjustment in an area in which the legislature has failed to act, that adjustment is not, of course, irreversible. If the judicial reform has provoked sufficient opposition, it is subject to legislative revision or repudiation.¹⁰¹ The same is true when a court deals with an ambiguous statute, such as one waiving the sovereign immunity of a state without mentioning the derived immunity of municipalities.¹⁰²

Of course, the forces that will produce a legislative response to judicial action will be similar to those that produce other legislation. A response is not likely if the judicial reform has not affected the interests of organized pressure groups and lobbies. In other words, it will not come because legislators spend their spare time reading advance sheets to check on how well the court is performing its work.¹⁰³ When the judicial reform is challenged the lobbies and pressure groups will, fortunately, bear a burden absent in the usual legislative situation—that of persuading legislators to overturn or modify the determination of a respected body of impartial men. Such a catalytic function of the judiciary, producing legislative consideration of society's needs on matters that no interested group would otherwise question, might well be categorized as an implementation of representative government. It certainly is not opposed to it.

The courts are not unaware of these pragmatic considerations. In *Wong Yang Sung v. McGrath*¹⁰⁴ the Supreme Court of the United States considered the question of whether deportation proceedings of the Immigration Service were subject to certain provisions of the Administrative Procedure Act; those provisions required separation of prosecuting functions from adjudicating functions. The Court held that the Service was subject to the provisions, saying:¹⁰⁵

100. See notes 2 & 12 *supra*.

101. See *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962), for a case in which a court specifically notes the possibility of corrective legislative action.

102. See Comment, *Abolition of Sovereign Immunity in Washington*, 36 WASH. L. REV. 312, 326-27 (1961).

103. Cf. *Knecht v. Saint Mary's Hosp.*, 392 Pa. 75, 140 A.2d 30 (1955) (Musmanno, J., dissenting).

104. 339 U.S. 33 (1950).

105. *Id.* at 47.

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The agencies, unlike the aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter.

More directly related, in this respect, to the problem of reform of tort law is the recent decision of the Supreme Court of Wisconsin, *Holytz v. City of Milwaukee*.¹⁰⁶ In that case the court abrogated the doctrine of sovereign immunity as it applied to all public bodies within the state, noting that if the legislature deemed it better public policy, it was free to reinstate the immunity. Also noted by the court were the possibilities that the legislature might impose ceilings upon liability or establish administrative requirements preliminary to commencement of suit.

Of even more interest is the recent decision of the Minnesota Supreme Court in *Spanel v. Mounds View School Dist.*¹⁰⁷ In the *Spanel* case the court abolished sovereign immunity as a defense to the tort liability of school districts, municipal corporations, and other subdivisions of government. Utilizing the technique of prospective overruling, the court announced that it would apply the new rule after the next session of the Minnesota Legislature adjourned, subject to any statutes that might then regulate the prosecution of the claims. Not only did the Minnesota court give the legislature an opportunity to pass upon the question; it also suggested a number of procedural and substantive matters that should be dealt with in such a statute.

In response to *Spanel*, the Minnesota Legislature restored all sovereign immunity for the remainder of 1963. Thereafter the immunity of school and drainage districts is specifically retained another four years, while the immunity of municipalities is, with certain exceptions, removed. These exceptions may be waived if the municipality obtains liability insurance, but in no other case will the municipality be liable beyond the monetary limits imposed by the statute.¹⁰⁸

The realistic and ingenious approach to the relationship between the judiciary and the legislature adopted in *Spanel* was, perhaps, suggested by recent experiences in other jurisdictions in which the courts have overruled immunity doctrines. In *Molitor v. Kaneland Community Unit Dist.*,¹⁰⁹ the Illinois Supreme Court abandoned the position that school districts enjoy an immunity from tort liability, implying that the whole doctrine of sovereign

106. 17 Wis. 2d 26, 115 N.W.2d 613 (1962).

107. 118 N.W.2d 795 (Minn. 1962), 48 MINN. L. REV. 193 (1963).

108. Minn. Sess. Laws 1963, ch. 793.

109. 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

immunity had been abrogated. In the legislative session that followed this decision, four bills were enacted conferring immunity from tort liability on various governmental subdivisions¹¹⁰ and one bill¹¹¹ was enacted restoring the immunity of school districts from liability in excess of 10,000 dollars on each separate cause of action.

A similar experience occurred in New Jersey following the decision in *Collopy v. Newark Eye and Ear Infirmary*.¹¹² In *Collopy* the New Jersey Supreme Court overruled the principle that a charitable corporation was immune from liability for the torts of its employees. The legislature responded by establishing a general charitable immunity from liability for what would otherwise be torts to beneficiaries, but permitting recovery, in tort actions involving not more than 10,000 dollars, from a nonprofit corporation organized exclusively for hospital purposes.¹¹³

More recently, the California Supreme Court discarded the rule of governmental immunity from tort liability.¹¹⁴ The legislative response was the adoption of a statute¹¹⁵ re-enacting the doctrine of sovereign immunity as it had previously existed, such im-

110. ILL. REV. STAT. ch. 105, §§ 12.1-1, 491 (1961) (park districts); ILL. REV. STAT. ch. 94, § 901.1 (1961) (counties); ILL. REV. STAT. ch. 57½ § 5a (1961) (forest preserve districts); ILL. REV. STAT. ch. 105, § 339.2a (1961) (Chicago Park District).

111. ILL. REV. STAT. ch. 122, §§ 821-31 (1961).

112. 27 N.J. 29, 141 A.2d 276 (1958).

113. N.J. STAT. ANN. §§ 2A:53A-7 to -11 (Supp. 1962).

114. *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rep. 89 (1961).

115. CAL. CIV. CODE § 22.3. For a discussion of the problems raised by this sequence of events, see Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. Rev. 463 (1963).

Editors Note: The California legislature recently enacted a statute that, with certain exceptions, abolishes sovereign immunity. Cal. Sess. Laws 1963, ch. 1631. Under the new statute, a public entity is liable for the injurious acts or omissions of its employees "if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." Cal. Sess. Laws 1963, ch. 1631, § 815.2(a). A public employee is liable for his injurious acts or omissions to the same extent that he would be liable as a private person. Cal. Sess. Laws 1963, ch. 1631, § 820(a). This liability is qualified, however, by several provisions, the broadest of which exempts a public employee, and hence his employer, from liability for an injury that "was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Cal. Sess. Laws 1963, ch. 1631, § 820.2. This provision seems to encompass the subsequent, more specific exemptions. Cal. Sess. Laws 1963, ch. 1631, §§ 820.2-321.3. Two final sections grant immunity from liability for funds stolen from

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117. ILL. REV. STAT. ch

munity to expire on the ninety-first day after the regular legislative session of 1963. Provision was also made for maintenance of suits on claims that otherwise would have arisen in the interim. In short, the legislature gave itself two years to study the problem and make provisions for tort suits against the state and its subordinate constituents.¹¹⁶

The experiences in Illinois, New Jersey, and California might be interpreted as rebuffs to reform-minded courts. The rules announced by the courts were not allowed to stand, and the immunities they had overruled were partially reinstated. Yet the Illinois Supreme Court certainly did not consider the legislative action as a rebuff; instead it adhered to its position in an opinion filed on rehearing after the legislature had acted, and it was on sound ground in doing so. The statement of policy of the new Illinois act,¹¹⁷ relating to the tort liability of school districts and nonprofit private schools, refers to "excessive" diversion of school funds but recognizes that there "should be a reasonable distribution among the members of the public at large of the burden of individual loss from injuries incurred as a result of negligence in

a non-negligent public employee and for negligent or even intentional misrepresentations, if the employee was not guilty "of actual fraud, corruption or actual malice." Cal. Sess. Laws 1963, ch. 1681, §§ 822, 822.2.

116. The Michigan Supreme Court has experienced a period of rather spasmodic interpretation of local sovereign immunity provisions. In *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961), an equally divided court affirmed, on the basis of sovereign immunity, the lower court's dismissal of a tort claim against the defendant municipality. A majority agreed, however, that the doctrine as applied to municipalities should be prospectively overruled. Four justices, headed by Mr. Justice Edwards, felt that the prospective overruling should have applied to the instant case. *Id.* at 267-68, 111 N.W.2d at 28-29. Mr. Justice Black wrote a separate opinion in which he agreed that the lower court's judgment should be affirmed, but concluded that municipal corporations should not have the protection of sovereign immunity in the future. *Id.* at 287, 111 N.W.2d at 18. Three justices, headed by Mr. Justice Carr, refused to acquiesce in the overruling of the doctrine of sovereign immunity. *Id.* at 249, 111 N.W.2d at 9.

Any hopes that the court would abrogate sovereign immunity for all purposes were quashed by the decisions in *McDowell v. State Highway Comm'r*, 365 Mich. 263, 112 N.W.2d 491 (1961), in which the court retained the immunity of the State and its departments, and *Sayers v. School Dist.*, 366 Mich. 217, 114 N.W.2d 191 (1963), and *Stevens v. City of St. Clair Shores*, 368 Mich. 341, 115 N.W.2d 69 (1963), two cases in which the court refused to remove the immunity of school districts. These last three decisions indicate a retreat from the court's position in *Williams*, where the court apparently took positive action in an area of legislative inactivity.

117. ILL. REV. STAT. ch. 122, § 5.1 (1961).

the conduct of school district affairs" During the same legislative session another bill¹¹³ was adopted increasing the tort jurisdiction of the Illinois Court of Claims from 7,500 to 25,000 dollars. Similarly, the immunity reinstated in New Jersey was not as complete as that previously recognized. The final result in California remains to be seen. But in each of the three states the judiciary clearly succeeded in serving as a catalyst, activating the legislature with respect to problems that otherwise would have been ignored. And in none of them has the court taken a position defiant of an expressed legislative determination.

It has been argued, however, that legislative inaction constitutes a tacit approval of the status quo. According to this view, judicial creativity in an area in which the legislature has not acted would amount to defiance of the legislature. The argument is well represented in a statement of the Oregon Supreme Court on the doctrine of charitable immunity:¹¹⁹

Over the years the legislature has taken no action to overturn the doctrine. By its silence, we may well infer its approval. But, however that may be, there was no occasion for it to act specifically if it was satisfied with the rule. The doctrine had become the firmly established law of this state; a part of the general public policy of the state relating to charitable institutions, and as established by the legislature.

The legislature had the right to assume that the rule would not be changed unless it itself acted.

Obviously this statement is a fine example of what Llewellyn called the "formal style,"¹²⁰ but the most striking thing about it is the way in which it ignores the legislative realities. As the Oregon court sees it, the legislature is really an assembly of philosopher kings, gathered to consider the problems of the republic and to settle matters dispassionately, for the good of society. It does, in

118. ILL. REV. STAT. ch. 37, § 439.8(D) (1961).

119. *Landgraver v. Emanuel Lutheran Charity Bd.*, 203 Ore. 460, 493-94, 280 P.2d 301, 303 (1955); cf. *Memorial Hosp., Inc. v. Oakes*, 200 Va. 678, 389, 108 S.E.2d 988, 996 (1959).

Editors Note: Subsequent to the completion of this Article, the Oregon Supreme Court, in *Hungerford v. Portland Sanitarium & Benevolent Ass'n*, 534 P.2d 1009 (Ore. 1963), rejected its previous approval of the charitable immunity doctrine, reasoning that "it is neither realistic nor consistent with the common-law tradition to wait upon the legislature to correct an outmoded rule of case law. . . . The fact that a rule has been followed for fifty years is not a convincing reason why it must be followed for another fifty years if the reasons for the rule have ceased to exist." *Id.* at 1011.

120. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 38-40 (1960).

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123. *Wycko v. Gu*
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124. Hart, *Comm*
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125. *Williams v. Cit*
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126. See *Martino v.*
143 A.2d 260 (1959); *Sch*
636 (Mo. 1961).

fact, comb through old decisions of the court to see which, if any, are getting out of adjustment with current values. Legislators will do this even though much of their time and attention in the short and hectic legislative sessions is taken by representatives of pressure groups and lobbies. Moreover, though most of them have had no legal training, they are able to understand, evaluate, and select for revision or repeal those judicially developed principles that are no longer productive of justice. And they can do this even though the rules and their various exceptions are stated, frequently without indicia of doubt, in the complicated, technical jargon of a learned profession.

In reality, there is no basis for this inference of legislative approval of the existing tort rules, and not all courts draw such an inference.¹²¹ For example, the Michigan court refused to find in legislative inactivity following decisions under a wrongful death statute an approval of the judicial interpretations.¹²² In the view of the Michigan court, "a legislature legislates by legislating, not by doing nothing, not by keeping silent."¹²³ Or, as Professor Hart has pointed out, the Constitution of the United States and each of the state constitutions prescribe the ways in which bills shall become law, and failing to enact a bill is not one of them.¹²⁴ Indeed, it is just as reasonable for the legislature to assume that if a judicially developed rule is unjust the courts will overrule it. And as Justice Black of the Supreme Court of Michigan demonstrated, this equally permissible inference has in fact been used by lobbyists in opposing changes in the law of torts.¹²⁵

Where reform bills have been defeated in a legislature, there may be more reason to infer legislative approval of the status quo. Some courts have drawn this inference¹²⁶ but others have refused

121. *E.g.*, *Hernandez v. County of Yuma*, 91 Ariz. 35, 359 P.2d 271 (1962).

122. *Wycko v. Gnodtke*, 331 Mich. 331, 105 N.W.2d 118 (1960); *cf.* *Girouard v. United States*, 328 U.S. 61, 69-70 (1946); *Park v. Employment Security Comm'n*, 355 Mich. 103, 94 N.W.2d 407 (1959).

123. *Wycko v. Gnodtke*, 331 Mich. 331, 338, 105 N.W.2d 118, 121-22 (1960).

124. Hart, *Comment on Courts and Law Making*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 40, 48 (1959).

125. *Williams v. City of Detroit*, 364 Mich. 231, 273, 111 N.W.2d 1, 11 (1961) (opinion of Black, J.).

126. See *Martino v. Grace-New Haven Community Hosp.*, 146 Conn. 735, 148 A.2d 259 (1959); *Schulte v. Missionaries of La. Salette Corp.*, 352 S.W.2d 636 (Mo. 1961).

to do so.¹²⁷ Once again the legislative realities indicate that the inference may be incorrect either as to the existence of a formulated legislative judgment or as to the reasons why the legislation failed to pass. Professor Hart's observation is again in point even if the inference might correctly be drawn as a matter of fact. Likewise, one might infer from limited reforms in a particular area of tort law that the legislature had determined that no further changes should be made in the doctrine involved. Yet at least three courts have refused to draw such an inference within recent years.¹²⁸

Of course, in some areas, legislatures may have substituted comprehensive statutory schemes for common-law tort principles. For example, the field of labor law was formerly governed by judicially developed tort principles.¹²⁹ Presently, federal statutes so dominate the area that continued judicial creativity would be inappropriate. The inappropriateness is currently stated in the doctrine of federal pre-emption,¹³⁰ although that doctrine does not apply to all torts which occur in a labor context.¹³¹ Even without the constitutional basis for the pre-emption doctrine, courts should refuse to play a creative role. In labor matters there is no lack of pressure groups or lobbies to initiate action; nor is there indifference on the legislative scene. Legislative policy-making is preferable in such a context, and judicial policy-making by state courts is inappropriate.

Excepting these areas where legislation has established a comprehensive scheme, and the specific situations in which the legislature has in fact spoken, recognition of the judiciary's reform function with respect to the law of torts involves no actual conflict with the legislature. Arguments to the contrary are based on an artificial view of the legislative process or a rigid and doctrinaire view of the common law. Indeed, as has been pointed out,

127. *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 20, 141 A.2d 276 (1958); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 31 (1961); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); cf. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47-48 (1959).

128. *Muskopf v. Corning Hosp. Dist.*, 65 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rep. 89 (1961); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 69 (1959); *Spanel v. Mounds View School Dist.*, 118 N.W.2d 705 (Minn. 1962).

129. See 4 RESTATEMENT, TORTS §§ 775-816 (1939).

130. *Garnier v. Teamsters Union*, 316 U.S. 485 (1953).

131. *UAW v. Russell*, 356 U.S. 634 (1958); *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954).

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judicial activity may well complement the representational system of government, apprising the legislature of matters that would otherwise be ignored in the turmoil of the legislative process.

VII. OTHER RESTRAINTS ON ACTIVE AND OPEN JUDICIAL REFORM

The absence of conflict with either the legislature or the concept of representative government does not of itself require an active and openly creative reform role for the judiciary. The potential gains must be weighed against the benefits to be lost and the new burdens imposed.

Probably the greatest danger of an active and openly creative reform role for the judiciary is that it might produce or even facilitate a legislative counterattack by the lobbies and pressure groups that favor the status quo. There is little reason to believe that they will not combat both judicial and legislative change with equal vigor. The same factors that lead to legislative inactivity will result in the absence of countervailing pressure groups protecting the judicial reform.

If revision is made demonstrably as a function of policy-making, it probably will be easier for lobbies and pressure groups to convince legislators that they are as competent as judges to make such decisions. And a rigid statutory solution established by the lobbyists may easily prove to be more of an inhibition to future adjustments than adherence to traditional methods of dealing with precedent. By Professor Llewellyn's count, there are 6½ traditional and impeccable techniques for dealing with precedent.¹³² Even if one were inclined to doubt the separate identity of some of the listed techniques, one cannot but be impressed by his account of the freedom and mobility which courts have developed within traditional limits and accordingly hold fears that this mobility might be lost under a statutory scheme.

Mr. Justice Cardozo recognized the potential of these techniques for accomplishing reform and the inhibiting influence that legislation might exert:

Time was when the remedial agencies, though inadequate, were at least in our own hands. Fiction and equity were tools which we could apply and fashion for ourselves. The artifice was clumsy, but the clumsiness was in some measure atoned for by the skill of the artificer. Legislation, supplanting fiction and equity, has multiplied a thousand fold the power and capacity of the tool, but it has taken the use out of our own hands and put it in the hands of others.¹³³

132. LLEWELLYN, *op. cit. supra* note 129, at 77-91.

133. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).

His opinion in *MacPherson v. Buick Motor Co.*¹³¹ is some measure of his ability to accomplish a major reform while insisting throughout an avowedly uncreative opinion that the result was dictated by a principle drawn from earlier cases, a good number of which were in a very practical way overruled. If Justice Cardozo had expressly stated a judicial responsibility for active and creative reform and then announced as the latest policy judgment the rule of manufacturers' liability for negligently made products, manufacturers' associations might have successfully sponsored an undesirable legislative response.

The danger of statutory intrusions depriving courts of the flexibility they possess in its absence can be overstated. As Gray pointed out several times in his classic work,¹³⁵ quoting Bishop Hooley, judges make the final determination of the meaning of a statute. They may exercise this power more than once, by changing an earlier court's interpretation of the statutory language.¹³⁶ For present purposes, a perverse exercise of this power may be found in the treatment that a number of state courts have given constitutional and statutory provisions authorizing suits against the state.¹³⁷ A much more severe test of a court's ability to interpret a statute without invoking legislative retaliation — perhaps the most severe test — can be found in those cases in which courts issued an injunction in a labor dispute on the basis of the preamble of a statute designed to prevent the issuance of such injunctions.¹³⁸ The presence of opposing pressure groups, however, may have made the venture less risky than an equally cavalier treatment of legislation that had strong supporters and no opponents.

Certainly, the judicial tendency to construe statutes strictly rather than analogize from their provisions has been demonstrated more than adequately.¹³⁹ On the other hand, a court may

134. 217 N.Y. 382, 111 N.E. 1050 (1916).

135. GRAY, *THE NATURE AND SOURCES OF THE LAW* 102, 125, 171-72 (2d ed. 1921).

136. *E.g.*, *Park v. Employment Security Comm.*, 355 Mich. 103, 94 N.W.2d 407 (1959); *Windust v. Department of Labor & Indus.*, 52 Wash. 2d 33, 323 P.2d 241 (1958).

137. See Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1963, 1965 (1954).

138. *Roth v. Local 1460, Retail Clerks Union*, 216 Ind. 303, 24 N.E.2d 280 (1939), *rev'd on other grounds*, 518 Ind. 275, 31 N.E.2d 956 (1941); *Gazam v. Building Serv. Employees*, 40 Wash. 2d 488, 188 P.2d 97 (1947); *cf. Lauf v. Shinner & Co.*, 303 U.S. 323 (1938).

139. See Laudis, *Statutes and the Sources of Law*, in *HARVARD LEGAL ESSAYS* 213 (1934).

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Use a statute as the base for a creative venture; for example the United States Supreme Court recently announced that the Federal Employers Liability Act created only a framework within which the courts were left to evolve, much in the manner of the common law, a system of principles to compensate injured employees consistent with the changing realities of the railroad industry.¹⁴⁰ In short, courts can remain creative even while working within a statutory scheme.

Assuming that courts can and do withstand the counterattack in their reforms, they face problems within their own walls. Having acknowledged their creative role, they should expect a response from those with an interest in producing change. The organized interests that function as legislative lobbies might well undertake experimental litigation to produce changes consistent with their objectives. If the appellate court might play its creative role in any case coming before it, interest groups may well conclude that they cannot ignore pending cases involving principles of law important to them. At the present time such groups do participate as amici in significant cases, but only where the significance of the case appears from the lack of controlling precedent or the convergence of conflicting precedents in the context of the pending case. Unless the courts develop some signaling device, such as setting the case for re-argument and inviting amicus briefs, they can expect an increase in the applications to participate as amicus. Even with the use of such a device, as case reports indicate,¹⁴¹ courts will receive what they might consider the mixed blessing of numerous briefs and oral arguments. While the matter rests within their control, it is unlikely that courts would want to refuse such assistance in the new role they have openly assumed.

If the courts undertake a creative role, they can expect pressure for changes in the rules of evidence. Much of the evidence that is inadmissible as irrelevant under existing rules might be relevant to the consideration of a change in the rules. The size of records might increase significantly, as those using the litigation process experimentally attempt to build the proper record, with data drawn from other disciplines and professions, for the policy

140. *Kernan v. American Dredging Co.*, 355 U.S. 426, 437 (1958).

141. For example, in *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961) the court received seven amicus curiae briefs, and in *Spanel v. Mounds View School Dist.*, 118 N.W. 2d 795 (Minn. 1963) ten amici curiae participated.

decision they will urge upon the court.¹⁴² To a certain extent, the problem can be avoided by liberal use of the technique of judicial notice. Not all relevant information and analysis, however, appear in available printed form. Again, the problem is within the control of the court, but the pressure to receive all volunteered information relevant to the policy decision will be difficult for a non-investigatory body to withstand.

Another facet of the total problem presented by a creative judicial role is that of dealing with *ex parte* communications. If the function of the judiciary is to ensure the correct application of the appropriate rules of law to the facts of a case, improper communications concerning these facts may be quite easily prohibited. If the courts affirmatively assume a policy-making role, however, what is the status of non-record communications made by a nonparty and not directed to the facts of a particular case but of great importance in establishing a policy that the communicator supports? Lord Mansfield has been commended for consulting with experts in the practices of merchants, but it is far from certain that present-day judges would not be censured for private discussions with economists, psychiatrists, or sociologists. The problem has been a major one for administrative agencies which possess both adjudicatory and rule-making powers.¹⁴³

VIII. LEGISLATIVE AND JUDICIAL STRENGTHS AND WEAKNESSES

Having surveyed some of the pros and cons of an actively creative role for the judiciary in the reform of tort law, a summary of the relative strengths and weaknesses of legislatures and courts as reform agencies is appropriate.

As the above discussion shows, there is a remarkable dearth of legislative incentive to consider or initiate reforms of tort law. A conscientious judge, on the other hand, might easily consider it one of his professional obligations. While legislatures have the power, and sometimes even the means, to investigate the relevant factors underlying a policy decision, their utilization of the existing facilities is extremely unlikely. No empirical data is available for some problems and for others the available data can be obtained without the use of legislative investigatory powers. On the other hand, courts have no investigatory powers to facilitate

142. Cf. *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 281 (2d Cir. 1929); FREUND, *ON UNDERSTANDING THE SUPREME COURT* 86-92 (1949).

143. See Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies*, 70 HARV. L. REV. 233 (1962).

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the accumulation of data relating to policy decisions, except as they might provide power to litigants by relaxing the evidentiary rules of relevance. Moreover, court records unfortunately stop short at the rendition of a judgment and are barren of information on how the determination made subsequently affected the parties and society. The necessity of making occasional policy decisions without adequate supporting data often produces a judicial tendency to ignore pertinent empirical data. But frequent encounters with a general problem, presented in various contexts that an endless variety of fact patterns provides, give courts a type of experimental program in which they can formulate and test a governing rule.¹⁴⁴ Moreover, their experience with jury refusals to apply the rules propounded by trial judges gives them some basis for determining whether the rules are compatible with the current values of society. Thus, courts have recently commented on the unacceptability of the rule by which contributory negligence bars recovery¹⁴⁵ and the rule limiting a parent's recovery for the wrongful death of a child to pecuniary losses.¹⁴⁶

If the comparison is made on the basis of what has in fact been done to accumulate data, as opposed to what could be done, courts compare quite favorably with legislatures. As Professor Leon Green has said,¹⁴⁷ courts know more of the history of the law, and thus probably more of what departure from an established rule involves, than a legislature knows or can learn.

Courts certainly equal legislatures in the ability to appraise the rationale of an existing rule. Particularly is this so in those areas where the need for reform has produced a host of irrational and unworkable distinctions, impressive and even awe-inspiring to laymen as an elaborate and complicated structure built by a learned profession, but without merit or justification to those who understand the problem. Not surprisingly, it is in these areas that

144. For an excellent example of an experimental enlargement and subsequent contraction of liability for negligent infliction of emotional harm, see the line of cases set out in GREGORY & KALVEN, *CASES AND MATERIALS ON TORTS* 860-88 (1959). The principal cases in order are: *Victorian Ry. Comm'ns v. Coultas*, [1883] 13 App. Cas. 222 (P.C.); *Dulieu v. White & Sons* [1901] 2 K.B. 669; *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141 (C.A.); *Owens v. Liverpool Corp.*, [1939] 1 K.B. 394 (C.A.); *Bourhill v. Young*, [1943] A.C. 92; *King v. Phillips* [1959] 1 Q.B. 429 (C.A.).

145. *Karcesky v. Laria*, 382 Pa. 227, 234, 114 A.2d 150, 154 (1955).

146. *Fussner v. Andert*, 261 Minn. 347, 113 N.W.2d 355 (1961), 47 MINN. L. REV. 923 (1962).

147. Green, *The Thrust of Tort Law: Part II Judicial Law Making*, 64 W. VA. L. REV. 117, 121 (1962).

courts have recently been most active in making reforms.¹⁴³ In making such appraisals they have the benefit of the extensive literature of the profession and, unlike legislators, a physical and social environment conducive to scholarly pursuits. Indeed, the extent to which judges have relied on law review commentary and scholarly treatises when undertaking a reform¹⁴⁹ is probably one of the greatest reassurances that can be given to those who wonder whether their literary products have a value equal to the pain of their labors.

Changes in substantive rules may affect the important relationship between the trial judge and jury.¹⁵⁰ In this area, courts are clearly superior to legislatures in the ability to determine the likelihood of such an effect and its desirability.

The proponents of legislation frequently are interested in maximizing only one value and may neglect others which assume

148. See, e.g., *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 839 P.2d 457, 11 Cal. Rep. 89 (1961); *Hargrove v. Town of Cocoa Beach*, 90 So. 2d 130 (Fla. 1957) (municipal immunity from tort liability); *Spanel v. Mounds View School Dist.*, 118 N.W.2d 705 (Minn. 1962); *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29, 141 A.2d 276 (1958); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 211 N.Y.S.2d 34 (1961) (liability for injury from negligently induced fright); *Bing v. Thunig*, 2 N.Y.2d 650, 143 N.E.2d 3, 103 N.Y.S.2d 3 (1957) (immunity of charitable hospitals); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); cf. *President & Directors of Georgetown College v. Hughes*, 130 F.2d 810, 822 (D.C. Cir. 1942). See also *Schulte v. Missionaries of La Salette Corp.*, 352 S.W.2d 630, 641-42 (Mo. 1961) (noting that the jurisdictions in which charitable immunity has recently been rejected were jurisdictions in which that immunity was not complete).

149. See, e.g., *Self v. Self*, 376 P.2d 65, 26 Cal. Rep. 07 (1962); *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 839 P.2d 457 (1961); *Hargrove v. Town of Cocoa Beach*, 90 So. 2d 130 (Fla. 1957); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952); *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961) (opinion of Black, J.); *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820 (1960); *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29, 141 A.2d 276 (1958); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 211 N.Y.S.2d 34 (1961); *Siragusa v. Swedish Hosp.*, 373 P.2d 767 (Wash. 1962); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). Judges have commented directly on the importance of an informed professional criticism. CARDOZO, *THE GROWTH OF THE LAW* 12 (1924); SCHAEFER, *PRECEDENT AND POLICY* 12 (1950). As might be expected, the critical views of the scholars are given greatest weight when the scholarly opinion is unanimous or nearly unanimous while precedents point in all directions. Cf. *President & Directors of Georgetown College v. Hughes*, 130 F.2d 810, 812 (D.C. Cir. 1942).

150. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 500-03 (1962).

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equal importance in varying factual contexts. The protection given insurers from fraudulent claims by host-guest statutes is an apt example. Indeed, if a statute incorporates a number of values and principles, it is likely to amount to no more than a general delegation of power which does not effectively control judicial decisions. Because of this, the legislative treatment of torts carries no guarantee of a reasoned and consistent approach to the problems of compensation and loss. Courts, on the other hand, are constantly presented with cases based on comparison and analogy, and for that reason, may produce a more balanced jurisprudential approach.

On the other hand, the flexibility of the legislative technique can be put to good use. Statutory limits on the amount of recovery can be used to balance the value of compensating an injured party against the value of preventing excessive diversion of funds or crushing liabilities.¹⁵¹ The legislative technique may provide the administrative machinery to carry out an established program. Thus, a compulsory automobile liability or loss insurance program can be established legislatively with the necessary administrative support in the licensing of vehicles and drivers, as well as the police supervision of their operation. Judicial expansion of the insurance principle must rely, however, on the self-executing effect of newly adopted rules which induce persons to purchase insurance to avoid liabilities.

The legislative approach to reform has the advantage of a possible statement of all the ramifications and consequences of the change made, whereas the traditional judicial approach may leave the full extent and significance of the change in doubt until another case presents the opportunity to consider another variation of the problem. But this limitation on judicial reform can be overstated. Thus, the day that the Supreme Court of California decided *Muskopf v. Coming Hosp. Dist.*,¹⁵² abrogating the rule of governmental immunity in that state, it also decided *Lipman v. Brisbane Elementary School Dist.*,¹⁵³ establishing a rule of non-liability for certain discretionary acts of governmental officials. This court also announced on the same day, two new rules creating inter-spousal liability for both negligence¹⁵⁴ and intentional torts.¹⁵⁵

151. See text accompanying note 117 *supra*.

152. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rep. 89 (1961).

153. 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rep. 97 (1961).

154. *Klein v. Klein*, 376 P.2d 70, 26 Cal. Rep. 102 (1962).

155. *Self v. Self*, 376 P.2d 65, 26 Cal. Rep. 97 (1962).

The Supreme Courts of Florida¹⁵⁶ and Wisconsin¹⁵⁷ did not enjoy the presence of such parallel cases when they decided cases abolishing the immunity of municipal corporations, but both found it possible to discuss the limitation of their new rules with respect to legislative and judicial acts of officials. The Wisconsin court distinguished between "governmental immunity from torts and the sovereign immunity of the state from suit"¹⁵⁸ and concluded that its decision had no effect on "the state's sovereign right under the Constitution to be sued only upon its consent."¹⁵⁹

Another advantage of the legislative technique of reform is that it can be given only future effect, thus avoiding what is generally considered undesirable: retroactive change in the law. Judicial reform is traditionally considered retroactive in effect, subjecting conduct to a rule of law that was not in existence when that conduct occurred. Of course, as has been frequently recognized,¹⁶⁰ the area of torts is largely an area of accidental loss where the objection of retroactivity is entitled to less consideration than in other contexts.

Perhaps the most serious objection is raised by those who claim they did not obtain liability insurance because of their reliance on a former rule that provided immunity from liability. Insurers could claim that the rates they charge for liability insurance are based on the prior rules governing liability and that

156. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957).

157. *Holytz v. City of Milwaukee*, 17 Wis. 2d 28, 115 N.W.2d 618 (1962).

158. *Ibid.*

159. *Id.* at 38, 115 N.W.2d at 626. If this language refers to the United States Constitution, it is much too broad; the eleventh amendment precludes actions unconsented to against states in a federal court, but it does not grant immunity from similar actions in state courts. U.S. CONST. amend. XI; see *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 290 (1952); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 469 (1945); *Dunnuck v. Kansas State Highway Comm'n*, 21 F. Supp. 882 (D.C. Kan. 1937); *Prudential Ins. Co. v. Murphy*, 207 S.C. 324, 35 S.E.2d 586 (1945), *aff'd*, 328 U.S. 408 (1946). In the context of its earlier discussion of the applicable provisions of the Wisconsin Constitution, however, a more reasonable interpretation of the court's statement would limit it to the state constitution. See *Holytz v. City of Milwaukee*, 17 Wis. 2d 28, 30, 115 N.W.2d 618, 625-26 (1962).

The Minnesota Supreme Court, in *Spanel v. Mounds View School Dist.*, 118 N.W.2d 705, 802 (Minn. 1962), also left its abolition of sovereign immunity open to statutory modification. The *Spanel* court alluded to the state's constitutional right of sovereign immunity, without distinguishing between suits in state and federal courts. This is clearly an improper construction of the eleventh amendment and is contrary to the great weight of authority. See 48 MINN. L. REV. 192, 203 (1963).

160. See note 14 *supra*.

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161. *Morrison v. University of California*, 391 U.S. 470 (1968), *reversed*, 391 U.S. 470 (1968).

162. *E.g.*, *Robinson v. Shelby County*, 398 U.S. 152 (1970), *reversed*, 398 U.S. 152 (1970); *Monroe St. L. Rev.* 297 (1963); *not retroactive*, 344 P.2d 1028 (1960); *change in a b.*

163. *City of Kaneland v. Williams*, 398 U.S. 152 (1970), *reversed*, 398 U.S. 152 (1970); *Port Huron View School Dist. v. Board of Education*, 398 U.S. 152 (1970), *reversed*, 398 U.S. 152 (1970); *N.W.2d* 618 (1962); 131, 202 (1961) (Mo. 1950) (prospective overruling), 287 U.S. 358 (1932) (prospective overruling of the Pure Prospective Overruling doctrine); *the warning doctrine*, *apply a new rule*, *Ins. Co.*, 8 Wis. 2d 28, 115 N.W.2d 618 (1962), *supra*, *prospective overruling*, 109 U.S. 109 (1882), *and Retroactive Overruling*.

164. *City of Kaneland v. Williams*, 398 U.S. 152 (1970), *reversed*, 398 U.S. 152 (1970).

change will inflict losses on them by requiring payments over and above those for which provision was made. What studies have been made, however, indicate that details of the substantive law governing liability play but a small and frequently undetectable part in the total costs of providing liability insurance.¹⁶¹

While legislatures can give statutes only a prospective effect, they do not always do so, and when they do, the statutory language is not always clear and explicit.¹⁶² In this respect the legislative product should be judged by what it is and not by what it might have been. On the other hand, in recent years a number of courts have put the device of prospective overruling to effective use in making reforms in the tort area.¹⁶³ The technique of applying the new rule in the case in which it is announced, as a reward for ingenuity of counsel, while giving it only prospective operation as to other cases is certainly questionable.¹⁶⁴ The adequacy

161. Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1960).

162. *E.g.*, compare *Denning v. Quist*, 160 Wash. 681, 296 Pac. 145 (1931), and *Robinson v. McHugh*, 153 Wash. 157, 291 Pac. 330 (1930) (both giving retroactive effect to a legislatively enacted immunity), with *Hammack v. Monroe St. Jumber Co.*, 54 Wash. 2d 224, 339 P.2d 684 (1959), 35 WASH. L. REV. 237 (1960) (holding that a statute removing the same immunity was not retroactive in effect). See also *Nogosek v. Truedner*, 54 Wash. 2d 908, 344 P.2d 1028 (1959) for an example of legislative failure to state whether a change in a host-guest statute had only prospective effect.

163. *City of Fairbanks v. Schaible*, 375 P.2d 201 (Alaska 1962); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); *Parker v. Port Huron Hosp.*, 361 Mich. 1, 105 N.W.2d 1 (1960); *Spanel v. Mounds View School Dist.*, 118 N.W.2d 795 (Minn. 1962); *Witte v. Fullerton*, 376 P.2d 244 (Okla. 1962); *Holytz v. City of Milwaukee*, 17 Wis. 2d 20, 115 N.W.2d 618 (1962); *Kojis v. Doctors Hosp.*, 12 Wis. 2d 307, 107 N.W.2d 131, 292 (1961); cf. *Moore v. Ready Mixed Concrete Co.*, 329 S.W.2d 14 (Mo. 1959) (prospective change of a procedural rule). The leading case on prospective overruling is *Great Northern Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932) (Cardozo, J.), which involved administrative regulation of the rates of a common carrier rather than a problem of tort law. Pure prospective overruling differs from a more familiar judicial technique, the warning dictum, only in the firmness of the commitment expressed to apply a new rule in future cases. *E.g.*, compare *Puhl v. Milwaukee Auto Ins. Co.*, 8 Wis. 2d 343, 90 N.W.2d 163 (1959), with *Holytz v. City of Milwaukee*, *supra*, and *Kojis v. Doctors Hosp.*, *supra*. The leading article on prospective overruling is *Levy, Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960). See also Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

164. *City of Fairbanks v. Schaible*, 375 P.2d 201 (Alaska 1962); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959);

of notice of a new rule that becomes effective as of the date the opinion is filed is similarly doubtful.¹⁶⁵ But some courts have provided a substantial notice period by stating a future date as of which the newly announced rule will become effective.¹⁶⁶ Despite questions or refinement of technique in the use of the device, judicial use of prospective overruling can eliminate any supposed superiority of the legislature as an instrument of reform insofar as avoidance of retroactivity is concerned.

IX. SPECIFIC APPLICATIONS

At this point it is appropriate to attempt an appraisal of the comparative abilities of courts and legislatures to deal with some specific problems in the field of torts. Foremost among these problems is that of how society should deal with the tremendous losses occasioned by automobile accidents. The indications are that greater reliance on loss distribution through insurance is in order and that fault as a basis for recovery must be abandoned.¹⁶⁷ Here, as with many other tort problems, the victims of automobile accidents are poorly organized and not likely to operate effectively as lobbyists, while the opponents of revision are. The breadth of the problem and its impact in all strata of society give some hope for legislative attention, but the possibilities of compre-

Browning v. Paddock, 364 Mich. 293, 111 N.W.2d 45 (1961); *Parker v. Port Huron Hosp.*, 361 Mich. 1, 105 N.W.2d 1 (1960); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); *Kojis v. Doctors Hosp.*, 12 Wis. 2d 367, 107 N.W.2d 181, 292 (1961).

165. *City of Fairbanks v. Schaible*, 375 P.2d 201 (Alaska 1962); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); *Parke v. Port Huron Hosp.*, 361 Mich. 1, 105 N.W.2d 1 (1960); *Kojis v. Doctors Hosp.*, 12 Wis. 2d 367, 107 N.W.2d 181, 292 (1961).

166. *Spanel v. Mounds View School Dist.*, 118 N.W.2d 795 (Minn. 1962) (close of the next session of the state legislature); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) (40 days after filing of opinion).

167. EHRENSWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM (1954); GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* (1958); COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, REPORT TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1932); JAMES, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315, 332-40 (1959); MARX, *Compensation Insurance for Automobile Accident Victims: The Case for Compulsory Auto Compensation Insurance*, 15 OHIO ST. L.J. 134 (1954); MORRIS & PAUL, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962).

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hensive legislative action are slight. Moreover, the amount of empirical research available to courts is impressive and convincing.¹⁶⁸ Nevertheless, the necessity of establishing administrative machinery to carry out an insurance program and check on compliance with its requirements puts this hoped-for reform beyond the limits of judicial creativity. As Professor James has suggested,¹⁶⁹ courts must limit their reforms to changes of tort doctrine that give emphasis to the concepts of compensation and loss distribution.

As an illustration of how courts may do this, consideration may be given to the family car doctrine.¹⁷⁰ Using their understanding of the doctrine and its fictional basis, courts should not hesitate to extend the liability to corporations or other owners of vehicles that cannot be characterized as the head of a household.¹⁷¹ And the extension of the doctrine to dangerous instruments such as powerboats, motor cycles, and mechanically powered "mountain goats," etc.¹⁷² is obviously a task that the courts must perform if the extension is to be made in most jurisdictions.

Courts may function effectively as reform agents in re-evaluating the various judicially created immunities from liability, such as sovereign immunity, charitable immunity, and the various family immunities. There is little reason to expect that organized pressure groups will be formed to lobby reform legislation through to enactment of statutes affecting any of these doctrines. On the other hand, organized pressure groups are active and effective in preventing their consideration by the entire legislature. The courts, however, are as competent as the legislatures to reappraise the rationale that supports the continued existence of these doctrines. Each consists of an elaborate, technical, and complicated formulation that impresses laymen as the product of a learned

168. HUNTING & NEUWIRTH, WHO SUES IN NEW YORK CITY? (1962); Adams, *A Comparative Analysis of Costs of Insuring Against Losses Due to Automobile Accidents*, Economic and Business Bulletin (Temple University), March, 1960, p. 1; Franklin, Chanin & Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 *COLUM. L. REV.* 1 (1961); Morris & Paul, *supra* note 167. A list of earlier studies is set forth in James, *supra* note 167, at 328-29.

169. James, *supra* note 167, at 334.

170. See PROSSER, *TORTS* 368-72 (2d ed. 1955); LATTIN, *Vicarious Liability and the Family Automobile*, 26 *MICH. L. REV.* 846 (1928).

171. Compare *Keller v. Federal Bob Brannon Truck Co.*, 151 *TENN.* 427, 269 *S.W.* 914 (1925), with *Durso v. A. D. Cozzolino, Inc.*, 128 *CONN.* 24, 20 *A.2d* 302 (1941), and *Smart v. Bissonette*, 106 *CONN.* 447, 138 *A.1.* 365 (1927).

172. *But see Felcyn v. Gamble*, 185 *MINN.* 357, 241 *N.W.* 37 (1932); *Meinhardt v. Vaughn*, 159 *TENN.* 272, 17 *S.W.2d* 5 (1929).

profession — a product that should not be disturbed by the uninformed. There is, moreover, little hope that legislative investigations could produce much empirical data, beyond that available to the judiciary, on which to base a judgment as to the desirability of retaining the immunity.

Insofar as sovereign immunity is concerned the legislature can make the appropriate provisions regarding notice of claims, special periods of limitations for the filing of suits, trial without a jury, possible monetary limits on liability, negotiation of settlements and compromises, and the budgeting and appropriation procedures to be followed.¹⁷² But these, as the California and Minnesota experiences indicate,¹⁷⁴ can also be produced by the legislature after the courts have played their creative role and directed legislative attention to a question that would otherwise be ignored. Finally, at least with respect to sovereign immunity and charitable immunity, the view of the scholars is that as presently recognized in most jurisdictions, they are indefensible.¹⁷³

The doctrine of comparative negligence should replace the absolute bar imposed by the contributory negligence rule, and this substitution should be made by the judiciary. The present

172. Indeed, the Washington statute waiving sovereign immunity, WASH. REV. CODE § 4.02.090, was apparently enacted without hearings. H.R. 338, from which the statute comes, was introduced in the House on January 30, 1961, and referred to the Committee on Judiciary-Civil. JOURNAL OF THE WASHINGTON HOUSE OF REPRESENTATIVES 184 (1961). Three days later, on February 2, 1961, the Committee reported favorably on the bill. JOURNAL OF THE WASHINGTON HOUSE OF REPRESENTATIVES 235 (1961). The report was so short and cryptic as to be uninformative to the uninitiated. Note 50 *supra*. The bill was received in the Senate on February 9, 1961, and referred to the Judiciary Committee. JOURNAL OF THE WASHINGTON SENATE 313, 315 (1961). Nineteen days later it was reported favorably to the Senate in a report as cryptic and uninformative as that of the House Committee on Judiciary-Civil. JOURNAL OF THE WASHINGTON SENATE 740 (1961). The only recorded discussion of the bill occurred in the Senate, which first adopted and then, upon reconsideration, refused to adopt an amendment giving the statute retroactive effect. The proponent of the amendment stated he had no idea of how many pending claims might be affected by adoption of the amendment. JOURNAL OF THE WASHINGTON SENATE 1010-12 (1961).

As enacted, the statute contained no provision respecting the immunity of municipalities, leaving its effect in that respect a matter of conjecture. Nor were any provisions made concerning notice of claims, filing of suits, or methods of payment. A statute enacted in 1963 now provides that detail. Wash. Sess. Laws 1963, ch. 150.

174. CAL. CIV. CODE § 22.3; Minn. Sess. Laws 1963, ch. 708.

173. 2 HARPER & JAMES, THE LAW OF TORTS 1612 n.13, 1667 n.2 (1956); PROSSER, TORTS 774 n.42 (1955). See also *President & Directors of Georgetown College v. Hughes*, 130 F.2d 810, 812 (D.C. Cir. 1942).

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176. *The Loss Apportionment Act*, Turk, *Comparative Negligence* (1950).

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170. Arkansas Acts 1955, Negligence Reform see Ark.

180. Accor lation has been California, Co North Dakota ton. Lipscomb of enactment of such legislative H.R. 40, 35th 32d Reg. Sess. *Cure for Our Maloney, From Reform*, 11 *University Negligence (Pennsylvania, York)*; 8 ALA.

comparative negligence rule followed in Georgia originated in a series of common-law decisions of the Georgia court during the 1850's, and that court's construction of subsequently enacted legislation codifying those decisions.¹⁷⁶ In Illinois, a limited form of comparative negligence, based on a distinction between gross and slight negligence, was judicially adopted in 1858¹⁷⁷ and ultimately abandoned, also by judicial decision, in 1894.¹⁷⁸ The significance of the abandonment is not that comparative negligence is unsound—for the abandonment was probably caused by the difficulties of working with such nebulous concepts as gross and slight negligence as well as the dissatisfaction with a rule that served only to transfer the entire loss to one party—but that such changes were made by courts, rather than legislatures, at a time when the creative role of the judiciary was not as well understood as at the present time.

It is unlikely that sufficient support for a comparative negligence rule could be organized to obtain its passage through a state legislature.¹⁷⁹ As in other areas appropriate for judicial reform, lobby and pressure groups are active and successful in preventing bills incorporating comparative negligence principles from obtaining full legislative consideration.¹⁸⁰ Judicial experience with jury verdicts provides the courts with ample proof that the contributory negligence rule is not compatible with the

176. The better discussions of this development are found in Philbrick, *Loss Apportionment in Negligence Cases*, 99 U. PA. L. REV. 766 (1951); Turk, *Comparative Negligence on the March*, 28 CIL-KENT L. REV. 304 (1950).

177. *Galena & Chicago Union R.R. v. Jacobs*, 20 Ill. 478 (1858).

178. *City of Lenark v. Dougherty*, 153 Ill. 163, 38 N.E. 802 (1894).

179. Arkansas adopted a comparative negligence statute in 1955, Ark. Acts 1955, No. 100, amended by Ark. Acts 1957, No. 208. For its present form see ARK. STAT. §§ 27-1730.1, 27-1730.2 (1962).

180. According to a list compiled in 1951, comparative negligence legislation has been introduced in the following sixteen states: Arizona, Arkansas, California, Colorado, Kansas, Massachusetts, Michigan, Missouri, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah, and Washington. Lipscomb, *Comparative Negligence*, 1951 INS. L.J. 667, 674. It has failed of enactment in all but Arkansas. Note 179 *supra*. Subsequent efforts to enact such legislation have failed. S. 460, 35th Reg. Sess. (1957) (Washington); H.R. 40, 95th Reg. Sess. (1957); S. 352, 93d Reg. Sess. (1953); H.R. 28, 93d Reg. Sess. (1951); Averbach, *Comparative Negligence Legislation: A Cure for Our Congested Courts*, 19 ALBANY L. REV. 4, 19 (1955) (New York); Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 136 n.5 (1958) (Florida); O'Toole, *Comparative Negligence: The Pennsylvania Proposal*, 2 VILL. L. REV. 474 (1957) (Pennsylvania); Note, 25 FORDHAM L. REV. 185 nn.5, 6 & 7 (1950) (New York); 8 ALA. L. REV. 71 (1955) (Alabama).

values of our society,¹⁸¹ and it has been abandoned in most common-law jurisdictions outside the United States.¹⁸² Moreover, scholars almost unanimously agree that a comparative negligence standard is a workable and more just scheme than the contributory negligence rule.¹⁸³ For these reasons a number of important voices have recently and quite properly urged that courts make the change to comparative negligence without waiting for legislative action.¹⁸⁴

Moreover, empirical data bearing upon the subject is as available to courts as it is to legislatures and their committees. Probably the most important consideration is the effect that such a change would have upon the operations of insurance companies. Few others could justifiably claim to have made commitments and taken action in reliance upon the existence of a rule by which contributory negligence bars recovery. What evidence there is indicates that a change in the rule would have a minimal and perhaps undiscernible effect on the total operations of insurers.¹⁸⁵

181. *Karcesky v. Laria*, 382 Pa. 227, 234, 114 A.2d 150, 154 (1955).

182. Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 393, 397-38 (1932); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 460 (1953).

183. GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* 4 (1936); MORRIS, *TORTS* 215 (1953); WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE*, 259 (1951); James, *Comparative Negligence*, 28 UTAH B. BULL. 109 (1950); James, *Contributory Negligence*, 62 YALE L.J. 691, 704-05 (1953); Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125, 142-47 (1945); Maloney, *supra* note 180, at 173; Philbrick, *supra* note 176, at 572; Pound, *Comparative Negligence*, 19 NACCA L.J. 105, 107 (1954); Prosser, *supra* note 182, at 508; Turk, *supra* note 176, at 341-45.

Mr. Justice Black, speaking for the Supreme Court of the United States, said about the two rules in *Pope & Talbot, Inc. v. Hawk*, 340 U.S. 406, 408-09 (1951):

The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires.

184. SEAVEY, *COGITATIONS ON TORTS* 55-56 (1954); Keeton, *supra* note 180, at 506-09. The same suggestion was made in the 1962 Ross Prize Essay. Gilliam, *How May the Disposition of Personal Injury Litigation Be Improved?*, 48 A.B.A.J. 834, 830 (1962).

185. Morris, *supra* note 161, at 553; Peek, *supra* note 161, at 689. Compare Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 19 ARK. L. REV. 89, 108 (1959) concluding that adoption of a comparative negligence standard allowed plaintiffs to win a higher proportion of cases but not to obtain larger verdicts. Indeed, directing the attention of the jury

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The apparent explanation of this fact is that comparative negligence is in fact the standard by which parties negotiate settlements.¹⁸⁶ The proportion of cases controlled by a judgment, which may involve as little as two percent of all claims,¹⁸⁷ is too small to affect the overall result even if juries did conscientiously follow the instructions given them. Other concerns, such as the extent to which a contributory negligence rule deters risk-creating conduct, is something that probably cannot be tested empirically because appropriate laboratory experiments cannot be practiced on human beings and the variables affecting the accident rate are so numerous that no effect can be attributed to the presence of a comparative negligence rule.

Finally, the involved and convoluted features of the last clear chance doctrine seem to ameliorate what would otherwise appear to be the harsh consequences of a rule barring recovery on the basis of contributory negligence. They provide for the layman the appearances of a system carefully designed to work justice between the parties to accident litigation. To judges and members of the legal profession, of course, the doctrine represents nothing more than an illogical scheme, difficult to apply, and frequently impossible to justify, the existence of which is tolerated only because it permits courts to escape the harsh consequences of the contributory negligence rule. As elsewhere, such doctrinal complications not only establish the need for reform; they also establish the propriety of judicial action.

Changes in the common-law rules respecting the right to contribution as well as the effect of a release given one tort-feasor on claims against others have also been pointed out as changes that courts might appropriately make.¹⁸⁸ There may be some doubts on the merits of permitting one tort-feasor to enforce a right to contribution against another.¹⁸⁹ If changes in the rule

to the possibility of deducting some portion of the plaintiff's damages as attributable to his fault may well have the effect of reducing the amount of the verdict from what it would have been under a rule by which plaintiff's negligence should only have the effect of a complete bar.

186. A study indicated that 84% of all those who made claims arising out of accidents in New York City received some compensation, leading the authors to conclude that the present liability rules prevent recovery by a maximum of 25% of all potential claimants, and that recoveries could be achieved in cases of doubtful liability. Franklin, Chanin & Mark, *supra* note 168, at 13, 34.

187. Franklin, Chanin & Mark, *supra* note 168, at 10.

188. SEAVEY, *COGITATIONS ON TORTS* 54 (1954).

189. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 *HARV. L. REV.* 1156 (1941).

are to be made, once again the lack of organized legislative lobbies to support such reforms, the presence of aged doctrines with elaborate distinctions, and the equality of access to empirical data indicate that the judiciary is an appropriate agency for reform.

In recent years courts have undertaken a creative role in enlarging the scope of liability for fright and emotional shock as well as for invasion of privacy.¹⁹⁰ Appraisal of the comparative abilities of courts and legislatures to deal with the problems leads to the conclusion that the courts have acted properly in doing so. Again the disorganized state of the victims of conduct producing such results and the consequent lack of organized lobbies seeking remedial legislation provide one rational explanation for legislative inattention to the problem.¹⁹¹ Legislative investigations might produce empirical data concerning the frequency with which such conduct occurs, but they probably could supply little information bearing upon the crucial question of whether a particular victim should be compensated. A legislative investigation could conceivably be directed toward determining the increased incidence of fraudulent claims accompanying liberalization of the right of recovery, but the techniques used to determine whether particular claims were fraudulent would necessarily parallel those used by the courts to determine the validity of claims. Moreover, courts are familiar with the trial process and are in a position to formulate subsidiary rules, relating to the burden of proof and procedure, to deal with the problem.¹⁹² Finally, the pre-existing law was filled with technicalities, such as the requirement of some physical contact with the victim, or

190. PROSSER, *TORTS* 38-47, 636-44 (2d ed. 1955). For recent examples, see *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1961); *Battalla v. State*, 10 N.Y.2d 230, 176 N.E.2d 729, 210 N.Y.S.2d 34 (1961). But see *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513, 29 Cal. Rep. 33 (1963) denying recovery to a mother for harm caused by fright and nervous shock suffered when she saw defendant's negligently operated truck run over her infant child.

191. Thus the New York Revision Commission filed a report in 1936 urging adoption of legislation that would allow the courts to impose liability for physical and mental injuries occasioned by negligently induced fright, with the courts working out the rules which would protect meritorious claimants and prevent the successful prosecution of non-meritorious or fraudulent claims. *NEW YORK LAW REVISION COMM'N, REPORT* 381-82 (1936). The report apparently gathered much dust but little support until utilized by the Court of Appeals in reaching its decision in *Battalla v. State*, 10 N.Y.2d 230, 176 N.E.2d 729, 210 N.Y.S.2d 34 (1961).

192. See *NEW YORK LAW REVISION COMM'N, REPORT* 351-82 (1936).

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193. PROSSER, *TORTS*
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that the victim, though untouched, had been within the area of risk of harm from physical contact, or that substantial damages for such harm could be awarded as a parasitic incident of the right to recover on some other tort theory. Similar reasons might be advanced to support the creative role that courts have played in recent years in permitting recovery for prenatal injuries.¹⁹³

Though the courts have performed well in the last two areas, they have been woefully inadequate in responding to the call for the reform of principles affecting the liability of landowners and land occupiers. Again, unorganized victims of harm that might have been avoided through the use of no more than reasonable care have no lobby to press the case for expanded rights of recovery. On the other hand, apartment house owners in particular, and business organizations in general, do have active lobbies to prevent legislative consideration of the problem. Moreover, the program of expanding liabilities is politically unpalatable for legislators, most of whom would quickly realize that its support would likely require them to defend against the charges that these organized groups would press. In politics it is frequently more advantageous to be on the offensive than the defensive, regardless of the merits of the proposition.

That the area is one in need of reform can hardly be doubted. The Supreme Court of the United States has said of the common-law rules governing land-occupiers' liabilities:¹⁹⁴

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, toward imposing on owners and occupiers a single duty of reasonable care in all the circumstances.

193. PROSSER, *TORTS* 174-75 (2d ed. 1953); Note, *Prenatal Injury*, 38 WASH. L. REV. 390 (1963). For a recent decision with a good discussion of the problem, see *Puhl v. Milwaukee Auto. Ins. Co.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959).

194. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959).

These proliferating technicalities, which the Supreme Court wisely refused to incorporate into admiralty law, are exactly the type that impress laymen and obscure from legislators the trend that the law is and should be following. On the other hand, a court may easily emulate Justice Cardozo in his famous *MacPherson* decision¹⁹⁵ and draw from the various exceptions to nonliability the governing principle that owners and occupiers have a single duty of reasonable care in all the circumstances.¹⁹⁶

Another area in which the courts have not been as responsive to the changing conditions of society is in the law of damages. Recently, the Supreme Court of Michigan abandoned the rule by which the damages awarded parents for the wrongful death of a child are measured by the pecuniary loss to the parents — that is, the difference between his probable wages during minority less the costs of his upkeep.¹⁹⁷ Labeling its earlier precedents a "remote and repulsive backwash of time and civilization, untouched by the onward march of society," the court attempted to adapt the rule to what it knew juries had in fact been practicing covertly. Earlier, the Supreme Court of Mississippi had brought its law of damages into conformance with general standards by removing the established denial of recovery for mental suffering experienced either as a result of physical disfigurement, or after physical pain had ceased.¹⁹⁸ But on the whole, courts, and law professors, have ignored what Professor Jaffe once called the crucial controversy in personal injury torts.¹⁹⁹ Among the impressive features of the law of damages for personal injuries today is the extent to which the rules confer discretion on juries who often receive no instruction as to whether they may consider various factors bearing on the amount of damages.²⁰⁰

In many jurisdictions, a plaintiff may receive two allowances for taxes that he will not be required to pay.²⁰¹ If the law of torts is to be limited to the compensatory function of placing

195. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

196. See, e.g., Prosser, *Business Visitors and Invitees*, 28 MINN. L. REV. 573 (1942).

197. *Wycko v. Gnodtke*, 381 Mich. 331, 105 N.W.2d 118 (1960).

198. *Vascoe v. Ford*, 212 Miss. 370, 54 So. 2d 541 (1951).

199. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 221-22 (1953).

200. See GREGORY & KALVEN, *CASES AND MATERIALS ON TORTS*, ch. *passim* (1950).

201. See Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L.J. 212 (1958).

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the victim, as far as possible, in the position in which he would have been absent the tort, the courts should reformulate the rules and instructions that require a consideration of income tax consequences in the verdict.

Other rules relating to the effect to be given collateral sources of compensation for injuries also need reworking.²⁰² In making such changes, the courts may act with the freedom derived from the realization that new rules would impose no new duties, nor would they discriminate against persons who had relied on the old rules. Courts, more effectively than legislatures, can determine the procedural complications that might arise from admitting evidence of, and giving effect to, collateral compensation received by a tort victim. Moreover, judges, unlike legislators, are aware of the underlying theories of liability; thus they can more effectively determine whether a punitive or deterrent effect may be achieved by visiting liability upon a wrongdoer for an item of damage for which other compensation has already been received, or when the more appropriate view is that "our legal system functions as an insurance scheme under which victims should receive full, but unduplicated, compensation for the injuries they have suffered."²⁰³ Insurance companies might be expected to lobby for legislation limiting the damages awarded in personal injury cases by the amounts received from collateral sources, but in fact they have not done so. Instead, the cost of double and even triple compensation is passed on to the public and this inflated cost of compensating for tortious injuries is advanced as a reason for not incorporating broader principles of insurance in the law of torts.

These comparative evaluations of the abilities of courts and legislatures certainly do not exhaust the field. Detailed attention might be accorded to the predictable problems involved in compensating injuries suffered by radiation, where the complications seem too great for traditional treatment by the courts.²⁰⁴ Or attention might be given to more familiar problems, such as the appropriate use of *res ipsa loquitur*, burden of proof, physical examination of plaintiffs in personal injury cases, and the selection of jurors, with respect to which courts are in a superior

²⁰² For a recent and thorough discussion of the subject, see Maxwell, *The Collateral Sources Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962).

²⁰³ Cf. James, *supra* note 167, at 337.

²⁰⁴ But cf. Estep, *Radiation Injuries and Statistics*, 50 MICH. L. REV. 259 (1960).

position to deal with the problems. Other comparable problems easily come to mind.

But the purpose of this Article has not been that of making a definitive assignment of some problems to legislative treatment and other problems to judicial treatment. Instead it has been merely to suggest some of the criteria by which those assignments should be made and further to suggest that courts should attempt to evaluate the comparative abilities of the two branches of government in deciding whether they or the legislature should undertake what appears to be a needed reform in the law of torts.

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COMPARATIVE NEGLIGENCE AND AUTOMOBILE LIABILITY INSURANCE

*Cornelius J. Peck**

IF one were to compile a list of much-discussed subjects of tort law a high ranking would certainly have to be given to writings on comparative negligence and its relative advantages and disadvantages as compared with the traditional contributory negligence rule. There certainly is no dearth of scholarly articles, which explore in detail the origins of the contributory negligence rule, the extent to which comparative negligence has been accepted at present, and the theoretical advantages and disadvantages of the two rules.¹ Opponents of comparative negligence, frequently insurance counsel, have likewise been productive of articles which generally combine somewhat less impressive scholarly research and theoretical analysis with the observations of men of practical experience.² Others, some of whom appear to have an organizational interest in representing claimants, have been quick to reply with arguments which likewise purport to be based upon practical considerations.³

*Professor of Law, University of Washington. — Ed.

Professor Z. William Birnbaum, Director of the Statistics Research Laboratory, University of Washington, has offered helpful suggestions. The National Bureau of Casualty Underwriters and the National Safety Council have also been of great help in providing statistical data, as the source citations throughout this article indicate. The author alone, however, is responsible for the somewhat unorthodox and frequently elementary statistical analysis, as well as the conclusions expressed. — C.J.P.

¹What has properly been called the classic article is Mole and Wilson, "A Study of Comparative Negligence," 17 *CORN. L. Q.* 333, 604 (1932). Other more recent and comprehensive treatments of the subject are Maloney, "From Contributory to Comparative Negligence: A Needed Law Reform," 11 *UNIV. FLA. L. REV.* 135 (1958); Philbrick, "Loss Apportionment in Negligence Cases," 99 *UNIV. PA. L. REV.* 572, 766 (1951); Prosser, "Comparative Negligence," 51 *MICH. L. REV.* 465 (1953); Turk, "Comparative Negligence on the March," 28 *CHI-KENT L. REV.* 189, 304 (1950). An extensive treatment of the subject may be found in GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* (1936). A study of relatively recent date devoted to the law of Great Britain, Ireland and the common law Dominions is WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* (1951). For a more complete bibliography, see INSTITUTE OF JUDICIAL ADMINISTRATION, *COMPARATIVE NEGLIGENCE* 16-21 (1955). Cf. also James, "Contributory Negligence," 62 *YALE L. J.* 691 (1953).

²E.g., Benson, "Comparative Negligence—Boon or Bane," 26 *INS. COUNSEL J.* 204 (1956); Gilmore, "Comparative Negligence from a Viewpoint of Casualty Insurance," 10 *ARK. L. REV.* 82 (1955); Harkavy, "Comparative Negligence: The Reflections of a Skeptic," 43 *A.B.A.J.* 1115 (1957); Lipscomb, "Comparative Negligence," 1951 *INS. L. J.* 667; Powell, "Contributory Negligence: A Necessary Check on the American Jury," 43 *A.B.A.J.* 1005 (1957); Varium, "Comparative Negligence in Automobile Cases," 24 *INS. COUNSEL J.* 60 (1957).

³E.g., Averbach, "Comparative Negligence Legislation: A Cure for Our Congested Courts," 19 *ALBANY L. REV.* 4 (1955); Bress, "Comparative Negligence: Let Us Harken to the Call of Progress," 43 *A.B.A.J.* 127 (1957); Eldredge, "Contributory Negligence: An

As a reference to any of the major studies of comparative negligence will quickly reveal, the doctrine that contributory negligence is a complete bar to recovery is now rejected in most of the common law world and retains its vitality only in this country.⁴ Even in this country greater recognition has been given to the principle of comparative negligence, or the proportional sharing of damages, than one inclined to dismiss statutes as exceptions might at first think.⁵ Moreover, either through legislation or judicial invention comparative negligence rules of general applicability, but varying form, prevail in seven states.⁶

It would appear that a comparative negligence standard is favored by the scholars as a workable and more just scheme than the contributory negligence rule which now prevails in most states.⁷ The reasons which appeal to the scholars do not, however, appear to be convincing to the legislative mind—if one may judge by the frequency with which proposals for adoption of comparative negligence are made and defeated in state legislatures.⁸ In

Outmoded Defense That Should Be Abolished," 43 A.B.A.J. 52 (1957); Haines, "Canadian Comparative Negligence Law," 23 INS. COUNSEL J. 201 (1956); Pound, "Comparative Negligence," 13 NACCA L. J. 195 (1954); Schroeder, "Courts and Comparative Negligence," 1950 INS. L. J. 791.

⁴ Mole and Wilson, "A Study of Comparative Negligence," 17 CORN. L. Q. 333 at 337-338 (1932); Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 at 466 (1953); Turk, "Comparative Negligence on the March," 28 CHI-KENT L. REV. 189 at 208-245 (1950).

⁵ Prosser states that there are some forty statutes, apparently in successful operation, and that they have been applied in about 1200 cases. Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 at 467 (1953).

⁶ Those states are Arkansas, Georgia, Mississippi, Nebraska, South Dakota, Tennessee, and Wisconsin. The statutes and other authorities in each state are discussed briefly, *infra*.

⁷ GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 4 (1936); James, "Contributory Negligence," 62 YALE L. J. 691 at 704-705 (1953); James, "Comparative Negligence," 26 UTAH BAR 109 (1956); Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 LA. L. REV. 125 at 142-147 (1945); Maloney, "From Contributory to Comparative Negligence: A Needed Law Reform," 11 UNIV. FLA. L. REV. 135 at 173 (1958); MORRIS, TORTS 215 (1953); Pound, "Comparative Negligence," 13 NACCA L. J. 195 at 197 (1954); Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 at 508 (1953); Philbrick, "Loss Apportionment in Negligence Cases," 99 UNIV. PA. L. REV. 572 at 572 (1951); Turk, "Comparative Negligence on the March," 28 CHI-KENT L. REV. 189 at 341-345 (1950); WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 259 (1951).

Justice Black, speaking for the Supreme Court of the United States, had the following to say about the two rules in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 at 408-409 (1953): "The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires."

⁸ According to a list compiled in 1951 comparative negligence legislation had been introduced in the following fifteen states, all of which have rejected the proposals: Arizona, California, Colorado, Kansas, Massachusetts, Michigan, Missouri, New York,

the absence of effect. The doctrine of contributory negligence grows that in most of the common law world and retains its vitality only in this country. Even in this country greater recognition has been given to the principle of comparative negligence, or the proportional sharing of damages, than one inclined to dismiss statutes as exceptions might at first think. Moreover, either through legislation or judicial invention comparative negligence rules of general applicability, but varying form, prevail in seven states. It would appear that a comparative negligence standard is favored by the scholars as a workable and more just scheme than the contributory negligence rule which now prevails in most states. The reasons which appeal to the scholars do not, however, appear to be convincing to the legislative mind—if one may judge by the frequency with which proposals for adoption of comparative negligence are made and defeated in state legislatures. In

The purpose of this study is to examine the history, case law, and legislative developments of comparative negligence. It is a competently titled and well-tailored consideration of the subject. Instead, the author's analysis of the differences between comparative negligence and insurance rate law and cases, are of the subject it might be expected to provide a substantiated answer to the question of whether the result in an increase

North Dakota, Ohio, Oregon, and Pennsylvania. "Comparative Negligence," 13 NACCA L. J. 195 (1954); Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 LA. L. REV. 125 at 142-147 (1945); Maloney, "From Contributory to Comparative Negligence: A Needed Law Reform," 11 UNIV. FLA. L. REV. 135 at 136, n. 5 (1958); *Nebraska*, 135 at 136, n. 5 (1958); *Nebraska*, 135 at 136, n. 5 (1958); *Nebraska*, 135 at 136, n. 5 (1958); *Pennsylvania*, 2 VILL. L. J. 195 (1954); Senate Bill No. 33, 35th reg. sess., 1957.

⁹ See authorities cited, *supra*.

¹⁰ A recently published study of the effects of that state's adoption of comparative negligence in Arkansas: A 'Before and After' Study of Related Problems in Arkansas. Of particular interest for the phenomenon of claims consolidation is discussed in chapter 20 of the book.

the absence of effective rebuttal of the scholarly view, the conviction grows that the persuasive arguments against comparative negligence are found, not in a supposed justice of denying recovery to one whose negligence contributed to his injuries, but in practical considerations of effect of adoption of such a rule. Such practical considerations include concern for the frequency with which claims would be made, the frequency with which juries would deal kindly with an injured party at the expense of a relatively innocent but financially responsible defendant, the effect of such verdicts upon negotiated settlements, the difficulties and expense of disposing of frivolous or nuisance claims, and the burden upon the courts resulting from litigation under a scheme making recoveries possible which would at the present time be barred by contributory negligence.⁹

The purpose of this article is not to re-plow the ground of history, case law, and statutory developments which has been so competently tilled by others. Nor is the purpose to give a detailed consideration of each of the practical matters mentioned above.¹⁰ Instead, the focus of this article is on the relationship between comparative negligence and automobile liability insurance. Insurance rates and accident statistics, rather than rules of law and cases, are the primary materials. Such a consideration of the subject it might be hoped would give a positive and substantiated answer to the frequently debated but never documented question of whether adoption of comparative negligence would result in an increase in automobile liability insurance premium

North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah, and Washington. Lipscomb, "Comparative Negligence," 1951 *INS. L.J.* 667 at 674. Subsequent efforts to enact such legislation have failed in *Alabama*, 8 *ALA. L. REV.* 71 (1955); *Florida*, Maloney, "From Contributory to Comparative Negligence: A Needed Law Reform," 11 *UNIV. FLA. L. REV.* 135 at 136, n. 5 (1958); *New York*, Averbach, "Comparative Negligence Legislation: A Cure for Our Congested Courts," 19 *ALBANY L. REV.* 4 at 13 (1955); Note, 25 *FORD. L. REV.* 184, notes 5,6,7 (1956); *Pennsylvania*, O'Toole, "Comparative Negligence: The Pennsylvania Proposal," 2 *VILL. L. REV.* 474 (1957); and *Washington*, House Bill No. 28, 32d reg. sess., 1951; Senate Bill No. 352, 33d reg. sess., 1953; House Bill No. 40, Senate Bill No. 460, 35th reg. sess., 1957.

⁹ See authorities cited, note 2 *supra*.

¹⁰ A recently published report of a survey of Arkansas judges and lawyers on the effects of that state's adoption of comparative negligence in 1955 furnishes much valuable information with respect to many of these problems. Rosenberg, "Comparative Negligence in Arkansas: A 'Before and After' Survey," 13 *ARK. L. REV.* 89 (1959). Another recent study of related problems is ZEISEL, KALVEN, AND BUCHHOLZ, *DELAY IN THE COURTS* (1959). Of particular interest for the purposes of this article is the author's conclusion that the phenomenon of claims consciousness does exist. Their discussion of the subject appears in chapter 20 of the book.

rates.¹¹ As will appear, however, such precision does not seem to be possible. Nevertheless it does appear possible to draw some meaningful conclusions about the limits within or extent to which comparative negligence does affect premium rates, if indeed it has any effect. The insurance statistics also contain information with respect to the effect of comparative negligence in stimulating the filing of claims and the size of claim settlements. Further observations may be made with respect to the frequently expressed view that even in states in which the contributory negligence rule prevails comparative negligence is in fact practiced by all concerned, including adjusters, attorneys, juries, and even judges. In this way it is hoped something will be added to the information available for evaluation of the practical considerations which appear to control the decision to adopt or reject a comparative negligence standard in lieu of the contributory negligence rule.

OBSTACLES TO DETERMINING THE EFFECTS OF COMPARATIVE NEGLIGENCE ON LIABILITY INSURANCE

As with discussions about the weather, many people have talked about the possible effect of comparative negligence on liability insurance premium rates, but nobody has done anything to demonstrate that effect. To some it appears to be so obvious that comparative negligence would increase the rates that no evidentiary data is advanced to support the proposition. Others, premising their conclusion on the assumption that comparative negligence is the true test applied in almost every case, are equally certain that comparative negligence has no effect on liability insurance rates. One skeptical view finds significance in the fact that insurance counsel, who have available to them the necessary data, have failed to produce statistical support for the proposition that rates are increased.¹² Another author does state that a 10-year study indicates that automobile liability rates in Wisconsin, where a form of comparative negligence prevails, exceed the rates for comparable cities and areas in surrounding

¹¹ E.g., Averbach, "Comparative Negligence Legislation: A Cure for Our Congested Courts," 19 ALBANY L. REV. 4 at 11 (1955); Bress, "Comparative Negligence," 43 A.B.A.J. 127 at 129 (1957); Grubb and Roper, "Comparative Negligence," 32 NEB. L. REV. 234 at 246-247 (1952); Hayes, "New York Should Adopt a Comparative Negligence Rule," 27 N.Y.S. L.J. 283 at 289 (1955); Harkavy, "Comparative Negligence," 43 A.B.A.J. 115 at 116 (1957); Pound, "Comparative Negligence," 13 NACCA L.J. 195 at 198-199 (1954); note, 30 N.D. L. REV. 105 at 117 (1954).

¹² Maloney, "Comparative Negligence: A Needed Law Reform," 11 UNIV. FLA. L. REV. 135 at 163 (1958).

states by 17 to 64%. The variance is caused by the fact that some states to be destroyed by comparative negligence have such diverse conditions concerning to enter into comparative negligence, which is a result of the fact that tort actions otherwise result in decreased rates. Perhaps, despite the fact that comparative negligence is inactive in some states, as is done about it.

Certainly the effect of comparative negligence upon insurance rates varies. Obviously, one may not expect to find a uniform form of comparative negligence in every state in which the comparative negligence rule is adopted. It is concluded that any difference in rates given to negligence is almost certain to be caused by differences in states, and as might be expected, the conditions and the factors which bear part in determining the effect of this rule of law. The effect will depend upon many variables. Streets and highway engineering have been

¹³ Grubb and Roper, "Co

¹⁴ As pointed out *infra*, one of the reasons why the rates in some states is that the rates become higher. An adjustment can be made with respect to the change factor to reduce the number of automobile model years. The declining values of autos with respect to collision insurance seem unre-

A sample check of the effect of a \$50.00 deductible collision insurance and in effect September 1959. The rates in that territory were lower than the rates for Iowa. Michigan in its neighboring states. One state territory were higher than the rates but lower than those applicable in other states. Carolina, but lower than those

states by 17 to 64 percent.¹³ The inference, however, that this variance is caused by comparative negligence alone would seem to be destroyed by the improbability that a single cause would have such diverse effects. Meanwhile, no one seems sufficiently concerned to enter upon speculation as to whether comparative negligence, which would permit insurers to maintain subrogation actions otherwise barred by the insured's negligence, would result in decreased rates for insurance against loss by collision.¹⁴ Perhaps, despite the attempt made here, the explanation of this inactivity is that, as is the case with the weather, nothing can be done about it.

Safety Factors

Certainly the obstacles to detecting an effect of a rule of law upon insurance rates are both numerous and imposing. Obviously, one may not simply compare the rates of a state with a form of comparative negligence with the rates of a neighboring state in which the contributory negligence rule prevails, and conclude that any difference in rates is attributable to the legal effect given to negligence on the part of the injured party. There are almost certain to be differences in safety conditions in the two states, and as might be expected and can be demonstrated, safety conditions and the accident rate play a much more important part in determining the level of insurance rates than do differences in this rule of law. Safety conditions within a state in turn depend upon many variables, such as the physical condition of streets and highways, the degree to which principles of safety engineering have been incorporated in construction, the traffic

¹³ Grubb and Roper, "Comparative Negligence," 32 *NEB. L. REV.* 234 at 246-247 (1952).

¹⁴ As pointed out *infra*, one of the difficulties of comparing insurance rates in different states is that the rates become effective in different states upon different dates. While adjustment can be made with respect to liability insurance on the basis of a monthly change factor to reduce the rates to a common date, the addition of the variables of the number of automobile models, the changing automobile styles of the models, and the declining values of autos with age and obsolescence makes similar adjustments with collision insurance seem unreal.

A sample check of the rates published by National Auto Underwriters Association for \$50.00 deductible collision insurance on a Chevrolet 6-cylinder 4-door Bel Air sedan, and in effect September 1959, did show that Wisconsin rates for the remainder of state territory were lower than the rates in Illinois, Michigan, and Minnesota though higher than the rates for Iowa. Mississippi's comparable rates were lower than those applicable in its neighboring states. On the other hand, the Arkansas rates for the remainder of state territory were higher than those applicable in Missouri, Oklahoma, and Mississippi, but lower than those applicable in Louisiana and Tennessee. The Georgia rates applicable were also higher than those applicable in Alabama, Florida, North Carolina, and South Carolina, but lower than those applicable in Tennessee.

volume, the distribution of the traffic between rural and urban driving, the weather conditions which prevail, the level of driver education and the degree to which safety-mindedness has been impressed upon the driving population, the traffic laws, such as speed limits, the minimum age for drivers' licenses, the tests administered upon granting and renewal of licenses, and even the liquor laws and licensing policies, as well as the effectiveness with which traffic laws are enforced.¹⁵

Economic Variables

Another cluster of factors affecting insurance rates may be characterized as economic. Tremendous differences may exist in the economies of neighboring states. For example, the 1956 per capita income in Mississippi, a comparative negligence state, was \$964, whereas the 1956 per capita income in the neighboring state of Louisiana was \$1,444.¹⁶ Manufacturers' payrolls are almost double farm income in Wisconsin, whereas in adjoining Iowa farm income is more than triple the total of manufacturers' payrolls.¹⁷ These differences in economic level and type of activity are reflected in the damages awarded for loss of earnings. They also affect jury estimates of the value to be assigned pain and suffering or the loss of a limb. Economic factors have a secondary effect through their direct effect on highway construction, repair, and the type and density of traffic. Finally, the effectiveness of governmental regulation of the insurance industry and the rates which it charges varies greatly from state to state. Thus, rates of a state which are higher in relation to the frequency of accidents and the economic level than those of another state may reflect an insurance commission's acceptance of lower permissible loss ratios, or higher insurance industry profits.

Legal Factors

Turning to legal considerations, it is also obvious that differences in other rules of law may be equally significant in determining the level of insurance rates. For example, in Wisconsin

¹⁵ For a discussion of the numerous causes of traffic accidents, see DeSilva, *Why We Have Automobile Accidents* (1942). The National Safety Council's annual publication, *Accident Facts*, contains much statistical information about traffic accidents. For assistance in interpretation of such statistics, see NATIONAL CONFERENCE ON UNIFORM TRAFFIC ACCIDENT STATISTICS, *USES OF TRAFFIC ACCIDENT RECORDS* (1947).

¹⁶ THE WORLD ALMANAC — 1958, p. 752.

¹⁷ *Id.*, pp. 657, 688.

a statute allows the as a defendant in the The general rule is the intentional inject liability insurance b dict's.¹⁸ If there is ar joinder statute must any excess of Wisconsin able to legal rules.

Other legal factors the presence or absence gross negligence, re satisfaction of some liability to a gratuitous ceivable that rates would car doctrine, or a statute owner of an automobile vehicle. Statutory violations receive varying treatment negligence per se in some others.²² These differences rates, as would differences contributory negligence

¹⁸ Wis. Stat. (1957) §§85.93, 85.94, 85.95, 85.96, 85.97, 85.98, 85.99, 85.100, 85.101, 85.102, 85.103, 85.104, 85.105, 85.106, 85.107, 85.108, 85.109, 85.110, 85.111, 85.112, 85.113, 85.114, 85.115, 85.116, 85.117, 85.118, 85.119, 85.120, 85.121, 85.122, 85.123, 85.124, 85.125, 85.126, 85.127, 85.128, 85.129, 85.130, 85.131, 85.132, 85.133, 85.134, 85.135, 85.136, 85.137, 85.138, 85.139, 85.140, 85.141, 85.142, 85.143, 85.144, 85.145, 85.146, 85.147, 85.148, 85.149, 85.150, 85.151, 85.152, 85.153, 85.154, 85.155, 85.156, 85.157, 85.158, 85.159, 85.160, 85.161, 85.162, 85.163, 85.164, 85.165, 85.166, 85.167, 85.168, 85.169, 85.170, 85.171, 85.172, 85.173, 85.174, 85.175, 85.176, 85.177, 85.178, 85.179, 85.180, 85.181, 85.182, 85.183, 85.184, 85.185, 85.186, 85.187, 85.188, 85.189, 85.190, 85.191, 85.192, 85.193, 85.194, 85.195, 85.196, 85.197, 85.198, 85.199, 85.200, 85.201, 85.202, 85.203, 85.204, 85.205, 85.206, 85.207, 85.208, 85.209, 85.210, 85.211, 85.212, 85.213, 85.214, 85.215, 85.216, 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a statute allows the joinder of the insurance company concerned as a defendant in the action brought against the alleged tortfeasor.¹⁸ The general rule is that prejudicial error may be committed by the intentional injection of evidence showing the defendant carries liability insurance because of its tendency to induce larger verdicts.¹⁹ If there is any factual basis for this rule, the Wisconsin joinder statute must be assigned considerable responsibility for any excess of Wisconsin rates over those of its neighbors attributable to legal rules.

Other legal factors which might affect insurance rates include the presence or absence of a "guest statute," requiring proof of gross negligence, recklessness, or intentional wrongdoing, or satisfaction of some other difficult test as a basis for imposing liability to a gratuitous passenger in an automobile.²⁰ It is conceivable that rates would be affected by the acceptance of the family car doctrine, or a statutory basis²¹ for imposing liability on the owner of an automobile for injuries inflicted by others using the vehicle. Statutory violations, particularly violations of traffic laws, receive varying treatment in different jurisdictions, constituting negligence per se in some states and only evidence of negligence in others.²² These differences might be expected to affect insurance rates, as would differences in the degree to which the presence of contributory negligence is determined by the same standards used

¹⁸ Wis. Stat. (1957) §§85.93, 260.11 (1). See MacDonald, "Direct Action Against Liability Insurance Companies," 1957 Wis. L. Rev. 612.

¹⁹ 4 A.L.R. (2d) 764 at 765 (1949). The Wisconsin court appears to have little doubt that the joinder statute has increased recoveries in that state. In *Bergstein v. Popkin*, 202 Wis. 625 at 633, 233 N.W. 572 (1930), the court said: "Whether or not it is an indictment of our jury system, it is a fact recognized by everyone that the purpose of making the insurance company a party defendant is to increase the award of damages made against the insured. That it has that effect, no one familiar with the trial of cases can doubt."

²⁰ Wisconsin, for example, has no host-guest statute, which might be expected to contribute to higher rates. However, one authoritative view is that the net effect of such statutes on recoveries by guests as a class is not materially different from that which obtains under the common law rules developed in Wisconsin. Campbell, "Host-Guest Rules in Wisconsin," 1943 Wis. L. Rev. 180 at 203.

Neither Georgia nor Mississippi, both states with comparative negligence rules and the subject of detailed investigation, *infra*, have host-guest statutes. Arkansas, another state with a comparative negligence statute, does have a statute requiring the proof of willful and wanton operation. Ark. Stat. Ann. (1947) §75.913. For a listing of state statutes and a discussion of the host-guest liability problem, see 2 HARPER AND JAMES, TORTS 950-962 (1956).

²¹ See 2 HARPER AND JAMES, TORTS 1419-1428 (1956); PROSSER, TORTS, 2d ed., 369-372 (1955).

²² 2 HARPER AND JAMES, TORTS 997 (1956); PROSSER, TORTS, 2d ed., 152-164 (1955). For an interesting attempt to compare the difficulties of recovery presented by varying treatments of contributory negligence in Wisconsin and the four states surrounding it, see comment, 1954 Wis. L. Rev. 95.

to determine what constitutes negligence on the part of the defendant.²³ Varying forms of the last clear chance doctrine produce disparity of treatment of contributory negligence in different states,²⁴ and thus permit a range for differences in the operative effects of comparative and contributory negligence in comparisons between various states. Moreover, as will be seen, considerable variation exists in the formulation of the comparative negligence rules of the various states, again destroying any expectation that a fixed or quantitative difference exists when so-called comparative negligence state rates are compared with rates of states enforcing a contributory negligence rule. For example, recognition of assumption of the risk as a complete defense may make less distinct the differences between a contributory negligence rule and a comparative negligence rule.²⁵

The Existing Data

The difficulty of sorting out and identifying the effect of any one of these many variables affecting rates is made even more difficult, or perhaps impossible, by the deficiencies and inadequacies of existing statistical and rate data. Of course, the existing data were not accumulated for the purpose of detecting an effect due to the different legal consequences of contributory negligence. Accordingly, it is necessary to mine, stamp, and refine the existing raw materials in order to extract any information on the subject.

There is, for example, no single liability rate for a particular state. The number of insurance companies engaged in the casualty insurance business in each state is an assurance of diversity within the limits established by competition. To a considerable extent this difficulty is overcome by the rate formulation services performed by associations of casualty insurance companies, such as

²³ Cf. James, "Contributory Negligence," 62 YALE L.J. 691 at 723-729 (1953).

²⁴ 2 HARPER AND JAMES, TORTS 1245-1255 (1956); PROSSER, TORTS, 2d ed., 290-296 (1955). A view that the version of last clear chance known as the "humanitarian doctrine," and applied in Missouri to defendants operating motor vehicles [HARPER AND JAMES, TORTS 1252-1253 (1956); PROSSER, TORTS, 2d ed., 294-295 (1955)], is productive of higher liability insurance rates than comparative negligence finds some support in comparison of the insurance rates applicable in Missouri and Arkansas. See Tables IV-A and V.

²⁵ Insofar as assumption of the risk is merely another way of stating that there is no liability in the absence of a duty, recognition of the defense under a comparative negligence system would seem to be of little importance. But conduct which might be more properly characterized as contributory negligence is sometimes recognized as a defense under the label of assumption of the risk. E.g., *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 88 S.E. (2d) 6 (1955). Cf. *Storlie v. Hartford Accident & Indemnity Co.*, 251 Wis. 340, 28 N.W. (2d) (1947); *Saxton v. Rose*, 201 Miss. 814, 29 S. (2d) 646 (1947).

the National Bureau of Economic Research, the losses reported are made of the rate of risks in the various members and sold to services of the Association of Underwriters also states rates with the various Departures from the are made by those not the rate determination arrive at a rate structure

Of course, even with of the rate structure free comparison of state. The National example, divided each the purpose of accurate Several territories in a territorial grouping within that grouping ence to permit more mination of what are territorial grouping d Without uniformity may be compared only states the bureau has nated "remainder of the did not have sufficient ment as a separate territory which appears to offset since it generally covers differences between the density of population, vigilance in municipalities however, far from an ideal

In addition to the breadth of coverage in classified in a number of private automobiles, Class driven for pleasure and to or from work, and r

the National Bureau of Casualty Underwriters. On the basis of the losses reported to these associations actuarial determinations are made of the rates which should be charged for various categories of risks in the various states. This information is furnished to members and sold to other companies which wish to purchase the services of the associations. The National Bureau of Casualty Underwriters also serves as an agent for its members, filing new rates with the various state insurance commissions for approval. Departures from these rates for competitive purposes may be and are made by those non-member companies which merely purchase the rate determination services of the bureau. Other companies arrive at a rate structure in various independent ways.

Of course, even what uniformity is obtained through acceptance of the rate structure of a particular association does not permit free comparison of the rates of one state with rates of another state. The National Bureau of Casualty Underwriters has, for example, divided each state into a number of rate territories for the purpose of accumulating loss statistics and for fixing of rates. Several territories in a particular state may be combined in a single territorial grouping with a single rate structure for all territories within that grouping, pending accumulation of sufficient experience to permit more refined treatment of each territory. Determination of what area shall be encompassed in a territory or a territorial grouping depends upon a number of variable factors. Without uniformity in definition, territories in different states may be compared only with extreme difficulty. For most of the states the bureau has established one catch-all territory, denominated "remainder of the state," which includes all the areas which did not have sufficiently distinctive characteristics to merit treatment as a separate territory. It is this territorial rate structure which appears to offer the greatest opportunity for comparison, since it generally covers rural and small city areas, where the differences between territories in the accident rate caused by density of population, volume of traffic, and varying degrees of vigilance in municipal law enforcement are minimized. It is, however, far from an ideal unit for comparison.

In addition to the possibilities of classifying insurance by breadth of coverage in monetary terms, the risks insured may be classified in a number of other ways. One bureau classification of private automobiles, Class I-A, covers individually-owned vehicles, driven for pleasure and not used for business or for transportation to or from work, and not owned or driven by a male under the

age of 25. Another classification covers similarly-described vehicles, except that transportation to and from work not in excess of ten miles in each direction is allowed. Other classifications of privately-owned vehicles exist, of course, and commercial vehicles are subject to many classifications based upon the type of vehicle and its use. Of course, even standard policies are subject to varying constructions in different states. The effect of this diversity of classification with respect to privately-owned automobiles is, however, greatly minimized by the use of a rate for a particular classification as the base rate, with the rates for other classifications computed as fixed percentages of the base rate. For example, in most states Class I-A is the base rate for the privately-owned automobile, and the rates for other risk classifications of privately-owned vehicles are computed as fixed percentages of that rate.²⁶

Comparison of the rates effective in different states is further complicated by the fact that there is no uniformity between states in the dates upon which filings of rates take place. For example, the National Bureau of Casualty Underwriters filed the Class I-A rate, now effective in Oklahoma, on October 23, 1957, whereas the rate for the same classification in Arkansas was filed on December 19, 1958. In light of the general inflationary trend, direct comparison of these rates would be misleading. Some correction for the differences in dates of filing can be made, as has been done in the computations made herein, by determining a monthly rate of increase or decrease between two filing dates, and using that monthly rate figure to reduce the rates of all states to a hypothetical common filing date.

Differences in insurance rates exist, of course, not only because of the claim consciousness of the population of a state but also because of the difference in safety conditions in various states and the frequency with which insured vehicles are involved in accidents. Before comparison of rates may be made for the purpose of determining whether comparative negligence has an effect on the rates, proper adjustment must be made for the difference in the rates caused by a higher or lower accident rate. However,

²⁶ The rate structure in the commercial classification of the bureau no longer follows this pattern. Within the privately-owned automobile classification, the additional premiums for categories of increased risks are determined as a fixed percentage of the Class I-A rate. A different set of percentage ratios are used for determining the increased premium applicable in large cities than is used with small cities and rural areas. Two sets of percentage ratios for these two types of territories have been established on a country-wide basis. However, there are variations in a number of states.

the available statistical data which might be used to make the results satisfactory. Although the data on vehicle accidents,²⁷ these of reporting authorities, and applied in the same manner as they. For example, during the period of reported deaths in Arkansas to 241 injuries, a variation exists, not because of what injuries are reported.

Death, of course, has a high degree of reliability to death statistics. The reliability of the reports of deaths has adopted a uniform rate for each death for estimating the number of each state.²⁸ While such an assumption is more than the available reported data, it is an assumption which is incorrect even after allowance for population differences. The ratio of injuries to fatalities is much higher in rural areas, probably because an accident is more likely to be reported in an urban accident.³⁰ Since the data on injuries in urban and rural states, it must be acknowledged that the safety conditions in the various states is inaccurate.

Finally, the available statistics are often in a form which renders them extremely difficult for persons unskilled in statistics to use. Fortunately appropriate for those who are concerned with the problem. The combinations produce distortions involving small samples and

²⁷ U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, *VEHICLE ACCIDENTS*, 2d rev. (1953).

²⁸ *TRAFFIC SAFETY*, p. 34 (December 1957).

²⁹ Letter from the National Safety Council to the Michigan State Police.

³⁰ DESILVA, *WHY WE HAVE AUTO ACCIDENTS*, NATIONAL SAFETY COUNCIL, *ACCIDENT FACTS—1957*, 50, 55.

the available statistical data on non-fatal accidents and injuries which might be used to make such an adjustment is far from satisfactory. Although there exist uniform definitions of motor vehicle accidents,²⁷ these definitions are not used by all accident reporting authorities, and it appears that the definitions are not applied in the same manner by those authorities which do use them. For example, during the year 1957 the ratio of reported injuries to reported deaths varied from six injuries to one death in Arkansas to 241 injuries to one death in Massachusetts.²⁸ Such variation exists, not because of true differences in the ratios, but because of what injuries are counted.

Death, of course, has a uniformity and importance which does give reliability to death statistics. Upon appraisal of the relative reliability of the reports available, the National Safety Council has adopted a uniform ratio of thirty-five disabling injuries for each death for estimating the number of disabling injuries for each state.²⁹ While such an estimate is undoubtedly more reliable than the available reported information, it obviously rests upon an assumption which is incorrect. Other statistics indicate that, even after allowance for poorer reporting in rural areas, the ratio of injuries to fatalities is much higher in urban regions than in rural areas, probably because the higher rate of speed in rural accidents is more likely to produce a fatality than is the case in an urban accident.³⁰ Since the relative distribution of the population in urban and rural regions varies greatly in the various states, it must be acknowledged that even the best indicator of safety conditions in the various states—that found in death statistics—is inaccurate.

Finally, the available statistics are frequently presented in a form which renders extremely hazardous their manipulation by persons unskilled in statistical methods. That description is unfortunately appropriate for most members of the legal profession who are concerned with the subject. Chance and fortuitous combinations produce distortions, particularly in statistical analysis involving small samples and fields; and with the limited number

²⁷ U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, *UNIFORM DEFINITIONS OF MOTOR VEHICLE ACCIDENTS*, 2d rev. (1953).

²⁸ *TRAFFIC SAFETY*, p. 34 (December 1957).

²⁹ Letter from the National Safety Council, March 26, 1958.

³⁰ DESILVA, *WHY WE HAVE AUTOMOBILE ACCIDENTS* 120 (1942); NATIONAL SAFETY COUNCIL, *ACCIDENT FACTS—1957*, 50, 55.

of states in the country as well as the small number of states with comparative negligence the risk of distortion here is high. Statistics themselves prove nothing; a cause and effect relationship must be read into them. And one who has a priori knowledge of the cause and effect probably can find at least some statistics which demonstrate what he already knew.³¹

The lawyer unskilled in statistics may take encouragement from the statement of the National Conference on Uniform Traffic Accident Statistics that experience has shown that relatively advanced statistical techniques are not normally necessary or practical in traffic accident analysis work.³² But, having surveyed the difficulties presented by the multitude of operative factors and the inadequacy of the data available, he will abandon hope that effect of comparative negligence can be shown with an accuracy expressible in fixed percentages or many figured decimal ratios. He may even agree with one eminent scholar that the windfall to plaintiffs caused by retention of the last clear chance doctrine in states with comparative negligence rules must be reflected in insurance rates.³³ But he will feel sure that no instrument now exists which can measure that consequence.

THE COMPARATIVE NEGLIGENCE STATES

As mentioned above, comparative negligence exists in many states in the form of statutes of limited application, and, indeed, it may be found throughout the nation in litigation under the Federal Employers' Liability Act. However, only seven states have comparative negligence rules of general applicability which

³¹ E.g., Powell, "Contributory Negligence: A Necessary Check on the American Jury," 43 A.B.A.J. 1005 at 1007 (1957), cites statistics indicating that even under contributory negligence rules 85% to 90% of all claims asserted are settled, but distinguishes the comparable statistics of litigation under the comparative negligence rule of the Federal Employers Liability Act, in which 87% of the claims are reported to be settled by compromise prior to verdict, on the basis that in such cases only one claimant out of each thousand fails to obtain compensation. On the other hand, statistics reported in ZEISEL, KALVEN, AND BUCHHOLZ, *DELAY IN THE COURTS* 40 (1959), indicate that in New York city only 1.7% of all personal injury claims are tried to completion. Assuming even a 50% victory rate for plaintiffs, the total result in proportion of claimants receiving compensation would appear to be little different from that indicated in the statistics cited by Powell.

Or, for another example, see the suggestion, *infra* note 72, of a possible use of statistics to support a conclusion that comparative negligence encourages bad driving habits and accidents.

³² NATIONAL CONFERENCE ON UNIFORM ACCIDENT STATISTICS, *USES OF TRAFFIC ACCIDENT RECORDS* 153 (1947).

³³ Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 at 496 (1953).

might be expected to affect the comparative negligence rules. The comparative negligence rules are far from uniform, and a necessary basis for evaluation

Detailed consideration of Georgia may be found in a series of common law decisions as authority for the plaintiff should go to mitigate the Georgia Code of 1860 principle of these cases, as code.³⁵ Although the present limit application of the principle of these cases, as defendants, this in fact has no one of general applicability. Comparative negligence rules with the defects in the Georgia rule. The plaintiff is less than that of damages in proportion to the plaintiff. The bar to recovery is equal to or greater than another statutory provision³⁷

³⁴ Mole and Wilson, "A Study of Comparative Negligence Reform," 11 UNIV. FLA. L. REV. 135 at 150 (1932); Maloney, "From Contributory Negligence Cases," 99 UNIV. PA. L. REV. 465 at 489-90 (1931); "Contributory Negligence on the March," 28 CHI-KENT L. REV. 304 at 304 (1943).

³⁵ The better discussions of this development in Negligence Cases," 99 UNIV. PA. L. REV. 465 at 489-90 (1931); "Contributory Negligence on the March," 28 CHI-KENT L. REV. 304 at 304 (1943).

³⁶ Ga. Code Ann. (1935) §94-703: "Contributory negligence as affecting the amount of damages from a railroad company for injury done by his consent or is caused by his agents of the company are both at fault, the damages shall be diminished by the jury in proportion to the fault of the plaintiff."

³⁷ Ga. Code Ann. (1935) §105-603: "If the consequences to himself caused by the negligence of the defendant is not recover. In other cases the defendant is not way have contributed to the injury sustained

might be expected to affect automobile liability insurance rates. The comparative negligence rules of even these seven states are far from uniform, and a brief summary of their differences seems a necessary basis for evaluation of statistical data.

Georgia

Detailed consideration of the comparative negligence rule of Georgia may be found in any of the major articles on the subject of comparative negligence.³⁴ The rule appears to have originated in a series of common law decisions in actions against railroads in which the Georgia court drew on a few contemporary English decisions as authority for the proposition that fault on the part of the plaintiff should go to mitigation of the damages. The codifiers of the Georgia Code of 1860-1862 restated and incorporated the principle of these cases, as they were authorized to do, in that code.³⁵ Although the present code language³⁶ would appear to limit application of the principle to cases involving railroad defendants, this in fact has not been the case, and the principle is one of general applicability. However, one who judges comparative negligence rules with the standards of a purist will find some defects in the Georgia rule. It applies only where the fault of the plaintiff is less than that of the defendant, producing a mitigation of damages in proportion to the fault attributable to the plaintiff. The bar to recovery still exists where plaintiff's fault is equal to or greater than that of the defendant. Moreover, another statutory provision³⁷ has been applied in connection with

³⁴ Mole and Wilson, "A Study of Comparative Negligence," 17 *CORN. L. Q.* 604 at 635-627 (1932); Maloney, "From Contributory to Comparative Negligence: A Needed Law Reform," 11 *UNIV. FLA. L. REV.* 135 at 156-157 (1958); Philbrick, "Loss Apportionment in Negligence Cases," 99 *UNIV. PA. L. REV.* 766 at 777-780 (1951); Prosser, "Comparative Negligence," 51 *MICH. L. REV.* 465 at 489-490, 497 (1953); Turk, "Comparative Negligence on the March," 28 *CIN-KENT L. REV.* 304 at 326-333 (1950).

³⁵ The better discussions of this development are found in Philbrick, "Loss Apportionment in Negligence Cases," 99 *UNIV. PA. L. REV.* 766 (1951) and Turk, "Comparative Negligence on the March," 28 *CIN-KENT L. REV.* 304 (1950).

³⁶ Ga. Code Ann. (1935) §94-703: "Consent or negligence of person injured as defense: comparative negligence as affecting the amount of recovery—No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him."

³⁷ Ga. Code Ann. (1935) §105-603: "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."

the comparative negligence rule so as to create what has appropriately been called a reverse last clear chance doctrine³⁸ which completely bars recovery if the plaintiff could have avoided the consequences of defendant's negligence by the exercise of ordinary care. This provision has been applied rigorously by the Georgia courts,³⁹ and would bar recovery even in a case in which the defendant was guilty of gross negligence.⁴⁰ It also appears that it may be utilized to give complete effect to contributory negligence as a bar in the guise of assumption of the risk.⁴¹ Nevertheless, the consensus appears to be that the Georgia rule represents one of the more comprehensive forms of comparative negligence.

Mississippi

The first comparative negligence statute of general applicability in this country was enacted in Mississippi in 1910.⁴² As might be expected the statute and case law have been the subject of extensive comment in the various writings on comparative negligence.⁴³ The statute creates what might be called true comparative negligence in that it rejects the requirement found in Georgia law, that the plaintiff's negligence be less than that of the defendant. Under this statute it is conceivable that one whose negligence constituted 80 or 90 percent of the fault causing his injuries could recover 10 or 20 percent of his damages from the defendant. Likewise, the statute permits recovery by one who was guilty of "gross negligence," provided that a proportional

³⁸ Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 at 497 (1953). Cf. Maloney, "From Contributory to Comparative Negligence: A Needed Law Reform," 11 UNIV. FLA. L. REV. 135 at 156 (1958); Philbrick, "Loss Apportionment in Negligence Cases," 99 UNIV. PA. L. REV. 766 at 778 (1951).

³⁹ *Central of Georgia Ry. Co. v. Roberts*, 213 Ga. 135, 97 S.E. (2d) 149 (1957); *Brown v. Atlanta Gas Light Co.*, 96 Ga. App. 771, 101 S.E. (2d) 603 (1957).

⁴⁰ *Oast v. Mopper*, 58 Ga. App. 506, 199 S.E. 249 (1938).

⁴¹ *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 83 S.E. (2d) 6 (1955).

⁴² Miss. Code Ann. (1942) §145: "In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property."

§1455: "All Questions of negligence and contributory negligence shall be for the jury to determine."

⁴³ Mole and Wilson, "Comparative Negligence," 17 CORN. L. Q. 604 at 640-643 (1932); Philbrick, "Loss Apportionment in Negligence Cases," 99 UNIV. PA. L. REV. 766 at 795 (1951); Shell and Bufkin, "Comparative Negligence in Mississippi," 27 MISS. L. J. 105 (1956); note, 17 TEMP. L. Q. 276 at 283-285 (1943); GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 57-59 (1936).

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⁴⁶ Wis. Stat. Ann. (1957)
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⁴⁸ Campbell, "Ten Years

⁴⁹ Id. at 297-301.

⁵⁰ Ark. Acts 1935, No. 19

⁵¹ Prosser, "Comparative

reduction in the damages awarded is made.⁴⁴ Assumption of the risk constitutes a bar to recovery.⁴⁵ Nevertheless, the Mississippi rule presents comparative negligence in its purest and most comprehensive form, making that state's rule a desirable subject of investigation for present purposes.

Wisconsin

The comparative negligence law of Wisconsin is likewise based upon a statute,⁴⁶ and has been the subject of extensive comment in writings on comparative negligence.⁴⁷ The law, enacted in 1931, resembles that of Georgia in that recovery is allowed only in cases in which the plaintiff's negligence is not as great as that of the defendant. In such cases damages are reduced in the proportion which plaintiff's negligence bears to the total negligence involved in producing his injuries.⁴⁸ Assumption of the risk is recognized as a complete defense, but the statute does not require diminution of the damages where the defendant has been guilty of gross negligence.⁴⁹ Like the Georgia and Mississippi rules, the Wisconsin law appears to be a desirable subject of investigation.

Arkansas

The most recent adoption of a comparative negligence rule of general applicability occurred in Arkansas in 1955.⁵⁰ Based upon a draft prepared by Dean Prosser,⁵¹ the 1955 act followed the

⁴⁴ Mole and Wilson, "Comparative Negligence," 17 *CORN. L.Q.* 604 at 641 (1932); Shell and Bufkin, "Comparative Negligence in Mississippi," 27 *MISS. L.J.* 105 at 112-113 (1956).

⁴⁵ Shell and Bufkin, "Comparative Negligence in Mississippi," 27 *MISS. L. J.* 105 at 108-109 (1956).

⁴⁶ Wis. Stat. Ann. (1957) §331.045: "Contributory negligence shall not bar recovery in an 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 the proportion to the amount of negligence attributable to the person recovering."

⁴⁷ Campbell, "Wisconsin's Comparative Negligence Law," 7 *WIS. L. REV.* 222 (1932); Campbell, "Ten Years of Comparative Negligence," 1941 *WIS. L. REV.* 289; Knoeller, "Review of the Wisconsin Comparative Negligence Act," 41 *MARQ. L. REV.* 397 (1958); Padway, "Comparative Negligence," 16 *MARQ. L. REV.* 3 (1951); Prosser, "Comparative Negligence," 51 *MICH. L. REV.* 465 at 490-494 (1953); Whelan, "Comparative Negligence" 1933 *WIS. L. REV.* 465; GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* 63-67 (1936).

⁴⁸ Campbell, "Ten Years of Comparative Negligence," 1941 *WIS. L. REV.* 289 at 291-292.

⁴⁹ *Id.* at 297-301.

⁵⁰ Ark. Acts 1955, No. 199.

⁵¹ Prosser, "Comparative Negligence," 51 *MICH. L. REV.* 465 at 503 (1953).

the comparative negligence rule so as to create what has appropriately been called a reverse last clear chance doctrine³⁸ which completely bars recovery if the plaintiff could have avoided the consequences of defendant's negligence by the exercise of ordinary care. This provision has been applied rigorously by the Georgia courts,³⁹ and would bar recovery even in a case in which the defendant was guilty of gross negligence.⁴⁰ It also appears that it may be utilized to give complete effect to contributory negligence as a bar in the guise of assumption of the risk.⁴¹ Nevertheless, the consensus appears to be that the Georgia rule represents one of the more comprehensive forms of comparative negligence.

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³⁸ Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 at 497 (1953). Cf. Maloney, "From Contributory to Comparative Negligence: A Needed Law Reform," 11 UNIV. FLA. L. REV. 135 at 156 (1958); Philbrick, "Loss Apportionment in Negligence Cases," 99 UNIV. PA. L. REV. 766 at 778 (1951).

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⁴² Miss. Code Ann. (1942) §1454: "In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property."

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⁴⁷ Campbell, "Wisconsin's Comparative Negligence Law," 7 WIS. L. REV. 222 (1932); Campbell, "Ten Years of Comparative Negligence," 1941 WIS. L. REV. 289; Knoeller, "Review of the Wisconsin Comparative Negligence Act," 41 MARQ. L. REV. 397 (1958); Padway, "Comparative Negligence," 16 MARQ. L. REV. 3 (1931); Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 at 490-494 (1953); Whelan, "Comparative Negligence" 1938 WIS. L. REV. 465; GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 65-67 (1936).

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⁴⁹ Id. at 297-301.

⁵⁰ Ark. Acts 1955, No. 199.

⁵¹ Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 at 508 (1953).

⁴⁶ at 497 (1953). Cf. Maloney, "Law Reform," 11 UNIV. FLA. IN NEGLIGENCE CASES," 99 UNIV.

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pure comparative negligence principle of the Mississippi law and allowed recovery regardless of whether or not the plaintiff's negligence exceeded that of the defendant. Two years later, the legislature found that there was lack of understanding and uniformity in the application of the 1955 act and that with the law in its then-existing state, great confusion and unfairness occurred in the trial of negligence cases. Accordingly, the statute was repealed.⁵² However, Arkansas did not return to a contributory negligence rule, for the repealing statute enacted in place of the 1955 act the more limited version of comparative negligence which prevails in Georgia and Wisconsin. And so since 1957 recovery has been allowed in Arkansas only where the plaintiff's negligence is "of less degree" than the negligence of the person causing the injuries.⁵³

The short time since adoption of comparative negligence in Arkansas, as well as a possible unsettling effect from the 1957 change of the law, might be considered to render the state's insurance situation an unsuitable subject of investigation. Whatever defects as a subject might be caused by uncertainties about whether the full effect of the change has yet been experienced would seem to be more than offset by the unique opportunity afforded to analyze the changes which occur within a state which does adopt comparative negligence. One very valuable study, based on the responses to a survey of Arkansas judges and lawyers with extensive experience in personal injury litigation, has led its author to conclude that introduction of comparative negligence in Arkansas brought perceptible changes to the course of personal injury litigation, but did not drastically alter the size or quality of the courts'

⁵² Ark. Acts 1957, No. 296. The reasons for the repeal are said to be dissatisfaction with a rule permitting recovery by one as much as 90% at fault as well as the confusion about the proper handling of cases involving set-off of counterclaims by insured parties. Note, 11 ARK. L. REV. 391 at 392 (1957). For a discussion of the latter problem, see LeBar and Wolfe, "Must the Insurer Reimburse the Insured for His Personal Loss Credited Against the Judgment?" 11 ARK. L. REV. 71 (1956).

⁵³ Ark. Stat. Ann. (Supp. 1959) §27-1730.1: "Contributory negligence shall not bar recovery of damages for any injury, property damage or death where the negligence of the person injured or killed is of less degree than the negligence of any person, firm, or corporation causing such damage."

§27-1730.2: "In all actions hereafter accruing for negligence resulting in personal injuries or wrongful death or injury to property, the contributory negligence shall not prevent a recovery where any negligence of the person so injured, damaged, or killed is of less degree than any negligence of any person, firm, or corporation causing such damage; provided that where such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence."

burdens in processing cases.⁵⁴ Against a background of such conclusions, study of changes in automobile liability insurance in Arkansas may be particularly informative.

Tennessee

The courts of Tennessee early developed a comparative negligence rule of general applicability but limited scope.⁵⁵ In that state plaintiff's contributory negligence which is a proximate cause of his injuries bars recovery, but remote contributory negligence of the plaintiff is considered only for the purposes of mitigating damages. The supreme court of the state has expressly repudiated the doctrine of comparative negligence,⁵⁶ and, as Dean Prosser has noted, in practical operation the Tennessee rule has resulted in apportionment only in cases in which the defendant had the last clear chance.⁵⁷ Viewed in this light, there is no greater expectation that so-called comparative negligence rule of Tennessee will be reflected in automobile liability insurance statistics than would be the case for any of the other variations of the last clear chance rule. Considering the obstacles mentioned above, that expectation must be regarded as an insubstantial possibility.

Nebraska and South Dakota

The comparative negligence rules of Nebraska and South Dakota are both statutory, that of South Dakota being a 1941 copy⁵⁸ of a law adopted in Nebraska in 1913.⁵⁹ The statute pro-

⁵⁴ Rosenberg, "Comparative Negligence in Arkansas: A 'Before and After' Survey," 18 ARK. L. REV. 89 at 103 (1959).

⁵⁵ Mole and Wilson, "A Study of Comparative Negligence," 17 CORN. L.Q. 604 at 611-613 (1932); Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 at 485-486, 496-497 (1953); Turk, "Comparative Negligence on the March," 28 CUM-KENT L. REV. 304 at 313-317 (1950).

⁵⁶ East Tennessee, V. & G. Ry. Co. v. Hull, 88 TENN. 33, 12 S.W. 419 (1869). Cf. Atlantic Coastline R. Co. v. Smith, (6th Cir. 1959) 264 F. (2d) 428 at 432.

⁵⁷ Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 at 497 (1953).

⁵⁸ S.D. Code (Supp. 1952) §47.0304-1.

⁵⁹ Neb. Rev. Stat. (1956) §25-1151. The language of both the Nebraska and South Dakota statutes is as follows:

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

vides that contributory negligence shall not bar recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison. In such cases the jury is to consider the contributory negligence in mitigation of damages in proportion to the amount of the contributory negligence. As reference to the discussions⁶⁰ of the Nebraska and South Dakota statutes will soon reveal, incorporation of the treacherous words, "slight" and "gross" has been productive of considerable litigation which has failed to produce certainty. While statements of the Nebraska court made in contexts in which direct consideration of the problem was not required indicate that ratios of one to four⁶¹ or one to six⁶² might comply with the requirement that plaintiff's negligence be slight, the consensus of the writers,⁶³ which is confirmed by the cases,⁶⁴ is that essentially these states have retained the doctrine of contributory negligence. This being so, these states, like Tennessee, do not provide workable opportunities for learning whether or not comparative negligence has an effect upon automobile liability insurance.

They do, however, furnish an example of the difficulty of explaining a variation in rates in states which have the same rule governing contributory negligence and also have a comparable climate and economy. Thus, Table I presents some basic data concerning these states and their immediate neighbors to the north and south. While it comes as no surprise that the premium rate for the remainder of the state territory is not the same for the two states, South Dakota's lower rate is not what would be expected in light of the fact that that state has a considerably higher rate of deaths per registered automobile than does Nebraska. One might attempt to explain the higher premium rate in Nebraska on the basis of the higher per capita income and the higher proportion of urban dwellers in that state, pointing out that these

⁶⁰ Baylor, "Comparative Negligence in Nebraska," 10 S. D. B. J. 146 (1941); Grubb and Roper, "Comparative Negligence," 32 NEB. L. REV. 234 (1952); Mole and Wilson, "A Study of Comparative Negligence," 17 CORN. L. Q. 604 at 637-639 (1932); Philbrick, "Loss Apportionment in Negligence Cases," 99 UNIV. PA. L. REV. 766 at 793-795 (1951); Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 at 486-489 (1953); note, 17 NEB. L. BUL. 68 (1938); GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 61-63 (1936).

⁶¹ *Sgroi v. Yellow Cab and Baggage Co.*, 124 Neb. 525, 247 N.W. 355 (1933).

⁶² *Patterson v. Kerr*, 127 Neb. 73, 254 N.W. 704 (1934).

⁶³ GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 61 (1936); Philbrick, "Loss Apportionment in Negligence Cases," 99 UNIV. PA. L. REV. 766 at 794 (1951); Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 at 487 (1953).

⁶⁴ *Allen v. Kavanaugh*, 160 Neb. 645, 71 N.W. (2d) 119 (1955); *Pleinis v. Wilson Storage and Transfer Co.*, 75 S.D. 397, 66 N.W. (2d) 68 (1954); *Friese v. Gulbrandson*, 69 S.D. 179, 8 N.W. (2d) 438 (1943).

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TABLE I
NEBRASKA-SOUTH DAKOTA COMPARISON

State	Class I-A ¹ Premium Rate	Policy Claims ² Frequency	Deaths Per ³ Reg. Auto 1954-1956	Per Capita ⁴ Income 1956	Urban- ⁵ Rural Ratio, 1950
Nebraska.....	\$23.00	14	1.91	\$1538.	.88
South Dakota.....	21.00	10	2.46	1330.	.50
North Dakota.....	25.00	10	2.22	1365.	.37
Kansas.....	29.00	15	2.38	1668.	1.09

¹ Remainder of the State Premium adjusted as of January 31, 1958, for Class I-A Bodily Injury and Property Damage Coverage within limits of \$5,000 per claim and \$10,000 per accident for bodily injury and \$5,000 per accident for property damage—Rates of National Bureau of Casualty Underwriters.

² Number of personal injury claims incurred per 100 automobiles insured on a statewide basis during 1954-1956. Letter dated November 5, 1958, from the National Bureau of Casualty Underwriters.

³ Traffic deaths during 1954-1956 divided by the number of Registered automobiles, including taxis, but excluding trucks, busses, and publicly-owned vehicles. Death statistics taken from the WORLD ALMANAC, 1959, p. 309, and the WORLD ALMANAC, 1957, p. 367. Automobile Registration statistics taken from the STATISTICAL ABSTRACT OF THE UNITED STATES, 1957, p. 554.

⁴ WORLD ALMANAC, 1958, p. 752.

⁵ Ratio of urban population to rural population. THE STATISTICAL ABSTRACT OF THE UNITED STATES, 1957, p. 22.

factors would also explain why Kansas' rate exceeds that of Nebraska. But the argument runs aground with respect to North Dakota, where per capita income is a near equivalent of that in South Dakota, but, despite a lower urban-rural ratio and a lower rate of deaths per registered vehicle, the premium charged exceeds that charged in South Dakota.

The mystery grows when one considers that the experience of the National Bureau of Casualty Underwriters has led it to establish a rate of \$26 for Sioux Falls, South Dakota, which had a 1950 population of 52,000, for insurance costing \$10 more in Fargo, North Dakota, which in 1950 had a smaller population of 38,000. And, it should be noted that the difference in the rates applicable in Nebraska and North Dakota, which have different rules of law concerning contributory negligence, is less than the difference between Nebraska and South Dakota, which have the same rule.⁶⁵

Thus chastened by an inability to supply a ready explanation for the variations in rates, an approach may be made to the statistics and rate data concerning those states believed to be desirable subjects for the purpose of this investigation.

CLAIM FREQUENCY

The first two columns of Table II present statistics based upon the claim experience of insurance carriers reporting to the National Bureau of Casualty Underwriters in states with comparative

⁶⁵ Thus, perhaps, lending support to the decision to forego detailed consideration of the effect of the Nebraska and South Dakota statutes.

TABLE II
CLAIM FREQUENCY AND COSTS

State	1954-1956 ¹ Bodily Injury Claim Frequency	1954-1956 ¹ Property Damage Claim Frequency	1954-1956 ¹ Deaths Per Reg. Auto	1954-1956 ⁴ Bodily Injury Claims Per Death	1954-1956 ⁴ Property Damage Claims Per Death	1950 ⁵ Urban-Rural Population Ratio	1954-1956 ⁶ Average Bodily Injury Claim Cost	1954-1956 ⁷ Average Property Damage Claim Cost	1954-1956 ⁸ Total Pure Premium
Alabama.....	(9) 18	(10) 75	3.11	(14) 5.79	(11) 24.12	(12) .78	(10) \$765.	(11) \$129.	(14) \$23.06
Arkansas*.....	(8A) 19	(8) 78	3.29	(15) 5.78	(13) 23.71	(15) .49	(11) 755.	(6) 135.	(12) 24.74
Florida.....	(7A) 20	(9A) 76	2.32	(7) 8.62	(8) 32.76	(3) 1.90	(2) 906.	(7) 134.	(7) 28.47
Georgia*.....	(8B) 19	(9B) 76	3.24	(13) 5.86	(14) 23.46	(10) .83	(15) 738.	(4) 138.	(13) 24.64
Illinois.....	(1) 39	(2) 102	2.24	(1) 17.41	(4) 45.54	(1) 3.46	(8) 803.	(2) 144.	(1) 45.87
Iowa.....	(11) 15	(5A) 94	1.98	(10) 7.58	(3) 47.47	(9) .91	(12) 754.	(15) 108.	(16) 21.27
Louisiana.....	(4) 26	(7) 86	2.95	(6) 8.81	(9) 29.15	(6) 1.21	(13) 745.	(5) 137.	(5) 31.25
Michigan.....	(7B) 20	(1) 108	2.04	(5) 9.80	(2) 52.94	(2) 2.41	(16) 653.	(9) 131.	(8) 26.95
Minnesota.....	(6) 21	(6) 90	1.67	(3) 12.57	(1) 53.89	(7) 1.20	(4) 900.	(13) 118.	(6) 29.15
Mississippi*.....	(8C) 19	(13) 65	3.45	(16) 5.51	(16) 18.84	(16) .39	(1) 939.	(3) 139.	(9) 26.65
Missouri.....	(2) 34	(3) 100	2.70	(2) 12.59	(6) 37.04	(4) 1.60	(7) 828.	(12) 127.	(2) 40.55
North Carolina.....	(10) 17	(12) 68	2.86	(12) 5.94	(12) 23.78	(14) .51	(14) 744.	(10) 130.	(15) 21.59
Oklahoma.....	(8D) 19	(11) 71	2.45	(9) 7.76	(10) 28.98	(6) 1.04	(5) 872.	(8) 133.	(10) 25.97
South Carolina.....	(8E) 19	(14) 60	3.14	(11) 6.05	(15) 19.11	(13) .58	(6) 832.	(1) 162.	(11) 25.49
Tennessee.....	(5) 23	(5B) 94	2.84	(8) 8.10	(7) 33.10	(11) .79	(3) 901.	(9) 131.	(4) 32.71
Wisconsin*.....	(3) 27	(4) 99	2.40	(4) 11.25	(5) 41.25	(5) 1.37	(9) 800.	(14) 109.	(3) 32.73

* Italicized name indicates state has a comparative negligence rule.

¹ Number of claims per 1000 automobiles insured—National Bureau of Casualty Underwriters.

² Number of claims per 1000 automobiles insured—National Bureau of Casualty Underwriters.

³ Based upon deaths by place of accident—WORLD ALMANAC, 1958, p. 309; WORLD ALMANAC, 1957, p. 367; and registrations of private and commercial privately-owned automobiles including taxis, but excluding trucks, busses, and publicly-owned vehicles—STATISTICAL ABSTRACT OF THE UNITED STATES, 1957, p. 554.

⁴ For an explanation of the derivation of these ratios, see pp. 709-710 infra.

⁵ STATISTICAL ABSTRACT OF THE UNITED STATES, 1957, p. 22.

⁶ Average amount of losses per claim incurred with losses on a basic limits basis: Portions of losses in excess of \$5,000 per claim and \$10,000 per accident for bodily injury excluded—National Bureau of Casualty Underwriters.

⁷ Amount of losses in excess of \$5,000 for property damage excluded—National Bureau of Casualty Underwriters.

⁸ Average amount of losses per insured car on basic limits basis—National Bureau of Casualty Underwriters.

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negligence rules and their neighboring states. The states involved with comparative negligence rules are Arkansas, Georgia, Mississippi, and Wisconsin. Texas, though sharing a short common border with Arkansas has been omitted from the list, not in recognition of claims of sovereignty, but because its large size includes so much territory far away from and unlike Arkansas, with which it would otherwise be compared. In the first column of Table II the frequency of claims for personal injury per thousand automobiles insured is set out. In the second column, the frequency of claims for property damage per thousand automobiles insured is set out. In parentheses next to each frequency figure the relative rank of the state in claim frequency is set out.

Analysis of these statistics leads to no conclusion, unless it is that an effect of comparative negligence is not observable. Wisconsin, a comparative negligence state, does have a high bodily injury claim frequency which places it third in that list, and a high property damage claim frequency, which places it fourth in that list. However, Arkansas, Georgia, and Mississippi, other comparative negligence states, share a common frequency with Oklahoma and South Carolina, being tied for ranking of eighth in a field limited to eleven because of the number of instances in which states have the same frequency. With respect to property damage claim frequency, Arkansas, Georgia, and Mississippi rank eighth, ninth, and thirteenth, respectively, in a field enlarged to fourteen by fewer identical rates.

This great divergence in claim frequency between Wisconsin and the other comparative negligence states immediately suggests that analysis should proceed along more refined lines, with an attempt made to make adjustments for the difference in safety conditions and for what appears to be a difference between northern and southern states.

As mentioned above, the best indicator of safety conditions is that found in the reported death statistics of the various states.⁶⁶

In the attempt to make an allowance for variation in safety conditions, the statistics of the number of deaths per thousand registered automobiles have been set out in third column of Table II. If the claim frequencies of either column one or column two are divided by the death frequency statistics of column three,

⁶⁶ Pp. 698-699 supra.

the result is a statistic indicating the frequency of that type of claim per death. Thus,

$$\frac{\text{Claims}}{1,000 \text{ Insured Autos}} \div \frac{\text{Deaths}}{1,000 \text{ Registered Autos}} = \text{Ratio}$$

$$\frac{\text{Claims}}{1,000 \text{ Insured Autos}} \times \frac{1,000 \text{ Registered Autos}}{\text{Deaths}} = \text{Ratio}$$

Taking deaths as the most satisfactory, though not the most accurate, indicator of safety conditions, this ratio of claims per death may be considered instead a ratio of claims per accident, and consequently an index of the claim propensity of residents of the various states.

Of course, even this simple calculation is based upon assumptions which are not true. The ratio of accidents to deaths is not constant throughout the nation, but as has already been pointed out there are fewer accidents per death in rural areas where the higher speed of the vehicles involved results in a higher proportion of fatalities in the accidents which do occur. The calculation also assumes what undoubtedly is not true, that there is a constant proportion of insured automobiles in the total of registered automobiles in the various states. Also assumed, but undoubtedly not the fact, is that ratio of privately-owned automobiles to other vehicles is constant throughout the states, and that privately-owned automobiles are involved in the same proportion of fatal accidents in all the states. Nevertheless, this rough adjustment for the variation in safety conditions would appear to provide a more reliable and accurate index of the claim propensities of residents of various states than is found in the original data on the frequency of claims per insured vehicle. These adjusted statistics of claim frequency are set out in columns four and five of Table II, with the relative rank of the state set out in parentheses next thereto.

Upon this basis Wisconsin drops in rank to fourth in the frequency of bodily injury claims and fifth in the frequency of property damage claims in a field of sixteen states. Mississippi drops to last place with respect to both types of claims; Arkansas takes fifteenth place in bodily injury claim frequency and thirteenth in property damage claim frequency; Georgia takes thirteenth place in bodily injury claim frequency and fourteenth in property damage claim frequency. Again no conclusion can be drawn, unless it is that the effect of comparative negligence does not appear after correction for differences in safety conditions.

The divergences, however, are not surprising in view of the different conditions. A higher ratio in the northern and western states is possible that a higher ratio for white persons in rural areas may be a factor in the higher ratio in urban areas. A higher ratio in rural areas might be expected resulting from the harder conditions in rural areas.

An opportunity is afforded by the statistics found in the ranking of states in the frequency of claim per death correlation is not affected by the same ranking as they have within two of the states relative ranking in the three states, the relative ranking within one or two correlation between (or accident) frequency is close. Three states but two states, six places higher. Florida has a rural ratio ranking six places from the relation in ranking between claim frequency and consciousness.

Table III presents statistics developed from these there appears to

of that type of

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The divergence between northern and southern states is broadened, however, by the correction made for variations in safety conditions. Many economic and social differences exist between northern and southern states which might account for this difference in claim consciousness of their residents. For example, it is possible that southern Negroes may forego pressing claims against white persons which they would press in a northern state. Another factor may be differences in the distribution of population between urban areas and rural areas. Persons living in urbanized areas might be expected to be more claim conscious than those living in rural areas, because of the combination of the sophistication resulting from newspaper publicity given litigation in larger cities and the hardening to life that may still be the product of the less comfortably developed rural areas.

An opportunity to test the effectiveness of this factor is provided by the statistics of the ratio of urban population to rural population found in column six of Table II. And, when the relative ranking of states in urban-rural ratio is compared with the relative ranking in frequencies of claims per death (or accident) a sufficient correlation is found to support the belief that this factor does affect claim consciousness. Thus four of the sixteen states have the same ranking with respect to bodily injury claim consciousness as they have with respect to the urban-rural population ratio. Only two of the states, Florida and Minnesota, have changed their relative ranking in such a comparison by as much as four places; three states, Georgia, Michigan, and Tennessee, changed their relative ranking by three places, and the remaining eight are within one or two places in rank on both lists. Turning to the correlation between property damage claim frequency per death (or accident) and urban-rural ratio, one notes that it is not as close. Three states do have exactly the same ranking in each list, but two states, Iowa and Minnesota, have a claim frequency rank six places higher than their ranking in the urban-rural ratio list; Florida has a claim frequency rank five places below its urban-rural ratio rank; and Georgia and Tennessee have moved four places from their urban-rural ratio rank. Nevertheless, the correlation in ranking indicates the presence of an operative relationship between urban-rural distribution of population and claim consciousness.

Table III presents a regional comparison of the claim frequency statistics developed in Table II. Once again it may be noted that there appears to be no relationship between claim frequency and

TABLE III
REGIONAL COMPARISONS OF CLAIM FREQUENCY AND COSTS

State	1954-1956 Bodily Injury Claims Per Death	1954-1956 Property Damage Claims Per Death	1954-1956 Average Bodily Injury Claim Cost	1954-1956 Average Property Damage Claim Cost	1951-1956 Total Pure Premium	1950 Urban- Rural Population Ratio
Arkansas.....	(5) 5.78	(5) 23.71	(5) \$755.	(4) \$135.	(6) \$24.74	(5) .69
Louisiana.....	(2) 8.81	(3) 29.15	(6) 745.	(2) 137.	(3) 31.25	(2) 1.31
Mississippi.....	(6) 5.51	(6) 18.84	(1) 939.	(1) 139.	(4) 26.65	(6) .89
Missouri.....	(1) 12.59	(1) 37.04	(4) 828.	(6) 127.	(1) 40.55	(1) 1.00
Oklahoma.....	(4) 7.76	(4) 28.98	(3) 882.	(3) 133.	(5) 25.97	(3) 1.04
Tennessee.....	(3) 8.10	(2) 33.10	(2) 901.	(5) 131.	(2) 32.71	(4) .79
Georgia.....	(5) 5.86	(5) 23.46	(6) 738.	(2) 138.	(4) 24.64	(2) .41
Alabama.....	(6) 5.79	(3) 24.12	(4) 765.	(6) 129.	(5) 23.06	(4) .78
Florida.....	(1) 8.62	(2) 32.76	(1) 906.	(3) 134.	(2) 28.47	(1) 1.00
North Carolina.....	(4) 5.94	(4) 23.78	(5) 744.	(5) 130.	(6) 21.59	(6) .51
South Carolina.....	(3) 6.05	(6) 19.11	(3) 832.	(1) 162.	(3) 25.49	(5) .88
Tennessee.....	(2) 8.10	(1) 33.10	(2) 901.	(4) 131.	(1) 32.71	(3) .79
Mississippi.....	(5) 5.51	(5) 18.84	(1) 939.	(1) 139.	(3) 26.65	(5) .39
Alabama.....	(3) 5.79	(3) 24.12	(3) 765.	(5) 129.	(5) 23.06	(3) .78
Arkansas.....	(4) 5.78	(4) 23.71	(4) 755.	(3) 135.	(4) 24.74	(4) .49
Louisiana.....	(1) 8.81	(2) 29.15	(5) 745.	(2) 137.	(2) 31.25	(1) 1.31
Tennessee.....	(2) 8.10	(1) 33.10	(2) 901.	(4) 131.	(1) 32.71	(2) .79
Wisconsin.....	(3) 11.25	(5) 41.25	(3) 800.	(4) 109.	(2) 32.73	(3) 1.37
Illinois.....	(1) 17.41	(4) 45.54	(2) 803.	(1) 144.	(1) 45.87	(1) 3.46
Iowa.....	(5) 7.58	(3) 47.47	(4) 754.	(5) 108.	(5) 21.27	(5) .91
Michigan.....	(4) 9.80	(2) 52.94	(5) 653.	(2) 131.	(4) 26.95	(2) 2.41
Minnesota.....	(2) 12.57	(1) 53.89	(1) 900.	(3) 118.	(3) 29.15	(4) 1.20

comparative negligence, unless it is the unlikely one that comparative negligence discourages claims. Instead, there does appear the same rather positive correlation of claim frequency and urban-rural population except in the case of the Georgia grouping of states. In that grouping it may be noted that, except for Florida, there is very little difference in the urban-rural population ratio so that slight variations in that factor might not have an observable effect.

Explanations of the difference in the correlation of bodily claim frequency and property damage claim frequency statistics and the urban-rural population ratio might be advanced.⁶⁷ But the important thing for present purposes is not whether each state has received an exactly correct rating in the list of claim frequency statistics. It is instead that, after an adjustment for the differences in safety conditions, the statistics show a relationship between the

⁶⁷ The claim frequency statistics used here have been developed from the number of traffic deaths which occurred in each state during the years 1954 through 1956. Almost one half of the traffic deaths occurring in urban areas involve collisions with pedestrians, whereas only eleven percent of the rural accidents involve collisions with pedestrians. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS—1957, 48. Collisions with pedestrians are extremely unlikely to produce property damage claims, whereas other accidents, causing deaths, such as collisions of motor vehicles, collisions with fixed objects, trains, animals, and even running off the road, are likely to create property damage claims. Accordingly, the use of the death statistics in developing a claims ratio probably has a greater accuracy with respect to rural accidents than it does with urban accidents.

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degree of urbanization and claim consciousness but fail to show any relationship between comparative negligence and claim consciousness.

This, of course, does not mean that there is no relationship between comparative negligence and claim consciousness. It means only that the relationship cannot be detected with the statistical techniques here used. Nor is any information obtained to answer the important question of how many claims filed with companies reach the state of litigation. The analysis does indicate, however, that the influence of comparative negligence on claims consciousness is not as great as the effect of a higher degree of urbanization, which can be detected in the statistics.

Insurance Costs

Claim frequency, with which we have thus far been concerned, depends principally upon the accident rate, the types of accidents which occur, and the claims consciousness of the community. In turn, claim frequency is only one of the factors which determines the ultimate level of liability insurance premiums. A more prosperous economy can afford expensive safety features in highway construction, thus reducing accidents. On the other hand, the economic level of the community will have an effect in terms of the amount which must be paid to compensate for the loss of wages, salaries, or other income caused by injuries. The economic level of the community will also affect the community judgment expressed in the jury verdict (or the estimate of the jury verdict reflected in a compromise settlement) of the value to be placed upon pain and suffering and physical disfigurement. The extent to which the law permits, or community sentiment accords with, the award of punitive damages in service of the admonitory function of tort law is probably a factor affecting rates. Other social factors may affect community sympathy for an injured party and the community opinion of what injuries should be considered compensable and which injuries must be accepted with resignation in the same way that beauty, brains, and wealthy ancestors, or the lack thereof, must be accepted. And, while instructions to the jury may correct some misapprehensions of jurors about what matters are compensable and which are not, their latitude in determining the value to be placed on such intangibles will produce variation with respect not only to judgments entered on verdicts but with the negotiated settlements.

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Obviously many of these factors cannot be reduced to measurable quanta which can be the basis of comparison between states. For others some statistical data may exist. But the interaction of all the factors would seem to be too complicated to allow the use of a formula for accurate prediction of the rate level. To the extent that the social intangibles are a constant within a region of this country, comparisons of one state with its adjacent neighbors may be made without distortion. Tables IV-A, IV-B, IV-C, and IV-D present such comparisons of four comparative negligence states with their neighbors, with the various statistics set in columns depending upon whether they are higher, lower, or the same as that of the comparative negligence state.

TABLE IV
A. ARKANSAS
Remainder of State Comparison

Arkansas Figures: \$38.08—7.5—%6.9—&1.9—*777—\$25.03—@28.6—11071—D/R3.29—U/R.49.

Neighboring State Rate Is: Higher Lower Same

Louisiana.....	\$47.78—7.6—%7.5—&3.0—*798— \$36.99—11344—U/R1.21.....	@26.9—D/R2.95.....	
Mississippi.....	\$39.00—%8.1—*968—\$27.20—@29.6— D/R3.45.....	#6.3—1957—U/R.39.....	&1.9
Missouri.....	\$57.80—7.7—%2.8—*1030—\$40.09— @71.1—11786—U/R1.60.....	%6.2—D/R2.70.....	
Oklahoma.....	\$38.66—*837—11499—U/R1.01.....	#6.1—%6.2—&1.8—\$24.08— @27.7—D/R2.45.....	
Tennessee.....	\$39.79—#8.2—%8.0—&2.0—*975— \$30.90—11264—U/R.79.....	@23.6—D/R2.84.....	

B. GEORGIA

Remainder of State Comparison

Georgia Figures: \$37.00—#6.5—%8.2—&1.9—*766—\$24.82—@23.7—11338—D/R3.24—U/R.53.

Neighboring State Rate Is: Higher Lower Same

Alabama.....	\$37.30—#6.8—%8.6—*776—@25.1	&1.8—\$24.05—11185—D/R3.11—U/R.78	
Florida.....	*860—@37.1—11666—U/R1.90.....	\$32.63—#6.4—%6.6—&1.8—\$24.48— D/R2.32.....	
North Carolina.....	\$30.50—#6.4—%7.7—*759—\$23.66— @21.5—11254—D/R2.86—U/R.51.....		&1.9
South Carolina.....	%9.4—*813—\$25.34.....	\$34.60—#5.5—@17.6—11117— D/R3.14—U/R.58.....	&1.9
Tennessee.....	\$39.79—#8.2—&2.0—*975—\$30.90	%8.0—@23.6—11264—D/R2.84—U/R.79	

C. MISSISSIPPI

Remainder of State Comparison

Mississippi Figures: \$39.00—#6.3—%8.1—&1.9—*968—\$27.20—@29.6—1957—D/R3.45—U/R.39.

Neighboring State Rate Is: Higher Lower Same

Alabama.....	#6.8—%8.6—11185—U/R.78.....	\$37.30—&1.8—*776—\$24.05—@25.1— D/R3.11.....	
Arkansas.....	#7.5—11071—U/R.49.....	\$38.08—%6.9—*777—\$25.03—@28.6— D/R3.29.....	
Louisiana.....	\$47.78—7.6—&3.0—\$36.99— 11344—U/R1.21.....	%7.5—*798—@26.9—D/R2.95.....	&1.9
Tennessee.....	\$39.79—#8.2—&2.0—*975— \$30.90—11264—U/R.79.....	%8.0—@23.6—D/R2.84.....	

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Remainder of State Comparison

Wisconsin Figures: \$40.56—7.4—%7.0—&2.3—*911—\$29.93—@52.6—11760—D/R2.40—U/R1.37.

Neighboring State Rate Is:	Higher	Lower	Same
Illinois.....	#8.4—\$30.35—@89.8—12243—U/R3.46	\$34.38—%6.8—&2.1—*869— D/R2.24.....	
Iowa.....	#7.8.....	\$28.31—%5.5—&1.4—*856—\$21.55— @45.4—11580—D/R1.98—U/R.91.	
Michigan.....	#9.8—%7.1—12132—U/R2.41.....	\$37.18—&2.0—*697—\$27.26— @36.6—D/R2.04.....	
Minnesota....	*972—@98.7.....	\$37.00—#7.2—%4.8—&1.8—\$26.27— 11675—D/R1.67—U/R1.20.....	

Code:

- #—Remainder of State Premium, adjusted to July 1, 1958.
- 1955-1957 Property Damage Claim Frequency. Letter of National Bureau of Casualty Underwriters Sept. 10, 1959.
- %—1955 Mileage Death Rate. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS—1957, 56.
- &—1955-1957 Bodily Injury Claim Frequency. Letter of National Bureau of Casualty Underwriters, Sept. 10, 1959.
- *—1955-1957 Bodily Injury Average Claim Cost. Letter of National Bureau of Casualty Underwriters, Sept. 10, 1959.
- \$—1955-1957 Total Pure Premium. Letter of National Bureau of Casualty Underwriters, Sept. 10, 1959.
- @—Percentage of Policies Providing Bodily Injury Liability Coverage over \$10,000/\$20,000. Letter of National Bureau of Casualty Underwriters, Nov. 7, 1958.
- 1—Annual Per Capita Income (1955). WORLD ALMANAC, 1958, p. 752.
- D/R—Deaths Per Registered Auto. See Table II.
- U/R—Urban-Rural Population Ratio. See Table II.

The premium rate set out in the table is the combined rate for the basic Class I-A bodily injury and property damage coverage set by the National Bureau of Casualty Underwriters.⁶⁸ The rates are for the catch-all territories denominated "remainder of state."⁶⁹ They have been adjusted to a hypothetical rate effective as of July 1, 1958, to avoid the differentials that would otherwise be present in rates which became effective upon widely separated dates. The statistics on claim frequency, average claim cost, and pure premium are, however, based upon data covering all classes of insurance for the remainder of state territories, for the simple

⁶⁸ This class consists of privately-owned automobiles, driven for pleasure, and not used for transportation to or from work, for which there is neither a male owner nor driver under the age of 25. The limits of coverage are, for bodily injury, not in excess of \$5,000 to any individual nor more than \$10,000 for any one accident, and, for property damage, not in excess of \$5,000 for any accident.

⁶⁹ As mentioned above, these territories generally include rural and small city areas which do not have sufficiently distinctive characteristics to merit treatment as separate territories. They probably present the best opportunity for comparison because differences in the accident rate caused by density of population, volume of traffic, and varying degrees of municipal law enforcement, as well as the amount of claims consciousness created by particular news editorial policies, are minimized.

In the cases of Mississippi and Oklahoma the bureau now has no remainder of state territory. For those states the rates used are rates applicable in territories covering large rural areas such as those usually classified as remainder of state. Of course, a search for correlation between "remainder of state" rates and other statistics which are based upon the entire experience of the state proceeds upon the assumption that the insurance experience in these specially defined areas may properly be compared with other experience data accumulated on a statewide basis. Undoubtedly some distortion results.

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reason that this is the only form in which it was available. The sources for other data are set out in the tables, which include some of the data from Table II.

The first impression produced by examination of the tables is that variations in level of liability insurance premiums are accompanied by changes in the cluster of variable factors which might be expected to influence the rates, but no fixed relationship between rates and any one of the factors can be observed. Thus, there is a correlation between higher insurance rates and a higher mileage death rate in only ten of the eighteen comparisons. The correlation between higher insurance rates and the statewide death rate per registered automobile is the same, with an affirmative relation existing in ten of the eighteen comparisons. On the other hand, there is a substantial correlation between the frequency of claims per insured vehicle and the level of rates, there being twelve instances in the eighteen comparisons in which a higher frequency for bodily injury claims is accompanied by higher premium rates, and eleven instances of such correlation with respect to property damage claim frequency. The total pure premium figures, which represent the average amount of losses per insured car, have the highest correlation with insurance premium levels, there being an affirmative relationship in fourteen of the eighteen comparisons. The correlation between per capita income and insurance premiums is weaker, there being an affirmative correlation in only ten of the eighteen comparisons, suggesting the possibility that the higher economic losses in states with high per capita income is partially offset by the improvement in safety conditions which a higher economic level is capable of creating. The same weak correlation exists with respect to the urban-rural population ratio but this is not so puzzling since the rates compared are for the territories "remainder of state," which generally are rural or less developed parts of the state and hence less affected by the overall degree of urbanization.

If a comparison of the rates alone is made, as presented in Table V, it will be noticed that there is an equal division of instances in which the rates applicable in states with one rule exceed the rates applicable in states with another rule. In eight instances the rate of a state with a comparative negligence rule is higher than the rate of a neighboring state with a contributory negligence rule and in eight instances the rate of the state with a comparative

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TABLE V
PREMIUM RATES IN COMPARATIVE NEGLIGENCE STATES ARE:

State	Higher	Lower	State	Higher	Lower
<i>Arkansas</i>			<i>Mississippi</i>		
Louisiana.....		\$ 9.70	Alabama.....	\$ 1.70	
Mississippi.....		.92	Arkansas.....	.92	
Missouri.....	19.72		Louisiana.....		\$8.78
Oklahoma.....	.58		Tennessee.....		.79
Tennessee.....	1.71		<i>Wisconsin</i>		
<i>Georgia</i>			Illinois.....	6.18	
Alabama.....		.30	Iowa.....	12.25	
Florida.....	\$ 4.37		Michigan.....	3.38	
North Carolina.....	6.50		Minnesota.....	3.56	
South Carolina.....	2.40		AVERAGE DIFFERENCE (Eliminating Arkansas- Mississippi Comparison).....	5.04	5.55
Tennessee.....		2.79			

negligence rule is lower.⁷⁰ The average amount of the excess in those comparisons in which the rates for comparative negligence states exceed the average rate for contributory negligence states is \$5.04, which is 13.3 percent of the average rate for those twelve states with contributory negligence rules in the group compared. The average amount of the difference in those comparisons in which the rates for comparative negligence states are lower is \$5.55, which is 14.6 percent of the average rate in the states with contributory negligence rules.⁷¹ It should also be noted that four of the comparisons in which rates in comparative negligence states are higher involve Wisconsin, and that four of the comparisons in which rates of comparative negligence states are lower involve Arkansas.

This near equality of comparison of rates gives a superficial basis for a conclusion that comparative negligence has had no effect upon the insurance premium rates. However, this absolute equality of comparison in a field so small may be attributed to chance, such as peculiar and particular conditions prevailing in either Wisconsin or Arkansas, and therefore has little statistical significance. It may be noted, however, by reference to Tables IV-A, B, C, and D, that in every case in which the comparative negligence state had a higher premium rate than its neighbors, it also had a higher rate of deaths per registered vehicle, or a higher

⁷⁰ The number of possible comparisons of states on this basis is smaller than was possible for other statistical measures, because Arkansas and Mississippi, which both have comparative negligence rules, have common borders, but cannot be so compared.

⁷¹ This average difference has been distorted by the great difference between the rate applicable in Arkansas and the rate applicable in Missouri.

accident rate.⁷² And, two of the comparisons in which the comparative negligence state rates are substantially lower involve comparisons of Arkansas with its wealthier and more highly urbanized neighbors, Missouri and Louisiana. The other instance in which the comparative negligence state rate is substantially lower involves a comparison of Mississippi with the wealthier and more highly urbanized state of Louisiana.

The result of this rather tedious analysis of rates and other statistics is that nothing conclusive appears. While there is no preponderance of higher rates in states with comparative negligence rates, the field is not large enough to permit a statement that there is no effect. But if there is any effect, it certainly is not strong enough to be noted in the sixteen comparisons made.

The Arkansas Experience

As mentioned above, Arkansas adopted the principle of comparative negligence in June 1955. In 1957 the formulation of the principle was changed from the "pure" comparative negligence standard of 1955 to the more limited form in which recovery is allowed only where plaintiff's negligence is less than that of the defendant. Despite this change, the state has, for more than four years, been governed by a standard allowing recovery by one whose negligence was a contributing cause of his injuries. Accordingly, it furnishes working laboratory experiment on the effect of comparative negligence upon liability insurance premiums. If comparative negligence does produce increased premium rates for liability insurance one would expect the rate of increase of rates in Arkansas to be greater than that which has occurred in neighboring states.

Some obstacles exist to the making of such a comparison. Changes in insurance rates become effective in different states with varying frequencies and upon different dates. For example, the most recent of four increases in Class I-A rates for Arkansas since February 1955 became effective on December 10, 1958, whereas the most recent increase in the comparable rates in Oklahoma since November 1955 became effective in October 1957. Moreover, since the initial level of the rates differed in the two states, a dollar and cents increase comparison would be misleading

⁷² Thus supporting the proposition that comparative negligence causes carelessness and increases accidents — and at the same time furnishing an example of how statistical support may be found for almost any preconceived notion.

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as to the rate of increase. An adjustment may be made, however, for both these factors by converting the increase between the 1955 rate and the present rate into a percentage increase for the period, and then reducing that increase to a monthly rate of increase which is subject to comparison.

Another difficulty is caused by the number of rate territories and territorial groupings in the various states. Because each state has several territories, there are different and varying monthly rates of increase within each state. Moreover, during the four-year period territorial groupings have been broken up, and in 1959 several rate structures existed in some states for an area formerly covered by one rate structure. To some extent it appears that these new territorial groupings have been established for areas in which the greatest change in loss experience has occurred and that the highest monthly rate of change is associated with these new territories. Accordingly, care must be taken to avoid distortion from these figures.

Use of percentage increases by territorial groupings may be misleading as to the extent to which rates have increased in the state as a whole. For example, two states may each have four territorial groupings. In State *A*, the percentage increases in the four territories may have been 10%, 15%, 15%, and 20%, respectively. In State *B*, the rates of increase during the same period might have been 20%, 5%, 10%, and 10%, respectively. One who took an unweighted average of the percentage increases would conclude that there had been a greater increase in State *A* than in State *B*. However, if half of the insured vehicles in each state are located in the first territorial grouping and only one tenth of the insured vehicles are located in the fourth grouping, the increase has been greater in State *B* than in State *A*. In the absence of some statistical adjustment or weighting of averages (and there is none in the computations which follow) this possibility of inaccuracy inheres in the analysis.

The system used by the National Bureau of Casualty Underwriters divides Arkansas into four territories and three territorial groupings. Territory one consists of all Pulaski County, in which the city of Little Rock is located. Territory two covers the Fort Smith area on the border of Arkansas and Oklahoma. Territory three consists of all of certain northeastern counties bordering on Tennessee and hence close to Memphis. Territory four is the remainder of state territory. For purposes of rate structure at the

TABLE V:
AVERAGE MONTHLY PERCENTAGE INCREASE IN CLASS 1-A COMBINED BODILY INJURY AND PROPERTY
DAMAGE PREMIUM RATES IN ARKANSAS AND SURROUNDING STATES, 1955-1959

State	Territories							
	1	2	3	4	5	6	7	8
Arkansas.....	.8260%	1.9782%	.8260%	.....	.....	.....	.....	.....
Missouri.....	1.5227	1.4313	.0000	1.2272%	1.5909%	1.5909%	2.3409%	2.38(???)
Oklahoma.....	1.5652	.9565	1.3913	1.3913	1.3913	1.7826	.....	.....
Louisiana.....	.3939	1.6363	-.0909	.2727	.7878	1.3030	.2142	2.5(???)
Mississippi.....	1.0540	.1351	.7027	1.3513	.7027	.....	.....	.....
Tennessee.....	.5744	.1489	.4255	.1063	.4468	.8723	.4463	.....

present time, the bureau groups territory three and territory four together. The states of Louisiana, Mississippi, Missouri, Oklahoma, and Tennessee, which surround Arkansas, now have thirty-four different territorial groupings.

A tabulation of the monthly percentage increases in the Class I-A liability insurance rates set by the bureau for each of these territorial groupings is presented in Table VI. The same data are recast in graphic form for visual presentation in Table VII. The unweighted average of the monthly percentage increase for all of the 37 territorial groupings is 1.03 percent⁷³ whereas the monthly percentage increase in two of the Arkansas territorial groupings was .83 percent and for the other, the Fort Smith territory, the monthly percentage increase was 1.98 percent. The median of the monthly percentage increases, which is less affected by the extremely high percentage increases applicable to certain new territorial groupings,⁷⁴ is .96 percent.

Certainly in these statistics there resis no proof that comparative negligence results in higher liability insurance premium rates. Two of the territorial groupings, which cover most of the states and most of the insured vehicles in Arkansas, have a rate of increase below both the average and the median of the rate of increase which occurred in the other territorial groupings. One, the Fort Smith territory, located on the Oklahoma boundary, is very substantially above both the average and the median. For present purposes this is illuminating, since the residents of Fort Smith probably do a substantial amount of driving in Oklahoma and accordingly have accidents where the contributory negli-

⁷³ If the percentage increases in the seven territorial groupings in Texas are utilized in making the comparisons the unweighted average monthly percentage increase becomes instead .91%.

⁷⁴ If the percentage increases in the seven territorial groupings in Texas are utilized in making the comparisons the median increase drops to .79%.

TABLE VII
 AVERAGE MONTHLY INCREASE IN CLASS 1-A COMBINED BODILY INJURY AND PROPERTY DAMAGE
 PREMIUM RATES FOR ARKANSAS AND SURROUNDING STATES DURING 1955-1959

Terr. Groups	-.1%	0%	.1%	.2%	.3%	.4%	.5%	.6%	.7%	.8%	.9%	1.0%	1.1%	1.2%	1.3%	1.4%	1.5%	1.6%	1.7%	1.8%	1.9%	2.0%	2.1%	2.2%	2.3%	2.4%	2.5%	
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Note. Average monthly increases for Arkansas territorial groupings are indicated by diagonal lines.

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gence rule still prevails. Presence of this bar to recovery, which would be recognized in Arkansas under the usual rule applicable to such a conflict of laws situation,⁷⁵ would be expected to mitigate the increases in rates attributable to the change in Arkansas law if the legal effect given contributory negligence is a significant factor in this respect. Instead, the substantial increase in the Fort Smith rates appears to be caused by setting the dollar amount of those rates on a par with the other territorial groupings.

Of course, these statistics do not prove that comparative negligence does not affect the level of liability insurance premium rates.⁷⁶ Without enactment of the comparative negligence statutes Arkansas might have had a lower rate of increase, comparable, for example, with that of Tennessee. However, it is possible to say once again that if comparative negligence does affect insurance rates, its effect is not great enough to be observable in the complex of forces acting on the rate level. It is not, for example, anywhere near as strong as whatever peculiar local developments led to very high increase rates in new territorial groupings in Louisiana and Missouri.

Geographical Distribution of Rate Territories

Under the usual conflicts rule the law of the place of the tort determines the applicability of the defense of contributory negligence.⁷⁷ According to available statistics nonresident drivers are involved in a substantial number of accidents.⁷⁸ If the presence

⁷⁵ *Powell Bros. Truck Lines v. Barnett*, 194 Ark. 769, 109 S.W. (2d) 673 (1937); *Missouri P. R. Co. v. Miller*, 184 Ark. 61, 41 S.W. (2d) 971 (1931); *St. Louis-S.F. R. Co. v. Rogers*, 172 Ark. 508, 290 S.W. 74 (1927); *St. Louis, I.M. and S. R. Co. v. McNamare*, 91 Ark. 515, 122 S.W. 102 (1909); *LEFLAR, CONFLICT OF LAWS* 222 (1959).

⁷⁶ Cf. Professor Rosenberg's findings that the Arkansas statute did alter the value of personal injury claims for the purposes of settlement, and increased the proportion of verdicts won by plaintiffs, though it did not increase the size of verdicts. Rosenberg, "Comparative Negligence in Arkansas: A 'Before and After' Survey," 13 *ARK. L. REV.* 89 at 103-105 (1959).

⁷⁷ *CONFLICT OF LAWS RESTATEMENT* §385 (1934). The usual conflict rule is applied in *Arkansas*, cases cited note 75 supra. *Georgia*, *Craven v. Brighton Mills*, 87 Ga. App. 126, 73 S.E. (2d) 248 (1952), and *Mississippi*, *Tri-State Transit Co. v. Mondy*, 194 Miss. 714, 12 S. (2d) 920 (1949); and apparently would be applied in *Wisconsin*. See *Haumschild v. Continental Cas. Co.*, 7 Wis. (2d) 130, 95 N.W. (2d) 814 (1959). But cf. *Bourestom v. Bourestom*, 231 Wis. 666, 285 N.W. 426 (1939) (overruled on another issue in *Haumschild v. Continental Cas. Co.*, supra).

⁷⁸ During 1956, 16% of all fatal accidents and 9% of all accidents involved drivers who were not residents of the state in which the accident occurred. During the same year, 35% of all fatal accidents and 27% of all accidents involved drivers residing more than 25 miles from the place of the accident. NATIONAL SAFETY COUNCIL, *ACCIDENT FACTS - 1957*, 53.

⁷⁹ In 1956, 79,611; Ma

or absence of a complete defense in contributory negligence is a substantial factor in producing higher liability insurance rates one would hypothesize that residents living near the borders of states with comparative negligence rules would have a loss experience different from those living in the center of the state. Thus, drivers in states with comparative negligence who live near the borders of those states would have lower rates than otherwise comparable drivers in the center of those states. Likewise, drivers in neighboring states with contributory negligence rules who live near the border of a state with comparative negligence would have higher rates than otherwise comparable drivers living at a distance from that border.

The rate data of the National Bureau of Casualty Underwriters unfortunately does not make it possible to make a general test of this hypothesis. There is no general delineation of rate territorial boundaries in either category of states which indicates concern on the part of insurance actuaries for the probability of travel in neighboring states. Of course, this indicates more than lack of actuarial concern with comparative negligence; it indicates lack of concern with all difference in rules of law and, indeed, a lack of concern for a state-by-state consideration of the many other variables affecting insurance rates. It is also a reminder that the actuarial process by which rates are established is not so precise and delicate as to reflect separately the influences of the many factors thought to affect rate structures. Indeed, the insurance principle, requiring a sharing of generalized risks, precludes an overly refined system which would subject small groups or individuals to paying the costs of their particular experience.

There do exist, however, a few instances in which territorial boundaries have been drawn so as to make it possible to test this hypothesis. As previously mentioned, the Fort Smith territory in Arkansas is located on the border of Oklahoma. The bureau's class I-A liability rates for that territory were raised in 1956 to the same level as those for all other territories in Arkansas. Thus, proximity to Oklahoma and resultant driving under its laws have not been reflected in reduced rates for this border city.

Certain cities in Georgia, with comparable populations⁷⁰ each of which constitutes a separate territory for the purposes of ac-

⁷⁰ In 1950 the population of the cities was as follows: Augusta—71,508; Columbus—79,611; Macon—70,252. *THE WORLD ALMANAC* 1958, 273.

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cumulation of loss experience, provide another opportunity for a test. Augusta, Georgia is located on the border of South Carolina. Columbus, Georgia is located on the border of Alabama. Macon, Georgia is located in the middle of the state. Contrary to the hypothesis all three cities have the same bureau class I-A liability rates. In neighboring Alabama, the bureau has established the same rate for Montgomery, located in the center of the state, as that applicable to somewhat larger Mobile, which is approximately 20 miles from the Mississippi border. Six counties in a territory of South Carolina are located on the border of Georgia, yet they have the same rates as the remainder of the state. One bureau territory in Mississippi consists of a long narrow string of counties running the length of the Mississippi River, and hence a territorial grouping on the boundary with Arkansas and Louisiana. It has the same rate structure as another territory which covers most of the state.

In northern Wisconsin, LaCrosse, located on the border of Minnesota, is classified with and has the same rates as the more centrally located cities of Fond Du Lac, Green Bay, Madison, Oshkosh and Sheboygan. Beloit, located on the Illinois border, is classified with the more centrally located cities of Appleton, Chippewa Falls, Eau Claire, Waukesha, and Wausau. On the other hand, the northern counties of Wisconsin which border on the Upper Peninsula of Michigan have the lowest Class I-A rates in the state, suggesting that here the contributory negligence rule of Michigan has had an effect. This conclusion is dispelled when one notes that the counties of the Upper Peninsula of Michigan bordering on Wisconsin also have the lowest rates in Michigan, suggesting that level of the rates in comparison with the other portions of both states is caused more by similar economic, climatic, and social conditions than by differences in the treatment accorded contributory negligence. However, some factor dependent upon state boundaries, whether it is the regulation of the insurance industry, the Wisconsin joinder rule⁸⁰ or some

⁸⁰ The Wisconsin courts will not permit direct action against an insurance company on a policy with a "no action" clause (i.e., no action may be maintained against the insurance company until liability of the insured has been established by judgment) valid in the state in which it was issued. *Ritterbusch v. Sexsmith*, 256 Wis. 507, 41 N.W. (2d) 611 (1950). See MacDonald, "Direct Action Against Liability Insurance Companies," 1957 Wis. L. Rev. 612 at 616-617. Accordingly, even in an action brought in Wisconsin the insurer of a Michigan resident could not be joined as a party defendant if the policy contained such a clause, which is apparently valid in Michigan, but subject to waiver. Cf. *Kipkey v. Casualty Assn. of America*, 255 Mich. 408, 238 N.W. 239 (1931); *Barney v. Preferred Automobile Ins. Exchange*, 240 Mich. 199, 215 N.W. 372 (1927). On the other

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other legal factor is apparent in the difference between the \$27 rate charged for the basic Class I-A coverage in the Michigan counties and the \$40 rate charged in neighboring Wisconsin counties.

Once again analysis of the data does not permit an affirmative statement that comparative negligence does or does not affect liability insurance rate levels. This indefiniteness of the data might be due to the fact that the proportion of accidents involving nonresident drivers, though ranging from 9 to 16 percent on a statewide basis and undoubtedly higher near state boundaries,⁸¹ is not sufficient to make the effect of comparative negligence apparent in loss experience. The general lack of concern of the actuaries for proximity to state borders is consistent with this conclusion. However, while the possibility remains of an undetected effect of comparative negligence on the level of rates, this analysis of geographical distribution of territories indicates that its possible force is not sufficient to be observable.

Miscellaneous Indicators

Another indication of lack of concern on the part of insurance actuaries for the differences between comparative negligence and contributory negligence rules may be found in the practice used to determine the premium rate charged for coverage in excess of the basic limits of \$5,000 per person and \$10,000 per accident for bodily injury coverage and \$5,000 for property damage. It is sometimes argued that comparative negligence would encourage the filing of nuisance claims and would result in award of reduced damages to plaintiffs totally at fault out of sympathy for their handicapped condition.⁸² Accordingly, one would expect the losses within the basic limits to be higher in states with comparative negligence rules than it is in states following the rule that contributory negligence is a complete bar to re-

hand, it is clear that the insurance company could not be sued in a direct action in Michigan, *Lieberthal v. Glens Falls Indemnity Company*, 316 Mich. 37, 24 N.W. (2d) 547 (1946). Accordingly, the difference in the results due to the rules relating to joinder might be apparent in the rates, despite a substantial amount of travel across the border by residents of both states.

⁸¹ Note 78 *supra*.

⁸² E.g., Benson, "Comparative Negligence — Boon or Bane," 26 *INS. COUNSEL J.* 204 at 207 (1956); Gilmore, "Comparative Negligence from a Viewpoint of Casualty Insurance," 10 *ARK. L. REV.* 82 at 83 (1955); Lipscomb, "Comparative Negligence," 1951 *INS. L.J.* 667; Powell, "Contributory Negligence: A Necessary Check on the American Jury," 43 *A.B.A.J.* 1005 at 1007 (1957).

covery. Since the increase in premiums for extended coverage is computed as a percentage of the basic \$5,000/\$10,000 coverage policy, one would expect different percentage factors to be used in states with comparative negligence rules. However, the same factors are used for all states to determine the premiums for increased limits, with the exception of Louisiana and Oklahoma where somewhat higher factors are applicable.⁸³

Another indication that comparative negligence has not affected the proportionate distribution of small and large claims may be found in the statistics of average claim costs presented in Tables II and III, where no marked correlation between comparative negligence and ranking in size of average claim appears. On the other hand, reference to Table IV-A, B, C, and D will disclose that in only five comparisons between comparative negligence states and contributory negligence states did a higher proportion of the residents of states with contributory negligence rules carry insurance with higher coverage limits than the residents of comparative negligence states. Or to put in the other way, in eleven comparisons, a higher proportion of residents in comparative negligence states carried insurance with higher coverage limits than did residents in neighboring states with contributory negligence. From this one might conclude that the residents of comparative negligence states have been made more protection minded, but their concern does not appear to be with the smaller claims which comparative negligence is said to promote.

CONCLUSION

Certainly this analysis of insurance data and other statistical information has produced no definite or precise measure of the effect of comparative negligence on automobile liability insurance. The effect of some factors, such as safety conditions or the death rate and the urban-rural population ratio can be detected. Generally speaking, however, it must be said that no effect from comparative negligence appears in the data. Teachers of tort law who each year must instruct their first-year classes on the effect of contributory negligence upon recoveries—and their classes consist of college-educated students who certainly possess a sophistication much above that of the general public—may find nothing surprising in the indications that comparative negligence has no effect upon the claims consciousness of the general

⁸³ Letter from the National Bureau of Casualty Underwriters, November 5, 1958.

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public. A total lack of effect would be consistent with the view that despite the legal bar of contributory negligence, comparative negligence is in fact practiced in all states, by insurance adjusters,⁸⁴ defense and plaintiffs' attorneys, juries,⁸⁵ and even judges.⁸⁶ If this is true, one would expect no effect on the general level of rates. Instead, in only a limited number of cases, in which juries literally applied the contributory negligence bar or dealt freely with one totally at fault in producing his injuries, would a different result occur with a different rule of law. The choice then between the two rules would not be one involving a question of

⁸⁴ One manual for casualty insurance adjusters contains the following advice:

"Since our first and most important defense is that of contributory negligence, I think that this is the proper time to warn the new claims man that although he must know the law as related to his work, he must be just as careful to avoid giving it too much weight when it comes to settling claims. Take the law seriously, but don't become wedded to it. As the new man gains in experience, he will learn much to his chagrin that some juries do not give proper consideration to theoretically valid defenses.

". . . Theoretically, the percentage of negligence with which the plaintiff can be charged is immaterial in defeating his right of action, in cases where this defense is proper. In other words, according to the law, even if his own contributory negligence was only 10 per cent of all the negligence in the accident, this would be sufficient to bar his recovery. In practice, however, the theory is rarely applied so stringently." *MAGARICK, SUCCESSFUL HANDLING OF CASUALTY CLAIMS* 17-18 (1955). See also *id.* at 271-272; *GORTON, AUTOMOBILE CLAIM PRACTICE* 92, 145 (1940). But cf. *id.* at 158-159.

⁸⁵ *Benson, "Comparative Negligence—Boon or Bane,"* 26 *INS. COUNSEL J.* 204 at 205, 211 (1956); *Bress, "Comparative Negligence: Let Us Harken to the Call of Progress,"* 43 *A.B.A.J.* 127 at 128 (1957); *Harkavey, "Comparative Negligence—The Reflections of a Skeptic,"* 43 *A.B.A.J.* 1115 at 1116-1117 (1957); *Powell, "Contributory Negligence, A Necessary Check on the American Jury,"* 43 *A.B.A.J.* 1005 at 1006 (1957); *Tooze, "Contributory vs. Comparative Negligence—A Judge Expresses His Views,"* 12 *NACCA L.J.* 211 at 212 (1953); *ULMAN, A JUDGE TAKES THE STAND* 31-32 (1936).

⁸⁶ For an example of judicial approval, or at least condonation, of compromise verdicts limiting the damages awarded a plaintiff whose contributory negligence was believed by the jury to be a cause of his injuries, even though the legal rule would require a complete bar, see *Karetsky v. Laria*, 382 Pa. 227 at 231, 114 A. (2d) 150 (1955). The court there said, "The doctrine of comparative negligence, or degrees of negligence, is not recognized by the Courts of Pennsylvania, but as a practical matter they are frequently taken into consideration by a jury. The net result, as every trial judge knows, is that in a large majority of negligence cases where the evidence of negligence is not clear, or where the question of contributory negligence is not free from doubt, the jury brings in a compromise verdict.

". . . In the instant case twelve reasonable men could have serious doubt as to whether Laria was negligent; and if Laria was negligent, whether the accident was caused by his negligence or by the contributory negligence of the plaintiffs or partly by the negligence of each of them. Under such circumstances, a jury usually does what this jury did, namely render a compromise verdict which is much smaller in amount than they would have awarded (a) if defendant's negligence was clear, and (b) if they were convinced that plaintiffs were free from contributory negligence.

"Where the evidence of negligence or contributory negligence, or both is conflicting or not free from doubt, a trial judge has the power to uphold the time-honored right of a jury to render a compromise verdict, and to sustain a verdict which is substantial—a capricious verdict or one against the weight of the evidence or against the law, can and should always be corrected by the Court."

substantially higher insurance rates for everyone, but a question of the justness of results in a limited number of cases.

It is possible that comparative negligence has an effect upon insurance rates, but that that effect cannot be detected with the data on hand and the techniques used. Even if this is true, however, some measure of its force has been obtained. Adoption of a comparative negligence rule, as shown by the Arkansas experience, would not have a catastrophic result upon the insurance rate structure of any state. Indeed, it would not have as much effect as rapid growth of population, increased urbanization, or change to a traffic program with the effective safety record of a neighboring state. Its effect, if any, would probably go undetected in the rates and statistics of the insurance industry.

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NEGLIGENCE AND LIABILITY WITHOUT FAULT IN TORT LAW

Cornelius J. Peck*

It is frequently assumed that with a few exceptions the principles of negligence comprise the field of tort law, and that fault is the most common basis for determining liability for harmful conduct. The space devoted in most law school torts casebooks suggests to students and future lawyers that negligence is the dominant principle of tort law.¹ The emphasis given the subject by teachers, stimulated by the intellectual challenges of defining proximate cause or establishing standards of care, further impresses the importance of negligence principles upon each class of law students. Moreover, most of the tort cases litigated are in fact decided pursuant to principles of negligence, largely because of the litigation-spawning capacity of automobile accidents.² Though these are changing times, the concept persists that what now exists has always been. However, a survey of tort law produces a somewhat different view, and discloses a surprising number of instances in which liability is imposed without fault.

The conclusion reached by most scholars is that until the 19th century a person whose actions caused harm to another was in most situations held responsible for that harm simply because he had acted.

* Professor of Law, University of Washington; B.S., Harvard, 1944; Certificate, Harvard Business School, 1945; LL.B., 1949. This article first appeared in U.S. DEPT. TRANSP., *THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION—AUTOMOBILE INSURANCE AND COMPENSATION STUDY* (1970), and is reprinted in substantially the same form.

1. Prosser devotes in excess of 500 of 1150 pages in his casebook to negligence concepts, W. PROSSER & Y. SMITH, *CASES AND MATERIALS ON TORTS* (4th ed. 1967); W. SEAVEY, P. KEETON & R. KEETON, *CASES ON TORTS* (2d ed. 1964) devotes about 450 of its 1043 pages to negligence principles; and C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* (1959) likewise gave about 450 of 1299 pages to negligence concepts.

2. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 11.3, Supplement to Volume 2, Comments to 11.3 n.1, to 11.3 n.8 (1956); O'Connell, *Taming The Automobile*, 58 Nw. L. Rev. 299, at 303-04 (1963).

Holdsworth tells us that this was the case both with respect to early Anglo-Saxon law³ and the Mediaeval Common Law.⁴ Wigmore earlier summarized the primitive German doctrine that "The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer . . ."⁵ This absolute responsibility, without regard to blame, persisted until the early 1500's, when the primitive notion was abandoned in favor of permitting a defendant to exempt himself from liability by showing that he was without blame even though he had acted voluntarily.⁶ Street agreed that for several hundred years the conception of negligence was unknown to the law of trespass; a defendant was liable if it was shown that damage had been done by the direct or immediate application of force, without regard to whether or not he was negligent.⁷ Justice Holmes was persuaded that policy and consistency required rejection of the rule of strict liability, but recognized that the theory enjoyed the support of some lawyers of his time, and that the common law probably followed such a rule during what he called a period of dry precedent.⁸ Scholars today agree that a rule of strict liability prevailed at the early stages of development of the common law, usually rendering an actor liable if he in fact caused injury to another.⁹

Escape from the rule of strict liability evolved and developed slowly, in typical common law fashion. There are a number of detailed accounts of this development.¹⁰ Prominent among the early decisions is *The Case of Thorns*,¹¹ in which an action for trespass to real property was brought against a defendant who had cut a hedge of thorns, some of which fell upon plaintiff's land. While holding for the plaintiff, one of

3. 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 51 (3d ed. 1923).

4. 3 *id.* at 375-82.

5. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 313, 317 (1894).

6. Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 HARV. L. REV. 441, at 442-44 (1894).

7. T. STREET, FOUNDATIONS OF LEGAL LIABILITY 74-78 (1906).

8. O. HOLMES, THE COMMON LAW 89 (1881).

9. 2 F. HAPPER & F. JAMES, THE LAW OF TORTS § 12.2 (1956); W. PROSSER, THE LAW OF TORTS 144 (3d ed. 1964); J. FLEMING, THE LAW OF TORTS 107, 290 (3d ed. 1965).

10. Winfield, *The Myth of Absolute Liability*, 42 LAW Q. REV. 37 (1926); Winfield, *The History of Negligence in the Law of Torts*, 42 LAW Q. REV. 184 (1926); Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 HARV. L. REV. 441 (1894); O. HOLMES, THE COMMON LAW 85-88 (1881).

11. 1466 Y.B. 6 Ed. 4, f.7a pl. 18.

Liability Without Fault

the judges noted that the defendant had not acted in any other way than to keep the thorns from falling upon the plaintiff's land. This suggests that establishing a defense of negligence was not required. One hundred and thirty years later, made in a case holding liability for a defendant charged and injured the plaintiff, the plaintiff's man by force take my hand. The defendant had said that the plaintiff's man or had set forth the case with the plaintiff to the court that it had been committed no negligence to the plaintiff. Liability would have been imposed upon the defendant than what is today required.

And so things continued to pass by being imposed upon a defendant in cases suggesting that inevitable injury upon the part of the defendant was a defense against liability. In large part upon dicta from the defendant that liability could not be imposed upon the plaintiff for fault or neglect.¹² Of the three cases from Massachusetts in *Brown v. Kendall*,¹³ now considered the leading case on negligence in order to impose liability upon the plaintiff, the decision has gained that its author, Chief Justice Ives, derived from the fact that the defendant's negligence upon the plaintiff's land something to be proved. Several decisions suggested.¹⁴ Several

12. *Weaver v. Ward*, 80 Eng. R. 100 (1813).

13. See the cases set out in the *Acts: Its History—III*, 7 HARV. L. REV. 441 (1894); THE COMMON LAW 85-88 (1881).

14. *Vincent v. Stinehour*, 7 Vt. 100 (1843); *Brown v. Kendall*, 60 Mass. 292 (1851).

15. 60 Mass. (6 Cush.) 292 (1851).

16. In *Vincent v. Stinehour*, 7 Vt.

Liability Without Fault

the judges noted that the defendant had failed to allege that he could not have acted in any other way, or that he had done all in his power to keep the thorns from falling on plaintiff's land. This observation suggests that establishing such facts might have constituted a valid defense. One hundred and fifty years later a similar suggestion was made in a case holding liable a soldier whose gun accidentally discharged and injured the plaintiff.¹² But the examples given—"as if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt"—indicate that liability would have been imposed upon an actor guilty of much less than what is today required to establish negligence.

And so things continued until the 19th century, with liability in trespass being imposed upon actors who had caused harm in a series of cases suggesting that inevitability of the accident and lack of any fault upon the part of the defendant would have constituted justification and a defense against liability.¹³ Finally, three American courts, relying in large part upon dicta from earlier cases, announced the proposition that liability could not be imposed unless the actor were guilty of some fault or neglect.¹⁴ Of the three, the decision of the Supreme Court of Massachusetts in *Brown v. Kendall*¹⁵ became the most famous, and is now considered the leading case establishing the necessity of proving negligence in order to impose liability for accidental injury. Perhaps the decision has gained that position because of the esteem enjoyed by its author, Chief Justice Lemuel Shaw; more likely, its prominence derives from the fact that it clearly imposed the burden of proving negligence upon the plaintiff rather than leaving the absence of negligence something to be proved by the defendant, as the other two decisions suggested.¹⁶ Several years later, in England, comprehensive

12. *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616).

13. See the cases set out in the Appendix to Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 HARV. L. REV. 441, at 456-63 (1894). See also, O. HOLMES, *THE COMMON LAW* 85-88 (1881).

14. *Vincent v. Stinehour*, 7 Vt. 62 (1835); *Harvey v. Dunlop*, 39 N.Y.C.L.R. 193 (1843); *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850).

15. 60 Mass. (6 Cush.) 292 (1850).

16. In *Vincent v. Stinehour*, 7 Vt. 62, 65-66 (1835) the court said: "To prevent any

Liability Without Fault

theory the same burden which they formerly would have had to carry in an action on the case.²³

Why the change took place must, of course, remain a matter of speculation. It has been suggested that Chief Justice Shaw may have been motivated by a desire to make the risk-creating enterprises of a developing industrial economy less vulnerable to liability than they had been under the earlier common law.²⁴ This suggestion has been countered with the observation that *Brown v. Kendall*, which Shaw used as the vehicle for changing the law, involved not industry but instead the actions of private persons engaged in separating two fighting dogs.²⁵ It seems unlikely that Chief Justice Shaw shrewdly selected the case in order to disguise the ends to be served by changing the law; but it seems equally unlikely that he could have written the decision without considering what the contemporary conditions of society suggested as appropriate standards for allocating responsibility for unintentionally caused harms.

Indeed, the common law trespass rule was probably well suited to the conditions which prevailed during its evolution. Most energy sources at that time were either human or familiar domestic animals; the implements used in labor and recreation were relatively uncomplicated devices operating on elementary mechanical principles. One who directly or immediately harmed another by his active conduct probably had departed from community standards of behavior much in the same way that one who is negligent today departs from the standard of the reasonably prudent man. Proof of "immediate" causation was then a satisfactory standard for allocating responsibility for harm. It did not have a disruptive effect upon society, and did not deter or misdirect otherwise desirable economic activity.

The development of industry and transportation using steam and other sources of power, and the development of new products and devices, changed the situation. One need only read a description of the operation of steam locomotives prior to adoption of the air brake to

23. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 366 (1951).

24. *Id.* at 368.

25. Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade In A Tory Vein*, 50 CORNELL L.Q. 191, 205 (1965).

realize what costs might have been imposed upon railroads if liability for harm were to be determined by the common law trespass rule:²⁶

Down to the year 1868 the brake system remained very much as it was in 1830 when railways were first adapted to commercial operation. Even though detailed improvements covering structural items had been incorporated, the essential principles were the same. Those in charge of the locomotive had no direct control over the brake manipulation of the vehicles comprising the train. Communications between engine man on the locomotive who senses the danger and the brakeman in the cars who drew up the cables was effected by whistle signals in case of sudden emergency. The first action was to signal danger and to this signal the train crew was instructed to respond with celerity. Each operation required time and every second of time represented many feet of space.

Moreover, about the only safety measures which the railroads could use at crossings were warning signals by whistle and bell.²⁷ As one commentator colorfully put it some time ago:²⁸

Early railway trains, in particular, were notable neither for speed nor safety. They killed any object from a Minister of State to a wandering cow, and this naturally reacted on the law.

Predictably, the reaction of the law was not strict condemnation of this activity which offered escape from the slow, uncomfortable and jolting transport by stage over mud-filled roads,²⁹ and which promised development of the nation's rich resources deposited over thousands of miles of virgin territory. The negligence standard provided a legal environment in which rail transportation could grow and prosper. It aided other branches of industry and commerce as well.

The judicial response to the question of the liability of one who causes harm by handling a new and relatively unknown material suggests a similar adaptation of law. *The Nitroglycerine Case* involved an explosion which occurred soon after "a gentlemen by the name of Noble" [sic] suggested that nitroglycerine might be used for blasting

26. SILCOX, *SAFETY IN EARLY AMERICAN RAILWAY OPERATIONS: 1853-1871* (1936), quoted in Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 at 161 (1946) [hereinafter cited Malone].

27. *Id.*

28. Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184, 195 (1926).

29. See Malone, *supra* note 26, at 153-54.

purposes.³⁰ Employees of the defendant were taken with hammer and sickle and identified "sweet oil" was used which caused severe damage to the bus. The defendants were not negligent and it resulted "immediately" in the death of Justice Shaw's opinion holding that the direct negligence of the defendants' act related to the basis of liability. No negligence was to be determined. The defendant manufacturer was not liable and significantly aided preparation of the bus which would be produced by the defendant whose composition or price was not determined.

The restructuring of the law was not accomplished so as to determine liability for trespass as demonstrated,³² the concept of recovery rose to prominence and was compatible with the demands of the unimpressive opinions in the past. It was not until the late 19th century as the fountainhead of the law hardly have prompted such a change had it not been the case that the law was considered necessary and appropriate to benefit from the progress of the society could not afford to ignore individuals who were so important as an instrument of progress.

Thus it appears that a change in the abandonment of the strict liability standard and substitution of the principle

30. 82 U.S. (15 Wall.) 524, 525.

31. *Winterbottom v. Wright*, 10 B. & C. 297, 129 E.R. 1013 (1842).

32. Malone, *supra* note 26.

33. 11 East 59, 103 Eng. Rep. 103 (1807).

34. See L. GREEN, *TRAFFIC VIOLATIONS* (1964).

Liability Without Fault

purposes.³⁰ Employees of the defendant express company had undertaken with hammer and chisel to open a case, from which some unidentified "sweet oil" was leaking. The explosion which followed did severe damage to the building in which the express office was located. The defendants were not held liable for the harm done, even though it resulted "immediately" from the actions of the employees. Chief Justice Shaw's opinion in *Brown v. Kendall* provided the basis for holding that the directness or remoteness of the consequences of the defendants' act related only to the proper form of action, and not to the basis of liability. Negligence was the standard by which liability was to be determined. Coupled with the then prevailing notion that a manufacturer was not liable absent privity of contract,³¹ the decision significantly aided preparation of the legal environment for an economy which would be producing and using new and unfamiliar products whose composition or principles of operation were not generally known.

The restructuring of the legal environment for the industrial age was not accomplished solely through reformulation of the rule concerning liability for trespass. As Professor Malone has effectively demonstrated,³² the concept of contributory negligence as a bar to recovery rose to prominence in response to the need for a legal system compatible with the demands of a growing industrial economy. The unimpressive opinions in *Butterfield v. Forrester*,³³ uniformly recognized as the fountainhead of contributory negligence theory, could hardly have prompted such widespread proliferation of the doctrine had it not been the case that some additional bar to recovery was considered necessary and appropriate to the times. The entire population stood to benefit from the workings of an industrial economy, and society could not afford to burden itself with compensating those individuals who were so unfortunate as to be injured accidentally by an instrument of progress.³⁴

Thus it appears that a significant change in tort law was made by abandonment of the strict liability rule of common law trespass, and substitution of the principles of negligence law in cases involving un-

30. 82 U.S. (15 Wall.) 524, 529 (1872).

31. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842).

32. Malone, *supra* note 26.

33. 11 East 59, 103 Eng. Rep. 926 (K.B. 1809).

34. See L. GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* 33-34 (1958).

intended consequences. That this change took place within the last one hundred and fifty years is in itself evidence that strict liability is not a principle alien to Anglo-American tort law. Perhaps even more persuasive evidence is the fact that strict liability is applied as the principle for determining responsibility for much harmful conduct within the area of tort law. Strong eddies and cross-currents developed in response to the changes in liability for unintended consequences, and, to extend the metaphor, it seems possible that the tide has begun to turn.

An example of strict liability derived from the early common law, but still of vitality, is the rule imposing liability upon one who intentionally enters onto land in the possession of another, even though under a reasonable mistake.³⁵ Of course, a distinction exists between consequences which are intended, though brought about by mistake, and consequences which are unintended. But the significant point is that liability may be imposed for trespass even though a reasonable man might have made the same mistake. Moreover, the liability of a trespasser extends to all harm which he in fact causes to the land, the possessor, or members of the possessor's household, without regard to whether the trespasser acted in a way which was intentionally wrongful, reckless, or negligent.³⁶ Perhaps the preservation of this rule of strict liability can be attributed to our unexamined retention of the early common law zeal for protecting interests in land; or perhaps no social purpose equivalent to that of freeing industry from judicial restraints has been advanced on behalf of trespassers to real property. The consequence is, at any rate, that one may be held liable for harm caused without fault other than entry based upon a reasonable mistake.³⁷

35. 1 RESTATEMENT (SECOND) OF TORTS § 164 (1965); J. FLEMING, *THE LAW OF TORTS* 77-80 (3d ed. 1965); 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 12-13 (1956); W. PROSSER, *THE LAW OF TORTS* 74 (3d ed. 1964).

36. 1 RESTATEMENT (SECOND) OF TORTS § 162 (1965); J. FLEMING, *THE LAW OF TORTS* 38 (3d ed. 1965); 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 29 (1956); W. PROSSER, *THE LAW OF TORTS* 67 (3d ed. 1964).

37. Illustration 2 to § 162 of 1 RESTATEMENT (SECOND) OF TORTS is as follows:

2. A is driving his car along the highway in a neighborhood with which he is unfamiliar. He asks B to direct him to a certain town. B tells him that he can take a short cut through a private road over which the public is not accustomed to travel, which B asserts to be upon his own land but which, in fact, is on the land of C. While driving carefully along the road, A runs over D, C's three-year-old child, who suddenly dashes out from the bushes which border the road. A is

Strict liability is still important necessary lateral or subjacent another thereby causing subsidence of the land and for any damage thereon.³⁸ In fact, *Tentative Torts Second* recently proposed of land by imposing strict liability on persons otherwise privileged to use or other substances from underground by the subsidence of land with the weight of buildings upon it.⁴⁰ but the total picture favors tortious liability. Aggravation of an unexamined retention of interests in land, but the result is unintended consequences caused by the actor.

The early common law rule was done by trespassing animals and avoided by surrender of the animal personal to the possessor of the land. a rule of strict liability compared with the applicability of this strict liability in the States was a matter of some importance, but today, even in jurisdictions which have rejected, it has since found life in fencing statutes.⁴² Once again the law seems to have turned upon the needs of the community, rather than as to whether the possessor is at fault.

subject to liability to D and to C.
38. 4 RESTATEMENT OF TORTS §§ 1.1, 1.2, 1.3 OF TORTS § 1.27 (1956).

39. RESTATEMENT (SECOND) OF TORTS § 1.27 (1956).

40. 4 RESTATEMENT OF TORTS § 1.27 (1956).

41. O. HOLMES, *THE COMMON LAW OF TORTIOUS ACTS: ITS HISTORY*, 7 HARV. L. REV. 1 (1897).

42. See 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 12-13 (1956).

Strict liability is still imposed upon one who removes the naturally necessary lateral or subjacent support of land in the possession of another thereby causing subsidence of the land, both for damages to the land and for any damage to buildings or artificial conditions thereon.³⁸ In fact, Tentative Draft Number 15 of the *Restatement of Torts Second* recently proposed to increase this protection for support of land by imposing strict liability for subsidence of land caused by persons otherwise privileged to withdraw subterranean water, oil, minerals, or other substances from under the land.³⁹ Liability for harm caused by the subsidence of land which would not have taken place but for the weight of buildings upon it is determined by principles of negligence,⁴⁰ but the total picture is one of broad exposure of land excavators to strict liability. Again, the reason for the strict liability may be an unexamined retention of the common law's zealous protection of interests in land, but the result is that one may be held liable for unintended consequences caused without fault other than that of being the actor.

The early common law also recognized a strict liability for harm done by trespassing animals, although liability apparently could be avoided by surrender of the animals.⁴¹ In time, this liability became personal to the possessor of the animals, and thus became more nearly a rule of strict liability comparable to those discussed previously. The applicability of this strict liability rule to conditions in the United States was a matter of some doubt during the formative stages of this nation, but today, even in jurisdictions in which it was judicially rejected, it has since found legislative acceptance in various forms of fencing statutes.⁴² Once again, the appropriateness of strict liability seems to have turned upon how well the particular rule has suited the needs of the community, rather than upon any philosophical conclusion as to whether the possessor of an animal, for example, was guilty of fault.

subject to liability to and to C.

38. 4 RESTATEMENT OF TORTS §§ 817, 820 (1939); 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 1.27 (1956).

39. RESTATEMENT (SECOND) OF TORTS §§ 818 (Tent. Draft No. 15, 1969).

40. 4 RESTATEMENT OF TORTS §§ 819, 821 (1939).

41. O. HOLMES, *THE COMMON LAW* 1520-23 (1881). Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 325 *et seq.* (1894).

42. See 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 14.9 (1956).

There are other rules derived from early common law precedents which also may appropriately be considered rules of strict liability within the body of tort law. For example, a bona fide purchaser of stolen property is strictly liable to the true owner for its value, regardless of the care and prudence he may have exercised in ascertaining the title of the vendor.⁴³ This liability is imposed without regard for the relative fault of the owner in exposing the goods to the possibility of conversion.⁴⁴ Another rule of law holds a bailee liable for misdelivery of property, regardless of his good faith or his freedom from negligence.⁴⁵ Moreover, in order to avoid an otherwise insurmountable obstacle to recovery, the usual rule is that a bailor may establish a prima facie case simply by proving that he delivered the property, and that the bailee either failed to return it, or returned it in damaged condition.⁴⁶ The same reasoning underlay the common law rule, now embodied in the Interstate Commerce Act, making a carrier liable for damage to goods transported unless it can show that the damage was caused solely by an act of God, the public enemy, the shipper himself, a public authority, or by the inherent nature of the goods.⁴⁷ The consequence is that a carrier may be held liable even though it was guilty of no negligence. Except where modified by statute, a similar strict liability has been imposed upon hotels and innkeepers for the loss or destruction of the goods of guests.⁴⁸ It might be objected that these are rules of property law rather than tort law; but such an argument smacks too much of the fine analysis formerly applied in determining the correct form of action for obtaining redress for harmful conduct.

If instead one may avoid that perspective of the law, it seems quite certain that the strict liability effect of the *respondet superior* doctrine is one of the most important principles of liability for tortious conduct. Early commentators described it as such,⁴⁹ and the fact that the doctrine

43. R. BROWN, *THE LAW OF PERSONAL PROPERTY* 231 (2d ed. 1955) [hereinafter cited as BROWN]; See UNIFORM COMMERCIAL CODE § 2-403.

44. BROWN, *supra* note 43, at 241-42. RESTATEMENT (SECOND) OF TORTS § 234 (1965).

45. BROWN, *supra* note 43, at 351; 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 156 (1956); W. PROSSER, *THE LAW OF TORTS* 88 (3d ed. 1964).

46. BROWN, *supra* note 43, at 359-75; RESTATEMENT (SECOND) OF TORTS § 328A, comment b (1965).

47. *Missouri Pac. R.R. v. Elmore & Stahl*, 377 U.S. 134 (1964).

48. BROWN, *supra* note 43, at 481-87. Innkeepers are afforded a greater opportunity than carriers to escape liability by showing freedom from negligence.

49. Wigmore, *Responsibility for Tortious Acts: Its History—II*, 7 HARV. L. REV. 383 (1894); 1 W. BLACKSTONE, *COMMENTARIES* 429-32 (17th ed. 1830).

seems to fit more neatly into emphasizing its operative effect on the employer for the tortious conduct imposed without regard to the reference how careful the employer carefully he trains them, or his duties. If an employee commits a tort his employer is liable.

Another rule of liability without fault created an element of agency law, determining liability for tortious harm done by carefully selected non-delegable duties.⁵⁰ This liability is the strict liability imposed for entities, for it extends to activities, principles of vicarious liability, and likewise be considered to permit conduct without proof of fault. In situations, someone has been attributed, for present purposes the liability be imposed on one who was with

The employment relationship without fault. For example, the liability of an employer of seamen, to furnish who fall sick or are injured in liability imposed without regard from meeting disapproval in not codified by the Jones Act,⁵¹ was Moreover, the enactment of work the United States reflects the com

50. See RESTATEMENT (SECOND) OF TORTS

51. See RESTATEMENT (SECOND) OF TORTS § 418 (Maintenance of Public Health is under a duty to his lessee to make) § 425 (Repair of a chattel supplied of business).

52. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*

53. See *Calmar Steamship Corp. v. Taylor*, 1 U.S. 158 (1903).

54. 46 U.S.C. 688 (1964).

Liability Without Fault

seems to fit more neatly into the law of agency is no reason for de-emphasizing its operative effects in the law of torts. The liability of an employer for the tortious conduct of his employee is a strict liability imposed without regard to the fault of the employer. It makes no difference how careful the employer is in recruiting his workers, how carefully he trains them, or how carefully he supervises their activities. If an employee commits a tort in the course of his employment, his employer is liable.

Another rule of liability without fault which is frequently considered an element of agency law, but which is also clearly a principle for determining liability for tortious conduct, is that imposing liability for harm done by carefully selected independent contractors performing non-delegable duties.⁵⁰ This liability is not simply a development of the strict liability imposed for engaging in abnormally hazardous activities, for it extends to activities which are not so classified.⁵¹ Other principles of vicarious liability, such as the family car doctrine,⁵² may likewise be considered to permit the imposition of liability for tortious conduct without proof of fault. While it is true that in many of these situations, someone has been at fault in bringing about the harm suffered, for present purposes the significant point is that liability may be imposed on one who was without fault.

The employment relationship offers other illustrations of liability without fault. For example, the obligation imposed in admiralty upon an employer of seamen, to furnish maintenance and cure for seamen who fall sick or are injured in the service of the vessel, is a strict liability imposed without regard to the fault of the employer.⁵³ Far from meeting disapproval in modern times, this principle has been codified by the Jones Act,⁵⁴ which broadens the rights of seamen. Moreover, the enactment of workmen's compensation acts throughout the United States reflects the conclusion that imposition of strict liabil-

50. See RESTATEMENT (SECOND) OF TORTS §§ 416-27B (1965).

51. See RESTATEMENT (SECOND) OF TORTS § 417 (1965) (Work done in a public place) § 418 (Maintenance of Public Highways) §§ 419, 421 (Repairs which a lessor is under a duty to his lessee to make) § 422 (Work on buildings and other structures on land) § 425 (Repair of a chattel supplied or land held open to the public as a place of business).

52. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1419-24 (1956).

53. See *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525 (1938); *The Osceola*, 189 U.S. 158 (1903).

54. 46 U.S.C. 688 (1964).

ity upon employers is an appropriate way to deal with industrial accidents.⁵⁵

Defamation is, of course, an intentional tort insofar as it requires an intention to publish the defamatory statement, but it is often illustrative of liability without fault. Except for constitutionally protected statements concerning public officials, public figures, and matters of public interest,⁵⁶ liability may be imposed because a statement, innocent on its face, was rendered defamatory by facts not known to the defendant nor discoverable by him in the exercise of reasonable care.⁵⁷ Liability may likewise be imposed even though the defendant did not intend to defame the plaintiff, and had no reason to know that his statement would be defamatory.⁵⁸ In short, one who publishes a defamatory statement will be held liable to one injured without regard to whether the publication could be said to be the product of fault.

An innocent misrepresentation made by a party to a business transaction may also give rise to liability irrespective of the good faith or reasonable belief of the defendant.⁵⁹ Prosser lists eighteen jurisdictions which have adopted this rule of strict liability, and suggests that in other jurisdictions such a rule is in fact applied, although disguised in the more traditional language of fraud through the use of presumptions or fictions concerning the defendant's state of mind.⁶⁰ The rule may also have been made effective with respect to the sale of securities by Section 17(a) of the Securities Act of 1933, and Rule 10b-5 of the

55. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 730-33 (1956); W. PROSSER, *THE LAW OF TORTS* 554-58 (3d ed. 1964).

56. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

57. 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 5.5 (1956); W. PROSSER, *THE LAW OF TORTS* 791-92 (3d ed. 1964). A leading example is a Scottish case, *Morrison v. Ritchie & Co.*, 39 Scot. L.R. 432 (1902), in which the defendant published as a routine social item a false report that plaintiff had become the mother of twins. Plaintiff had been married only a few weeks, but this was unknown to defendant. Defendant was held liable. Care or the lack of it went only to affect damages.

58. F. HARPER & F. JAMES, *supra* note 57, at § 5.7 (1956); W. PROSSER, *THE LAW OF TORTS* 791 (3d ed. 1964). A leading example is the case of *Jones v. E. Hulton & Co.*, [1909] 2 K.B. 444, *aff'd* [1910] A.C. 20, in which defendant published what it intended to be a fictitious account of immoral behavior of one Artemus Jones on the beach at Dieppe. A real Artemus Jones was held entitled to recover despite defendant's lack of intent to defame any living person.

59. 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 7.7 (1956).

60. W. PROSSER, *THE LAW OF TORTS* 724-29 (3d ed. 1964).

Securities Exchange Commission Act of 1934.⁶¹

One of the more specific instances has been the adoption of strict liability for defective products for the leading decision of the Supreme Court in *Bloomfield Motors*,⁶² and in other jurisdictions.⁶³ Strict liability that the reported *Torts* urged abandonment of strict liability to production of a broader version of *Second* of *Torts*. The broader version later now appears as Section 402A. This strict liability has been produced by a mass defective truck,⁶⁴ and to the manufacturer received before purchase liability reflects a judicial burden upon the injured to the present day economic burden upon the injured the manufacturer or seller.

There remains to be seen who engage in extra-hazardous activities. This is probably the type of activity to mind when the subject

61. See Meisenholder, *Scientist Seller Under Rule 10b-5*, 4 CORP. & SEC. L.J. 358, 161 A.2d 69 (1960).

62. 32 N.J. 358, 161 A.2d 69 (1960); *Greenman v. Yuba Power Products, Inc.*, 39 Cal. 2d 530, 24 Cal. Rptr. 120 (1962); *Goldberg v. Kollsman Int'l. Corp.*, 37 Wis. 2d 441, 181 N.W. 2d 522, 452 P.2d 729 (1965).

63. *Restatement (Second) of Torts* § 402A, 50 M. & B. 1 (1965).

64. *Schipper v. Levitt & Sons*, 39 Cal. 2d 530, 24 Cal. Rptr. 120 (1962).

65. *Cintrone v. Hertz Truck Rental Co.*, 39 Cal. 2d 530, 24 Cal. Rptr. 120 (1962).

66. *Delaney v. Towmotor Corp.*, 39 Cal. 2d 530, 24 Cal. Rptr. 120 (1962).

Liability Without Fault

Securities Exchange Commission's Regulations pursuant to the Securities Act of 1934.⁶¹

One of the more spectacular changes in tort law in recent years has been the adoption of a rule imposing strict liability upon sellers of defective products for the harm caused by the defect. Soon after the leading decision of the Supreme Court of New Jersey in *Henningsen v. Bloomfield Motors*,⁶² this rule of strict liability was adopted in many other jurisdictions.⁶³ So swift was this change to the rule of strict liability that the reporter and council for the *Restatement (Second) of Torts* urged abandonment of a section approved in 1962 limiting such strict liability to products designed for intimate bodily use, and adoption of a broader version applicable to all products so that the *Restatement (Second) of Torts* would not be out of date when published.⁶⁴ The broader version later obtained the approval of the Institute, and now appears as Section 402A of the *Restatement (Second) of Torts*. This strict liability has been further extended to defects in housing produced by a mass developer of housing,⁶⁵ to the lessor of a rental truck,⁶⁶ and to the manufacturer of a demonstrator model for injuries received before purchase.⁶⁷ This general and rapid acceptance of strict liability reflects a judicial consensus that the rule is more appropriate to the present day economy than was the old rule, which imposed a burden upon the injured party to prove negligence on the part of the manufacturer or seller of the product.

There remains to be noted the strict liability imposed upon those who engage in extra-hazardous or abnormally dangerous activities. This is probably the type of strict liability which most readily comes to mind when the subject of strict liability is mentioned, perhaps be-

61. See Melsenholder, *Scienter and Reliance as Elements in Buyer's Suit Against Seller Under Rule 10b-5*, 4 CORP. PRAC. COM. 27 (1963).

62. 32 N.J. 358, 161 A.2d 69 (1960).

63. E.g., *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963); *Dlppel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); *Ulmer v. Ford Motor Co.*, 75 Wn. 2d 522, 452 P.2d 729 (1969). See Prossen, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

64. RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 10, 1964).

65. *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

66. *Cintrone v. Hertz Truck Leasing and Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965).

67. *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir., 1964).

cause several generations of lawyers have now been exposed to torts courses in which this type of liability was discussed as a contrast to basic negligence principles. Traditional discussion of the subject begins with analysis of the decision in *Rylands v. Fletcher*,⁶⁸ even though the opinions in that case reveal that the judges had no intention of changing the law or providing remedies beyond those which had existed for centuries under English law. In any event, the principle of liability without fault applied in that case had a ready adaptability to cases involving harm caused by the powerful devices and products of an industrial age. Although a number of courts have avoided specific application of *Rylands v. Fletcher* to problems of this sort, in fact a principle of strict liability for extra-hazardous activities has become accepted doctrine in American law.⁶⁹ The original *Restatement of Torts* incorporated the principle of strict liability for what were called "ultrahazardous activities."⁷⁰ With a change of terminology to "abnormally dangerous activities"⁷¹ and recognition that the liability should attach even though the activity might be perfectly safe if the utmost care were used,⁷² this principle will be carried into the *Restatement (Second) of Torts*, where it will be extended even further to cover harm caused to property or persons on the ground by the ascent, descent or flight of any aircraft.⁷³

In a number of respects, even liability imposed on a negligence basis is in fact a liability without fault. The standard of the reasonably prudent man is an objective standard which ignores many considerations which would be involved in determining whether there was moral or ethical fault on the part of the actor.⁷⁴ Deviations from that standard are made at the peril of the actor, as are the deviations from community standards which take place when one engages in abnormally dangerous activities. Certainly there is no moral fault on the part of a man who for more than 30 years has driven carefully and without accident, but

68. 3 Hurl. & C (Ex. 1865); [1866] L.R. 1 Ex. 265; [1868] L.R. 3 H.L. 330.

69. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 14.4 (1956); W. PROSSER, *THE LAW OF TORTS* 523-32 (3d ed. 1964).

70. 3 *RESTATEMENT OF TORTS* §§ 519-24 (1938).

71. *RESTATEMENT (SECOND) OF TORTS* § 519 (Tent. Draft No. 10, 1964).

72. *Id.* at § 520.

73. Compare *RESTATEMENT (SECOND) OF TORTS* § 520A (Tent. Draft No. 12, 1966) with § 520A (Tent. Draft No. 11, 1965) and § 520A (Tent. Draft No. 10, 1964).

74. See Seavey, *Negligence, Subjective or Objective*, 41 *HARV. L. REV.* 1 (1927).

who, distracted by concern through a stop sign and way. Yet such a man would only certain aspects of liable risks. Even insane persons and their conduct is judged man, although it is beyond

At times, allocation of also impose liability upon established. Thus the establishment of a criminal statute constituting establishing excuse or justification if such is not established by statute can never be excluded. Act,⁷⁵ for example—liability of the circumstances no fault. In some jurisdictions a presumption of negligence supports liability where the usual version of the doctrine creates a permissible inference of liability that a jury will draw negligence.

CONCLUSION

This review of the field to the various types of products of cases pending on court than negligence as the primary a mere vestige of primitive

75. *RESTATEMENT (SECOND)*

76. 2 F. HARPER & F. JAMES

PROSSER, *THE LAW OF TORTS* § 1

77. *O'Donnell v. Elgin J. &*

945 (1950).

78. 2 F. HARPER & F. JAMES

LAW OF TORTS, 232-39 (3d ed. 1

79. See authorities in note 78

Liability Without Fault

who, distracted by concern for the health of his hospitalized wife, drives through a stop sign and collides with a person who had the right of way. Yet such a man would be deemed negligent because, considering only certain aspects of his conduct, he created unusual and unreasonable risks. Even insane persons are liable for negligently inflicted harm and their conduct is judged by the standard of the reasonably prudent man, although it is beyond their power to meet that standard.⁷⁵

At times, allocation of the burden of proof in negligence cases may also impose liability upon one whose fault has not in fact been established. Thus the established principle that an unexcused violation of a criminal statute constitutes negligence per se places the burden of establishing excuse or justification on the defendant, with liability following if such is not established.⁷⁶ Even when the violation of the statute can never be excused—as with the Federal Safety Appliance Act,⁷⁷ for example—liability may be imposed although a total evaluation of the circumstances would lead to the conclusion that there was no fault. In some jurisdictions, the effect of *res ipsa loquitur* is to create a presumption of negligence which stands unless rebutted,⁷⁸ and hence supports liability where in fact there was no fault. Where the more usual version of the doctrine is followed, and *res ipsa loquitur* simply creates a permissible inference of negligence,⁷⁹ there is still the possibility that a jury will draw that inference where in fact there was no negligence.

CONCLUSION

This review of the field of tort law indicates that if regard is given to the various types of problems encountered, rather than the number of cases pending on court dockets, strict liability is applied more often than negligence as the principle which determines liability. It is neither a mere vestige of primitive law, as indicated by its recent judicial

75. RESTATEMENT (SECOND) OF TORTS § 283B (1965).

76. F. HARPER & F. JAMES, THE LAW OF TORTS § 17.6, at 1010-11 (1956); W. PROSSER, THE LAW OF TORTS § 35, at p. 202 (3d ed. 1964).

77. O'Donnell v. Elgin J. & E.R.R., 338 U.S. 384 (1949), *rehearing denied* 338 U.S. 945 (1950).

78. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 19.11 (1956); W. PROSSER, THE LAW OF TORTS, 232-39 (3d ed. 1964).

79. See authorities in note 78, *supra*.

and legislative applications, nor a new and untried development. It is a principle with adaptability to serve the needs of society in a variety of situations. Apparently no set formula can be derived as to when strict liability constitutes the appropriate principle of liability, but some observations may be made about certain common features of the situations in which strict liability is applied.

One of these common features is that the person harmed would encounter a difficult problem of proof if some other standard of liability were applied. For example, the disasters caused by those who engage in abnormally dangerous or extra-hazardous activities frequently destroy all evidence of what in fact occurred, other than that the activity was being carried on. Certainly this is true with explosions of dynamite, large quantities of gasoline, or other explosives. It frequently is the case with falling aircraft. Tracing the course followed by gases or other poisons used by exterminators may be difficult if not impossible. The explosion of an atomic reactor may leave little evidence of the circumstances which caused it. Moreover, application of such a standard of liability to activities which are not matters of common experience⁸⁰ is well-adapted to a jury's limited ability to judge whether proper precautions were observed with such activities.

Problems of proof which might otherwise have been faced by shippers, bailors, or guests at hotels and inns certainly played a significant role in shaping the strict liabilities of carriers, bailees, and innkeepers. Problems of proof in suits against manufacturers for harm done by defective products became more severe as the composition and design of products and the techniques of manufacture became less and less matters of common experience; this was certainly a factor bringing about adoption of a strict liability standard.⁸¹ Superior knowledge and difficulties of proof are frequently mentioned as justifications for application of the *res ipsa loquitur* doctrine.

Another common feature of situations in which strict liability is imposed is that the conduct giving rise to liability is not one which it would be socially desirable to prohibit or enjoin, so that the giving of a remedy to a plaintiff threatened with harm must be delayed until

80. See RESTATEMENT OF TORTS § 520 (1939).

81. See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 50 P.2d 436, 440 (1944).

Liability Without Fault

harm has actually occurred. In dangerous activities, the keeper of lateral or subjacent support for views which may be defamatory

Another very important common function in a compensatory function in through the use of insurance responsible person. Certainly the *respondeat superior* principle, vicarious liabilities. It is also true liability of one engaging in an activity (generally true of common carriers or guests), as well as those who remove lateral or subjacent support liability in these situations is usually activities on to those who enjoy

A number of the situations in which a type of conduct which can be ensure that application of a strict miscarriages of justice in a substantial parent with respect to those who employees, manufacturers, persons who keep the keepers of domestic animals, victims of stolen property, and persons violating statutes.

If the activity involved is one of precision, that definition may serve the costs of the activity may be allocated. Precise definition of an activity and actuarial techniques for accumulating the activity appropriate for service

Of course, not all activities to which apply are now governed by a rule. Automobile accident claims settlements are an example of an area to which the principle is applied with benefit, but in which no

The problems of proof involved

Liability Without Fault

harm has actually occurred. This is certainly the case with abnormally dangerous activities, the keeping of domestic animals, the removal of lateral or subjacent support for land, the publication of statements or views which may be defamatory, and the flight of aircraft over land.

Another very important common feature is that strict liability serves a compensatory function in situations where the defendant is, or through the use of insurance may become, the financially more responsible person. Certainly this underlies the strict liability of the *respondeat superior* principle, the family car doctrine, and other vicarious liabilities. It is also true of a manufacturer's liability and the liability of one engaging in abnormally dangerous activities, and is generally true of common carriers and innkeepers (rather than shippers or guests), as well as those who engage in excavating activities which remove lateral or subjacent support. The consequence of imposing such liability in these situations is usually to pass the cost of the beneficial activities on to those who enjoy its benefits.

A number of the situations in which strict liability is imposed involve a type of conduct which can be defined with sufficient precision to ensure that application of a strict liability principle will not produce miscarriages of justice in a substantial number of cases. This is apparent with respect to those who engage in abnormally dangerous activities, manufacturers, persons who remove lateral or subjacent support, the keepers of domestic animals, shippers, bailees, innkeepers, bona fide purchasers of stolen property, publishers of defamatory statements, and persons violating statutes.

If the activity involved is one which can be defined with sufficient precision, that definition may serve as an accounting unit to which the costs of the activity may be allocated with some certainty and precision. Precise definition of an accounting unit makes it possible to use actuarial techniques for accumulating loss experience, thus rendering the activity appropriate for service by insurance institutions.

Of course, not all activities to which these general observations might apply are now governed by a rule imposing strict liability for harm. Automobile accident claims settlement and litigation is a prime example of an area to which the principle of strict liability might be applied with benefit, but in which negligence standards still prevail.

The problems of proof involved in automobile accident litigation

under a negligence standard are so great that it is only blind optimism in a large number of cases to hope that what in fact occurred will become known. Modern highway traffic situations may attach critical significance to such factors as lines and markers painted on a road surface, relative positions of rapidly moving vehicles, presence and color of steady or flashing lights, and very short time intervals. On-the-scene observations are ordinarily made by untrained persons, who were not prepared for the event which transpired. The event may have been so shocking that it had effects upon both their psyche and memory. Moreover, the determination is not based upon what these untrained persons in fact observed, but instead turns upon what they remember of what they observed perhaps two or three years earlier. Even these memories do not control the final judicial decision, because that depends upon what jurors can remember perhaps two or three days after having heard the poorly remembered and conflicting accounts of witnesses, who may have been neither articulate nor precise in their use of language. As with a number of other situations in which strict liability provides an appropriate rule, one may be able to say confidently only that the parties were engaged in a particular activity—*i.e.*, the use of motor vehicles.

Given the values of our society, high speed traffic is a necessity of the day. It cannot be prohibited, and those threatened by it must await harmful injury before seeking a remedy. The owner of an automobile has by its acquisition demonstrated a financial capacity making it possible for him at least to purchase insurance to absorb any loss caused by its operation. So much of our affluence is devoted to automobiles, there is little doubt that, taken as a whole, the activity can afford to bear all the costs of harm which are factually connected with it. If insurance is made compulsory its cost becomes a cost of transportation, and thus is passed on to those who benefit from the use of automobile transportation. The activity involved—the use of motor vehicles—is one which can be defined with sufficient precision to ensure that strict liability will not be imposed unjustly in any significant number of cases. Finally, it is an activity for which there is a wealth of statistical data, making it possible to use the actuarial techniques which facilitate the use of insurance.

It should be no surprise, then, that in recent years a number of proposals have been made to deal with the problem of distributing

the costs of automobile accidents. This is not the proper occasion to discuss the merits of such plans, or to determine whether strict liability without regard to fault is a just basis for accident insurance. But it may be in the foreseeable future, some plan without fault will substantially reduce the costs of automobile accident claims. If, when an accident occurs, the principles of negligence they now occupy in tort law are applied to automobile accidents.

82. R. KEETON & J. O'CONNELL, *BA*
L. GREEN, *TRAFFIC VICTIMS: TORT LAW*
Financial Impact of Automobile Accidents
ZWEIG, *FULL AID INSURANCE FOR TORT*
these and other proposals, see R. KEETON
contrary view, see W. BLUM & H. F. BLUM,
LAW SUBJECT (1965), first published in

the costs of automobile accidents upon some basis other than fault.⁸² This is not the proper occasion to review or evaluate these various plans, or to determine whether the optimal scheme would be to impose strict liability without regard to fault or to utilize some type of accident insurance. But it may be said with a certain confidence that, in the foreseeable future, some principle or principles of liability without fault will substantially replace the principles of negligence law in automobile accident claims settlement and litigation. When this occurs, the principles of negligence will have lost the dominant position they now occupy in tort law due to the frequency of automobile accidents.

82. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965); L. GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE (1958); Morris and Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962); A. EHRENZWEIG, FULL AND INSURANCE FOR THE TRAFFIC VICTIM (1954). For a description of these and other proposals, see R. Keeton and J. O'Connell, *supra*, at 124-219. For a contrary view, see W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW SUBJECT (1965), first published in 31 U. CHI. L. REV. 641 (1964).

JUDICIAL ACTIVISM IN TORT REFORM:
THE GUEST STATUTE EXEMPLAR AND A
PROPOSAL FOR COMPARATIVE NEGLIGENCE

Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values.¹

I. INTRODUCTION

The California Supreme Court in its comprehensive efforts to reform tort law has fulfilled Justice Traynor's challenge: tort law has been shaped and reshaped by the hammer blows of an activist court. The result is a system of law guided by the modern policy goal of increasing the incidence of compensation for accidental injury by placing tort liability on the party who is best able to spread the risk of loss.

Though judicial activism is generally regarded by traditional legal process scholars as undesirable, in tort law, it appears to be an appropriate fulfillment of the historical function of the common law—to meld the precedents of the past to the needs and concerns of the present. The California Supreme Court has most forcefully demonstrated the strength of its resolve to reform tort law and its willingness to employ activist judicial standards to accomplish the reform in the case of *Brown v. Merlo*² which found the California automobile guest statute³ to be unconstitutional. *Brown* illustrates the vitality of the court's resolve to reform and gives evidence of the overriding importance of judicial policy goals in tort law. Given the magnitude of the resolve so strongly shown in *Brown*, this Comment proposes that the California Supreme Court pursue its course one further step by implementing comparative negligence.

One of the primary obstacles to a judicial implementation of

¹ Justice Roger Traynor, *Law and Social Change in a Democratic Society*, U. ILL. L.F. 230, 232 (1956).

² 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

³ The basic premise of a guest statute is that the driver of a vehicle owes no duty of ordinary care to one who rides with him gratuitously. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 16.15, at 950-51 n.4 (1956); *Id.* at 48-49 (Supp. 1968). W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 60, at 382-85 (4th ed. 1971).

comparative negligence which would seem to be manifested in *Brown* manifestly the implementation of this level in the tort law reformulation.

Brown v. Merlo is a classic example of judicial activism. The California guest statute which required a guest in any vehicle to assume the risk of injury for such ride.⁴ The court's decision as a denial of the guest statute would have been alone.⁵ The concurring opinion in *Brown* v. Merlo guest statute violation California Constitution United States Constitution

Several aspects of the decision taken in *Brown* v. Merlo standard of equality rather than merely a matter of fact, rather than

⁴ The California [1929] Cal. Stats. 15 aggravated negligence "unless the plaintiff was injured from the intoxication of the driver."

⁵ In October 1973 in Butte County, California, a divider and crashing mishap, attempted to sue for negligence and willful misconduct from the provisions of the statute which was a usual practice of the statutory exception decided in favor of the plaintiff. The case was decided in favor of the defendant.

For critical analysis of the California guest statute see *Them (The California Judicial Nullification)*

⁶ The equal protection clause in Article 1, section 13 of the California Constitution provides for "uniform operation"; "privileges or immunities of citizens."

comparative negligence has been the doctrine of judicial restraint which would severely restrict the judicial law-making capacity. *Brown* manifests a high level of judicial activism. Judicial implementation of comparative negligence would not reach even this level in that it involves modification of a common law formulation.

Brown v. Merlo is an important exemplar of appropriate judicial activism in tort law and warrants careful analysis. The California guest statute denied recovery for unaggravated driver negligence to any person injured who "as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride."⁴ The plaintiff in *Brown* challenged the statute as a denial of equal protection because a "paying" passenger would have been entitled to recover on the negligence issue alone.⁵ The court agreed. In a thorough and carefully structured opinion written by Justice Tobriner, the court found the guest statute violative of the equal protection guarantees of the California Constitution⁶ and the Fourteenth Amendment of the United States Constitution.

Several aspects of the decision illustrate the activist stance taken in *Brown*. First, the court applied a somewhat redefined standard of equal protection—a standard requiring a "realistic," rather than merely a "legitimate," state purpose which is *substantially*, rather than merely rationally, supported by the classifica-

⁴ The California guest statute was passed in 1929. Ch. 787, § 141.75, [1929] Cal. Stats. 1580, reenacted, ch. 3, § 17158, [1959] Cal. Stats. 1655. The aggravated negligence portions of the statute provided there would be no recovery "unless the plaintiff . . . establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver." *Id.*

⁵ In October 1967, the plaintiff, Brown, was a passenger in Merlo's jeep in Butte County. Unexpectedly the jeep left the road, crossing the center divider and crashing into an embankment. Brown, seriously injured in the mishap, attempted to recover damages from Merlo charging both simple negligence and willful misconduct. The plaintiff did not attempt to exempt himself from the provisions of the guest statute, though as the *Brown* court noted, it was a usual practice for a guest plaintiff to claim he or she was within one of the statutory exceptions. The jury heard the willful misconduct issue and decided in favor of the defendant; plaintiff did not appeal on that cause of action. The case came to the Supreme Court on an appeal from a summary judgment for the defendant on the negligence issue.

For critical and sometimes amusing histories of the applications of the California guest statute, see Lascher, *Hard Laws Make Bad Cases—Lots of Them (The California Guest Statute)*, 9 SANTA CLARA LAW. 1 (1968); Comment, *Judicial Nullification of Guest Statutes*, 41 S. CAL. L. REV. 884 (1968).

⁶ The equal protection guarantees of the California Constitution appear in Article 1, sections 11 & 21: "All laws of a general nature shall have a uniform operation"; and "[no] citizen, or class of citizens [shall] be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

tion system set up by the legislature.⁷ In contrast to its approach in earlier equal protection cases,⁸ the court in *Brown* refused to attribute to the legislature a "theoretically 'conceivable,' but totally unrealistic, state purpose that might support this classification scheme"⁹ Thus the California Supreme Court, perhaps following the lead of the United States Supreme Court in recent equal protection cases,¹⁰ adopted a more activist equal protection standard of review than had been traditionally followed in cases not involving suspect categories of classification or deprivations of fundamental interests.¹¹

Second, the court in *Brown* overtly measured the rationality of both the purpose of the statute and the effectiveness of its classification system against *common law* judgments made by the court in recent tort cases. In *Brown*, common law standards of rationality were made determinative of constitutional rationality; the guest statute fell because it was directed toward a purpose and utilized a classification scheme considered and rejected by the courts in analogous cases.¹² Thus, the court made

⁷ 8 Cal. 3d at 865 & n.7, 506 P.2d at 219 & n.7, 106 Cal. Rptr. at 395 & n.7.

⁸ In previous equal protection cases the California Supreme Court has closely adhered to the "dual level test" in reviewing legislative classifications. Justice Sullivan utilized the two level analysis in *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) and *In re Antazo*, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970). See also *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969). In economic areas the court has exercised restraint, "investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear *some rational relationship to a conceivable legitimate state purpose.*" *Westbrook v. Mihaly*, 2 Cal. 3d 765, 784, 471 P.2d 487, 500, 87 Cal. Rptr. 839, 852 (1970) (emphasis added).

Earlier cases using traditional equal protection review emphasized the wide discretion given the legislature in making classifications. See, e.g., *Subsequent Injuries Fund v. Industrial Accident Comm'n*, 48 Cal. 2d 365, 310 P.2d 7 (1957); *Sacramento Municipal Util. Dist. v. Pacific Gas & Elec. Co.*, 20 Cal. 2d 684, 693, 128 P.2d 529, 535 (1942). These cases were quoted approvingly in *Board of Admin. v. Ames*, 215 Cal. App. 2d 215, 29 Cal. Rptr. 917 (1st Dist. 1963), where a more beneficial retirement plan for legislators and judges was sustained against an equal protection attack.

For recent changes in equal protection standards compare Justice Sullivan's opinions in *Serrano v. Priest*, *supra* and *In re Antazo*, *supra* with *Swoap v. Superior Ct. of Sacramento County*, 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 136 (1973).

⁹ 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

¹⁰ See generally Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther] and cases cited therein.

¹¹ See generally Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*]. For recent developments see Gunther, *supra* note 10; Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) [hereinafter cited as Tribe].

¹² See notes 63-96 & accompanying text *infra*.

a two-step attitudinal relationship review the legislative classification; legislative judgments in tort cases. Included there was equal protection constitutional.

The court's sweeping redefinition have countenanced judgments over apparent that the *Brown* is not good policy. Indeed judicial activism in law.

This Commission in *Brown* through protection. It was tempered and espoused law. Finally it comparative negligence form implicit in than the court made

A. Equal Protection

To appreciate protection analysis in regards ordinarily encountered the demand for equal accommodate the non-legitimate legislative conceive of legislative some way classify

¹³ This term is taken from *Other Approach to Equal Protection* [hereinafter cited as *Other Approach*] in some lower court opinion 476 F.2d 806, 814 (2d Cir. 1974); *Aguayo v. Rich*.

¹⁴ See generally Tribe, 37 CALIF. L. REV. 341 (1973).

a two-step attack upon the statute. First, in requiring a "substantial relationship in fact,"¹³ the court opened to judicial review the legislative judgment underlying the guest-passenger classification; second, the court measured the rationality of the legislative judgment by its own judgments in analogous common law tort cases. Applying this standard of review, the court concluded there was no rational relationship under the traditional equal protection test, and therefore the guest statute was unconstitutional.

The court in *Brown* thus appears to have undertaken a sweeping redefinition of equal protection doctrine and appears to have countenanced anathema—the superiority of judicial policy judgments over those of the legislature. However, it is further apparent that those characteristics of the decision are misleading. *Brown* is *not* good constitutional law; it is, however, sound tort policy. Indeed the case is best understood as an instance of judicial activism in the service of the substantive reform of tort law.

This Comment will delineate the level of judicial activism in *Brown* through careful analysis of the court's use of equal protection. It will then explain that the activism is both well-tempered and especially appropriate as a means of reform of tort law. Finally it will discuss how the judicial implementation of comparative negligence would further the principles of tort reform implicit in *Brown* and would require even less activism than the court manifested in *Brown*.

II. EQUAL PROTECTION

A. Equal Protection Standards

To appreciate fully the activism implicit in the equal protection analysis in *Brown v. Merlo*, it is useful to review the standards ordinarily employed in equal protection cases.¹⁴ In general, the demand for equal protection has always been assumed to accommodate the need of a state to classify its citizens for various legitimate legislative and administrative purposes. It is difficult to conceive of legislation which is functional and which does not in some way classify persons differently. Thus, equal protection

¹³ This term is taken from Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 817 (1973) [hereinafter cited as *Fundamental Personal Rights*], although it has been used in some lower court opinions as well. See, e.g., *Boraas v. Village of Belle Terre*, 476 F.2d 806, 814 (2d Cir. 1973), *rev'd*, 42 U.S.L.W. 4475 (U.S. Apr. 2, 1974); *Aguayo v. Richardson*, 473 F.2d 1090, 1109 (2d Cir. 1973).

¹⁴ See generally Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments, supra* note 11.

traditionally has been said to demand only that a classification system encompass "all [and only those] persons who are similarly situated with respect to the [legitimate] purpose of the law."¹⁶ Justice Tobriner stated in *Brown v. Merlo*: "The primary concern of the 'equal protection' guarantee of our state and federal Constitutions, however, is that 'persons similarly situated with respect to the legitimate purpose of the law receive like treatment'"¹⁶ However, this apparently simple formula requires complex judgments about the legislature's purposes, the legitimacy of those purposes, and the required degree of relevance between the classification and the purposes, since virtually no classification could meet perfectly the general test of "all and only those."¹⁷ With respect to the relationship between the challenged classification and the (assumed) legislative purpose, the classification system at a minimum must "be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."¹⁸

Two completely disparate standards of review for equal protection challenges have been delineated, one of general application and the other of special application to cases involving suspect classifications or touching fundamental interests.¹⁹ In general, the standards differ in both the degree of relevance required between the challenged classification and the statutory purpose and the substantiality of the interest allegedly furthered by the classification.²⁰

1. Rational Relationship Test²¹

This test has been described as "restrained review"²² and as involving "minimal judicial scrutiny."²³ Equal protection re-

¹⁶ Tussman & TenBroek, *supra* note 14, at 346.

¹⁷ 8 Cal. 3d at 876, 506 P.2d at 227, 106 Cal. Rptr. at 403, *citing* Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 578, 456 P.2d 645, 653, 79 Cal. Rptr. 77, 85 (1969); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

¹⁸ *Developments, supra* note 1, at 1076-77.

¹⁹ *P.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

²⁰ The two level structure, particularly as it emerged in the Warren Court, is thoroughly delineated in *Developments, supra* note 11.

²¹ Although Justice Harlan, dissenting in *Katzenbach v. Morgan*, 384 U.S. 641, 660-61 (1966), denied the existence of a dual level test for equal protection, most equal protection scholars are in agreement that such a standard exists. See, e.g., Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966); Gunther, *supra* note 10, at 8-9; *Developments, supra* note 11, at 1120-23.

²² The textual description of the "rational relationship" test is the traditional version, pre-1969 or so.

²³ *Developments, supra* note 11, at 1077.

²⁴ *Fundamental Personal Rights, supra* note 13, at 808.

view under the almost irrebut challenges to constitutionality by hypothesizing a level of effectiveness which is effective level relationship between the legislature and the people therefore almost entirely."²⁴

2. Strict Scrutiny
This most has been applied

²⁴ The case of illustration. *McGo* goods, but excepting gasoline, oils, greases against an equal price ceiling to the legislature their constitutional some inequality. A facts reasonably near the Court was willing legislature might refer to the safety and well

Similar latitude in classification (1949), a law which those by the owners "The local authorities own wares on their the nature or extent

²⁵ Several comments the support for a of purpose is inferred suggested by the plaintiff *Motivation in Constitutional* commentator in Note YALB L.J. 123 (1972) an overall legislative *Id.* at 127.

For illustration of sustain legislation, see U.S. 464 (1948) (state to barowner upheld in *Pilots Comm'r's*, 330 upheld as conceivably

²⁶ *Fundamental* considering the years rational relationship

view under this test has been in reality no review at all, as an almost irrebuttable presumption of constitutionality foils those challenges to legislative classifications.²⁴ This presumption of constitutionality has led many courts to defer to the legislature by hypothesizing some conceivable permissible legislative purpose which is supported by the challenged classification.²⁵ The effective level of judicial scrutiny under the traditional rational relationship test is so minimal and extends so much deference to the legislature that, as one commentator concluded, "[it] has therefore almost always resulted in a finding of constitutionality."²⁶

2. Strict Scrutiny

This most demanding equal protection standard of review has been applied to two types of classifications—those based on

²⁴ The case of *McGowan v. Maryland*, 366 U.S. 420 (1961), provides illustration. *McGowan* sustained a Sunday closing law, banning the sale of all goods, but excepting "tobacco products, confectioneries, milk, bread, fruits, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals" against an equal protection attack. *Id.* at 422-23. The Court extended great leeway to the legislature: "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 425-26. In *McGowan* the Court was willing to "strain" to find a reasonable rationale, concluding the legislature might reasonably have determined that the exemption was conducive to the safety and well-being of the populace. *Id.* at 426.

Similar latitude has been extended to legislatures making very subtle distinctions in classifications. In *Railway Express Agency v. New York*, 336 U.S. 106 (1949), a law which prohibited all commercial advertisements on trucks except those by the owners of the trucks themselves was justified on safety grounds: "The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use." *Id.* at 110.

²⁵ Several commentators have observed that the selection of a purpose as the support for a challenged classification is often a mere tautology since the purpose is inferred from the classification itself: that is, the purpose is suggested by the plain terms of the statute. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205 (1970). The student commentator in Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 *YALE L.J.* 123 (1972) questioned why a single purpose is necessary rather than an overall legislative purpose of "partial achievement of several sub-purposes." *Id.* at 127.

For illustration of the "conceivable" purposes the Court has relied upon to sustain legislation, see Justice Frankfurter's opinions in *Goesaert v. Cleary*, 335 U.S. 464 (1948) (statute denying bartending licenses to women unless related to barowner upheld on the conceivable purpose of avoiding social and moral problems involved in having women in bars); *Kotch v. Board of River Port Pilots Comm'rs*, 330 U.S. 552 (1947) (nepotism statute involving river pilots upheld as conceivably a safety measure).

²⁶ *Fundamental Personal Rights*, *supra* note 13, at 808. Professor Gunther, considering the years prior to 1970, e.g., found the correlation between the rational relationship test and a finding of constitutionality to be "virtually

suspect classifications²⁷ and those infringing fundamental interests.²⁸ This strict scrutiny standard results in a dramatic contraction of the latitude permitted legislatures in classifying their

perfect." Gunther, *supra* note 10, at 19. See also Tribe, *supra* note 11, at 118 n.9. Recent cases, however, have struck down legislation, purportedly using the traditional rational relationship test. See Gunther, *supra* note 10, at 18-20; cases cited notes 13 *supra* & 74 *infra*.

²⁷ The suspect classification doctrine was originally developed and applied in the area of classifications based on race. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (overturning a state antimiscegenation law); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (striking down a law against interracial cohabitation). Classifications based on national ancestry (*Korematsu v. United States*, 323 U.S. 214 (1944)) and alienage (*Graham v. Richardson*, 403 U.S. 365 (1971)) have also been treated as resting on suspect criteria. But with respect to alienage, *Sugarman v. Dougall*, 413 U.S. 634 (1973) and *In re Griffiths*, 413 U.S. 717 (1973) (discussed in detail note 44 *infra*) appear to utilize the rational relationship test though referring to alienage as a suspect category. Four members of the majority in *Frontiero v. Richardson*, 411 U.S. 677 (1973), advocated treating sex as a suspect category. It is deemed to be so under the California Constitution. See *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). Illegitimacy has been suggested as a suspect category. See *Gomez v. Perez*, 409 U.S. 535 (1973); *Levy v. Louisiana*, 391 U.S. 60 (1968). But see *Labine v. Vincent*, 401 U.S. 532 (1971). Perhaps sex and illegitimacy can be classified as "near-suspect" criteria, as suggested in Comment, *A Question of Balance: Statutory Classifications under the Equal Protection Clause*, 26 STAN. L. REV. 155, 158-60 (1973).

²⁸ Various interests have been designated as fundamental by the United States Supreme Court, the protection of which demands strict equal protection scrutiny comparable to that afforded to constitutionally guaranteed rights. The essential characteristic of fundamentality cannot be stated simply. On the one hand, it has been argued that only constitutionally enumerated rights should be treated as sufficiently fundamental to merit this kind of scrutiny. This is the view of the four justices who joined Justice Powell's plurality in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29-36 (1973). See also *Shapiro v. Thompson*, 394 U.S. 618 (1969) (Harlan, J., dissenting); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (Harlan, J., dissenting). The right of interstate travel is said to be of constitutional significance. *United States v. Guest*, 383 U.S. 745 (1966). Legislative classifications impairing its exercise have been subjected to strict scrutiny. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Other interests deemed fundamental are said to derive from constitutionally protected rights or are such that their protection is deemed essential to the exercise of explicitly guaranteed rights. Thus the right to vote (in state elections) is fundamental because it is a necessary prerequisite to the continuation of all rights. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). But see *San Antonio Independent School Dist. v. Rodriguez*, *supra* at 30.

Other rights are more personal: the right to procreate which is designated as fundamental in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). Justice Marshall advocates a standard which would be protective of "the literally vital interests of a powerless minority" while continuing a policy of deference in "the area of economics and social welfare" in his dissent in *Dandridge v. Williams*, 397 U.S. 471, 520 (1968).

Recently the Court has rejected a suggestion that housing is a fundamental interest. *Lindsey v. Normet*, 405 U.S. 56 (1972). The *Rodriguez* majority similarly rejected such a designation for education. The California Supreme Court apparently disagrees. See *Brown v. Merlo*, 8 Cal. 3d 855, 863 n.2, 506 P.2d 212, 216 n.2, 106 Cal. Rptr. 388, 392 n.2 (1973); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

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²⁹ See, e.g., Se "[T]he presumption dispelled, whenever it certain persons beca 626.

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³¹ See Kramer in *In re Griffiths*, J state's interest suffic riding," "compelling," court attributed "no U.S. 717, 722 n.9 (19

³² E.g., in McL that the specific ban by "the general, neu Similarly in a funda (1965), the Court sug to residents could be by the wholesale disen

³³ See Gunther, See also notes 13 *supra*

³⁴ See, e.g., Kra v. Priest, 5 Cal. 3d 584

³⁵ See, e.g., Shap

citizens. The presumption of constitutionality is reversed when the challenged classification utilizes a suspect criterion²⁰ or when it impairs interests deemed to be fundamental.²⁰ Strict scrutiny requires more than a simple rational connection to a legislative purpose; the classification must be "necessary to a compelling governmental interest"³¹ and a less onerous alternative must not be possible.³² Similarly, greater exactitude in the drawing of classifications, as well as a real rather than a hypothetical legislative purpose, is required when scrutiny is strict. Thus the converse effect of the traditional rational relationship test results from the application of the strict scrutiny test—that is, legislation so reviewed consistently has been found to be violative of equal protection.³³

In this two tier system, the critical juncture in a decision is the determination of which test to apply: the traditional deferential test or the strict scrutiny test. If a court finds that a fundamental interest is involved or that the classification is based upon suspect criteria, the court will require strict scrutiny. The foreseeable result in such a case is that the challenged legislative classification will be held to be a denial of equal protection either on the ground that the classification is not "necessary" to achieve the legislative purpose³⁴ or that the legislative purpose, supported by the classification, is not sufficiently "compelling."³⁵ On the other hand, if neither a fundamental interest nor a suspect criterion is involved, the test is the traditional one of a ra-

²⁰ See, e.g., *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952): "[T]he presumption of validity is greatly narrowed in scope, if not entirely dispelled, whenever it is shown . . . that legislation actually discriminates against certain persons because of their race or nationality." *Id.* at 730, 242 P.2d at 626.

³⁰ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964).

³¹ See *Kramer v. Union School Dist.*, 395 U.S. 621 (1969). However, in *In re Griffiths*, Justice Powell reviewed the various characterizations of a state's interest sufficient to justify the use of a suspect classification—"overriding," "compelling," "important," "substantial" and "necessary"—and noted the court attributed "no particular significance to these variations in diction." 413 U.S. 717, 722 n.9 (1973).

³² E.g., in *McLaughlin v. Florida*, 379 U.S. 184 (1964) the Court held that the specific ban on cohabitation by interracial couples could be enforced by "the general, neutral, and existing ban on illicit behavior." *Id.* at 196. Similarly in a fundamental interest case, *Carrington v. Rash*, 380 U.S. 89 (1965), the Court suggested that Texas' interest in restricting the state franchise to residents could be served by individual assessment of residency rather than by the wholesale disenfranchisement of all servicemen. *Id.* at 96.

³³ See *Gunther*, *supra* note 10, at 19; *Tribe*, *supra* note 11, at 118 n.9. See also notes 13 *supra* & 74 *infra*.

³⁴ See, e.g., *Kramer v. Union School Dist.*, 395 U.S. 621 (1969); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

³⁵ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

tional relationship, and the legislation most likely will be sustained.³⁶ The accuracy of this observation is evidenced by Justice Powell's prodigious efforts in *San Antonio Independent School District v. Rodriguez*³⁷ to deny that the case involved either a suspect category (wealth)³⁸ or impaired a fundamental interest (education)³⁹ in order to sustain the Texas school financing system.

3. Transitional Test: Substantive Reasonableness

Dissatisfaction with the rigidity of the two level approach to equal protection⁴⁰ has led to covert attempts to formulate a standard of review which permits an intermediate degree of judicial scrutiny.⁴¹ Professor Gunther saw in these efforts a higher standard of scrutiny in cases not involving suspect categories or touching fundamental interests. He concluded, "The Court is prepared to use the [equal protection] clause as an interventionist tool without resorting to strict scrutiny language"⁴² The emerging standard of equal protection has been called "substantial relationship in fact,"⁴³ implying that it constitutes a stronger version of the rational relationship test, though no such clear enunciation has come from the Supreme Court. Indeed, there seems to be some struggle over equal protection criteria. In recent suspect classification cases, the standards of strict scrutiny seemed to undergo some dilution in strictness, resulting in a muting of the differences between the levels of the two tier rationale.⁴⁴

³⁶ *But see* cases cited note 13 *supra* & 42, 74 *infra*.

³⁷ 411 U.S. 1 (1973).

³⁸ *Id.* at 18-29.

³⁹ *Id.* at 29-39. That was despite the fact that a line of cases beginning with *Brown v. Board of Education*, 347 U.S. 483 (1954) have so classified education. See the dissenting opinions filed by Justices Brennan, White, Douglas, and Marshall in *Rodriguez*, 411 U.S. at 63-133.

⁴⁰ See, e.g., Justice Marshall's dissent in *Dandridge v. Williams*, 397 U.S. 471, 520-23 (1968).

⁴¹ Gunther, *supra* note 10; Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 *FORD L. REV.* 605 (1973); *Fundamental Personal Rights*, *supra* note 13. See cases cited in *Brown*, 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

⁴² Gunther, *supra* note 10, at 12. It should be noted that Professor Gunther further suggests that a weakening of the strictness of the strict scrutiny standard may be a contrapuntal element of the "newer" equal protection as well. Recent cases suggest the accuracy of the second observation, see, e.g., *Kahn v. Shevin*, 42 U.S.L.W. 4591 (U.S. Apr. 24, 1974) (holding that a statute granting widows, but not widowers, a \$500 property tax exemption not violative of equal protection); *Village of Belle Terre v. Boraas*, 42 U.S.L.W. 4475 (U.S. Apr. 2, 1974) (discussed in notes 52-54 & accompanying text *infra*).

The *Brown* court, however, cited Gunther's "prediction" of a "new bite" for the "traditional 'rational basis' test." 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

⁴³ See note 13 *supra*.

⁴⁴ For example in *Sugarman v. Dougall*, 413 U.S. 634 (1973), the Court

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The "newer" equal protection doctrine may have a much more delimited meaning, however. One of the most salient fea-

found a New York state ban on permanent employment by aliens in "competitive job classifications" to be violative of equal protection. The Court acknowledged that classifications based on alienage are "subject to close judicial scrutiny" (*id.* at 64.) but then reverted to language more akin to the rational relationship test: "We therefore, look to the substantiality of the State's interest in enforcing the statute in question, and to the narrowness of the limits within which the discrimination is confined." *Id.* The tone of the opinion leans away from the "suspect" category as a *per se* test for constitutionality: "A restriction on the employment of noncitizens, narrowly confined, could have particular relevance to this important state responsibility, for alienage itself is a factor that reasonably could be employed in defining 'political community'." *Id.* at 649. Similarly, *In re Griffiths*, 413 U.S. 717 (1973), a companion case of *Sugarman*, struck down a Connecticut ban on the admission of aliens to the bar because the state failed to demonstrate the rationality of its wholesale ban: "[T]he Committee has failed to show the relevance of citizenship to any likelihood that a lawyer will fail to protect faithfully the interest of his clients." *Id.* at 724.

Similarly, several of the cases cited in *Brown* for the new, stronger rational relationship test might have reached the same results through the application of the strict scrutiny standard if they had been decided by an earlier Court. Two of the cases so cited involved classifications which have been suggested as having the essential characteristics of suspect categories, that is, an immutable trait, determined at birth and bearing no relation to an individual's ability to perform or contribute to society. *Developments, supra* note 13, at 1126-27. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) struck down a statutory exclusion of illegitimate dependent children from recovery under the Louisiana workmen's compensation statute. Illegitimacy had been suggested for suspect designation. See cases cited note 27 *supra*. The plurality in *Frontiero v. Richardson*, 411 U.S. 677 (1973) suggested the explanation of *Reed v. Reed*, 404 U.S. 71 (1971) was that sex was a suspect category justifying departure from the deferential traditional rational relationship in that case. 411 U.S. at 682. See also Justice Marshall's dissent in *Rodriguez*, 411 U.S. at 70 (1973).

None of the cases cited by the *Brown* court involved a designated fundamental interest category. However, several of the cases concern interests parallel to earlier cases discussed in the rubric of fundamental interests. *James v. Strange*, 407 U.S. 128 (1972) struck down a Kansas statute which was designed to recoup legal defense fees. *James* appears to have utilized stricter scrutiny than the traditional rational relationship test it purported to use. Justice Powell in fact acknowledged both the importance of the state's purpose and the rational relevance of the classification to the attainment of the purpose. This is usually sufficient to satisfy the traditional test for constitutionality. Instead Justice Powell appeared to employ the less onerous alternative requirement in striking down the statute. The key to the stricter standard appeared to be the same kind of wealth discrimination recognized in *Douglas v. California*, 372 U.S. 353 (1963) and *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966): not wealth *per se*, but a classification of wealth affecting some other important individual interest.

Stanley v. Illinois, 405 U.S. 645 (1972) did not use the specific language of fundamentality, but it certainly evoked the essence of the doctrine:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a *powerful countervailing interest*, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

Id. at 651 (emphasis added).

tures of the new doctrine is that it appears to be applicable to situations where (1) a statutory classification scheme is (at least arguably) supportive of a state goal, (2) the classification is clearly overinclusive in individual cases, and (3) there is no appeal from the presumptive classification. In *Reed v. Reed*⁴⁵ the Supreme Court acknowledged the legitimacy of the state purpose in minimizing government expenditure by the elimination of an individual hearing. However, even though the classification scheme arguably supported the state purpose of obtaining the best estate administrators,⁴⁶ neither the state goal nor the underlying rationale was sufficiently preeminent to allow a state to make a decision by presumption between equally qualified men and women.⁴⁷ The result in *Stanley v. Illinois*⁴⁸ was the same. Despite the important interest of the state in the protection of children and the conceivable validity of the assumption underlying the classification that "most unmarried fathers are unsuitable and neglectful parents,"⁴⁹ the Court said the denial of a hearing to an individual unmarried father was not reasonable.

In *Reed* and *Stanley* the Court was unable to find a sufficient "rational" connection between the purpose of the statute and the differential status established to implement it. The cases strongly demonstrate antipathy to presumptive procedure.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.⁵⁰

Thus the redefined activist equal protection standard of substantive reasonableness seems to demand not only that the relationship between the classification and the purpose be substantial but

⁴⁵ 404 U.S. 71 (1971). An Idaho probate statute which dictated a preference for a man over an equally qualified woman when appointing an administrator of an estate was struck down as a denial of equal protection.

⁴⁶ One rationale offered was that men generally have more business experience than women and thus would probably make better administrators.

⁴⁷ The plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973) indicated that the Court's abandonment of the traditional rational basis test in *Reed* actually occurred because they concluded "classifications based upon sex . . . are inherently suspect . . ." *Id.* at 688.

⁴⁸ 405 U.S. 645 (1972). Mr. Stanley's three illegitimate children were taken from him following their mother's death. This occurred under the state system which presumed an unwed father to be unfit to raise his children while all other "parents" (married, unmarried, or adoptive) (*id.* at 650, citing Juvenile Court Act, ch. 37, § 14, [1966] Ill. Laws Reg. Sess. 2585) were afforded the protection of a judicial neglect hearing involving "notice, hearing and proof of such unfitness." *Id.*

⁴⁹ *Id.* at 654.

⁵⁰ *Id.* at 656-58.

also that the classification is avoided.

If the Supreme Court applied a two tier test, a state may be able to justify its classification and apply it. In *Boraas v. Villagrasa*, 476 F.2d 80 (9th Cir. 1974), the court found a racial classification in a law governing the occupancy of dwellings to be unconstitutional. The court found that the law was more than two unrelated standards, but a "more flexible" standard. "Under this approach, the Equal Protection Clause is substantially related to the classification."

Manifestly, the relationship and reiteration of the relationship to a parent, however, whether it is reasonable or not.

B. Activist Equal Protection

In *Brown v. Board of Education*, 347 U.S. 483 (1954), the court found that the segregation of children "comparable to that which would be for injuries neglected to constitute a fundamental right." It then subjected the segregation to strict scrutiny and found that the effect of adopting the traditional standard in *Brown* was struck down as unconstitutional.

⁵¹ *Stanley* impairs the protection of his children is so significant a part of all unwed fathers' lives that it is a denial of equal protection. *Id.* at 652.

⁵² 476 F.2d 80 (9th Cir. 1974).

⁵³ *Id.* at 814 (citing *id.* at 814).

⁵⁴ 42 U.S.L.W. 10,000 (1974).

⁵⁵ It is difficult to see how the Dep't of Agriculture's classification denying to have no rational basis for the classification probably most accurately reflects the applicable standards of the Equal Protection Clause.

⁵⁶ 8 Cal. 3d at 100.

also that the classification be carefully drawn so that overinclusion is avoided.⁵¹

If the Supreme Court recently has been inclined to blend the two tier test, a few lower courts have been more open in enunciating and applying a "newer" standard of equal protection. In *Boraas v. Village of Belle Terre*,⁵² the Second Circuit Court of Appeal found a zoning ordinance unconstitutional which limited occupancy of dwellings to traditional families or to groups no larger than two unrelated persons. In the clearest expression of the new standard, the court formulated and applied what it deemed a "more flexible and equitable approach" to equal protection: "Under this approach the test for application of the Equal Protection Clause is whether the legislative classification is *in fact* substantially related to the object of the statute."⁵³

Manifestly, the Supreme Court disagreed, reversing the decision and reiterating the traditional language of "rational relationship" to a permissible local goal.⁵⁴ It is not yet clear, however, whether the reversal is a complete rejection of "substantive reasonableness."⁵⁵

B. *Activist Equal Protection in Brown v. Merlo*

In *Brown v. Merlo*, the California Supreme Court appeared to adopt a stance similar to that of the Second Circuit in *Boraas*. The court found automobile guests were not a suspect category "comparable to racial or sexual classifications" and that recovery for injuries negligently inflicted by the host-driver did not constitute a fundamental interest "analogous to voting rights or education." It therefore rejected the plaintiff's contention that the strict scrutiny standard of review should apply.⁵⁶ Although in effect adopting a standard stricter than the no-review stance of the traditional rational relationship test, the court's analysis in *Brown* was structured similarly to that in cases applying the traditional standard.

⁵¹ *Stanley* implies the interest of the individual father in retaining custody of his children is so "cognizable and substantial" that even a showing that 99 percent of all unwed fathers are unfit would be insufficient to sustain the statute. *Id.* at 652.

⁵² 476 F.2d 806 (2d Cir. 1973), *rev'd*, 42 U.S.L.W. 4475 (U.S. Apr. 2, 1974).

⁵³ *Id.* at 814 (emphasis in original).

⁵⁴ 42 U.S.L.W. 4475 (U.S. Apr. 2, 1974).

⁵⁵ It is difficult to reconcile the reversal of *Boraas* with United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), where a virtually identical classification denying food stamps to members of unrelated households was found to have no rational relationship to a legitimate legislative purpose. It is probably most accurate to say that the law is uncertain with regard to the applicable standards of equal protection review.

⁵⁶ 8 Cal. 3d at 862 n.2, 506 P.2d at 216 n.2, 106 Cal. Rptr. at 392 n.2.

The court first ascribed to the statute two alternative purposes—each of which has been advanced in judicial opinions and commentary.⁵⁷ The first purpose was the promotion of hospitality “by insulating generous drivers from lawsuits instituted by ungrateful guests who have benefited from a free ride.”⁵⁸ According to the court, this rationale contained two separate policy strands: (a) affirmation of the axiom, “you get what you pay for,” and (b) legislative condemnation of an instance of inexcusable ingratitude.⁵⁹ The second purpose considered was “to eliminate the possibility of collusive lawsuits, in which a host fraudulently confesses negligence so as to permit his guest—presumably a friend or relative—to collect from the host’s insurance company.”⁶⁰ Neither purpose was challenged by the court as being impermissibly discriminatory or beyond the scope of legislative power.

The second step in the court’s analysis was the delineation of the classification system set out in the statute. The guest statute at the time of *Brown* read as follows:

No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the owner or guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.⁶¹

Thus, as pointed out by the court, the statute established a “tripartite” classification system: (1) “paying” automobile guests and “non-paying” automobile guests; (2) automobile guests and social guests; and (3) several subclasses within the statute itself (“in a vehicle,” “during a ride,” and “upon a public highway”).⁶² The court then discussed each of the asserted purposes in light of the triple classification system to determine whether the classifications were reasonably relevant to the purposes.

1. The Hospitality Purpose

The court observed that under contemporary California law

⁵⁷ See, e.g., *Stephan v. Proctor*, 235 Cal. App. 2d 228, 45 Cal. Rptr. 124 (2d Dist. 1965); 2 HARPER & JAMES, *supra* note 2, § 16.15, nt 961 (1956 ed.).

⁵⁸ 8 Cal. 3d at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394.

⁵⁹ *Id.* at 866, 506 P.2d at 220, 106 Cal. Rptr. at 396.

⁶⁰ *Id.* at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394.

⁶¹ Ch. 3, § 17158, [1959] Cal. Stats. 1655, amended ch. 1600, § 1, [1961] Cal. Stats. 3429 (emphasis added).

⁶² 8 Cal. 3d at 863, 506 P.2d at 217, 106 Cal. Rptr. at 393.

“similarly situated (of generosity) injuries.”⁶³ The statute was a tort law and a tort law. This California tort law of reasc and deference tional no-revie

The court of reasonable decisions abandoned landoccupiers eliminating the charitable inst against recovery *v. Rowland* cupiers a sing characterized case, *Malloy* another category of cha afforded by the

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⁶³ The Court (or motorboat) g interest in protec Cal. Rptr. at 394-

⁶⁴ *Id.* at 86-

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⁶⁷ 37 Cal. 2-

⁶⁸ See *Rail v. Lindsley v. Natur supra.*

The fact that

"similarly situated individuals," (i.e., other guests and recipients of generosity) are permitted to recover for negligently inflicted injuries.⁶³ The differential treatment of automobile guests under the statute was thus contrary to the mainstream of California tort law and therefore "an arbitrary and unreasonable classification."⁶⁴ This conclusion, while sound in light of developing California tort law, amounts to the substitution of a judicial judgment of reasonableness for the presumption of constitutionality and deference to legislative judgment which underlay the traditional no-review rational relationship test.

The court in *Brown* measured the constitutional requirement of reasonableness in light of the rationales of common law decisions abandoning old limits on the duties of landowners and landoccupiers to those injured on their property and decisions eliminating the immunity from negligence liability enjoyed by charitable institutions. These decisions found the historical rules against recovery for negligence to be irrational in modern society. *Rowland v. Christian*⁶⁵ imposed upon landowners and occupiers a single duty of due care to all persons, including those characterized as "social guests" or "invitees."⁶⁶ In an earlier case, *Malloy v. Fong*,⁶⁷ the court applied the same reasoning to another category of gratuitous relationships, holding that beneficiaries of charitable institutions were entitled to the protections afforded by the requirement of due care.

The decisions in *Rowland* and *Malloy* did not have to find an equal protection violation in order to alter tort law principles since there were no statutes involved. However, in *Brown* the court's prior judgments of the irrationality of the rules limiting recovery in situations analogous to that of the guest statute were transmuted into judicial criteria for determining the constitutionality of legislation. This was a departure from traditional equal protection review which had merely demanded a showing of conceivable reasonableness.⁶⁸ This departure demonstrates the

⁶³ The Court found no rational distinction between automobile (or airplane or motorboat) guests and "all other guests" in relation to an asserted state interest in promoting hospitality. *Id.* at 864 n.5, 506 P.2d at 218-19 n.5, 106 Cal. Rptr. at 394-95 n.5.

⁶⁴ *Id.* at 865 n.6, 506 P.2d at 219 n.6, 106 Cal. Rptr. at 395 n.6.

⁶⁵ 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

⁶⁶ The court concluded: "Whatever may have been the historical justifications for the common law distinctions [between social guests and business guests], it is clear that those distinctions are not justified in the light of our modern society . . ." *Id.* at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.

⁶⁷ 37 Cal. 2d 356, 232 P.2d 241 (1951).

⁶⁸ See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949); *Lindsay v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); cases cited note 25 *supra*.

The fact that the old rules against recovery persist in the majority of

extent of the court's commitment to the reform of tort law. In *Brown*, the court clearly abandoned a posture of complete deference to legislative judgments and relied upon its own stringent evaluation of the rationality of the challenged classification:

Rowland, *Malloy* and *Silva* teach that "however laudable" the motives of a hospitable host or generous charity, it is irrational to reward that generosity by subjecting beneficiaries to a greater risk of uncompensated injury than is faced by other individuals; under this principle, the guest statute's classification scheme is clearly unreasonable.⁶⁹

The *Brown* court, acknowledging that it could do so, refused to ascribe a theoretically "conceivable" purpose to the classification system differentiating automobile guests.⁷⁰ The refusal to do so constitutes a further departure from traditional equal protection review. Justice Rehnquist, dissenting from the decision in *Weber v. Aetna Casualty & Surety Co.*⁷¹ succinctly stated the traditional approach:

[Equal protection] requires neither that State enactments be 'logical' nor does it require that they be 'just' in the common meaning of those terms. It requires only that there be some conceivable set of facts which may justify the classification involved.⁷²

Brown substituted for this permissive test a requirement of rational relationship to an *actual* rather than constructive legislative purpose. Acknowledging that this was in some fashion "new,"⁷³ the court found precedent for its action in seven recent United States Supreme Court cases which purportedly used the

jurisdictions is evidence that the underlying rationale is at least reasonable to the point of being "conceivable" which was sufficient to satisfy the traditional test. To date a declassification of landowner immunities similar to *Rowland* has been adopted only in Hawaii and the District of Columbia. See *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir. 1972); *Pickard v. Honolulu*, 51 Hawaii 134, 452 P.2d 445 (1969); *Gibo v. Honolulu*, 51 Hawaii 299, 459 P.2d 198 (1969) (imposing a duty of reasonable care to all persons reasonably anticipated to be on the premises). There are, however, suggestions that *Rowland* will be followed in the future in Colorado and Missouri. See *Mile High Fence Co. v. Radovich*, 474 P.2d 796 (Colo. Ct. App. 1970), *aff'd*, 489 P.2d 308 (Colo. 1971) and *Smith v. Mill Creek Court, Inc.*, 457 F.2d 589 (10th Cir. 1972) (which stated that *Mile High* "did away with the distinctions." *Id.* at 591); *Heald v. Cox*, 480 S.W.2d 107 (Mo. Ct. App. 1972) (which termed the distinctions "vestigial remnants of the historical past." *Id.* at 109). Numerous cases in other jurisdictions since *Rowland* have maintained the landowner liability classification system. See, e.g., *Lemon v. Busey*, 204 Kan. 119, 461 P.2d 145 (1969); *Moore v. Denune & Pipic, Inc.*, 26 Ohio St. 2d 125, 55 Ohio Op. 2d 237, 269 N.E.2d 599 (1971); Annot., 35 A.L.R.3d 230 (1971, Supp. 1973); Annot., 32 A.L.R.3d 496 (1970, Supp. 1973).

⁶⁹ 8 Cal. 3d at 870-71, 506 P.2d at 223, 106 Cal. Rptr. at 399.

⁷⁰ *Id.* at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

⁷¹ 406 U.S. 164 (1972).

⁷² *Id.* at 183 (Rehnquist, J., dissenting).

⁷³ 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

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⁷⁴ The cases v. Indiana, 406 U.S. 164 (1972); *Stanley v. Rael*, 403 U.S. 504 (1972); *U.S. 71* (1971).

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⁷⁶ *Reed v. Reed*, 404 U.S. 71 (1971).

⁷⁷ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁷⁸ See *Karst v. United States*, 415 U.S. 360 (1974).

Equal Protection, cited in note 74 as to cases within the *Invidious Discrimination Due-Process Form*

⁷⁹ See the discas cited note 25

⁸⁰ 8 Cal. 3d at 870-71, 506 P.2d at 223, 106 Cal. Rptr. at 399.

traditional rational relationship standard of equal protection to strike down statutory classification schemes.⁷⁴ As pointed out above,⁷⁵ many of the cases cited involved situations which earlier might have been decided under the strict scrutiny standard, because they involved, for example, classifications based on sex⁷⁶ or infringed privacy interests.⁷⁷ Thus the more stringent application of the rational relationship test was justifiable even in traditional terms. The *Brown* court had no similar rationalization for its application of the more activist standard. So *Brown* appeared to be an expansion of the application of "activist" equal protection.

Such an expansion may be criticized as a return to a pre-1935 judicial predilection for substantive review of legislation—derogatorily referred to as "substantive equal protection" by some commentators.⁷⁸ However, the court's approach in *Brown* appears to be less of a rampaging "activism" than a retreat from the kind of unthinking deference apparently endemic to traditional equal protection review of legislative schemes.⁷⁹ The California Supreme Court simply refused to engage in what it termed "such a highly fictionalized approach."⁸⁰ This refusal restores to the judiciary a measure of credibility abdicated under the result-oriented approach of traditional equal protection analysis.

2. The Collusion Prevention Purpose

The second ostensible purpose of the guest statute fared no better under the *Brown* court's reasonableness standard. The rationale of the guest statute was said to be that there was substantial risk that guest and insured driver would falsely swear to negligence so that the guest could recover from the driver's insurance company. In order to avoid such fraudulent actions, the legislature barred non-paying passengers from recovery for sim-

⁷⁴ The cases cited were: *James v. Strange*, 407 U.S. 128 (1972); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971).

⁷⁵ See note 44 *supra*.

⁷⁶ *Reed v. Reed*, 404 U.S. 71 (1971).

⁷⁷ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁷⁸ See *Karst & Horowitz, Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CR. REV. 39. Prior to *Brown* and perhaps the cases cited in note 74 *supra*, "substantive equal protection" appeared to be confined to cases within the suspect category-fundamental interest spectrum. See *Karst, Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law—Due-Process Formula,"* 16 UCLA L. REV. 716 (1969).

⁷⁹ See the discussion of *McGowan v. Maryland* in note 24 *supra*. See also cases cited note 25 *supra*.

⁸⁰ 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

ple negligence. The court examined this underlying rationale and concluded that the goal of preventing collusive lawsuits and potential fraud upon insurance companies does not "provide a sufficient basis for the statute's wholesale elimination of all automobile guests' causes of action for negligently inflicted injury."⁸¹ The court found irrationality in two aspects of this system: First, the elimination of all suits because of the risk that a few might be collusive and second, the differentiation between vehicle passengers on the basis of whether payment was given did not rationally relate to the problem of collusion.⁸²

As it did in considering the hospitality purpose, the court observed that it had previously examined policies which eliminated all lawsuits between whole classes of individuals because of the risk of collusion. A line of cases examining common law interfamilial immunities found the rationale of collusion to be unreasonable in that it amounted to a per se rejection of recovery with no alternative for non-collusive situations.⁸³ In *Emery v. Emery*⁸⁴ the seminal case in the interfamilial immunity line of cases, the court concluded, "the fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class."⁸⁵

Applying this reasoning to the classification scheme of the guest statute, the court said that the paying-nonpaying distinction was

a classic case of an impermissibly overinclusive classification scheme, that is, a scheme in which a statute's classification "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims".⁸⁶

The classification was overinclusive because it eliminated the lawsuits of honest plaintiffs as well as the lawsuits of collusive

⁸¹ *Id.* at 872-78, 506 P.2d at 224-28, 106 Cal. Rptr. at 400-04.

⁸² *Id.* at 875, 506 P.2d at 226-27, 106 Cal. Rptr. at 402-03.

⁸³ *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955).

⁸⁴ 45 Cal. 2d 421, 289 P.2d 218 (1955).

⁸⁵ *Id.* at 431, 289 P.2d at 225. In *Brown*, the court found the risk of collusion to be smaller in the automobile guest situation than in the family lawsuit, terming the automobile guest status a "far grosser indicant of the likelihood of collusion" since it exempted friends or relatives who give "compensation" and who in the court's opinion "pose as great a risk of collusion as nonpaying guests." In addition, the nonpaying distinction eliminated many persons with no close relationship with the driver and who therefore presented little danger of collusion. 8 Cal. 3d at 875, 506 P.2d at 226, 106 Cal. Rptr. at 402.

⁸⁶ *Id.* at 876, 506 P.2d at 227, 106 Cal. Rptr. at 403 (utilizing Tussman & tenBroek's standard definition of an overinclusive classification). Tussman & tenBroek, *supra* note 14, at 351.

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plaintiffs. Here again a *common law* determination of the reasonableness of a category was used to measure the *constitutionality* of the statute.

It should be recognized that the guest statute provisions represented the judgment of the legislature (albeit thirty years ago and under undoubted political pressure from insurance lobbies⁸⁷) that the danger of collusion in the automobile guest situation is so great as to require elimination of all recoveries except for willful misconduct or intoxication. The provision as to compensation represented a judgment that one who paid should have been able to claim a higher degree of due care from the driver of the automobile than one who did not pay. While operating in the verbal range of the traditional equal protection test, the court was in reality passing judgment upon the soundness of these legislative policy judgments.

The court's approach seemed to be that, even given what is a very legitimate interest of the state (prevention of collusion), any per se exclusion classifications must be precisely tailored to promote that interest in order to meet the demand of equal protection. For example, in *Brown* the court concluded "'compensation' is not a factor that assures dishonesty in its absence, or that guarantees honesty in its presence"⁸⁸ The court further noted that the statute merely changed the probable basis of collusion from fraudulent representations as to negligence to fraudulent representations as to whether compensation was given.⁸⁹ However, the traditional equal protection standard had long been tolerant of such *underinclusiveness* on the rationale that a legislature "is free to remedy parts of a mischief or to recognize degrees of evil and to strike at the harm where it thinks it most acute."⁹⁰

Requiring greater exactitude between the challenged classification and the state interest it allegedly supports accords with the approach of the United States Supreme Court in the cases

⁸⁷ PROSSER, *supra* note 2, § 34, at 187; Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287, 287-88 (1958); Note, 5 UTAH L. REV. 257, 258 & n.10 (1968).

⁸⁸ 8 Cal. 3d at 878, 506 P.2d at 228, 106 Cal. Rptr. at 404.

⁸⁹ *Id.* at 875, 506 P.2d at 226-27, 106 Cal. Rptr. at 402-03.

⁹⁰ *Developments, supra* note 11, at 1084, citing *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955), where Justice Douglas wrote for the Court:

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

Id. at 489 (citations omitted). See also *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), discussed in note 24 *supra*.

cited in *Brown*.⁹¹ It also reflects the Court's disapproval of classifications which create irrebuttable presumptions. For example, in *Vlandis v. Kline*⁹² the Court struck down a statute which assumed, allowing no showing to the contrary, that all married applicants to the state universities who have out-of-state mailing addresses are and remain non-residents for as long as they are students in the state. *Vlandis* relied upon due process deficiencies; and perhaps one valid reading of the "newer" equal protection cases is as an amalgam of equal protection and due process requirements.⁹³ Given a conceivable legislative judgment, for example, that paying passengers are less likely to be collusive, an individual passenger is still entitled to a separate evaluation as to whether or not he or she is in fact colluding. This seems to be in accord with the results in *Reed v. Reed*⁹⁴ and *Stanley v. Illinois*⁹⁵ where neither plaintiff had recourse to establish their qualifications apart from the presumptions established by the statutory classifications.⁹⁶

The "newer" equal protection may simply be a fusing of procedural due process requirements to legislative classifications which are not precisely tailored in and of themselves. While there may be a "conceivable" relationship between the classification and the legislative purpose, it is not so unequivocally certain as to justify denial of benefits or impose burdens on the basis of such status alone.

3. The Statutory Subclasses

The final equal protection consideration in *Brown* was that the internal subclasses of the guest statute were irrational in light of the purposes of the act (collusion prevention and promotion of hospitality) and rendered the recovery or lack of recovery largely "fortuitous." The statute burdened only a "portion of all injured automobile guests."⁹⁷ The court examined the subcategories of section 17158—"during the ride," "in any vehicle," and "upon a highway" and found: (1) They were totally unre-

⁹¹ See cases cited note 74 *supra*.

⁹² 412 U.S. 441 (1973).

⁹³ It has been suggested that many of the equal protection cases could have been decided on due process grounds. See Karst, *supra* note 78; Karst & Horowitz, *supra* note 78; Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

⁹⁴ 404 U.S. 71 (1971).

⁹⁵ 405 U.S. 645 (1972).

⁹⁶ It is true that Stanley might have been able to regain custody of his children through adoption proceedings or as guardian. The Court rejected this solution saying it had not embraced "the general proposition that a wrong may be done if it can be undone." *Id.* at 647.

⁹⁷ 8 Cal. 3d at 878-82, 506 P.2d at 228-31, 106 Cal. Rptr. at 404-07.

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lated to the collusion prevention purpose of the statute, and (2) they resulted in a pattern of unequal judicial treatment of persons "similarly situated." These statutory subclassifications created a structure of illogical uncertainty which the court found similar to the pattern resulting from statutory and common law exceptions to sovereign immunity prior to *Muskopf v. Corning Hospital District*.⁹⁸

The court specifically denied that any disparity resulting from the application of the subcategories was of judicial origin.⁹⁹ The distinctions, it argued, derived from the legislature, not the courts. Furthermore, a narrow statutory construction by the courts was appropriate since the guest statute was an exception to the general rule of recovery for negligently caused injury, and finally, the failure of the legislature to counteract such judicial interpretations indicated its approval.¹⁰⁰ Regardless of whether the restrictive interpretations were legislatively mandated or judicially created, it should be noted that it was the consequent disparity of results for plaintiffs "similarly situated" which constituted the violation of equal protection.

4. Summary of Equal Protection in *Brown*

The equal protection analysis in *Brown* departed in three significant respects from traditional equal protection: (1) in requiring a "real reason" for the statute rather than a hypothetical one, (2) in applying *common law* determinations of reasonableness to determine the rationality of a statutory classification system, and (3) in refusing to tolerate relative inexactness of classification in light of the alleged legislative purpose supported by the classification. But whatever the ultimate delineation of the "newer" equal protection criteria by the California Supreme

⁹⁸ 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). In *Muskopf*, the court observed that the government immunity doctrine "has become riddled with exceptions, both legislative . . . and judicial . . . , and the exceptions operate so illogically as to cause serious inequality." *Id.* at 216, 359 P.2d at 460, 11 Cal. Rptr. at 92.

Prior to *Muskopf*, scattered statutory exceptions to sovereign immunity provided at least occasional relief. See examples cited note 187 *infra*. Prior to *Brown*, it was the statute which barred recovery while judge-made exceptions allowed recovery for some fortunate automobile guests. But the reform thrust of both *Muskopf* and *Brown* was identical: to increase the opportunity for compensation of those injured.

For a highly satirical summary of the effect of the subcategories on actual recovery see Lascher, *supra* note 5, at 14.

⁹⁹ 8 Cal. 3d at 880 n.20, 506 P.2d at 230 n.20, 106 Cal. Rptr. at 406 n.20.

¹⁰⁰ *Id.* However, it may be noted that a court's responsibility to interpret legislation so as to make it constitutional, if possible, is at least matched by the requirement of strict construction of statutes in derogation of the general standard of liability.

Court, its decision in *Brown v. Merlo* primarily represents a further step in the court's modernization of tort law rather than a precedential change in equal protection doctrine.¹⁰¹ The equal protection analysis in *Brown* relied heavily upon recent California tort cases. The cases provided in the first instance the evolving common law standard of tort liability toward social guests against which the ossified statutory treatment of the similarly situated automobile guest was measured and found wanting. In the second instance, common law assessments of the reasonableness of a policy which deprived whole classes of plaintiffs of a cause of action for negligence either to promote hospitality or to prevent collusion were utilized to construct a constitutional standard of rationality. The underlying rationale of *Brown* was the same as that of recent decisions reforming California tort law—a judicial policy that people should be compensated for their injuries, at least when there is a financially responsible defendant able to absorb and spread the initial risk of loss.

The real significance of the activist equal protection standard utilized in *Brown* does not lie in constitutional law. Rather it lies in the graphic demonstration of the assiduity with which the California Supreme Court is determined to pursue its goal of reform of tort law. At the same time, *Brown v. Merlo* represents a confluence of tort law and constitutional law—embodying as it does both the increasing antipathy of common law courts to liability rules which automatically exclude whole classes of plaintiffs from recovery for negligently inflicted injuries and the constitutional law standards of equal protection and due process which demand that a plaintiff have some opportunity to overcome statutory or administrative presumptions.

II. JUDICIAL ACTIVISM IN THE REFORM OF CALIFORNIA TORT LAW

A. Review of Tort Law Reform in California

Although it utilized a novel approach, *Brown v. Merlo* is only the latest in a distinguished line of cases which have re-

¹⁰¹ The fact that *Brown* is not a constitutional law precedent is evident in the fact that it has yet to be cited for its equal protection standard. See, e.g., the recent cases of *Swoap v. Superior Court*, 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 136 (1973); *D'Amico v. Board of Medical Exam'rs*, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974). Note especially Justice Tobriner's dissent in *Swoap* where he protests against the use of the "minimal rationality" test without referring to *Brown* as precedent for another standard. 10 Cal. 3d 490, 511, 516 P.2d 840, 854, 111 Cal. Rptr. 136, 150 (1973).

An intermediate appellate court has interpreted *Brown* conservatively: "*Brown* demonstrates not all legislative classifications are rationally related to legitimate government purposes, but does not allow the court to substitute its judgment for

formed tort law commentators toward increasing liability from the inevitable areas of history.¹⁰³ A coalition of risk-spreaders and any single incident affect the entire years represent a statutory limitation than imposing precedents.¹⁰⁴ was to create negligence,¹⁰⁵ and finally the of liability be harm for which

that of the Legislature San Diego, 35 Cal.

¹⁰² See, e.g., (1954); Keeton, *Appellate Courts, and Lawmaking*, [hereinafter cited

¹⁰³ Professor in two directions so as to clear out that inhere in the *supra* note 102, at

¹⁰⁴ Evidence served in the California considering a no-fault tort and loss-spreading nature's concern with increasing compensation 723, 313 P.2d 88

injured while a passenger on the California Legislature thereby restrict the which reads: "No

driven by another Stat. 3429. The decision (8 Cal. 3d) although the statute statutory distinction passenger. Patton

(1963). The ban See 1973 amendment other than owners. Jones, 35 Cal. App.

¹⁰⁵ Traynor, *et*

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¹⁰⁷ C. Gregor

formed tort law in California. The thrust of tort reform, which commentators are united in characterizing as dramatic,¹⁰² is toward increasing the incidence of recovery for injuries resulting from the inevitable clashes of flesh and machine by eliminating areas of historical immunity and by expanding the scope of liability.¹⁰³ A corollary concern has been to increase the incidence of risk-spreading so as to reduce the impact of actual loss on any single individual. Reform has been so thorough-going as to affect the entire structure of the law.¹⁰⁴ Judicially, the past few years represent an almost complete rejection of nineteenth century limitations on recovery. However, reform is doing more than imposing rationality upon "our senseless hodgepodge of precedents."¹⁰⁵ While the orientation of the nineteenth century was to create and delineate immunities and restrict liability to negligence,¹⁰⁶ that of the twentieth century has been to curtail and finally eliminate those immunities and to expand the range of liability beyond negligence by greatly expanding the kinds of harm for which the standard is strict liability.¹⁰⁷

that of the Legislature when a rational relationship can be shown." *Hughes v. San Diego*, 35 Cal. App. 3d 349, 352, 110 Cal. Rptr. 751, 756 (4th Dist. 1973).

¹⁰² See, e.g., James, *Inroads on Old Tort Concepts*, 14 NACCA L.J. 226 (1954); Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TEX. L. REV. 1254 (1966); Traynor, *Comment on Courts and Lawmaking*, LEGAL INSTITUTIONS TODAY AND TOMORROW, 48, 52 (1959) [hereinafter cited as Traynor].

¹⁰³ Professor Fleming James found the expansion of tort liability proceeding in two directions: (1) "The negligence principle is being constantly expanded so as to clear out pockets of vestigial immunity;" and (2) "limitations to liability that inhere in the negligence principle are giving way to [strict liability]." James, *supra* note 102, at 226.

¹⁰⁴ Evidence of a reorientation toward tort law policy may also be observed in the California Legislature. In recent years it has been seriously considering a no-fault insurance system, the primary motive of which is compensation and loss-spreading. See note 123 *infra*. However, as late as 1961 the Legislature's concern was still oriented toward restriction of recovery rather than increasing compensation. In response to *Ahlgren v. Ahlgren*, 152 Cal. App. 2d 723, 313 P.2d 88 (4th Dist. 1957), which had exempted an owner of a vehicle injured while a passenger in his own car from the provisions of the guest statute, the California Legislature amended the statute to specifically include owners and thereby restrict their recovery. See California Vehicle Code section 17158 which reads: "No person riding in or occupying a vehicle owned by him and driven by another person with his permission . . ." Ch. 1600, § 91, [1961] Cal. Stats. 3429. The *Brown* court did not evaluate the constitutionality of this provision (8 Cal. 3d at 862 n.3, 506 P.2d at 217 n.3, 106 Cal. Rptr. at 393 n.3), though the statute earlier survived an equal protection attack based upon the statutory distinction between the paying-owner-passenger and the paying-nonowner-passenger. *Patton v. Lubree*, 60 Cal. 2d 606, 387 P.2d 398, 35 Cal. Rptr. 622 (1963). The ban on recovery by owner-passengers is apparently still operative. See 1973 amendment to the guest statute which deleted all references to guests other than owners. Ch. 803, § 4, [1973] Cal. Stats. 1611. See also *Schwalbe v. Jones*, 35 Cal. App. 3d 214, 110 Cal. Rptr. 563 (1st Dist. 1973).

¹⁰⁵ Traynor, *supra* note 102, at 53.

¹⁰⁶ See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 409-27 (1973).

¹⁰⁷ C. Gregory, *Trespas to Negligence to Absolute Liability*, 37 VA. L. REV.

In California, charitable immunities have yielded to the general principle of liability for negligently caused harm.¹⁰⁸ Inter-familial immunities, which formed another cluster of exceptions to liability for negligence, disappeared one after the other.¹⁰⁹ A hierarchy of landowner immunities from negligence was firmly rejected in *Rowland v. Christian*.¹¹⁰ Broad governmental immunity under the common law disappeared in *Muskopf v. Corning Hospital District*.¹¹¹ Most notably, the California Supreme Court has significantly expanded the basis of tort liability through the development of product liability doctrines.¹¹²

Two themes of tort law reform are discernable in these cases. The first is a tendency to impose a uniform duty of reasonable care in all circumstances through the systematic elimination of the various *common law* exceptions to negligence liability.

359 (1951); F. James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315 (1959).

¹⁰⁸ *Malloy v. Fong*, 37 Cal. 2d 356, 23 P.2d 241 (1951); *Silva v. Providence Hosp.*, 14 Cal. 2d 762, 97 P.2d 798 (1939).

¹⁰⁹ In *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955), two sisters were permitted to recover from their brother for simple negligence. A pair of cases in 1962, *Self v. Self*, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962) and *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962), abolished interspousal immunities for negligent as well as intentional torts. Finally in *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971), parental immunity for negligence was similarly discarded as a "legal anachronism." *Id.* at 917, 479 P.2d at 650, 92 Cal. Rptr. at 290. In *Gibson* the supreme court was openly concerned with compensation and insurance coverage: "We feel we cannot overlook the widespread prevalence of liability insurance and its practical effect on intrafamily suits . . . it is unrealistic to ignore this factor in making an informed policy decision on whether to abolish parental negligence immunity." *Id.* at 918, 479 P.2d at 653, 92 Cal. Rptr. at 293.

¹¹⁰ 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

¹¹¹ 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). Immediately following *Muskopf* the legislature conditionally restored the doctrine of governmental immunity for two years but provided for recovery for causes of action occurring during the period unless barred by subsequent legislation. Ch. 1404, § 1 et seq., [1961] Cal. Stats. 3209. The moratorium was followed by a comprehensive governmental tort liability statute and the time lag presumably permitted government units to cover their liability with insurance.

¹¹² These doctrines have brought to fruit the rationale expressed in Justice Traynor's 1944 concurrence in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944): "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Id.* at 462, 150 P.2d at 441. See *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (establishing strict liability in tort for manufacturer of defective product); *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (extending the rule of *Greenman* to retailers); *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (extending the principle of strict liability in tort to bystanders injured by defective products). For products liability see generally Rintala, *The Supreme Court of California 1968-1969, Foreword: "Status" Concepts in the Law of Torts*, 58 CAL. L. REV. 80 (1970).

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ity.¹¹³ The second is a tendency to reject "automatic" exclusions from recovery which are either based upon historical exceptions found to be irrational in modern society or abstract legal concepts such as privity which serve no important policy function. *Brown v. Merlo* falls squarely within these tendencies.¹¹⁴

Most recently, the California Supreme Court has moved from reform of common law rules to an increased use of statutes in the service of reform. Thus in *Vesely v. Sager*,¹¹⁵ the court found the vendor of alcoholic beverages to be civilly liable for injuries to a third person caused by a customer when the customer had been served in violation of law. Such liability had earlier been rejected on proximate cause grounds;¹¹⁶ courts declared themselves impotent to impose such liability without legislative direction.¹¹⁷ The *Vesely* court denied the need for legislative action, maintaining it was merely changing a "judicially created rule now inconsistent with prevailing tort law."¹¹⁸ But the action in *Vesely* did not alter the statute itself, merely its application as a standard for tort liability. Until *Brown*, the cases evidenced a respect for statutory proscriptions against recovery. Indeed, earlier tort reform cases consistently repeated the refrain that the only justification for rules of law out of line with the general standard of liability was legislative policy.¹¹⁹ *Brown* represents then the point at which the compensatory impulse of modern tort reform could not be contained even by a clear statutory exception.

¹¹³ The general standard of liability for negligence is codified in section 1714 of the California Civil Code which reads:

Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

CAL. CIV. CODE § 1714 (West 1971).

¹¹⁴ The elimination of the guest statute exception means that the duty owed by a driver to a guest passenger is now the same as the duty owed to all others who may be injured as a result of the driver's simple negligence. 8 Cal. 3d at 865 n.6, 506 P.2d at 219 n.6, 106 Cal. Rptr. at 395 n.6. Similarly, *Brown* rejects the "automatic" exclusion of the guest passenger from possible recovery through the tort system by the implicit, irrebuttable assumption of collusion. *Id.* at 877, 506 P.2d at 227-28, 106 Cal. Rptr. at 3-04.

¹¹⁶ 5 Cal. 3d 153, 486 P.2d 151, 5 Cal. Rptr. 623 (1971).

¹¹⁶ *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1st Dist. 1949); *Hiltson v. Dwyer*, 61 Cal. App. 2d 803, 143 P.2d 952 (3rd Dist. 1943).

¹¹⁷ *Cole v. Rush*, 45 Cal.2d 345, 355-56, 289 P.2d 450, 452-53 (1955).

¹¹⁸ 5 Cal. 3d at 166, 486 P.2d at 160, 95 Cal. Rptr. at 632.

¹¹⁹ "[I]t is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no exception should be made unless clearly supported by public policy." *Rowland v. Christian*, 69 Cal. 2d at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100 (1968) (emphasis added).

B. *Appropriateness of Judicial Activism in Tort Law Reform*

Brown is an expansion of judicial activism in tort law from the systematic elimination of common law rules antipathetic to modern tort policies to the elimination of a similarly offensive statutory scheme. This kind of judicial activism should not be confused with the activism attacked by traditional legal process scholars.¹²⁰ First, whatever the merit of the anti-activist posture with regard to constitutional adjudication of economic regulatory legislation under the equal protection and due process clauses, it has little relevance to tort law. Second, the anti-activist stance is based upon an unrealistic assessment of the capabilities of the legislature and the realities of the legislative process.

1. *Irrelevance of Traditional Anti-Activist Standard to Tort Law Reform*

Traditional attacks upon judicial activism, admittedly formulated in the milieu of constitutional law, are overbroad when applied to tort law. Tort law is, and historically has been, an area predominately developed and cultivated by the courts.¹²¹ Statutory intervention has been minimal and largely supplementary. In addition, tort law activism simply does not present the very real dangers of rampant judicial activism dramatically manifested in the substantive due process excesses of the courts in the 1920's and 1930's. Tort law activism can be distinguished from that of the 1930's in at least two ways. First, activist tort law reform has generally been in touch with the present concerns of society and has been appropriately responsive to them. The model of judicial activism implicit in the anti-activist stance is that of a court acting in opposition to the will of a legislature, frustrating its efforts to deal with contemporary problems.¹²²

¹²⁰ Some of the more recent critics in this tradition are: A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* (1970); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973); Hart, *The Supreme Court 1958 Term, Foreword: The Time Chart of the Justices*, 73 *HARV. L. REV.* 84 (1959); Linde, *Judges, Critics and the Realist Tradition*, 82 *YALE L.J.* 229 (1973).

¹²¹ See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409-27 (1973); R. Keeton, *Creative Continuity in the Law of Torts*, 75 *HARV. L. REV.* 463 (1962).

¹²² The present generation of legal process scholars spent its formative years under the influence of a generation of legal realists who dissected and observed the process of judicial decision making. The "realists" applied the teachings of the behavioral sciences to understand the process of judicial decision making. The conclusions were that judges were not objective and rational, rather their decisions were invidiously influenced by their own intellectual make-up. See Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 *ILL. L. REV.* 96 (1922); Radin, *The Theory of Judicial Decision Making: Or How Judges Think*, 11 *A.B.A.J.* 357

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¹²⁴ Keeton, *sup* interaction can be s to the decision in B the automobile, boat Another example is apportionment of the based upon the sub nessee since 1901 undertake such reap of all proposals for

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However, activist tort law reform, like that exemplified in *Brown v. Merlo*, is actually a model of cooperative endeavor with the legislature, in accord with the tendencies and concerns of this time period.¹²³ It is apparent that cooperation between the courts and the legislature in law reform can take several forms. One possibility, suggested by Professor R. E. Keeton, is that a court and a legislature may act together to achieve a joint policy goal more rapidly than either could do alone. The courts' role in this model is to strike down a statute which no longer reflects contemporary concerns and which, because of the nature of the political process, is unlikely to be legislatively eliminated.¹²⁴ *Muskopf v. Corning Hospital*, though striking down precedent rather than statute,¹²⁵ exemplifies this kind of cooperation which resolves in a short period of time a particularly difficult legisla-

(1925). These theories were in the ascendancy in the early 1930's. See White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972). See generally E. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* (1953); Ackerman, *Law and the Modern Mind*, 103 DAEDALEUS 119 (1974).

A second component of the formation of the legal process stance was the traumatic collision between the Presidency and the Supreme Court in the mid-1930's. The generation witnessed the efforts of the Supreme Court conservatives to nullify judicially the New Deal, providing an eminent example of an exclusively American phenomenon. In Sir Wilmot Lewis' statement is the essence: "Legislation in the United States is a digestive process by Congress with frequent regurgitations by the Supreme Court." Quoted in A. SCHLESINGER, *THE POLITICS OF UPHEAVAL* 452 (1966). See also Frankfurter & Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577 (1938); ALFANOE, *THE SUPREME COURT AND THE NATIONAL WILL* (1937); JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941).

¹²³ The California Legislature has been actively considering a program of greatly increased compensation in the form of a no-fault insurance system. See Robinson, *No-fault and the State Bar*, 47 CAL. ST. B.J. 286 (1972). Robinson indicated the plan had the support of the Reagan Administration, the State Bar of California, and the Association of Northern and Southern Defense Counsel. In California he noted the support of automobile insurance companies, saying "a large segment in California aggressively favors a modified no-fault plan." *Id.* at 286. During the 1973-74 legislative session, no less than five proposals for no-fault automobile insurance plans were presented in the California State Senate. S.B. 410, S.B. 557, S.B. 10, S.B. 429, S.B. 1273.

Further, the reforming decisions of the California Supreme Court seem to be firmly within the Holmesian tradition of basing the law upon experience rather than logic. O.W. HOLMES, *THE COMMON LAW* 5 (1881).

¹²⁴ Keeton, *supra* note 121, at 354. One excellent example of this kind of interaction can be seen in the immediate reaction of the California Legislature to the decision in *Brown v. Merlo*. The Legislature amended the provisions of the automobile, boat, and airplane guest statutes, deleting all references to guests. Another example is seen in the apportionment decision which ordered the reapportionment of the Tennessee legislature in *Baker v. Carr*, 369 U.S. 186 (1962), based upon the substantial growth and redistribution of the population of Tennessee since 1901 and the recognized inability of its general assembly to undertake such reapportionment. The Court specifically mentioned the failure of all proposals for reapportionment for 60 years.

¹²⁵ 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

tive problem. The result in *Brown* is similarly within this framework of cooperation; it is certainly not directly contrary to the will of the legislature at a time when the legislature is itself preoccupied with perfection of the compensation delivery system for accidental automobile injuries.

A second point of distinction between judicial activism of the 1930's and tort law activism is their different intellectual origins.¹²⁶ Substantive due process activism was based largely upon an abstract "natural law-natural right" intellectual framework which purported to set forth absolute reality to which present reality must be made to conform.¹²⁷ Tort law activism has been notably loath to rely upon abstractions. Rather tort law reform is modern, practical and policy-oriented. Cases like *Brown* are firmly grounded in practical assessments of the most rational means to implement the policies of tort law—to compensate the victims of accidents and to spread the risks of loss as broadly as possible. Change in tort law has resulted directly from changed circumstances, such as the increased incidence and availability of liability insurance.

There may be some argument that judicial activism in the reform of common law tort precedents is less offensive and more appropriate than reform of statutes using activist constitutional law principles. However, statutes certainly can be as irrational, arbitrary, and outdated as common law precedents. To deny totally to the judiciary the competency to utilize its constitutional powers of judicial review to strike down obsolete and now unjustifiable statutes, solely because enacted by some legislature at another time, from another frame of reference, and in pursuit of a different policy goal, is to give statute law a superior status completely out of touch with the realities of the legislative process.

2. Unreality of the Legislative Model of Traditional Anti-Activism

Opponents of judicial activism in general insist that the legislature is the only appropriate governmental body to undertake law reform and policy formulation.¹²⁸ This argument exaggerates the practical ability of a legislature to meet all the needs of a

¹²⁶ The author is indebted to Professor E. Ursin of the UCLA School of Law for this analysis.

¹²⁷ See Hamilton, *The Path of Due Process of Law*, 48 ETHICS 269 (1938). The clearest judicial reflection of this natural law rationale is seen in *Lochner v. New York*, 198 U.S. 45 (1905).

¹²⁸ See, e.g., the discussion in H.M. HART & A.M. SACKS, *THE LEGAL PROCESS* 386-407 (tent. ed. 1958) of the case of *Norway Plains Co. v. Boston & Maine R.R.*, 1 Gray 263 (Mass. 1854); in general as to legislatures see, *id.* at 714-48.

pluralistic and legislatures themselves legislate fully legislative power to have been characterized of specific rules legislatures do not

The anti-activist nature of legislative interests and a body of philosophy the public welfare of society, that a legislature rules of liability group to push is not constant, if it is to be full important concern they ever be—the complexities of the burden of lawmaking. Therefore, in practice government in which California Supreme it is in a better technical changes the court has written on separate issues from being in a collecting data and the courts are able to know what the political tools to implement is the only body of lemons, aware of the of political pressure

¹²⁹ A legislature's interaction with the system of law, such as imposing a guest statute. Absent hampered by a kind of most looming problem

¹³⁰ See A.F. BERRY, *DEMOCRACY UNDER PRESSURE* (1960). See also *SCOTT ANNALS*, Sept. 1948, at

¹³¹ See notes 109-

pluralistic and increasingly complex industrial society. That legislatures themselves are cognizant of the limits of their ability to legislate fully is demonstrated by the massive delegations of legislative power to executive and quasi-legislative agencies which have been characteristic of the period since 1933. The reform of specific rules of tort law is precisely the kind of action which legislatures do not ordinarily undertake.¹²⁰

The anti-activist stance neglects the essentially political nature of legislative activity. A legislature is subjected to competing interests and acts in response to them.¹³⁰ A legislature is not a body of philosophers selecting the best, most just policies for the public welfare. In view of the staggering magnitude of problems of society, it is unrealistic to expect, much less demand, that a legislature take action to alter the somewhat technical rules of liability for negligence. There is no articulate pressure group to push for such change. The class of injured plaintiffs is not constant, organized, and articulate, as it would have to be if it is to be fully effective in the political process. Not all the important concerns of a growing, pluralistic society are—nor can they ever be—fully represented in the legislature. Given the complexities of modern life, it is foolish to place the entire burden of lawmaking as well as law-unmaking upon the legislature. Therefore, in practical terms, courts are perhaps the only unit of government in which certain kinds of reform are possible. The California Supreme Court by its judgment in *Brown* indicates that it is in a better position than the legislature to see the need for technical changes in tort law. Certainly in the last twenty years the court has written a startling number of innovative decisions on separate issues of tort law.¹³¹ The record indicates that far from being in a disadvantaged position vis-à-vis the legislature in collecting data and considering factors necessary to draft changes, the courts are actually in a better position than the legislature to know what the problem areas are and which are the most practical tools to implement change. The California Supreme Court is the only body in the state sufficiently involved with the problems, aware of the trends and needs of tort law, and independent of political pressures to undertake this kind of reform.

¹²⁰ A legislature is more likely to respond to the pressure of great dissatisfaction with the system of accident compensation by sweeping changes in the law, such as imposing a no-fault insurance system, than to repeal the automobile guest statute. Absent pressure from a vocal interest group, a legislature is hampered by a kind of political nearsightedness which tends to obscure all but most looming problems.

¹³⁰ See A.F. BENTLEY, *THE PROCESS OF GOVERNMENT* (1956); S. CHASE, *DEMOCRACY UNDER PRESSURE* (1945); B. GROSS, *THE LEGISLATIVE STRUGGLE* (1960). See also Schattschneider, *Pressure Groups versus Political Parties*, *ANNALS*, Sept. 1948, at 17.

¹³¹ See notes 109-112 & accompanying text *supra*.

Thus while *Brown* ignores traditional doctrines of judicial restraint, it is entirely in accord with a more realistic model of legislative realities.

III. A PROPOSAL FOR CALIFORNIA SUPREME COURT IMPLEMENTATION OF COMPARATIVE NEGLIGENCE

Brown v. Merlo stands firmly within the movement to reform California tort law. The next step in this reform is, in a sense, easier than the last. *Brown*, invalidating a statute, required a somewhat daring application of equal protection criteria; the judicial implementation of comparative negligence involves only a judicial reevaluation of common law tort precedent,¹³² a task the court has grown comfortable with in recent years.

Contributory negligence, unlike the guest statute, does not operate as a per se exclusion from all opportunity to recover for negligently inflicted injuries, since a plaintiff is allowed to prove that he or she was not contributorily negligent; it does, however, operate as a per se exclusion once it is proved. As such, it remains the feature of modern California tort law most inconsistent with the underlying thrust of tort reform. As the various restraints upon liability and compensation are eliminated, contributory negligence stands out in dramatic contrast to the emerging consistent goal of the recovery system to promote compensation rather than provide wholesale exclusions therefrom.¹³³ A standard of comparative negligence is more in keeping with the general liability principle of tort law and consistent with the trend of

¹³² At first glance it appears that California contributory negligence is statutory since section 1714 of the Civil Code codifies the common law rule of contributory negligence:

Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, *except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.*

CAL. CIV. CODE § 1714 (West 1973) (emphasis added).

However, there is nothing in the codification language itself which requires that contributory negligence act as a complete bar to recovery. Indeed such an interpretation is implicitly inconsistent with the language. The phrase, "except so far as," implies, "but not more than." In other words, a doctrine of comparative negligence is well within a permissible statutory interpretation of section 1714. Such an interpretation would understand the "except so far as" phrase to diminish the primary negligence responsibility, but only to the degree that another has contributed to his own injury.

Further evidence that section 1714 does not impose contributory negligence by statute is evident in the fact that courts were able to completely disregard contributory negligence in the formulation of products liability doctrines.

¹³³ See discussion in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); Annot., 32 A.L.R.3d 463, 487-88 (1970).

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¹³⁴ HARPER & 1236-41; Mole & W CORNELL L.Q. 333, *Liability Insurance, negligence*, 51 MICH. L. ARKANSAS: A "Before Comparative Negligence" (1950).

¹³⁵ Benson, *Col* 204 (1956); Powell *American Jury*, 43 A

¹³⁶ Arguments b negligence have been response to a suggest that the rule of con overruled the contrib Maki v. Frelk, 85 I decision was overturn 2d 193, 239 N.E.2d *Comments on Maki v the Court or Legisla* articles by F. James, [hereinafter cited as C

reducing per se recovery-exclusions. Numerous commentators have set forth the objections to contributory negligence on both theoretical and practical grounds and the superiority of comparative negligence.¹³⁴ The defenders of contributory negligence, or more precisely the opponents of comparative negligence, have not been silent either.¹³⁵ Therefore, this Comment need not examine the pros and cons of comparative versus contributory negligence. It will instead: (1) attempt to delineate the extent to which the contributory negligence doctrine violates the principle of modern tort law reform and the way in which comparative negligence would partially remedy the evil; (2) examine the arguments against judicial implementation of the change;¹³⁶ and (3) indicate to what extent the California Supreme Court in *Brown v. Merlo* has already overcome such objections.

A. *Inability of Contributory Negligence to Serve the Goals of Modern Tort Law*

The major shortcoming of the doctrine of contributory negligence from the point of view of the modern rationale of tort law reform is that it places the entire burden of loss on one party. Chief Justice Traynor points to the automobile accident situation, in particular, as one in drastic need of loss-spreading:

On the highways alone injury and slaughter are not occasional events, but the order of the day, and sooner or later there is bound to be more rational distribution of their costs than is now possible under the law of negligence. It is ironic that in the field of automobile accidents, where the need for

¹³⁴ HARPER & JAMES, *supra* note 2, §§ 22.1-3, at 1193-1209, § 22.11, at 1236-41; Mole & Wilson, *A Study of Comparative Negligence* (pts. 1-2), 17 CORNELL L.Q. 333, 604 (1932); Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1960); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959); Turk, *Comparative Negligence on the March* (pts. 1-2), 28 CIL-KENT L. REV. 189, 304 (1950).

¹³⁵ Benson, *Comparative Negligence—Boon or Bane*, 23 INS. COUNSEL J. 204 (1956); Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005 (1957).

¹³⁶ Arguments both for and against judicial implementation of comparative negligence have been made largely in the context of the *Maki v. Frelk* episode. In response to a suggestion by the Illinois Supreme Court that perhaps it was time that the rule of contributory negligence be reconsidered the appellate court overruled the contributory negligence ban and instituted comparative negligence. *Maki v. Frelk*, 85 Ill. App. 2d 439, 229 N.E.2d 284 (2d Dist. 1967). The decision was overturned upon appeal to the Supreme Court of Illinois. 40 Ill. 2d 193, 239 N.E.2d 445 (1958). For extensive commentary on this case, see *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889 (1968) (containing articles by F. James, J. Kalven, R. Keeton, R. Leflar, W. Malone, and J. Wade) [hereinafter cited as *Comments on Maki v. Frelk*].

compensating victims regardless of fault is most urgent, we continue to let fault determine whether or not there shall be compensation.¹³⁷

It should be noted that where insurance is common, an increase in compensation is also an increase in loss-spreading to the entire class of automobile insurance buyers. Broadening liability increases the likelihood of people buying insurance in Traynor's view,¹³⁸ and thus spreads the losses of apparently inevitable accident casualties. In *Brown*, as in other tort reform cases, the court emphasized insurance as a factor in its decision.¹³⁹

In theory, contributory negligence bars individuals from recovering their losses if they were in any slight degree responsible for the injury-causing event. The harsh non-compensatory aspect of the rule is mitigated by certain exceptions,¹⁴⁰ although the exceptions do not function to spread the losses since only one party pays the whole cost in any event.¹⁴¹ Moreover, as with the earlier exceptions to governmental immunity, landowner immunity, and driver immunity (to guests), a pattern of illogical and somewhat fortuitous recovery is spawned by the exceptions to the contributory negligence ban and with the uncertainty of its application by juries. The resulting unevenness is exacerbated by

¹³⁷ Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 375-76 (1965).

¹³⁸ See Traynor's concurrence in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944); Traynor, *supra* note 102, at 52.

¹³⁹ *Brown* cites the present general availability of liability insurance (in contrast to its unavailability when the guest statute was enacted) as one factor contributing to the present irrationality of the statute. 8 Cal. 3d at 863-64 n.4, 868 n.9, 506 P.2d at 217-18 n.4, 221 n.9, 106 Cal. Rptr. at 393-4 n.4, 397 n.9.

¹⁴⁰ The recognized exceptions to the contributory negligence ban are: (1) the doctrine of last clear chance; (2) the willful, wanton exception; and (3) the violation of certain kinds of statutes designed to protect a given class of plaintiffs. See generally PROSSER, *supra* note 2, § 66, at 427-33 (last clear chance), § 34, at 184-86 (willful wanton exception), § 68, at 453-54 (violation of statute). An interesting account of the history of the doctrine of contributory negligence and the exceptions it generated is contained in L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409-27 (1973).

¹⁴¹ There is widely accepted doubt that contributory negligence acts as a complete bar as a practical matter. Professor Keeton contends that juries tend to reach compromise verdicts where there is persuasive evidence of contributory negligence—thus there exists an ad hoc comparative system. Keeton contends that "Hardly anyone doubts the prevalence of this doctrinally illegitimated practice of jurors today." R. KEETON, *supra* note 121, at 503. Lawyers and judges believe it to be true. See, e.g., *Haeg v. Sprague, Warner & Co.*, 202 Minn. 425, 430, 281 N.W. 261, 264 (1938); J. ULMAN, *A JUDGE TAKES THE STAND* 30-34 (1933); POWELL, *supra* note 135. Professor Weinstein's analysis of voluminous empirical studies appears to substantiate these impressions. See Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831 (1961). Professor Keeton is severely critical of the practice; he described it as "unpoliced, irregular, and unreasonably discriminatory." *Comments on Maki v. Frelk*, *supra* note 136, at 906, 918 (Comment by R. Keeton).

casuistic distinction through mitigation. One of the standards of contributory negligence is difficult to prove. *Railway*,¹⁴² for contributory negligence while trying to

In contrast that a rule of with current plaintiff and between them and

¹⁴² James, *Before Verdict*, 455 (1971).

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¹⁴⁴ The California Civil Code section getting on or off negligence is involved.

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casuistic distinctions made by courts encouraging compensation through mitigation of the absolute ban of contributory negligence. One example of this kind of distinction is the differential standards of proof required to show primary negligence and contributory negligence.¹⁴² Contributory negligence is increasingly difficult to prove; in *Beard v. Atchison, Topeka, & Santa Fe Railway*,¹⁴³ for example, the court sustained a finding of no contributory negligence where a fourteen year old boy lost his leg while trying to jump on a moving train.¹⁴⁴

In contrast to the rule of contributory negligence, it is clear that a rule of comparative negligence would be more in accord with current policy goals. Comparative negligence permits the plaintiff and defendant to spread the cost of the accident between them and by insurance to all drivers.¹⁴⁵ The incidence of

¹⁴² James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961); 57 AM. JUR. 2d *Negligence* §§ 426-55 (1971).

¹⁴³ 4 Cal. App. 3d 129, 84 Cal. Rptr. 449 (2d Dist. 1970)

¹⁴⁴ The California Legislature responded to this decision with a statute, Civil Code section 1714.7, which denied recovery to a person injured while getting on or off a moving locomotive or railroad car, except where aggravated negligence is involved. CAL. CIV. CODE § 1714.7 (West 1973).

¹⁴⁵ It is interesting to note that the California Legislature has already instituted a primitive form of loss spreading where two or more joint tortfeasors share responsibility for an accident. Section 875 of the California Code of Civil Procedure provides for a right of contribution among joint tortfeasors when a judgment is rendered against them, and one has paid more than his pro rata share. CAL. CIV. PROC. CODE § 875 (West Supp. 1974). Section 876 provides that the share be divided equally among the tortfeasors. *Id.* Thus while the division of loss is not based upon a comparative negligence standard, at least the loss is spread among those at fault. In terms of compensation and loss spreading even this is preferable to the complete ban of contributory negligence which bars any division of loss between the "joint tortfeasors," plaintiff and defendant.

Such an equal division may turn out in certain cases to be even more grossly unfair than contributory negligence is to the plaintiff (in theory). In New York, the court of appeals was recently induced to abolish equal contribution between joint tortfeasors and to substitute a rule of pure comparative contribution determined upon the degree of fault of each defendant. In *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), the court was confronted with grossly disparate negligence (active v. passive) and a very large judgment. The decision may have indicated a judicial adoption of comparative negligence in that state: "The fairer rule, we believe, is to distribute the loss in proportion to the allocable concurring fault." *Id.* at 294, 282 N.E.2d at 292, 331 N.Y.S. at 386. There is apparently some confusion in New York about whether *Dole* did adopt comparative negligence. See *Dixon v. Knickerbocker Drivurself, Inc.*, 72 Misc. 2d 1025, 341 N.Y.S.2d 150 (Albany City Ct. 1973); *Sorrentino v. United States*, 344 F. Supp. 1308 (E.D. N.Y. 1972), indicating that the rule is unsettled.

With regard to the interrelationship between contribution and comparative negligence see *Loui v. Oakley*, 50 Hawaii 260, 438 P.2d 393 (1968). There the Hawaiian Supreme Court discussed the desirability of comparative negligence in the contribution situation and suggested: "It may be time to reconsider the applicability of the doctrine of contributory negligence, a judge-made rule, in light of the mores of the day. Perhaps it should be judicially replaced by a comparative negligence standard . . ." *Id.* at 265 n.5, 438 P.2d at 397 n.5. Ap-

compensation is increased to the extent that previously uncompensated plaintiffs, guilty of contributory negligence, are no longer denied any recovery.

The major disagreement, however, is not over whether comparative negligence is superior to contributory negligence in terms of policy goals. It is rather a question of how comparative negligence should be instituted. Professor R. E. Keeton describes the issue:

[T]he question whether a court should change the outmoded contributory negligence rule or instead wait for the legislature of its state to act—is actively disputed. There is little doubt that ten years ago a majority of judges and perhaps academic commentators as well would have answered that this is a task for legislatures. A significant change has occurred in these ten years It is becoming an accepted principle that courts should take a more active role in reforming outmoded tort law than they had done before this past decade. Although no judicial opinions previous to those filed in *Maki v. Frelk* had brought this new spirit to bear upon the contributory negligence rule, this seems a very appropriate area for law reform by judicial decision.¹⁴⁶

The major rationale for judicial implementation seems to be a kind of possessory doctrine.¹⁴⁷ The Illinois Appellate Court in *Maki v. Frelk* reasoned: "The doctrine of contributory negligence was created by the Courts, not by the legislature. If we have created it, and if it does not meet the needs of present day life, then we are duty bound to abolish it."¹⁴⁸ Prior to *Maki*, no court had acted to implement fully comparative negligence.¹⁴⁹

B. Objections to Judicial Replacement of Contributory Negligence

There is certainly no agreement that it is indeed the province of the courts to modify their own doctrine. In general, three principle objections are raised to judicial implementation of comparative negligence.

One was cited by the Illinois Supreme Court in overturning *Maki*: "[S]uch a far-reaching change, if desirable, should be

patiently the Hawaiian Legislature acted first to introduce comparative negligence. See HAWAII REV. STAT. § 663-31 (Supp. 1973). An excellent discussion of the relationship between comparative negligence and contribution is in Annot., 32 A.L.R.3d 463 (1970).

¹⁴⁶ Comments on *Maki v. Frelk*, *supra* note 136, at 906, 914-15 (Comment by R. Keeton).

¹⁴⁷ See generally Annot., 32 A.L.R.3d 463, § 9 (1970).

¹⁴⁸ 85 Ill. App. 2d at 452, 229 N.E.2d at 291.

¹⁴⁹ Florida recently adopted comparative negligence judicially. See *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). New York may have done so in *Dole v. Dow Chemical Co.*, discussed in note 145 *supra*.

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made by the legislature rather than by the court."¹⁵⁰ The underlying idea is bifurcated; it is argued that in a democracy a legislature, responsible directly to the electorate, is the only proper forum for such a decision¹⁵¹ and that a legislature is in a superior position to accumulate the necessary data to construct a complex policy. The effect of judicial nullification of contributory negligence is merely to create a void; bringing in comparative negligence to fill the void would require detailed policy decisions more characteristic of the legislative process than the judicial process. A court, it is argued, is ill-equipped to legislate.¹⁵²

A second objection is that such a change is a gross violation of the principle of stare decisis. The supreme court in *Maki* made the point that "[w]hen a rule of law has once been settled, contravening no statute or constitutional principle, such rule ought to be followed unless it can be shown that serious detriment is thereby likely to arise prejudicial to public interests."¹⁵³ The court continued: "Rules long recognized as the law should not be departed from merely because the court is of the opinion that it might decide otherwise were the question a new one."¹⁵⁴

A third objection is raised by Professor Kalven.

There is also the fact that the difficulties and weaknesses of the common law rule as to contributory negligence had been fully disclosed and argued out for generations. There was no technological or sociological change that made the doctrine now look different than it had in prior years In brief, nothing was producing any new insight about the rule nor was there any new reason for changing it that had not been fully evident to all those courts which for all those years had refused to make the change.¹⁵⁵

The foregoing represent the principle objections to a judicial implementation of comparative negligence. The purpose below is to indicate more fully the scope of these objections and to demonstrate that the California Supreme Court has answered many of these arguments itself in prior decisions, particularly in *Brown*.

The California court sees its role as updating tort law in accord with present conditions—something it is uniquely qualified to do since rules of tort law are constantly before the court. *Brown* illustrates the court's commitment to this modernizing

¹⁵⁰ 40 Ill. 2d at 196, 239 N.E.2d at 447.

¹⁵¹ See H. M. HART & A. M. SACKS, *THE LEGAL PROCESS* 1413-16 (tent. ed. 1958).

¹⁵² See generally, *id.* at 1425-30; Annot., 32 A.L.R.3d 463, § 10 (1970).

¹⁵³ 40 Ill. 2d at 196, 239 N.E.2d at 447.

¹⁵⁴ *Id.* at 196-97, 239 N.E.2d at 447.

¹⁵⁵ *Comments on Maki v. Frelk, supra* note 136, at 897, 898-99 (Comment by Kalven).

role; there the court insisted that the constitutionality of the guest statute's classification system "be evaluated in light of contemporary treatment accorded similarly situated individuals,"¹⁵⁶ even though it acknowledged that when the statute was enacted it was consistent with prevailing policies of tort liability¹⁵⁷ (and thus probably did not create a classification grossly violative of equal protection).

1. Comparative Negligence can be Implemented only by the Legislature

It seems probable that one aspect of the hesitation of courts to implement comparative negligence stems from the fact that no court, until recently, had ever done so successfully.¹⁵⁸ The abortive attempt in *Maki*, coupled with a good deal of verbal hand-wringing upon that occasion by the traditional legal process scholars,¹⁵⁹ reinforced the reluctance to act. However, the Florida Supreme Court in *Hoffman v. Jones*¹⁶⁰ instituted pure comparative negligence¹⁶¹ in order to "join what seems to be a trend toward almost universal adoption of comparative negligence."¹⁶² The *Hoffman* court emphasized the judicial origin of the rule of contributory negligence and indicated the judiciary

¹⁵⁶ *Id.* (emphasis added).

¹⁵⁷ 8 Cal. 3d at 865 n.6, 506 P.2d at 219 n.6, 106 Cal. Rptr. at 395 n.6.

¹⁵⁸ See recent cases cited note 145 *supra*. Georgia has a modified form of comparative negligence which came about through broad judicial interpretation of a statute on its face applicable to negligence suits against railroads, a feat Dean Prosser termed a "rather remarkable tour de force of construction . . ." PROSSER, *supra* note 2, § 67, at 436. See Goodrich, *Origin of the Georgia Rule of Comparative Negligence and Apportionment of Damages*, 1940 GA. BAR. A.J. 174; Wynne v. Southern Bell Tel. & Tel. Co., 159 Ga. 623, 126 S.E. 388 (1925); Moore v. Sears, Roebuck & Co., 48 Ga. App. 185, 172 S.E. 680 (1934). The Georgia adoption was unique and does not offer precedent to other states without similar statutes.

The California Supreme Court is apparently now considering whether to adopt comparative negligence in the case of *Nga Li v. Yellow Cab Co.*, (L.A. 2 Civ. 41888) which the court accepted for hearing after the Court of Appeal affirmed a verdict for defendant. Accepted for hearing March 18, 1974 (112 Cal. Rptr. No. 5, at 1). An opinion is expected early in the fall.

¹⁵⁹ See, e.g., *Comments on Maki v. Frelk*, *supra* note 136, at 897 & 918 (Comments by Kalven & Leflar).

¹⁶⁰ 280 So. 2d 431 (Fla. 1973).

¹⁶¹ Under a pure comparative negligence system a plaintiff's recovery is reduced by the degree of his negligence. Thus if the plaintiff is found to be 20 percent negligent, he will receive 80 percent of his damages. A plaintiff may recover in a pure system even if he is more negligent than the defendant. The court in *Hoffman* stated the policy: "The liability of the defendant . . . should not depend upon what damages he suffered, but upon what damages he caused." 280 So. 2d at 439. Modified comparative negligence diminishes the plaintiff's recovery in the same way, except that a plaintiff may only recover where he is less negligent than the defendant.

¹⁶² 280 So. 2d at 438.

enjoys "broad take into account and prescriptive comparative negligence both in fairness,¹⁶⁴ and equity and a moral duty. Indeed, the subject is so overwhelming [its] duty if [it]

The *Hoffman* decision is common law. Recognizing a social problem and a spirit of cooperation to solve the problem:

Our society is entitled to compensation. Florida has a comparative negligence system which is much more equitable than ours but we must be careful of securing justice for all parties who have

Judicial creativity is not to be irrevocably stepped in to make contributory negligence one of the mainstays to overcome the problem would have delayed in such an legislative modification of tortious creativity" that neither alone

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¹⁶³ *Id.* at 435

¹⁶⁴ *Id.* at 437

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 438

¹⁶⁷ *Id.* at 436

comparative negligence system thus prevented recovery at 438.

¹⁶⁸ Keeton, *supra*

¹⁶⁹ *Id.*

enjoys "broad discretion" to change the common law so as to take "into account the changes in our social and economic customs and present day conceptions of right and justice."¹⁰³ Comparative negligence was held to be superior to contributory negligence both in its correlation with contemporary assessments of fairness,¹⁰⁴ and as a more equitable means of "determining liability and a more socially desirable method of loss distribution."¹⁰⁵ Indeed, the superiority of comparative negligence was held to be so overwhelming that the court indicated it "would be shirking [its] duty if [it] did not adopt the better doctrine."¹⁰⁶

The *Hoffman* court acted in the finest tradition of the common law. Recognizing the need for a response to the "pressing social problems" of automobile accidents, the opinion evidenced a spirit of cooperation with the legislature in responding to the problem:

Our society must be concerned with accident prevention and compensation of victims of accidents. The Legislature of Florida has made great progress in legislation geared for accident prevention. The prevention of accidents, of course, is much more satisfying than the compensation of victims, but we must recognize the problem of determining a method of securing just and adequate compensation of accident victims who have a good cause of action.¹⁰⁷

Judicial implementation of comparative negligence would not be irrevocable. Once a decision is made the legislature may step in to make policy adjustments or even completely reinstate contributory negligence. Professor R. E. Keeton maintains that one of the main functions of the overruling judicial decision may be to overcome "legislative inertia, a potent force that otherwise would have delayed or deflected attempts at reform."¹⁰⁸ He further sees in such an interchange (an overruling decision followed by legislative modification) the possibility that "decisional and statutory creativity" will serve "in combination to bring about reform that neither alone would have been likely to achieve."¹⁰⁹

Some commentators purport to find significance in the fact that few legislatures have acted to implement comparative negli-

¹⁰³ *Id.* at 435.

¹⁰⁴ *Id.* at 437.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 438.

¹⁰⁷ *Id.* at 436. The court indicated Florida had just missed adopting comparative negligence judicially in 1943 by the veto of the Governor: "One man thus prevented this State from now operating under a much more equitable system of recovery for negligent personal injuries and property damage." *Id.* at 438.

¹⁰⁸ Keeton, *supra* note 121, at 475.

¹⁰⁹ *Id.*

gence—despite the existence of models of comparative negligence in the United States for nearly seventy years.¹⁷⁰ This failure only reflects the political nature of the legislative process and the relatively unpolitical nature of the contributory-comparative controversy.¹⁷¹ It says little about the merits of, or degree of support for, comparative negligence in judicial and scholarly circles; nor does it indicate the extent to which comparative negligence accords with common expectations of justice. In *Brown* the supreme court demonstrated its unwillingness to defer to the legislature's judgment in passing a law; why then should it defer to the legislature in not changing a law?

A more serious argument against judicial implementation results from the effect of a judicial repudiation of contributory negligence. If contributory negligence is eliminated, something must replace it. Earlier judicial changes in tort law for the most part involved a simple change from negative to affirmative. In the case of government immunity, for example, "no, you cannot recover for negligence" simply became "yes, you can recover." As Robert Leflar noted, "The change in the law was complete within itself."¹⁷² In contrast, judicial promulgation of comparative negligence, he argues, would be "baldly incomplete."¹⁷³ Leflar sets out eleven complex policy decisions necessary to create a full comparative negligence system.¹⁷⁴ His conclusion is that "a

¹⁷⁰ A comprehensive workmen's compensation plan based upon comparative negligence was instituted by the Federal Employer's Liability Act in 1908. 45 U.S.C. § 53 (1964).

¹⁷¹ Comparative negligence legislation perhaps may be described by Professor Leach's phrase, "politically sexless legislation." Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 989 (1965).

¹⁷² *Comments on Maki v. Frelk*, *supra* note 136, at 921, 929 (Comment by Leflar).

¹⁷³ *Id.* at 920.

¹⁷⁴ Leflar's policy decisions are:

- (1) Should injured persons recover only in cases in which their negligence is less than that of the other party . . . or in every case in which the negligences can be apportioned. . . .
- (2) Should the comparison of negligences be in terms of percentages . . . or in terms of "slight" and "gross"
- (3) If the comparison is to be in terms of percentages, should they be percentages of causal responsibility for the injury, or percentages of fault (relative badness)?
- (4) If both parties be injured, should each be allowed to recover from the other, with a setoff? Or, recognizing that recoveries really are from insurance companies, should each injured party be entitled to his full comparative recovery from the other's insurer, without setoff, on the theory that a liability policy covers actual liabilities regardless of separable rights in others?
- (5) What about the multi-defendant case May the plaintiff recover from any, all, or which of the others?
- (6) If comparative negligence . . . is established, do not logic and equal fairness require that a rule of contribution between joint tortfeasors be established at the same time. . . .
- (7) If comparative negligence is put into effect, should the last clear

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¹⁸⁰ *Id.* at 439.

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comprehensive statute is [needed], with sections and subsections carefully worked out in advance by a legislative drafting committee aided by an advisory commission."¹⁷⁵ The argument centers around the relative incapacity of courts to create complex rules tantamount to legislation. A court, it is argued, cannot investigate, assemble data, and sift varying policy alternatives—all of which is necessary in order to "legislate." The minute precision of *Roe v. Wade*¹⁷⁰ a year ago, setting out a complex structure for all laws, demonstrates the contrary. The Court in *Roe* was able to formulate standards matched to contemporary medical realities; such an exemplar of judicial law making diminishes the force of the argument of incapacity.

Specifically, with respect to the implementation of comparative negligence, there is no necessity that all the policy decisions listed by Leflar be decided at once. Indeed, it should be noted that typical comparative negligence statutes fail to answer more than four or five of the "relevant questions."¹⁷⁷ Usually the remaining decisions are made by judicial interpretations or by subsequent legislation. The *Hoffman* court, for example, designated the adoption of pure comparative negligence,¹⁷⁸ indicated the degree to which the application of the new rule would be retroactive,¹⁷⁹ and authorized trial courts to impose special verdict procedures.¹⁸⁰ The court declined to answer other issues, de-

chance doctrine . . . be abandoned. . . .

(8) Should the rule . . . allowing full recovery for wilful and wanton misconduct despite the injured person's contributory negligence be retained. . . .

(9) What about assumption of the risk? Should that defense be regarded as something completely embodied in contributory negligence? . . .

(10) Should special verdicts or answers to interrogatories be required to set out the total value of injury suffered and the specific percentages of negligence charged to each party, so that a court can doublecheck the jury's damage calculations. . . .

(11) If the state has a host-guest statute, does the comparative negligence system supersede it.

Id. at 920-21 (footnotes omitted).

¹⁷⁵ *Id.* at 921.

¹⁷⁶ 410 U.S. 115 (1973).

¹⁷⁷ The Wisconsin comparative negligence statute reads:

Contributory negligence shall not bar recovery in an 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 the proportion to the amount of negligence attributable to the person recovering.

WIS. STAT. § 331.045 (1958). See also the statutes collected in GREGORY & KALVEN, *CASES AND MATERIALS ON TORTS* 250-54 (2d ed. 1969).

¹⁷⁸ 280 So. 2d at 438.

¹⁷⁹ *Id.* at 440.

¹⁸⁰ *Id.* at 439. The form of the authorization was as a suggestion; "[T]he trial court is authorized to require special verdicts to be returned by the jury and to enter such judgment or judgments as may truly reflect the intent of the jury as

scribing them as "unripe."¹⁸¹

In short, there is no reason a common law, case-by-case structure cannot accomplish the desired completeness. Certainly one relevant question, the choice between pure and modified comparative negligence, must be answered at the outset. But whatever the judicial decision (especially if made as a prospective ruling), the legislature will be able to act to recapture the policy-making initiative by choosing its own alternative. In some jurisdictions, legislatures have reacted in just this way after a judicial abrogation of governmental immunity.¹⁸²

The California Supreme Court has shown itself eminently able to deal with complex problems in tort law and has consistently maintained that courts are able to make subtle and necessary determinations, so that the wholesale elimination of complicated questions from judicial contemplation is unnecessary. Particularly in the line of cases eroding and finally ending inter-familial immunities, the court insisted that the judiciary is able to deal with the risks of collusion and yet avoid a complete ban on the cause of action.¹⁸³ Similarly the *Brown* court, quoting *Emery*, conceded:

The courts may and should take cognizance of fraud and collusion when found to exist in a particular case. However, the fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases.¹⁸⁴

The *Hoffman* court expressed its confidence in the ability of trial courts to deal with any problems raised by comparative negli-

expressed in any verdict or verdicts which may be returned." *Id.* at 440. In general the approach of the *Hoffman* court was to grant the trial court judges "broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion." *Id.* at 440.

¹⁸¹ *Id.* at 439.

¹⁸² Illinois, *Moltor v. Kaneland Community Unit. Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), cert. denied, 362 U.S. 968 (1960) overruled a precedent recognizing governmental immunity. The legislature passed a series of statutes reinstating immunity for some institutions and partly restoring the immunities of school districts and nonprofit private schools. ILL. REV. STAT. c.A. 122, § 825 (1959). See Comment, *Governmental Immunity in Illinois: The Moltor Decision and the Legislative Reaction*, 54 NW. U.L. REV. 588 (1959).

¹⁸³ See the cases abolishing interfamilial immunities discussed in notes 79-80 & 103-06 *supra*. See also *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968): "[T]he possibility that fraudulent assertions may prompt recovery in isolated cases does not justify a wholesale rejection of the entire class of claims in which that potentiality arises." *Id.* at 735, 441 P.2d at 917, 69 Cal. Rptr. at 77.

¹⁸⁴ 8 Cal. 3d at 874, 506 P.2d at 225, 106 Cal. Rptr. at 401.

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Compared Court is in the gence.¹⁸⁶ Mee basis, the court tics and hypocri best appreciate view. Whateve limits to what gence situation law prior to M dealing with th was unable to p orts to amelio from interested problem and o the court could had a perceptio has not generat nonetheless the ture will not de tory negligence spite the regula negligence. Th judiciary as a v raised by comp the court should

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216-19, 359 P.2d 4 system of statutory dangerous or defect (West 1964)); dan (1964)); and liability. The piecemeal appo imunity indicated since the legislature to "sue c. be sued. SAFETY CODE § 3212

¹⁸⁸ See Annot. *Muskopf* which clin undertake such refo *Lawmaking in a Sta*

gence.¹⁸⁶ Certainly, the assessment of degrees of fault in a comparative negligence system is within the competency of the trial courts; comparative negligence entails no more complexity for juries than the severability of damages caused by multiple, sequential tortfeasors.

Compared to the state legislature, the California Supreme Court is in the better position to implement comparative negligence.¹⁸⁰ Meeting the problems of tort law on a continuing basis, the court is in a position to continually observe the inequities and hypocrisies of the contributory negligence system and can best appreciate comparative negligence from a policy point of view. Whatever the legislature "should" do, there are serious limits to what it will do. In some ways the contributory negligence situation is similar to the chaos of governmental immunity law prior to *Muskopf*.¹⁸⁷ There the legislature was incapable of dealing with the intricacies of the problem, largely because it was unable to perceive the extent of the morass. Legislative efforts to ameliorate the situation (prompted by outside pressure from interested groups)¹⁸⁸ were directed to isolated areas of the problem and only contributed to the overall inequities. Only the court could act to clear the muddle because only the judiciary had a perception of the whole field. Contributory negligence has not generated the same complex of inconsistent applications; nonetheless the legislature is similarly incapacitated. The legislature will not deal with a problem it does not see, and contributory negligence is not highly visible in the political landscape despite the regular introduction of bills to implement comparative negligence. The supreme court has the capacity to act, and the judiciary as a whole is capable of dealing with the complexities raised by comparative negligence. Considering the *realpolitik*, the court should act, if only because the alternative is stagnation.

¹⁸⁶ 280 So. 2d at 439-40.

¹⁸⁰ See the discussion note 132 *supra*.

¹⁸⁷ See discussion in *Muskopf v. Corning Hospital Dist.*, 55 Cal. 2d 211, 216-19, 359 P.2d 457, 460-61, 11 Cal. Rptr. 89, 92-93 (1969), of the intricate system of statutory exception to government immunity embracing, e.g., the dangerous or defective condition of public property (CAL. GOV'T CODE § 53051 (West 1964)); damage by mobs or riots (CAL. GOV'T CODE § 50140 (West 1964)); and liability of school districts (CAL. EDUC. CODE § 903 (West 1964)). The piecemeal approach of the legislature to the problems created by government immunity indicated that the full extent of the problem was not manifest, especially since the legislature also had enacted statutes which expressly permitted the state to "sue or be sued." CAL. GOV'T CODE § 641 (West 1964); CAL. HEALTH & SAFETY CODE § 32121 (b) (West 1964).

¹⁸⁸ See Annot., 60 A.L.R.2d 1198 (1958). For a critical comment on *Muskopf* which clings tenaciously to the argument that the legislature alone can undertake such reform, see Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963).

2. Violation of stare decisis

Unquestionably contributory negligence has been the rule of law in common law courts for more than 160 years.¹⁸⁰ The argument is that the important functions of stare decisis (continuity, predictability, and reliance) are too important for courts to act impulsively to change such a fundamental rule of law. Chief Justice Traynor's own reservations against judicial implementation of comparative negligence centered upon the reliance of insurance carriers upon contributory negligence.¹⁸⁰

In the last twenty years the California Supreme Court has often found that the need for flexibility and change in tort law outweighed the recognized values of stability and predictability,

¹⁸⁰ According to Dean Prosser, although courts almost from the beginning have displayed an uneasy consciousness that something is wrong with the doctrine of contributory negligence, they have been slow to move. See PROSSER, *supra* note 3, at 469. The United States Supreme Court expressed its dissatisfaction, calling contributory negligence a "discredited doctrine which automatically destroys all claims of the injured persons who have contributed to their injuries in any degree however slight." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953).

Judicial dissatisfaction with the doctrine of contributory negligence in California is manifest in one of the last cases to interpret the guest statute prior to *Brown v. Williams v. Carr*, 68 Cal. 2d 579, 440 P.2d 505, 68 Cal. Rptr. 305 (1968), in considering whether to apply contributory negligence in the guest statute context, expressed more dissatisfaction with contributory negligence than with the guest statute.

Further evidence of judicial unhappiness with the rule of contributory negligence is demonstrated by the eagerness with which several lower courts in New York have been willing to believe that the ruling in *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972), which instituted comparative contribution between joint tortfeasors, signalled the adoption of a general standard of comparative negligence. See *Dixon v. Knickerbocker Drivurself, Inc.*, 72 Misc. 2d 1025, 341 N.Y.S.2d 150 (Albany City Ct. 1973). See also *Sorrentino v. United States*, 344 F. Supp. 1308 (E.D. N.Y. 1972), indicating that the rule in New York is unsettled but concluding in the light of *Dole*: "[A] view of contributory negligence which makes it an absolute bar to a plaintiff's recovery cannot survive." *Id.* at 1310. But see *Kelly v. Long Island Lighting Co.*, 31 N.Y.2d 25, 334 N.Y.S.2d 851, 286 N.E.2d 241 (1972) where the court reiterated that *Dole* applied only to contribution among joint tortfeasors.

The question of whether contributory negligence should be replaced with the principle of comparative negligence which a Florida District Court of Appeal certified to the Florida Supreme Court indicates pressure from the lower courts for change because ordinarily only questions of law which are unsettled are certified to a higher court by a lower court. Certainly the rule with respect to contributory negligence in Florida was settled.

State legislatures are acting with increasing frequency to institute comparative negligence. Since 1969, six additional states have adopted some form of comparative negligence, bringing to 14 the total number of states in which contributory negligence as a complete bar to recovery has been abolished. See COMPARATIVE NEGLIGENCE MANUAL § 3 (1973).

¹⁸⁰ Traynor, *Statutes Revolving in Common Law Orbits*, 17 CALIF. UNIV. L. REV. 401, 414-15 (1968).

especially what takes. Certain than in the ab in the sweeping tions delineating illustrate the o trines have in which, coupled their reascning, than open chang

Certainly done more viol by insurance c for contributory on the guest s from the jury, gence or intoxic intervene frequ as a matter of there was no q Insurance carrie tributary neglig times,¹⁰² cont securing summa ant. Contribut prives a plaintiff past.¹⁰³ In Cal contributory neg less the *only* re ists, or unless re sion.¹⁰⁴ In this

¹⁰¹ *Comments* (Kecton).

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¹⁰³ Professor K to a jury today on insufficient to warr that the plaintiff wa Arizona Constitution question. Heimke v observed a trend of 121, at 503.

¹⁰⁴ *Schmitt v. I* (1969); *Kuhlmann v. Dist.* 1970); *Markev* (2d Dist. 1967).

especially when the latter required the repetition of old mistakes. Certainly no more abrupt changes have been undertaken than in the abrogation of government immunity in *Muskopf* or in the sweeping elimination by *Rowland* of century-old distinctions delineating the varying liabilities of landowners. Both cases illustrate the observation of Professor Keeton that outdated doctrines have inbred tendencies to generate causistic distinctions which, coupled with a lack of candidness of courts in setting out their reasoning, may be far more dangerous to a system of law than open change.¹⁰¹

Certainly *Brown* and the cases upon which it relies have done more violence to the principle of stare decisis and reliance by insurance carriers than would a substitution of comparative for contributory negligence. Insurance carriers were able to rely on the guest statute to remove the issue of simple negligence from the jury, requiring the plaintiff to prove aggravated negligence or intoxication. Moreover, judges could be expected to intervene frequently to disallow a claim of aggravated negligence as a matter of law. In the case of familial immunities as well there was no question for a possibly sympathetic jury to decide. Insurance carriers have been unable to rely similarly upon contributory negligence as a complete bar. In contrast to earlier times,¹⁰² contributory negligence is no longer a reliable means of securing summary judgment or a directed verdict for the defendant. Contributory negligence which as a matter of law deprives a plaintiff of his cause of action, is largely a thing of the past.¹⁰³ In California the generally recognized standard is that contributory negligence is not established as a matter of law unless the *only* reasonable hypothesis is that such negligence exists, or unless reasonable men could have drawn *only* that conclusion.¹⁰⁴ In this modern context, where contributory negligence

¹⁰¹ *Comments on Maki v. Frelk*, *supra* note 136, at 914 (Comment by R. Keeton).

¹⁰² Professor Malone demonstrates that judges used contributory negligence as a brake upon the looseness of juries in the nineteenth century. See Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

¹⁰³ Professor Keeton emphasized the point: "Many cases are allowed to go to a jury today on evidence that twenty-five years ago would have been held insufficient to warrant reasoned inferences that the defendant was negligent and that the plaintiff was not." Keeton, *supra* note 121, at 503. Apparently the Arizona Constitution requires that the issue of contributory negligence be a jury question. *Heimke v. Munoz*, 106 Ariz. 26, 470 P.2d 107 (1970). Keeton also observed a trend of "less judicial supervision of verdicts." Keeton, *supra* note 121, at 503.

¹⁰⁴ *Schmitt v. Henderson*, 1 Cal. 3d 460, 462 P.2d 30, 82 Cal. Rptr. 502 (1969); *Kuhlmann v. Pascal & Ludw.*, 5 Cal. App. 3d 144, 85 Cal. Rptr. 199 (2d Dist. 1970); *Markewych v. Altshules*, 255 Cal. App. 2d 642, 63 Cal. Rptr. 335 (2d Dist. 1967).

is almost always a jury question, the argument of insurer reliance makes more noise than sense.

Critics of judicial implementation emphasize phrases like "drastic change," but studies of the actual impact of comparative negligence found it to be much less dramatic than either its advocates or critics maintained.¹⁹⁵ Professor Peck, basing his conclusions on an exhaustive analysis of homogeneously matched states with and without comparative negligence, concluded that a shift to comparative negligence would have little, if any effect on liability insurance rates.¹⁹⁶ Professor Rosenberg's study of the effect of introducing comparative negligence in Arkansas found that lawyers evaluated their cases differently and that plaintiffs won a higher percentage of verdicts under the comparative system but that the individual recoveries were not larger.¹⁹⁷

Thus, it is apparent the argument that stare decisis should bar judicial implementation does not withstand close analysis. Contributory negligence has not been a reliable force in halting recovery, even if such a policy goal could be justified.

3. No New Reasons to Make the Change.

The argument that there are no new developments which make contributory negligence more inadequate today than it has been in the past is a relativistic argument which fails to recognize the cumulative effect of a series of gradual changes. Indeed, the evolution from the nineteenth century of proof of fault to the twentieth century value of injury compensation is truly remarkable. The *Hoffman* court referred to this as a change from favoring industry over the individual to favoring the individual over industry.¹⁹⁸ The development has been gradual although the last twenty years have seen a good deal of acceleration. As the peripheral doctrines of tort law are changed to correspond with the compensatory-loss spreading impulse, other doctrines, once only slightly dissatisfactory, appear more invidious in comparison. *Brown* provides an apt illustration of this phenomenon. One source of the inequity of the guest statute derived from the elimination of barriers to recovery by other categories of guests. Thus the guest statute, once only somewhat unfair and disparate, by 1973 appeared to be grossly inequitable.

¹⁹⁵ Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1 (1936); Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1950); Rosenberg, *supra* note 134.

¹⁹⁶ Peck, *supra* note 195.

¹⁹⁷ Rosenberg, *supra* note 134.

¹⁹⁸ 280 So. 2d at 437, citing INSTITUTE OF JUDICIAL ADMINISTRATION, COMPARATIVE NEGLIGENCE 2 (Supp. 1954).

The steady carnage wrought by the cost of accident litigation that legislature that however, do not such pressures leads to safety to the entire liability in tort law is cooperation with the courts show law to bring it in

The California overall development. Certainly no one is responsible for the dangers of development and with closures. In fact, injuries and wrongs in the concept changes in tort law or social value and before taking is not even the legislatures react top-heavy, over the field of contract

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¹⁹⁹ A similar rate among railroad 2,660 employees was a comprehensive survey, *seq.*, 27 Stat. 531. as a complete alternative ACCIDENTS AND TORT ROADS, see the discussion

²⁰⁰ *Dillon v. L.*

The steady advance of automobile statistics measuring the carnage wrought by the automobile and the steadily advancing cost of accidents eventually generates political forces upon the legislature that demand major change.¹⁹⁹ Political pressures, however, do not cause technical changes in tort law. Rather, such pressures are manifested in statutes imposing strict standards for safety apparatus and serious consideration of alternatives to the entire liability system. By default, if nothing else, reform in tort law is largely the province of the courts. In a spirit of cooperation with the legislature, reflecting the concerns of the era, the courts should continue to alter the substance of negligence law to bring it into the twentieth century.

The California Supreme Court has clearly concluded that overall developments warrant a thoroughgoing reform of tort law. Certainly no abrupt technological or social revolution was responsible for the rapid development of products liability. The dangers of defectively manufactured products are surely not greater today than in a period totally without government regulation and with only minimal protection from mass media disclosures. In fact, except for the vitality concept in prenatal injuries and wrongful death plus perhaps a greater sophistication in the concept of mental suffering,²⁰⁰ none of the existing changes in tort law rests upon a fundamental change in technology or social values. California has never required such a standard before taking action. Dramatic change, it may be argued, is not even the kind of change to which courts ordinarily react; legislatures react to dramatic change. Courts ultimately react to top-heavy, over-distinguished, out-of-date precedents, with which the field of contributory negligence is certainly littered.

IV. CONCLUSION

The decision in *Brown v. Mevlo*, utilizing activist tools of constitutional law in the service of substantive reform of tort law, gives evidence of the strength of the reform impulse in the California Supreme Court. The reforms already completed in the pursuit of greater compensation and loss-spreading suggest the

¹⁹⁹ A similar political force was generated by the excessively high injury rate among railroad workers at the turn of the century. In 1892, for example, 2,660 employees were killed and 26,140 injured. The first result of pressure was a comprehensive safety statute, the Railway Safety Act of 1893, ch. 196, § 1 *et seq.*, 27 Stat. 531. The eventual result was the workman's compensation system as a complete alternative to the tort law system. See G. CAMPBELL, *INDUSTRIAL ACCIDENTS AND THEIR COMPENSATION* (1911). As to the problem on the railroads, see the discussion in *Johnson v. Southern Pac. Co.*, 196 U.S. 1 (1904).

²⁰⁰ *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

appropriateness of further modification of common law barriers to recovery,²⁰¹ the most inequitable of which is the contributory negligence rule. The court should act, therefore, to substitute a rule of comparative negligence more in line with contemporary policy objectives.

DIAN DICKSON OGILVIE

²⁰¹ If the legislature adopts a comprehensive no-fault insurance plan, the need for this action will be diminished. However, if, as seems more likely, the plan is modest (e.g., with a \$2,000 threshold) the implementation of comparative negligence will remain desirable as a more symmetrical adjunct to the plan than contributory negligence. In fact the most nearly successful California proposal for a no-fault insurance (the Fenton-Song Motor Vehicle Repairs Act, A.B. 801) also provided for the amendment of section 1714 of the Civil Code to abolish contributory negligence for automobile accidents. The bill would have instituted instead modified comparative negligence. A.B. 801 passed the Assembly June 14, 1973. As of June 5, 1974 the bill remained stuck in the Committee on the Judiciary in the Senate.

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COMPARATIVE NEGLIGENCE: A TIME FOR CHANGE IN ALASKA

INTRODUCTION

At the present time, throughout most of the country¹ and in Alaska,² an action for the recovery of damages resulting from an injury to person or property is completely barred if the injured party was in any degree causally negligent. This strict rule of law, known as the doctrine of contributory negligence,³ is applicable even to situations in which the injured party is only slightly negligent while the party inflicting the injury is seriously at fault.⁴ The result is a tort system which places the entire financial burden of an accident upon the less blameworthy of two persons who are both negligent, permitting the more negligent tortfeasor to escape all responsibility and virtually allowing him to profit from his wrong.

General adherence to the principle of contributory negligence is particularly surprising in view of the amount of criticism the doctrine has engendered. For many years, legal scholars have advocated its abrogation.⁵ Members of the judiciary, charged with the duty of administering the rule, have likewise expressed serious concern over the inherent inequities embodied in this aspect of

¹ See notes 26-29 & accompanying text *infra*.

² See, e.g., *Roach v. Benson*, 503 P.2d 1392 (Alaska 1972). Although the Alaska Supreme Court refused to apply the contributory negligence rule to the facts of the *Roach* case, the decision made no mention of any alternative to this all-or-nothing approach. The rule that a negligent plaintiff must be denied any recovery is the applicable principle in Alaska today.

³ The doctrine of contributory negligence has a common law history dating back to the English case of *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809). In that case the plaintiff was injured when he rode his horse into a pole which the defendant had negligently left protruding across a public highway. The court denied recovery, asserting that "[A] party is not to cast himself upon an obstruction which has been made by fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right." *Id.* at 927.

⁴ See, e.g., *Seaboard Coast Line R.R. v. Owen Steel Co.*, 348 F. Supp. 1363 (D.C.S.C. 1972); cf. *Odgen v. State*, 395 P.2d 371 (Alaska 1964), in which the plaintiff slipped on a bank of ice which had been allowed to accumulate in front of the main entrance to Fairbanks International Airport. The court found that the plaintiff had failed to exercise reasonable care for his own safety and thus contributory negligence barred his recovery. While the defendant may have been more seriously negligent in permitting the icy condition to exist, the contributory negligence rule allowed the court to ignore this possibility.

⁵ See, e.g., Bress, *Comparative Negligence: Let us Harken to the Call of Progress*, 43 A.B.A.J. 127 (1957); Ghiardi & Hogan, *Comparative Negligence—The Wisconsin Rule and Procedure*, 18 DEFENSE L.J. 537 (1969); Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 ORE. L. REV. 38 (1969); Helt & Helt, *The Two-Layer Cake: No Fault and Comparative Negligence*, 58 A.B.A.J. 933 (1972); Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Turk, *Comparative Negligence on the March*, 28 CHL.-KENT L. REV. 189 (1950).

tort law.⁶ Since its first application in America in 1824,⁷ contributory negligence has been variously depicted in judicial opinions⁸ as "unjust and inequitable,"⁹ "harsh,"¹⁰ and "highly unrealistic."¹¹ Nevertheless, despite the intensity of the attack, this common law rule remains a settled principle of law in most jurisdictions.¹²

Efforts to ameliorate the severe impact that contributory negligence has had on our tort system have intensified in recent years. The trend has been to replace the all-or-nothing approach with a more flexible system of "comparative negligence."¹³ Nineteen states have recognized this need for change and have adopted comparative negligence rules applicable to all negligence cases.¹⁴ It appears that similar forces are at work in Alaska, but thus far legislative inertia has served to perpetuate one of the most problematic doctrines in the common law.¹⁵ The purpose of this Comment is to compare the

⁶ See, e.g., *Haeg v. Sprague, Warner & Co.*, 202 Minn. 425, 281 N.W. 261 (1938), in which the court reluctantly denied the injured plaintiff any recovery whatsoever. "No one can appreciate more than we the hardship of depriving plaintiff of his verdict and of all right to collect damages from defendant . . ." *Id.* at 427, 281 N.W. at 263.

⁷ *Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824).

⁸ It should be noted that the expressions of judicial dissatisfaction referred to herein are taken from majority opinions. Despite a general recognition that the rule is unfair, the courts apparently feel compelled to follow it. This result is due mainly to the operation of the principle of stare decisis, but it may also stem from an unwillingness to tackle such a complex problem which might more easily be left to the legislature. See notes 85-88 & accompanying text *infra*.

⁹ *Louisville & N.R.R. v. Yniestra*, 21 Fla. 700, 737 (1886).

¹⁰ *Sun Oil Co. v. Seamon*, 349 Mich. 387, 390, 84 N.W.2d 840, 843 (1957).

¹¹ *Frummer v. Hilton Hotels Intl., Inc.*, 60 Misc. 2d 840, 847, 304 N.Y.S.2d 335, 342 (Sup. Ct. 1969).

¹² Oddly enough, the United States is "virtually the last stronghold of contributory negligence," the doctrine as a complete defense having disappeared from the law in continental Europe, New Zealand, Western Australia, and the Canadian Provinces. There is also evidence of apportionment of damages in China, Japan, Russia, Poland and the Philippines. Even in England, where the rule was born, it has since been rejected by the English Reform Act of 1945. Annot., 32 A.L.R.3d 463, 469 (1970). See also Hest & Hest, *Comparative Negligence: Wisconsin's Answer*, 55 A.B.A.J. 127 (1969).

¹³ See note 36 & accompanying text *infra*.

¹⁴ ARK. STAT. ANN. §§ 27-1730.12 (1962); COLO. REV. STAT. § 41-2-14 (1971); GA. CODE ANN. §§ 105-603 (1968), 94-703 (1972); HAWAII REV. STAT. § 663-31 (Supp. 1972); IDAHO CODE §§ 6-801 to -806 (Supp. 1973); ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1972); MASS. ANN. LAWS ch. 231, § 85 (Supp. 1972); MINN. STAT. ANN. § 604.01 (Supp. 1973); MISS. CODE ANN. § 1454 (1956); NEB. REV. STAT. § 25-1151 (1964); N.H. REV. STAT. ANN. ch. 507:7a (Supp. 1972); N.J. LAWS ch. 146 (1973); N.D. CENTURY CODE ch. 9-10-07 (Supp. 1973); ORE. REV. STAT. § 18.470 (1971); S.D. COMP. LAWS § 20-9-2 (1967); UTAH CODE ANN. §§ 78-27-37 to -43 (Supp. 1973); VT. STAT. ANN. tit. 12, § 1036 (1973); WIS. STAT. ANN. § 895.045 (Supp. 1973); WYO. STAT. § 1-7.2 (Supp. 1973). These statutes apply to all types of negligence cases and must be distinguished from statutes which adopt the comparative negligence doctrine only in limited situations. See note 58 & accompanying text *infra*.

¹⁵ The Alaska legislature has had a consistent history of inaction with respect to comparative negligence bills. The first such bill, House Bill 306, was introduced in 1966 but died in committee. In 1969, House Bill 336 received a strong endorsement from the Judiciary Committee. Referring to contributory negligence as a "harsh rule of law," the committee inserted the following report in the legislative journal:

[A] number of states are moving toward a more reasonable rule which would

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A. Definition

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permit recove in proportion as the doctrin seven states, degree of ju doctrine. The bill was amed in committee Two more bi only to meet a s introduced Senate the Judiciary Co be subject to furth ¹⁰ Bertram v found in RESTATE

opportunity for reform in Alaska with the lawmaking experience of other states and to urge that the anachronistic doctrine of contributory negligence be supplanted by a more equitable system of comparative negligence. Specifically, it shall be proposed that the Alaska Legislature rather than the courts implement the reform.

I. CONTRIBUTORY NEGLIGENCE—THE PROBLEM

A. *Definition and Rationales*

Contributory negligence has been defined by the Alaska Supreme Court as conduct on the part of a plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.¹⁰ At least six rationales may be offered in support of the doctrine: (1) that the rule has a deterrent effect on plaintiff's carelessness; (2) that a negligent plaintiff ought to assume full responsibility for his negligent act; (3) that the plaintiff's fault is an intervening and superseding cause which acts as a fissure between the defendant's negligence and the ensuing injury; (4) that the equitable notion of unclean hands dictates that the courts should not interfere in cases where both parties are at fault; (5) that contributory negligence provides some check on plaintiff-oriented juries; and (6) that whatever injustice may derive from the doctrine, compromise jury verdicts tend to overcome this defect.

The first four arguments are little more than theoretical justifications having no basis in reality. With respect to the deterrence argument, it is unlikely that the behavior of a potential plaintiff in an accident situation is in any way affected by prior or contemporaneous consideration of legal niceties. The second rationale suggests that the plaintiff should be punished for his carelessness by bearing the responsibility for not only his own negligent act, but for that of the defendant as well. This penal basis stems from a 19th

permit recovery by the injured person, but would diminish his recovery in proportion to the degree of negligence attributable to him. This is known as the doctrine of "comparative negligence" and has now been adopted by seven states. The comparative negligence rule, we feel, provides a greater degree of justice than is now afforded by the contributory negligence doctrine.

The bill was amended slightly and managed to pass the House, but thereafter it too died in committee.

Two more bills (Senate Bill 132 and House Bill 176) were introduced in 1971, only to meet a similar fate. Finally, on February 23, 1973, Senator John Rader introduced Senate Bill 166, relating to comparative negligence. It was referred to the Judiciary Committee, but no other action has been taken to date. The bill will be subject to further action in the Second Session of the Eighth Legislature.

¹⁰ *Bertram v. Harris*, 423 P.2d 909 (Alaska 1967). The court used the definition found in RESTATEMENT (SECOND) OF TORTS § 463 (1965).

century philosophy of justice,¹⁷ the harshness of which is no longer considered acceptable. The theory most frequently advanced in favor of the contributory negligence rule is the notion of "intervening cause"; however, the application of the principle in this context is wholly inappropriate. The issues of foreseeability and proximate causation must be dealt with before a defendant can invoke this doctrine, and merely establishing the existence of contributory negligence does not resolve these issues.¹⁸ In a case of two negligent drivers, each of whose actions constitute a proximate cause of injury to an innocent bystander, one cannot point to the negligence of the other as an intervening cause insulating him from liability. It is irrational to pursue a different approach when the two negligent drivers are labeled "plaintiff and defendant" and the third party element is removed.¹⁹ The fourth reason enumerated above suffers from a similar doctrinal distortion. The "unclean hands" principle operates to deny equitable relief to persons whose conduct relative to the matter in issue is unconscionable or morally reprehensible.²⁰ The failure to exercise reasonable care for one's own safety is not the sort of wrongdoing contemplated under the policy of the rule. Finally, the arguments based on assumptions about behavior of juries are equally fallacious. It has never been conclusively demonstrated that juries tend to be plaintiff-oriented,²¹ and to argue that juries circumvent the rule of contributory negligence through compromise verdicts suggests that continued adherence to the rule fosters disrespect for the courts' instructions.

While all of the foregoing theories have been advanced as justifications for the rule, it is generally conceded that the contributory negligence doctrine is simply a crude mechanism for insuring that a negligent plaintiff does not benefit from his own misconduct.²² The problem with this notion is that it ignores the realities of tort litigation and human experience, since fault is rarely the monopoly of a single party. The rule presupposes a negligent defendant and then causes the entire controversy to be automatically dismissed if the plaintiff is shown to have been negligent as well. Aside from the

¹⁷ See note 28 & accompanying text *infra*.

¹⁸ An extensive analysis of the scope and application of "intervening cause" is not appropriate here. For a thorough review of the doctrine see W. PROSSER, *THE LAW OF TORTS* § 44 (4th ed. 1971).

¹⁹ *Id.* § 65 at 417.

²⁰ See, e.g., *New York Football Giants v. Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471 (5th Cir. 1961).

²¹ On the contrary, an empirical study of 4,000 civil jury cases by the University of Chicago Law School revealed that juries reached the same decision as the judge in 78% of the cases. H. KALVEN & H. VEISEL, *THE AMERICAN JURY* 63 n.4 (1966).

²² See, e.g., Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 *ORE. L. REV.* 38 (1969).

requirement that of the injury,²³ of fault on either side, and the plaintiff's contributory negligence, which is synonymous with the defendant's negligence, thereby accords the plaintiff the right to recover, but the defendant is not liable in order to escape

A more realistic approach to the possible situation of contributory negligence is to consider the situation where the plaintiff's own negligence is the major element in the case, and the defendant's negligence is the minor element. In such a situation, the plaintiff's damages should be reduced, but the plaintiff should still be able to recover. This approach is more in line with the first two ext

B. Historical

Certainly no one would deny that the contributory negligence rule is a harsh rule. However, an inquiry into the historical factors which led to the expansion of the rule in the nineteenth century clarifies the situation. While it is true that the major element in the rule is the desire to protect the defendant's response to an injury, the early nineteenth

²³ *Rowe v. Uni*. The court refused to find that the plaintiff was not a

²⁴ "It is generally recognized that recovery has denied to the plaintiff. Helt & Helt, *The American Bar Association*, 933, 936 (1947).

²⁵ This logical conclusion is supported by the opinion in *Butterfield v. Swire*, which held that the defendant's negligent risk created by the plaintiff's negligence embraced the plaintiff's negligence.

²⁶ See Malone, *supra* note 25, at 151 (1947).

requirement that the plaintiff's negligence be a contributing cause of the injury,²³ there is no consideration given to the relative degree of fault on either side. Mutual negligence is treated as if it were synonymous with equal negligence, and defendants as a class are thereby accorded an unfair advantage.²⁴ Both the plaintiff and the defendant seek to prove causal negligence on the part of the other, but the defendant need only find a slight degree of carelessness in order to escape all liability.

A more realistic view of concurrent fault would embrace three possible situations. In cases of minor or remote fault a plaintiff's misconduct should be totally ignored. There are other times, as for example where the plaintiff is primarily responsible for causing his own injury, when his carelessness must be treated as a risk factor that should preclude recovery altogether. At still other times, in situations which fall in between the first two cases, it seems obvious that the victim's negligence should serve only to mitigate his damages.²⁵ Unfortunately, contributory negligence recognizes only the first two extremes.

B. *Historical Development*

Certainly no one theory can explain the doctrine of contributory negligence or the reason that it has persisted to this day. Nevertheless, an inquiry into its historical development suggests some important factors which at least encouraged the growth of the rule.²⁶ The expansion of the concept of contributory negligence during the nineteenth century closely paralleled the growth of the Industrial Revolution. While it has not been explicitly recognized by the courts, a major element in the early acceptance of the rule was undoubtedly the desire to protect developing industry, particularly the hazardous yet essential railroads, from unlimited liability in the tort field. In response to an uneasy fear of overly sympathetic juries, courts of the early nineteenth century came to regard the rule of contributory

²³ *Rowe v. United States*, 14 Alaska 463, 116 F. Supp. 553 (D.C. Alaska 1953). The court refused to apply contributory negligence where the negligence of the plaintiff was not a proximate cause of the accident.

²⁴ "It is generally recognized that contributory negligence as a complete bar to recovery has denied justice to more injured persons than any other legal concept." Hest & Hest, *The Two-Layer Cake: No Fault and Comparative Negligence*, 58 A.B.A.J. 933, 936 (1972).

²⁵ This logical three-fold analysis was suggested by Wex S. Malone in *Comments on Maki v. Freik*, 21 VAND. L. REV. 930, 934 (1968). He also expressed the opinion that *Butterfield v. Forrester* (see note 3 *supra*) is an illustration of an extravagant risk created by the plaintiff's conduct and should never have been expanded to embrace misconduct of a lesser degree.

²⁶ See Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1947).

negligence as "a convenient instrument of control over the jury by which the liabilities of rapidly growing industry were curbed and kept within bounds."²⁷

The judicial system exists as an instrument of society, and although these factors may have been very persuasive in their day, societal values now reflect an increased concern for the individual and a desire to see injuries compensated. In addition, if the rule was indeed meant to provide an effective means of controlling plaintiff-oriented juries, its success in achieving that purpose is far from certain.²⁸ The fact that contributory negligence has endured for over 160 years may ultimately be attributed to the principle of stare decisis or to legislative neglect.²⁹

Perhaps the strongest indication of the deficiencies in the contributory negligence rule and the discomfort courts have felt in applying it is the number and wide use of exceptions it has generated. England early developed the first anomaly. In *Davies v. Mann*,³⁰ under a fact situation very similar to that in *Butterfield*,³¹ the plaintiff was allowed to recover because the defendant could have prevented the accident had he used reasonable care. This modification has come to be known as the doctrine of "last clear chance" and is still widely accepted and applied.³² Another legal device which is designed to ease the harshness of the contributory negligence rule is the willful misconduct exception. Courts have refused to allow the defense of contributory negligence in actions for injury resulting from reckless or wanton misconduct on the part of the defendant.³³ Finally, in tort actions based on something other than ordinary negligence (for example, breach of statutory duty, intentional wrongs, nuisance, and strict liability), jurisdictions throughout the country have developed a number of lesser exceptions and modifications to the rule.³⁴ All these adaptations emphasize the shortcomings

²⁷ Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953). See also Turk, *Comparative Negligence on the March*, 28 CIL-KENT L. REV. 189 (1950).

²⁸ As early as 1934, Professor Charles Lowndes noted "the tall timber in the legal jungle has been whittled down to toothpick the sympathetic sabotage of juries." Lowndes, *Contributory Negligence*, 22 CALIF. L. J. 674 (1934).

²⁹ See notes 85-88 & accompanying text *infra*.

³⁰ 152 Eng. Rep. 588 (1842).

³¹ 103 Eng. Rep. 926 (K.B. 1809). See note 3 *supra*.

³² Alaska's use of the last clear chance doctrine is set forth in *Benson v. United States*, 235 F. Supp. 495 (D.C. Alaska 1964). The doctrine is applicable when it appears that the plaintiff has been negligent, that as a result of his negligence he is in a position of peril from which he cannot escape by the exercise of ordinary care, and that the defendant is aware of plaintiff's helplessness, has a clear chance to avoid the injury by exercising ordinary care, and yet fails to do so.

³³ See, e.g., *McLemore v. Harris*, 374 P.2d 410 (Alaska 1962). Only if the plaintiff's own conduct is willful or wanton will it balance against similar conduct by the defendant.

³⁴ See, e.g., *Mayer v. Hyers*, 214 Minn. 54, 7 N.W.2d 403 (1943) (statutory duty exception); *Kassouf v. Lee Bros., Inc.*, 209 Cal. App. 2d 568, 26 Cal. Rptr. 276

of contributory negligence. They operate to protect the plaintiff, when it

II. COMPARATIVE NEGLIGENCE

A. History and Development

The shortcomings of the contributory negligence rule are readily apparent. The doctrine of recovery to a plaintiff is slight in comparison to the equitable and effective recovery available under negligence on the part of the defendant. To substitute, the plaintiff's negligence as a viable alternative

The broad application of the doctrine has made it impossible to recover damages. The common law which is rough and ready in its problem presented barring recovery of comparative negligence relative degree of fault, whether, and the amount to the other.³⁵

In 1910, Michigan adopted comprehensive comparative negligence for personal injuries in actions for damages. In other states

(1962) (Implied warranty of fitness) & *Preston v. United States* (strict liability except gross misconduct and virtually replaced the

³⁵ See Turk, *Comparative Negligence* (1950), for a thorough general theory of application.

³⁶ See Annot., 30 Cal. Rptr. 276, rather than totally bar plaintiff's negligence.

³⁷ Now Miss. Code Ann. § 11-1-1.

³⁸ See note 14 *supra*.

of contributory negligence. Furthermore, like the doctrine itself, they operate to place the entire burden of loss on a single party, the defendant, when in reality both are to some degree at fault.

II. COMPARATIVE NEGLIGENCE—THE SOLUTION

A. *History and State Statutes*

The shortcomings of the contributory negligence rule are readily apparent. In its application, the doctrine denies all right of recovery to an injured plaintiff even though his negligence was slight in comparison to that of the defendant. Obviously a more equitable and effective means of dealing with cases where there is negligence on the part of both parties must be devised. As a complete substitute, the principle of comparative negligence is a desirable and viable alternative.

The broad concept of comparative negligence dates back to the seventeenth century in English admiralty law.³⁵ Since that time the doctrine has taken shape in a variety of forms, so that it is impossible to refer to a single "rule" of comparative negligence. Instead, it is best to conceive of the term as a general principle of law which is roughly equivalent to the theory of apportionment of damages. The concept itself is simply the logical solution to the problem presented by the contributory negligence rule: instead of barring recovery completely in cases of concurrent negligence, "comparative negligence" would include any legal rule under which the relative degree of negligence of the parties is involved in determining whether, and the degree to which, either party should be held liable to the other.³⁶

In 1910, Mississippi became the first state to enact a comprehensive comparative negligence statute applicable to all actions for personal injuries, and expanded that statute in 1920 to include actions for damages to property.³⁷ In the years that followed, eighteen other states adopted broad apportionment statutes.³⁸ All of

(1962) (Implied warranty exception); *Bachner v. Pearson*, 479 P.2d 319 (Alaska 1970) & *Preston v. Up-Right Inc.*, 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (1966) (strict liability exception). When considered in addition to the last clear chance and gross misconduct anomalies, it is not unfair to say that these exceptions have virtually replaced the rule itself.

³⁵ See Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950), for a thorough review of the early history of comparative negligence. The general theory of apportioning damages and liability can be traced to medieval times.

³⁶ See Annot., 32 A.L.R. 3d 463 (1970). In general, comparative negligence, rather than totally barring recovery, reduces the award in a proportion equal to the plaintiff's negligence.

³⁷ Now Miss. CODE ANN. § 1454 (1956).

³⁸ See note 14 *supra*.

these enactments are applicable to any action based on negligence, and therefore each completely supersedes the rule of contributory negligence. Beyond this, however, uniformity ends. The statutes are normally divided into three distinct groups: (1) the "pure" form, (2) the "slight v. gross" form, and (3) the "modified" form.³⁹

Mississippi is the only state which has adopted the "pure" form of comparative negligence.⁴⁰ Under this approach the plaintiff is allowed to recover a portion of his damages equal to the overall percentage of negligence attributable to the defendant, whether or not the plaintiff's negligence is greater than that of the defendant. Thus, in a case where the plaintiff's negligence is determined to have caused 90 percent of the accident, he would recover only 10 percent of his damages. The major criticism of this approach is that it allows a person of greater fault to recover from one of lesser fault under a tort system founded upon individual responsibility. There seems to be little, if any, legal or social justification for such a result.⁴¹

The "slight v. gross" form allows for apportionment of damages only when the negligence of the plaintiff is "slight" and the defendant's "gross" in comparison. Only Nebraska adheres strictly to this approach,⁴² although South Dakota's statute is generally included under the same classification.⁴³ A serious defect in this form of comparative negligence is that the statutes lose their effectiveness in cases where the parties' negligence is approximately equal.⁴⁴ The difficulty of determining the percentage degree of negligence above which the plaintiff's conduct becomes "gross" has engendered numerous appeals and inconsistent holdings.⁴⁵ Finally, should the court

³⁹ Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 484-489 (1953).

⁴⁰ MISS. CODE ANN. § 1454 (1956):

In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured . . . may have been guilty of contributory negligence shall not bar recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured . . .

⁴¹ See Ghilardi & Hogan, *Comparative Negligence—The Wisconsin Rule and Procedure*, 18 DEFENSE L.J. 537, 544 n.19, 560 (1969).

⁴² NEB. REV. STAT. § 25-1151 (1964):

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

⁴³ S.D. COMP. LAWS § 20-9-2 (1967). In 1964 the statute was amended to eliminate the requirement that the defendant's negligence be "gross." South Dakota now applies the rule of comparative negligence whenever a plaintiff's negligence is "slight" in comparison with that of the defendant.

⁴⁴ W. PROSSER, *THE LAW OF TORTS* § 67 at 437 (4th ed. 1971).

⁴⁵ See, e.g., *Kirchner v. Gast*, 169 Neb. 404, 100 N.W.2d 65 (1959); *Allen v. Kavanaugh*, 160 Neb. 645, 71 N.W.2d 119 (1955); *Roger v. Shepherd*, 159 Neb. 292,

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The "modified comparative negligence type ordinarily a plaintiff's negligence. Put another way, his comparative of the other hand, the sustained damages is the type of considered by the Al

66 N.W.2d 815 (1954) (1933).

⁴⁶ At the present "modified" form of Idaho, Maine, Mass., Dakota, Oregon, Utah

⁴⁷ This formulation statutes presently in negligence. See, e.g., H

Contributory negligence or his legal representative death or in injury great as the negligence

The words "not as equal to that of the accepted aspect" of the comparative negligence statute

In 1971, however, the percentage of fault only a small change, negligence exceeds the model for reform has (1973):

Contributory negligence or his legal representative death or in injury than the negligence damages allowed negligence attributable

⁴⁸ SB 166, 8th LEGISLATIVE DAMAGES IN TORT NEGLIGENCE

(a) Contributory person or his legal in the death of a contributory negligence whom recovery is portion to the amount damages.

(b) In an nonjury trial, shall return a special verdict

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decide that the plaintiff's negligence was more than slight, the plaintiff is barred from all recovery even though the defendant's negligence was the greater of the two.

The "modified," approach is by far the most popular form of comparative negligence.⁴⁶ Unlike the "pure" form, statutes of this type ordinarily apportion damages only in situations where the plaintiff's negligence is less than the defendant's by comparison. Put another way, a plaintiff would not be allowed any recovery if his comparative degree of fault was 50 percent or greater.⁴⁷ If, on the other hand, the plaintiff was only 25 percent at fault and had sustained damages of \$100,000, his recovery would be \$75,000. This is the type of comparative negligence statute presently being considered by the Alaska Legislature.⁴⁸

66 N.W.2d 815 (1954); *Monasmith v. Cosden Oil Co.*, 124 Neb. 327, 246 N.W. 623 (1933).

⁴⁶ At the present time no less than 16 states of the 19 total have adopted the "modified" form of comparative negligence: Arkansas, Colorado, Georgia, Hawaii, Idaho, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, North Dakota, Oregon, Utah, Vermont, Wisconsin, and Wyoming.

⁴⁷ This formulation of the rule is consistent with the language of the "modified" statutes presently in effect in the majority of states which have adopted comparative negligence. See, e.g., HAWAII REV. STAT. § 663-31 (Supp. 1972):

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

The words "not as great as" simply mean that the plaintiff whose negligence is equal to that of the defendant is denied any recovery. This result was long an accepted aspect of the "modified" approach as exemplified by the Wisconsin comparative negligence statute.

In 1971, however, Wisconsin amended its law to permit recovery in cases where the percentage of fault attributable to each party is equal. Although this represents only a small change, since a plaintiff is still barred from recovery if his share of negligence exceeds the defendant's, it is significant that the state which provided the model for reform has since altered that model. See WIS. STAT. ANN. § 895.045 (Supp. 1973):

Contributory negligence shall not bar recovery in an 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 greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

⁴⁸ SB 166, 8th Legis., 1st Sess. (1973):

DAMAGES IN NEGLIGENCE ACTIONS INVOLVING CONTRIBUTORY NEGLIGENCE.

(a) Contributory negligence does not bar a recovery in an action by a person or his legal representative to recover damages for negligence resulting in the death of or injury to the person, or injury to his property, if the contributory negligence was not as great as the negligence of the person from whom recovery is sought. Any damages awarded shall be diminished in proportion to the amount of negligence attributable to the person awarded the damages.

(b) In an action to which (a) of this section applies, the court, in a nonjury trial, shall make a finding of fact or, in a jury trial, the jury shall return a special verdict which states:

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

(2) the degree of negligence of each party, expressed as a percentage.

Of the three variants, the "modified" form is the most desirable. It does not allow a seriously negligent plaintiff to recover damages from a defendant whose share of fault was minor, and it avoids the semantic and practical difficulties associated with the use of vague labels such as "slight" and "gross." While this type of comparative negligence has been criticized as having the potential for arbitrary results,⁴⁹ it nevertheless retains more elements of a system based on fault than does the "pure" form which, by allowing a plaintiff to recover in situations where his negligence was the major cause of the accident, approaches a system of strict liability.⁵⁰ Finally, proponents of the "modified" version are quick to point out that this type of comparative negligence has proven itself in a number of states over a substantial period of time.⁵¹

Experience has indeed shown that the "modified" rule of comparative negligence can work.⁵² Under the Wisconsin rule, the percentage of negligence attributable to each party is determined by the jury so as to total 100%. This is accomplished by means of a special verdict designed to confine the jury to a series of conclusive issue determinations: (1) defendant's negligence, (2) plaintiff's negligence, (3) causation, and (4) damages suffered. These separate findings are then compiled and mathematically computed by the court to form a general verdict.⁵³ The jury is therefore able objectively to arrive at its findings without knowledge or consideration of the sum; the judge will ultimately award the plaintiff.⁵⁴ Apportion-

(c) Upon the making of the finding of fact or the return of a special verdict, required under (b) of this section, the court shall reduce the amount of the verdict in proportion to the amount of negligence attributable to the person awarded the damages.

⁴⁹ The appellate court in *Maki v. Freik*, 229 N.E.2d 284, 291 (Ill. App. 1967), questioned the effect of allowing the plaintiff who is 49 percent negligent to recover a large share of his damages, and yet allowing nothing to the plaintiff whose negligence is equal to the defendant's.

⁵⁰ See Maloney, *From Contributory to Comparative Negligence, A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958).

⁵¹ A "modified" comparative negligence statute has been in effect in Wisconsin since 1931. See WIS. STAT. ANN. § 895.045 (Supp. 1973).

⁵² See Knoeller, *Review of Wisconsin Comparative Negligence Act*, 41 MARQ. L. REV. 397 (1958); Hest & Hest, *Comparative Negligence: Wisconsin's Answer*, 55 A.B.A.J. 127 (1969).

The Wisconsin statute has been the prototype for legislative reform. Perhaps its single most impressive feature is the provision for a special jury verdict which not only reveals the specific findings of fact relating to the proportion of negligence attributable to each party, but also leaves the actual apportionment of damages in the hands of the court. The proposed Alaskan statute is derived from the Wisconsin example and incorporates this special verdict feature. See note 48 *supra*.

Wisconsin has developed a series of standardized jury instructions for use in all types of civil litigation. The three-volume set, entitled "The Wisconsin Jury Instructions—Civil," may be obtained from University of Wisconsin-Extension, L401 Law School Building, Madison, Wisconsin 53706. The set includes instructions pertaining to comparative negligence.

⁵³ See Hest & Hest, *The Two-Layer Cake: No Fault and Comparative Negligence*, 58 A.B.A.J. 933 (1972).

⁵⁴ For an excellent discussion of the operation of the Wisconsin verdict proce-

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B. Special App

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ment of fault and damage by juries presents no problems more difficult than those encountered in other types of cases as, for example, where a dollar amount must be ascertained for pain and suffering or for the loss of an arm. Judge and jury can work together to fairly and effectively apply a rule of comparative negligence.

B. *Special Applications of the Comparative Negligence Rule*

In addition to the state statutes which apply comparative negligence to all negligence cases, both the federal government and state governments have enacted numerous comparative negligence laws applicable to specific situations. The Federal Employers' Liability Act⁵⁵ utilizes the "pure" form of comparative negligence in all actions brought by railroad employees engaged in interstate commerce. Comparative negligence of the "pure" type is also provided for in the Merchant Marine Act and the Jones Act,⁵⁶ and in the statute relating to death on the high seas from wrongful conduct.⁵⁷ Not less than 30 states have adopted comparative negligence in a variety of railway and other labor acts in an apparent effort to insure recovery by injured workmen as against their employers.⁵⁸ Considered in the aggregate, therefore, these laws suggest that apportionment of damages in the United States is far from an isolated phenomenon.

C. *Criticism of the Rule*

Criticism of the doctrine of comparative negligence has centered primarily on objections regarding the feasibility of adopting such a system. While the desirability of the principle of fault apportionment is generally conceded, it has been argued that a comparative negligence rule would result in increased litigation and corresponding congestion in the courts, but experience has shown otherwise.⁵⁹ The logical explanation for this is that, although more actions may be instituted, the greater likelihood of recovery is conducive to an in-

dure, see Decker, *Some Random Observations About Comparative Negligence and the Trial Process in Wisconsin*, 1 *CONN. L. REV.* 56 (1968).

⁵⁵ 35 Stat. 69 (1908), U.S.C. § 53 (1970).

⁵⁶ 41 Stat. 988, 1007 (1920); 46 U.S.C. § 688 (1970).

⁵⁷ 41 Stat. 537 (1920); 46 U.S.C. § 766 (1970).

⁵⁸ W. PROSSER, *THE LAW OF TORTS* § 67 at 437 (4th ed. 1971); Turk, *Comparative Negligence on the March*, 28 *CHI.-KENT L. REV.* 189 (1950).

⁵⁹ See Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 *ARK. L. REV.* 89 (1959). The results of Rosenberg's survey showed that 67% of the judges responding thought the effect of the comparative negligence rule was "helpful" in terms of problems of judicial administration. This led to the conclusion that: "Legislatures facing the issue should confine themselves to the substantive pros or cons of the contending principles and should rule out arguments tied to problems of court administration." *Id.* at 108.

crease in settlements.⁶⁰ The suggestion that liability insurance rates would rise under a comparative negligence system has also been disputed.⁶¹ The most persistent objections to the comparative negligence rule, that a fair apportionment of degrees of negligence is impossible and that it places too large a burden on the jury, have been considered and rejected as being inconsistent with actual jury practice.⁶² It appears that juries are indeed capable of apportioning the negligence of mutual tortfeasors⁶³ and that the doctrine of comparative negligence constitutes a feasible improvement in the judicial treatment of contributory fault.

III. THE ARGUMENT FOR REFORM IN ALASKA

In evaluating the desirability of abandoning the contributory negligence rule entirely, it is important to consider the erosion of the rule over time. Brief mention has already been made of the various state and federal statutes which apply the principle of comparative negligence to special cases involving mutual fault.⁶⁴ Alaska too has statutes which provide for comparative negligence in specific, narrow situations.

Alaska's employer liability statute provides that contributory negligence shall not be a defense in an action brought by an employee against his employer where the contributory negligence of the employee was slight and the negligence of the employer was gross in comparison. Instead, the damages are diminished by the jury in proportion to the amount of negligence attributable to the employee.⁶⁵ The law is applicable to any person engaged in manufactur-

⁶⁰ Hest & Hest, *Comparative Negligence: Wisconsin's Answer*, 55 A.B.A.J. 127, 130 (1969).

⁶¹ Peck, in *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1960), presents a statistical analysis of the effect of a comparative negligence rule on automobile insurance rates. On the basis of this study he states:

Adoption of a comparative negligence rule, as shown by the Arkansas experience, would not have a catastrophic result upon the insurance rate structure of any state. Indeed, it would not have as much effect as rapid growth of population, increased urbanization, or change to a traffic program with the effective safety record of a neighboring state. Its effect, if any, would probably go undetected in the rates and statistics of the insurance industry.

Id. at 728.

⁶² See Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 339-359 (1932). See also Ghiardi & Hogan, *Comparative Negligence—The Wisconsin Rule and Procedure*, 18 DEFENSE L.J. 537 (1969), for a detailed analysis of the procedural rules used to achieve responsible jury verdicts.

⁶³ In Wisconsin the jury's determination is presumed to be correct and equitable, and its verdict will only be set aside when the reviewing tribunal believes it is against the great weight and clear preponderance of the evidence. *Pruss v. Strube*, 37 Wis. 2d 539, 155 N.W.2d 650 (1968).

⁶⁴ See notes 55-58 *supra*.

⁶⁵ AS 23.25.020 (1972):

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ing, mining, constructing, building, or other like hazardous occupations carried on by means of machinery.⁶⁶ Unlike the federal statute pertaining to employers' liability,⁶⁷ Alaska's statute adopts the "slight v. gross" form of comparative negligence.⁶⁸ The usual problems of interpretation associated with the "slight v. gross" approach may be mitigated by the fact that in actions arising out of injuries incurred while engaged in a hazardous occupation employer negligence is typically of a serious nature.⁶⁹

Another instance of the application of comparative negligence in Alaska is in actions based on admiralty law. In *Maxwell v. Olsen*⁷⁰ the plaintiff was injured while disembarking from defendant's ferry boat. The court held that in such cases the plaintiff's contributory negligence does not bar recovery because the federal rule of comparative negligence must be followed.⁷¹ Although this decision was inspired not by a judicial recognition of the merits of the doctrine but rather by adherence to procedural rules, it does suggest that the state courts are capable of applying the notion of comparative negligence in admiralty cases. The nature of the negligence action in admiralty cases need not be unique at all. As a matter of fact, *Maxwell v. Olsen* could have been a non-admiralty negligence action. A comparative negligence rule was applied in that case only because the plaintiff happened to fall as she stepped from a ferry. Had she taken that critical step without incident and instead proceeded to stumble over a hazardously positioned coil of rope which the defendant had left on shore, the strict contributory negligence rule would be applicable. The essential factual character of the negligence action remains the same in both instances; it is simply the existence of a

fact that the employee may have been guilty of contributory negligence does not bar a recovery where his contributory negligence was slight and the negligence of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee.

⁶⁶ See AS 23.25.010 (1972).

⁶⁷ 45 U.S.C. § 53 (1970), *supra* note 55.

⁶⁸ See *Haman v. Allied Concrete Prods., Inc.*, 495 P.2d 531 (Alaska 1972), in which the court notes that Alaska's law and 45 U.S.C. § 53 (1970) adopt a comparative negligence rule in markedly similar language, although the federal statute is broader in scope.

⁶⁹ In *Haman v. Allied Concrete Prods., Inc.*, 495 P.2d 531 (Alaska 1972), the plaintiff was injured when the drive chain on a cement mixer broke and struck him in the head. Inasmuch as the plaintiff was not negligent at all, the employer's negligence in the maintenance of machinery was easily characterized as "gross." The Alaskan courts have not yet been confronted with a case under this statute in which the line between "slight" and "gross" negligence has been difficult to draw.

⁷⁰ 468 P.2d 48 (Alaska 1970).

⁷¹ Generally, the "saving to suitors" clause [of the Judicial Act of 1789] means that a suitor asserting an *in personam* admiralty claim may elect to sue in a "common law" state court through an ordinary civil action. In such suits, state courts are required to apply the same substantive law as would be applied had the suit been brought in admiralty in a federal court. 468 P.2d at 51 (footnotes omitted).

vessel floating on navigable water which distinguishes the two. There is no basis for perpetuating such a distinction, and yet the law requires it.

While comparative negligence has gained a foothold in Alaska, it would be misleading to suggest that the doctrine has ever seriously threatened its common law counterpart. The contributory negligence rule has been, and continues to be, the accepted principle of law in the state.⁷³ But even the most obstinate supporters of the rule cannot deny its propensity toward inflicting severe hardship, and the last clear chance doctrine⁷³ and willful misconduct exceptions⁷⁴ have been judicially recognized in Alaska. In addition, Alaska has departed from the ordinary contributory negligence rule in cases involving strict products liability.⁷⁵

Another indication of the shortcomings of the rule in the Alaska experience is the difficulty which the Alaskan courts have encountered in its application. In the past, the Alaska Supreme Court has held that a jury question is presented as to contributory negligence when fair-minded jurors could differ as to the facts pertaining to this issue.⁷⁶ The problem has been to determine whether the trial judge properly decided to submit the question to the jury,⁷⁷ and if he did correctly do so, whether the instruction itself was correctly stated.⁷⁸

Despite these procedural difficulties, however, the courts cling steadfastly to the theory that a plaintiff's own contributory negligence bars any right of recovery. In *Harris v. Barrett & Lesh, Inc.*⁷⁹ the Supreme Court of Alaska refused to deviate from its previous hold-

⁷³ See, e.g., *Cummins v. King & Sons*, 453 P.2d 465 (Alaska 1969); *Bertram v. Harris*, 423 P.2d 909 (Alaska 1967); *Ogden v. State*, 395 P.2d 771 (Alaska 1964).

⁷⁴ See *Benson v. United States*, 235 F. Supp. 495 (D.C. Alaska 1964), *supra* note 32.

⁷⁵ See *McLemore v. Harris*, 374 P.2d 410 (Alaska 1962), *supra* note 33.

⁷⁶ See, e.g., *Bachner v. Pearson*, 479 P.2d 319 (Alaska 1970). The court limited the application of contributory negligence, as a defense to strict liability in tort, to situations where a plaintiff voluntarily and unreasonably encounters a known risk.

⁷⁷ *Mallonee v. Finch*, 413 P.2d 159, 162 (Alaska 1966); *Otis Elevator Co. v. McLaney*, 406 P.2d 7, 9-10 (Alaska 1965); *Crawford v. Rogers*, 406 P.2d 189, 194 (Alaska 1965); *McCoy v. Alaska Brick Co.*, 389 P.2d 1009, 1010 (Alaska 1964).

⁷⁸ See, e.g., *Cummins v. King & Sons*, 453 P.2d 465 (Alaska 1969). In *Cummins* the plaintiff brought an action for injuries sustained in a fall on icy steps. The supreme court reversed the contributory negligence verdict in the lower court, holding that the facts did not even support submission of the issue to the jury.

It is also interesting to note that the case was remanded because there was no way to know whether the jury, in addition to finding the plaintiff guilty of contributory negligence, had also found that the defendant was negligent. "If we knew that the jury had simply found appellees free from negligence, then the error would be harmless. But we have no way of ascertaining what the jury's findings were on these issues." *Id.* at 467-68. The special verdict feature of the proposed Alaskan comparative negligence statute would eliminate this perplexity.

⁷⁹ See *Mitchell v. Knight*, 394 P.2d 892 (Alaska 1964).

⁸⁰ 426 P.2d 331 (Alaska 1967).

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⁸⁰ *Id.* at 334-3

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ings to adopt a comparative negligence rule for the state.⁸⁰ But its uninspired support of the rule,⁸¹ the exceptions which it has established and the problems in administering the doctrine suggest that the court has maintained its position more out of deference to the principle of stare decisis than to anything else.⁸² Yet because the judiciary continues to apply the contributory negligence rule despite these difficulties, it may be necessary to place the responsibility for effectuating the needed reform in the hands of the legislature.

IV. THE AGENCY OF REFORM—LEGISLATURE V. COURTS

Once it has been determined that reform is desired, should the court or the legislature initiate the change? Experience has shown that both are capable of effectuating a comparative negligence system.⁸³ Those who would delegate the lawmaking responsibility to the courts argue that since the contributory negligence rule is a product of judicial fiat, the common law courts ought to be the vehicle for reform.⁸⁴ In addition, as the history of comparative negligence bills in the Alaska Legislature demonstrates, legislative inaction appears to be a certainty with respect to this kind of issue.⁸⁵ As to this last point, the advocates of legislative adoption contend that the courts suffer the same inefficacy. The courts themselves have admitted to the great influence of prior precedent as a restraining factor on judicial action in this area.⁸⁶ Furthermore, court action

⁸⁰ *Id.* at 334-35.

⁸¹ The court in *Harris* did not attempt to justify the contributory negligence doctrine nor did it offer any arguments against the notion of comparative negligence. Instead, it simply stated: "[W]e are not inclined to rule upon such a significant policy matter [i.e., the comparative negligence question] when it has been so casually treated by appellant's counsel." *Harris v. Barrett & Lesh, Inc.*, 426 P.2d 331, 335 (Alaska 1967). The court's statement seems to imply a willingness to face the issue were it squarely presented, but thus far there has been no further direct treatment of the matter by the Alaska Supreme Court.

⁸² See note 86 *infra*.

⁸³ See notes 89-103 & accompanying text *infra*.

⁸⁴ See Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 506-09 (1962).

⁸⁵ See Leshar, *Comments on Maki v. Freck*, 21 VAND. L. REV. 918 (1968). Legislatures, by their very nature, are not responsive in such areas:

Comparative negligence involves a type of social progress to which no potent social action group is politically committed. The organized liability insurers are, for their own reasons, generally against it; the plaintiffs' bar is lukewarm about it; and the general public, except for the minority involved in accident lawsuits, hardly knows what the problem is. Legislatures are seldom alert to social needs that are not backed up by political pressures. Social needs with no potent lobby behind them, particularly if there is an active lobby against them, ordinarily do not receive much favorable attention in state legislatures. They are the sort of thing that courts have to take care of.

Id. at 928.

⁸⁶ See, e.g., *Harris v. Barrett & Lesh, Inc.*, 426 P.2d 331, 335 n.9 (Alaska 1967): "This court's past decisions have clearly established that a plaintiff's own contributory negligence bars any right of recovery." *Accord*, *Sun Oil Co. v. Seamon*, 349 Mich. 387, 391, 84 N.W.2d 840, 844 (1957).

may be less desirable than legislative enactment when dealing with sweeping social change. In *Maki v. Freck*,⁸⁷ the Illinois Supreme Court decided that the issue ought to be resolved by the legislature. The court overturned a decision of the appellate court to replace contributory negligence with comparative negligence, holding that "such a far-reaching change, if desirable, should be made by the legislature rather than by the court."⁸⁸ The arguments on both sides of the issue are persuasive, and the determination of whether the court or the legislature should properly promulgate a comparative negligence rule may ultimately be dictated by the probability of successful adoption by either body. What has the experience of other states shown?

Expanded interest in the principle of comparative negligence is exemplified by the number of recent writings on the subject as well as by the increase in state legislative proposals and judicial opinions which have contemplated adoption of the rule. Nine states have within the past three years acted to incorporate a comparative negligence system into the law of their jurisdiction.⁸⁹ Two have done so judicially, while the remaining seven have enacted statutes similar to Wisconsin's.⁹⁰ An examination of the differences between these approaches and of their relative strengths and weaknesses will certainly have an instructive value for the Alaska Legislature which is now contemplating parallel reform.

Judicial adoption of a comparative negligence rule applicable to all negligence cases is somewhat of a rarity. For many years, Tennessee was the only state in which comparative negligence had been promulgated entirely by judicial decision.⁹¹ The scope of its rule, however, is even today severely limited.⁹² Recent court decisions in New York and Florida, on the other hand, have established unrestricted forms of comparative negligence. Their importance as precedent for the judicial adoption of the doctrine is therefore con-

⁸⁷ 40 Ill. 2d 193, 239 N.E.2d 445 (1967).

⁸⁸ *Id.* at 195, 239 N.E.2d at 447.

⁸⁹ The states are: Colorado (1971), Florida (1973), Idaho (1971), New Jersey (1973), New York (1972), North Dakota (1973), Oregon (1971), Utah (1973), and Wyoming (1973).

⁹⁰ See notes 50-54 & accompanying text *supra*.

⁹¹ The Tennessee rule was delineated by the court in *Bejach v. Colby*, 741 Tenn. 686, 214 S.W. 869 (1919). The court decreed that if the plaintiff were guilty of negligence which directly and proximately contributed to his injury he could not recover, but if the plaintiff's negligence was only remotely connected with the cause of the injury he could recover, although the damages would be mitigated according to the extent of plaintiff's negligence.

⁹² See, e.g., *Hansard v. Ferguson*, 23 Tenn. App. 306, 132 S.W.2d 221 (1939). Contributory negligence remains a barrier to recovery in cases where the plaintiff's negligence, however slight, is a proximate cause of his injury. The rule may therefore be characterized as one of apportionment of damages under certain conditions rather than a true rule of comparative negligence. Annot., 32 A.L.R.3d 463, 479 (1970).

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The New York has not been established the in New York *Chemical Co.*⁹³ introduced the or concurrent decisions were among defendant contributory negligence courts within the plaintiff's negligence to the subject, a *Kelly* decisions approach suggested over, as the court rule as precedent

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⁹³ 30 N.Y.2d 1

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Id. at 1310. Thus, only that the relation there is no apparent include a plaintiff's

⁹⁶ See Berenge 1972); *Dixon v.* 150 (City Ct. of A

⁹⁷ The lower court expansion of the rule 1026, 341 N.Y.S.2d

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Id. at 533. It is no

siderably greater than Tennessee's because of the extent of the change they have introduced.

The New York judicial experience has been confusing and still has not been completely resolved. The State Court of Appeals established the foundation in 1972 for a comparative negligence rule in New York when it handed down its decisions in *Dole v. Dow Chemical Co.*⁹³ and *Kelly v. Long Island Lighting Co.*⁹⁴ These cases introduced the concept of comparative negligence, as between joint or concurrent tortfeasors, into the law of the state. Although the decisions were limited to the issue of apportionment of negligence among defendants, their implication with respect to a plaintiff's contributory negligence was readily apparent.⁹⁵ Accordingly, lower courts within the state soon extended the doctrine to embrace a plaintiff's negligence.⁹⁶ The Court of Appeals has not yet returned to the subject, and it remains to be seen whether or not the *Dole* and *Kelly* decisions have been properly interpreted.⁹⁷ This piecemeal approach suggests a significant difficulty with judicial fiat; moreover, as the court is only deciding the case before it, the value of the rule as precedent for other fact situations is always arguable.

Florida has accomplished the conversion from contributory negligence to comparative negligence in a more direct fashion. In a single case, decided earlier this year, the District Court of Appeals of Florida rejected the contributory negligence rule in favor of a "pure" form of comparative negligence.⁹⁸ The decision has been cer-

⁹³ 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972).

⁹⁴ 31 N.Y.2d 25, 335 N.Y.S.2d 851, 285 N.E.2d 241 (1972).

⁹⁵ See *Sorrentino v. United States*, 344 F. Supp. 1308 (E.D.N.Y. 1972). The court held:

One further point appears: the analysis of *Dole* and *Kelly* suggests that a view of contributory negligence which makes it an absolute bar to a plaintiff's recovery cannot survive.

Id. at 1310. Thus, while the strict rule of law announced in *Dole* and *Kelly* requires only that the relative degrees of negligence between joint defendants be apportioned, there is no apparent reason why this theory of apportionment cannot be extended to include a plaintiff's contributory negligence.

⁹⁶ See *Berenger v. Gottlieb*, 72 Misc. 2d 349, 338 N.Y.S.2d 319 (Civ. Ct. N.Y. 1972); *Dixon v. Knickerbocker Drivurself Inc.*, 72 Misc. 2d 1025, 341 N.Y.S.2d 150 (City Ct. of Albany County 1973).

⁹⁷ The lower courts appear confident that the Court of Appeals will uphold their expansion of the rule. In *Dixon v. Knickerbocker Drivurself Inc.*, 72 Misc. 2d 1025, 1026, 341 N.Y.S.2d 150, 151 (City Ct. of Albany County 1973), The court asserted: Comparative negligence is now the law in this state, although it remains for the Court of Appeals to decide what type of comparative negligence is to be applied."

⁹⁸ *Jones v. Hoffman*, 272 So. 2d 529 (Dist. Ct. App. Fla., 4th Dist., 1973). The court held:

We therefore decide that contributory negligence should not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, but any damages allowed shall be diminished in proportion (percentage) to the amount of the negligence attributable to the person bringing such action or on behalf of whom such action is maintained.

Id. at 533. It is not surprising that the language used here closely resembles that of

tified to the Florida Supreme Court for review, and thus the final disposition of the doctrine in this state, as in New York, has yet to be determined.

It is important to realize that the court method of reform has a number of shortcomings. For example, none of the judicial opinions, in either New York or Florida, mentions any of the procedural means through which a comparative negligence rule might be implemented.⁹⁹ In contrast, the legislature is likely to depart from legal formalism and establish pragmatic rules such as the special verdict procedure under which a jury actually arrives at a percentage distribution of fault. The legislative method of reform may also have the advantage of a statement of all the ramifications and consequences of the change being made, while the traditional judicial approach often leaves the full extent and significance of the change in doubt until another case presents the opportunity to determine an additional aspect of the problem.¹⁰⁰ Thus, the legislature can do more than merely announce a new rule of law; it can specifically establish the way in which the rule will operate and the effect of the rule on existing related concepts.¹⁰¹ Another advantage associated with legislative change is that it can be given a prospective effect. Judicial reform, on the other hand, customarily has an undesirable retroactive effect which subjects conduct to a legal rule that was not in existence at the time the cause of action arose.¹⁰² Finally, there is greater assurance of public acceptance when a new rule of law is adopted by the elected representatives of the people, rather than by the detached members of the judiciary.¹⁰³

Perhaps in recognition of these problems, seven states have recently chosen the legislative method of adoption.¹⁰⁴ Each of the

many comparative negligence statutes. A distinct disadvantage of judicial reform is that unless the courts are willing to make what is in effect a legislative decree, the change to comparative negligence will have to be made on a case-by-case basis. The resulting confusion and uncertainty is exemplified by the New York experience.

⁹⁹ The courts are, of course, well-suited to prescribe the necessary functions of the judge and jury under a comparative negligence system, but judicial opinions rarely utilize this empirical advantage. Judges are prone to ignore the details of actual courtroom practice when announcing broad doctrinal changes in the substantive law.

¹⁰⁰ Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 299 (1963).

¹⁰¹ In this context consideration should be given to the desirability of adopting an extensive comparative negligence rule which could encompass such problems as: (1) the operation of a special verdict for determining the comparative percentages of fault; (2) the effect of the rule on contribution among joint tortfeasors; and (3) the effect of the release of one tortfeasor on liability of others. See IDAHO CODE §§ 6-801 to -806 (Supp. 1973); UTAH CODE ANN. §§ 78-27-37 to -43 (Supp. 1973).

¹⁰² Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 400 (1963).

¹⁰³ Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 791 (1963).

¹⁰⁴ Colorado: COLO. REV. STAT. § 41-2-14 (1971); Idaho: IDAHO CODE §§ 6-801 to -806 (Supp. 1973); New Jersey: N.J. LAWS 1973, ch. 146, effective August 22,

laws was based on Alaska's proposed doctrine representing contributory negligence. The proposed Alaskan rule kept in mind the chance¹⁰⁷ would have under a negligence system. The harsh effects of the rule on the entire financial picture to the other. In a sense, the rule is unnecessary and a fault. Also, what is the proof? What about the kinds of questions to answer, but the implementation of a comparative negligence rule to be expected when enough that these are acceptable to resolution.

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1973; North Dakota: REV. STAT. § 18.470 (1973); and Wyoming: 105 See note 48 *supra*.

It is interesting to note the certitude with respect to P.2d 315 (Colo. 1971) statute was applicable at the time of enactment. Neither comparative negligence nor a vision that adequately covers causes of action which 8th Legis., 1st Sess. § 2.

¹⁰⁶ Fortunately, Alaska in contributory negligence the court criticized the rule that: "[O]nly the trial should govern cases such as should not be a defense.

¹⁰⁷ See W. Prosser suggested that the principle of a comparative negligence rule intended to be mitigated) is guaranteed.

¹⁰⁸ A detailed analysis of the tangential problem, e.g., Ghiardi & Hogan, 18 DEFENSE L.J. 537, 465 (1953).

laws was based on the Wisconsin model and closely resembles Alaska's proposed statute.¹⁰⁵ But while the comparative negligence doctrine represents a distinct improvement over the old rule of contributory negligence, it is surely not a panacea. In considering the proposed Alaskan statute, a number of potential problems should be kept in mind. The doctrines of assumption of risk¹⁰⁶ and last clear chance¹⁰⁷ would have to be applied differently under a comparative negligence system. The doctrines evolved as means to ameliorate the harsh effects of the contributory negligence rule, but in their operation the entire financial burden is merely transferred from one party to the other. In a system of damage apportionment these exceptions are unnecessary and at variance with the theory of comparative fault. Also, what would happen to the rules pertaining to burden of proof? What about contribution between joint tortfeasors?¹⁰⁸ These are the kinds of questions which may have to be left for the courts to answer, but they certainly present no major barrier to the enactment of a comparative negligence rule. Some amount of difficulty is to be expected when dealing with so fundamental a change, and it is enough that these practical problems are both foreseeable and susceptible to resolution.

V. CONCLUSION

The roots of contributory negligence are deeply embedded in the processes of American jurisprudence. Whatever the reason, the

1973; North Dakota: N.D. CENTURY CODE ch. 9-10-07 (Supp. 1973); Oregon: ORE. REV. STAT. § 18.470 (1971); Utah: UTAH CODE ANN. §§ 78-27-37 to -43 (Supp. 1973); and Wyoming: WYO. STAT. § 1-7.2 (Supp. 1973).

¹⁰⁵ See note 48 *supra*.

It is interesting to note that in both Colorado and Oregon there was some incertitude with respect to the retroactive effect of their laws. In *Joseph v. Lowery*, 261 Ore. 545, 495 P.2d 273 (1972), and in *Heafer v. Denver-Boulder Bus Co.*, 489 P.2d 315 (Colo. 1971), it was held that the newly enacted comparative negligence statute was applicable only to causes of action arising subsequent to the effective date of enactment. Neither plaintiff could therefore collect for his damages under the comparative negligence rule. The current Alaskan bill does, however, contain a provision that adequately deals with this issue. It states: "This Act applies only to causes of action which arise subsequent to the effective date of this Act." SB 166, 8th Legis., 1st Sess. § 2 (1973).

¹⁰⁶ Fortunately, Alaska has already discarded this doctrine as a separate defense in contributory negligence cases. In *Leavitt v. Gillaspie*, 443 P.2d 61 (Alaska 1968) the court criticized the operation of the assumption of risk doctrine and concluded that: "[O]nly the traditional notions of negligence and contributory negligence should govern cases such as we have here and that the defense of assumption of risk should not be a defense and should not be used." *Id.* at 63.

¹⁰⁷ See W. PROSSER, *THE LAW OF TORTS* § 67 at 439 (4th ed. 1971). Prosser has suggested that the principle of last clear chance would no longer be necessary under a comparative negligence system. There would obviously be no reason to perpetuate a rule intended to protect the plaintiff's right of recovery, since recovery (though mitigated) is guaranteed under a damage apportionment approach.

¹⁰⁸ A detailed analysis of these issues would serve no useful purpose here. They are tangential problems and have been adequately discussed in other writings. See, e.g., Ghiardi & Hogan, *Comparative Negligence—The Wisconsin Rule and Procedure*, 18 DEFENSE L.J. 537 (1969); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953).

harsh inequities attributable to the doctrine have been tolerated for far too long, a particularly regrettable fact in that a fair and effective alternative rule is available. Comparative negligence offers a more rational approach to the treatment of mutual fault, and experience has shown that the administration of an apportionment doctrine is possible. For Alaska, legislative initiative would be preferable to judicial inertia and piecemeal solutions. The legislature has the opportunity, since a comparative negligence bill is currently before it, to provide a timely and comprehensive solution to the contributory negligence problem. While the importance of tradition in the law is recognized, the legislature can implement needed social changes and discard antiquated rules. Tradition without justice, tradition merely for the sake of tradition, has no place and should give way to a more rational and equitable system.

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COMPARATIVE NEGLIGENCE

As a result of action by the 1973 Legislature,¹ on April 1, 1974, the State of Washington will abandon the doctrine of contributory negligence and replace it with the increasingly popular rule of comparative negligence. Comparative negligence has been described as "a fault concept that apportions liability for damages in proportion to the contribution of each tortfeasor causing the injury or damages."²

This note will discuss briefly the policy considerations underlying a choice between comparative negligence and contributory negligence, and will attempt to predict the effects, both procedural and substantive, of the new Act on practice in Washington.

I. WASHINGTON'S NEW COMPARATIVE NEGLIGENCE ACT

The new Washington Act provides:

Section 1. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages caused by negligence resulting in death or in injury to person or property, but any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering.³

Section 2. The negligence of one marital spouse shall not be imputed to the other spouse to the marriage so as to bar recovery in an action by the other spouse to the marriage, or his or her legal representative, to recover damages from a third party caused by negligence resulting in death or in injury to the person.⁴

Section 1 of the new Act replaces the rule of contributory negligence with the rule of comparative negligence; Section 2 abrogates a long standing community property rule. Some comparative negligence statutes permit only those plaintiffs who are themselves responsible for less than a specified percentage of the total negligence to recover; these

1. Ch. 138, [1973] Wash. Laws, 1st Ex. Sess. The Washington Comparative Negligence Act is codified in WASH. REV. CODE §§ 4.22.010-.910 (Supp. 1973).

2. C. R. HEFT & C. J. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 1.10, at 1 (1971) [hereinafter cited as HEFT & HEFT].

3. WASH. REV. CODE § 4.22.010.

4. *Id.*, § 4.22.020.

statutes enact "modified" comparative negligence. Section 1 of the Washington Act contains no such qualification, placing Washington among the states adopting "pure" comparative negligence. These two forms of comparative negligence have much in common, of course, and the experiences and judicial decisions of jurisdictions which have adopted pure as well as modified comparative negligence will exert persuasive force in construing the new Act.⁵

Although subject to conflicting interpretations,⁶ Sect. 1 2 of the new Act apparently abrogates the common law rule imputing the negligence of one marital spouse to the other so as to bar the latter's recovery in an action for damages caused by the negligence of a third party. Prior to the Act, the courts held that because the damage claim for personal injuries of one spouse is community property, the contributory negligence of the other spouse will bar recovery.⁷

II. HISTORY, ALTERNATIVE FORMS, AND EFFECT ON PROCEDURE OF COMPARATIVE NEGLIGENCE

Adoption of comparative negligence has been a response, by either the legislature or the courts, to the often inequitable results produced by the doctrine of contributory negligence. The judicially-created rule of contributory negligence,⁸ by which a plaintiff recovers all or

nothing, frequently frustrates recovery for the victims of tortious "joint" approach contrasts sharply with the "modified" approach which the fault of the plaintiff does not act as a total bar to recovery.

A. The Debate

Advocates of comparative negligence reduce court congestion by promoting simpler trials.¹⁰ Although the opponents of comparative negligence argue that the new approach reduces some recovery under comparative negligence on both sides and reduces the total amount of recovery. Those who oppose comparative negligence argue that the results are inequitable. Furthermore, they argue that comparative negligence is a just and equitable rule. They argue that the "profit" by their own wrongdoing is ameliorated by the rule.

5. For jurisdictions which have adopted pure comparative negligence, see note 20 *infra*. For jurisdictions which have adopted modified comparative negligence, see notes 28-30 *infra*.

6. Sections 1 and 2, read together, suggest that the Legislature intended each spouse's recovery to be diminished in proportion to the percentage of negligence attributable to the negligently acting spouse; imputed negligence lessens but does not bar recovery. This is consonant with the mandate of Section 1 that "any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering." But when read alone, the absolute prohibition of Section 2 that "the negligence of one marital spouse shall not be imputed to the other spouse . . ." appears to prohibit considering the acting spouse's fault when comparing the negligence of the other; to do so would be "impute" one spouse's negligence to the other. The first interpretation reduces Section 2 to a mere expression of an obvious inference from Section 1; the latter interpretation seems to express better the probable legislative intent.

7. See *Ostheller v. Spokane & Inland Empire R.R.*, 107 Wash. 678, 182 P. 630 (1929).

8. The doctrine originated in *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809), wherein the plaintiff was denied recovery for injuries resulting from a horse riding accident on the ground that he was partially responsible for the accident.

9. See Schwartz, *Pure Comparative Negligence*, 117, 118 (1972) [hereinafter cited as Schwartz]. At the date of this publication, 27 states have enacted some form of comparative negligence: Alaska, ALASKA STAT. § 27-1730.1 (1961); Colorado, COLO. CODE ANN. § 105-603 (1933); Georgia, GA. CODE ANN. § 53-2-1 (1933); Maine, ME. REV. STAT. ANN. tit. 14, § 101 (1969); Minnesota, MINN. CODE ANN. § 3.1454 (1969); Mississippi, MISS. CODE ANN. § 3.1454 (1913); New Hampshire, N.H. REV. STAT. § 18:470 (1971); Rhode Island, R.I. GEN. STAT. § 18-20-1 (1969); South Dakota, S.D. COMPILED LAWS ANN. § 17-22-1 (1969); Wisconsin, WIS. STAT. § 89.11 (1969).

10. See Note, *Tort-Comparative Negligence*, 117, 118 (1964).

11. See Haugh, *Comparative Negligence*, 38, 42 (1969) [hereinafter cited as Haugh].

12. See Cotton, *Comparative Negligence*, 205 (1969); Burns, *Comparative Negligence*, 708 (1963).

13. The arguments in favor of comparative negligence are: (1) A negligent plaintiff should not be barred from recovery for his negligent act; (2) the equitable principle that both parties are at fault, the court should reduce the plaintiff's recovery; (3) comparative negligence provides a check on plaintiff's negligence; (4) the superceding legal cause; and (5) the plaintiff's carelessness. See Haugh, *supra* note 11, at 41.

14. *Id.* at 41.

Comparative Negligence

nothing, frequently frustrates the attainment of full and fair compensation for the victims of tortiously caused accidents. This "all or nothing" approach contrasts sharply with comparative negligence under which the fault of the plaintiff reduces his recoverable damages but does not act as a total bar to recovery.⁹

A. The Debate

Advocates of comparative negligence contend that its adoption reduces court congestion by promoting more settlements and shorter, simpler trials.¹⁰ Although the change may result in an increase in litigation, they argue that the greater certainty of a plaintiff's realizing some recovery under comparative negligence promotes settlement by both sides and reduces the plaintiff's insistence upon a jury trial.¹¹ Those who oppose comparative negligence predict exactly opposite results.¹² Furthermore, they view the doctrine of contributory negligence as a just and equitable check on those individuals who seek to "profit" by their own wrongdoing,¹³ and suggest that any harshness of the rule is ameliorated by the jury's natural sense of justice.¹⁴ Propo-

9. See Schwartz, *Pure Comparative Negligence in Action*, 34 *AM. TRIAL LAW. L.J.* 117, 118 (1972) [hereinafter cited as Schwartz]; HEFT & HEFT, *supra* note 2.

At the date of this publication, the following states number among those which have enacted some form of comparative negligence: Arkansas, *ARK. STAT. ANN.* tit. 27-1730.1 (1961); Colorado, *COLO. REV. STAT.* ch. 41-2-14 (Supp. 1971); Georgia, *GA. CODE ANN.* § 105-603 (1933); Hawaii, *HAWAII REV. STAT.* § 663-31 (1968); Maine, *ME. REV. STAT. ANN.* tit. 14, § 156 (1964); Massachusetts, *MASS. GEN. LAWS ANN.* ch. 231, § 85 (1969); Minnesota, *MINN. STAT. ANN.* ch. 604.01 (1969); Mississippi, *MISS. CODE ANN.* § 3.1454 (1910); Nebraska, *NEB. REV. STAT.* § 25-1151 (1913); New Hampshire, *N.H. REV. STAT. ANN.* § 507:7a (1969); Oregon, *ORE. REV. STAT.* § 18.470 (1971); Rhode Island, *R.I. GEN. LAWS ANN.* § 9-20-4 (1971); South Dakota, *S.D. COMPILED LAWS ANN.* § 20-9.2 (1967); Utah, *UTAH CODE ANN.* § 12-1036 (1969); Wisconsin, *WIS. STAT. ANN.* § 995.045 (1931).

10. See Note, *Tort-Comparative Negligence Statute*, 18 *VAND. L. REV.* 327, 329-30 (1964).

11. See Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 *ORE. L. REV.* 38, 42 (1969) [hereinafter cited as Haugh].

12. See Cotton, *Comparative Negligence: Not in the Public Interest*, 17 *LA. B.J.* 205 (1969); Burns, *Comparative Negligence: A Law Professor Dissents*, 51 *ILL. B.J.* 708 (1963).

13. The arguments in favor of retaining contributory negligence as a bar to actions are: (1) A negligent plaintiff gives implied consent to all the consequences of his negligent act; (2) the equitable doctrine of unclean hands demands that where both parties are at fault, the courts should leave them as they are; (3) contributory negligence provides a check on plaintiff-oriented injuries; (4) the plaintiff's negligence is the superceding, legal cause; and (5) by denying recovery, the doctrine restrains carelessness. See Haugh, *supra* note 11, at 39.

14. *Id.* at 41.

ments of comparative negligence have categorically contradicted these claims.¹⁵

Studies indicate that, in actuality, the change to comparative negligence has little practical effect.¹⁶ A survey of the short-lived experiment of Arkansas with a pure comparative negligence statute from 1955 to 1957 resulted in the following conclusions:¹⁷ (1) The introduction of comparative negligence brought about no drastic change in the number of cases burdening the courts; (2) it did not affect the preference for jury trials or the length of trials; (3) it increased potential litigation but promoted more pretrial settlements; (4) damages were harder to determine under comparative negligence; (5) plaintiffs won more, but not larger, verdicts under comparative negligence; and (6) cases had a higher compromise value for settlement under comparative negligence. A follow-up survey studying the experience of Arkansas under a modified form of comparative negligence from 1957 to 1967 affirmed the conclusions of the original survey.¹⁸ In addition, an observer of Wisconsin's experience with comparative negligence indicates that it has not raised insurance rates.¹⁹

15. They point out that: (1) Where the entire burden of the loss falls upon the less negligent party the policy is harsh and unjustifiable; (2) there are exceptions to the rule by which the party can recover despite his negligence; (3) to say the plaintiff's negligence is the sole cause attributes a meaning to legal cause that is inaccurate; (4) it is unlikely that a negligent plaintiff has in mind his loss of recovery when he commits the negligent act; and (5) rendering the defendant immune may encourage carelessness on his part. To rebut the argument that the jury is already employing a form of comparative negligence, one writer has stated that because juries may use a comparative negligence approach in situations where the plaintiff was contributorily negligent, the retention of the contributory negligence rule leads laymen to disrespect our system of accident law and to ignore jury instructions. See generally HEFT & HEFT, *supra* note 2; Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 468, 470-71 (1953) [hereinafter cited as Prosser]; Laugesen, *Colorado Comparative Negligence*, 48 DENVER L.J. 469, 470 (1972); Haugh, *supra* note 11, at 40; Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 162 (1958) [hereinafter cited as Maloney].

16. See Rosenberg, *Comparative Negligence in Arkansas, A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959) [hereinafter cited as Rosenberg]; Note, *Comparative Negligence—A Survey of the Arkansas Experience*, 22 ARK. L. REV. 692 (1969) [hereinafter cited as Survey]; Pfankuch, *Comparative Negligence vs. Contributory Negligence*, 1968 ILS. L.J. 725, 731 (1968) [hereinafter cited as Pfankuch].

17. See Rosenberg, *supra* note 16, at 108.

18. See Survey, *supra* note 16, at 713.

19. See Pfankuch, *supra* note 16, at 731.

B. *The Pure Form of Comparative Negligence*

Under "pure" comparative negligence is an exact rendering of the portion of damages for which the claimant's damages are diminished. A plaintiff may recover even if his negligence is greater than that of the defendant, but his recovery is reduced by the amount of his own negligence. In terms of fault, a plaintiff who is 90% guilty of ninety-nine percent of his losses.²⁰ The defendant's negligence is 10% of pure comparative negligence.

The most severe criticism of pure comparative negligence is that it permits a wrongdoer to recover for a portion of the greater fault.²¹ Some courts have rejected the philosophy of our fault-based system on the principle that all persons are held to the same standards of conduct which, because of the defendant's negligence, is especially desirable.²² Others feel that a pure comparative negligence statute the jury would not apply in every case.

But, as Dean Prosser asserts, a pure comparative negligence statute is a justified apportionment; furthermore, the courts are less than the nuisance value of the defendant's tortors agree that pure comparative negligence is a just and equitable rule.

20. Delaware, Mississippi and Rhode Island have enacted pure comparative negligence by legislative enactment. R.I. GEN. LAWS § 9-20-4 (Supp. 1973); DEL. CODE ANN. tit. 10, § 2101 (1973). The Florida Supreme Court replaced the contributory negligence rule with comparative negligence. The court's decision was not clear and free from doubt. The law of England was enacted, it was a judicially adopted rule subject to the power of the legislature to change it.

21. See Flynn, *Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 162 (1958) [hereinafter cited as Flynn].

22. See HEFT & HEFT, *supra* note 2.

23. *Id.*

24. HEFT & HEFT propose that if A is 90% negligent and his damages are \$25,000 and he is 90% negligent, he would recover \$2,500. If B was damaged in the same accident, he would recover \$1,000 less than A.

25. *Id.*

26. Prosser, *supra* note 15, at 468.

B. The Pure Form of Comparative Negligence

Under "pure" comparative negligence, apportionment of damages is an exact rendering of the fault system.²⁰ The tortfeasor pays only that portion of damages for which he is accountable; conversely, the claimant's damages are diminished in proportion to his negligence.²¹ A plaintiff may recover even if his negligence is greater than that of the defendant, but his recovery is diminished by the amount of his own negligence. In terms of apportionment, if a plaintiff is found guilty of ninety-nine percent of the fault he still recovers one percent of his losses.²² The defendant's only escape from liability under the rule of pure comparative negligence is a finding of no fault on his part.²³

The most severe criticism directed at pure comparative negligence is that it permits a wrongdoer to recover damages even if he is guilty of the greater fault.²⁴ Some writers feel that this result is contrary to the philosophy of our fault system, a system which is premised on the principle that all persons are responsible for their negligent acts and omissions. They find that such a result diminishes the impact of standards of conduct which, because they reflect the moral law, are socially desirable.²⁵ Others fear that under a pure comparative negligence statute the jury would feel compelled to give the plaintiff something in every case.

But, as Dean Prosser asserts, the court still has control over an unjustified apportionment; furthermore, a small recovery often would be less than the nuisance value of a suit.²⁶ Prosser and other commentators agree that pure comparative negligence is the superior rule of

20. Delaware, Mississippi and Rhode Island have adopted this form of comparative negligence by legislative enactment. See, e.g., MISS. CODE ANN. § 11-7-15 (Supp. 1972); R.I. GEN. LAWS § 9-20-4 (Supp. 1972). In *Hoffmand v. Jones*, 280 So. 2d 431 (Fla. 1973), the Florida Supreme Court replaced the rule of contributory negligence with that of pure comparative negligence. The court reasoned that since the doctrine of contributory negligence was not clear and free from doubt at the time Florida's statute adopting the common law of England was enacted, it was not made a part of the statute law of Florida but was a judicially adopted rule subject to judicial abrogation. *Id.* at 434.

21. See Flynn, *Comparative Negligence: The Debate*, 8 TRIAL 49 (1972) [hereinafter cited as Flynn].

22. See HEFT & HEFT, *supra* note 2, § 1.50.

23. *Id.*

24. HEFT & HEFT propose an example: If *A* has been damaged to the extent of \$25,000 and he is 90% negligent, this would permit a recovery of \$25,000 less 90%, or \$2,500. If *B* was damaged in the same accident to the extent of \$1,000 and was 10% at fault, he would recover \$1,000 less 10% or \$900.

25. *Id.*

26. Prosser, *supra* note 15, at 494.

apportionment and that nonpure forms of comparative negligence leave damages undivided in too many cases and often lead to appeals abounding in confusion.²⁷

C. Modified Comparative Negligence

Nevertheless, most states which have abandoned the doctrine of contributory negligence have adopted a modified, or "nonpure," form of comparative negligence. One variation of this "nonpure" rule allows recovery to plaintiffs whose negligence is "not greater than" that of the defendant.²⁸ The more common form, however, permits only those plaintiffs whose negligence is "not as great as" the defendant's to recover.²⁹ Two states vary this formula by permitting a plaintiff to recover only when his negligence is "slight" relative to the defendant's "gross" negligence.³⁰

III. IMPACT OF COMPARATIVE NEGLIGENCE IN PRACTICE

A. Retroactive Applicability

Comparative negligence will not apply to causes of action which arise before April 1, 1974. In those states in which the issue has been litigated, the courts have unanimously and unequivocally denied retroactive application to comparative negligence unless required by statute;³¹ the new Act does not require retroactive applicability on its

27. See Prosser, *supra* note 15, at 508; Keeton, *Comment on Maki v. Freck*, 21 VAND. L. REV. 906, 911 (1968); Schwartz, *supra* note 9.

28. Three states follow this form of comparative negligence: New Hampshire, N.H. REV. STAT. ANN. § 507:7a (1970); Vermont, VT. STAT. ANN. tit. 12, § 1036 (1937); and Wisconsin, WIS. STAT. § 895 (1971).

29. Eight states follow this rule, but with individual variations: Arkansas, ARK. STAT. ANN. § 27-1730.1 (1947); Colorado, COLO. REV. STAT. ANN. § 41-2-14 (Supp. 1971); Georgia, GA. CODE ANN. § 105-603 (1968); Hawaii, HAWAII REV. STAT. § 663-31 (Supp. 1972); Maine, ME. REV. STAT. ANN. tit. 14, § 156 (1965); Massachusetts, MASS. GEN. LAWS ANN. ch. 231, § 85 (Cum. Supp. 1972); Minnesota, MINN. STAT. ANN. § 604.01 (1945); and Oregon, ORE. REV. STAT. § 18.470 (1953).

30. Nebraska, NEB. REV. STAT. § 25.1151 (1964); and South Dakota, S.D. COMPILED LAWS ANN. § 20-9-2 (1967).

31. See *Fuller v. Illinois Central R.R.*, 100 Miss. 705, 56 So. 783 (1911); *Brewster v. Ludtke*, 211 Wis. 344, 247 N.W. 449 (1933); *Reddell v. Norton*, 225 Ark. 643, 285 S.W.2d 328 (1955). In other states the legislatures have expressly stated the statute either would apply retrospectively or prospectively.

face. While no cases to the effect of *Hallows* argued in a recent decision, the application of Wisconsin's comparative negligence by the plaintiff so long as his negligence and the defendant's was remedial in nature, is pending causes of action.³²

B. Application of the Pure Comparative Negligence Rule to Specific Factual Situations

The operation of a pure comparative negligence rule is demonstrated by reference to the following cases:

Case 1: Plaintiff is guilty and defendant sustains no damage. The jury finds plaintiff twenty-five percent at fault. Comparing his negligence with the defendant's, the plaintiff's recovery accordingly is 75 percent of the total, so he recovers \$7,500.

Case 2: Plaintiff is guilty and the defendant sustains damage. The jury finds plaintiff 25 percent at fault. Plaintiff's negligence damages of \$10,000 are reduced to \$7,500. Plaintiff would have no recovery under contributory negligence jurisdiction.

Case 3: Plaintiff is more negligent than the defendant in a three party situation. Defendant number two (D-2) sustains no

32. *Holzem v. Mueller*, 54 Wis. 2d 100, 197 W.2d 100 (1972) (sentencing). *Hallows* further points out that the merits of which are not determined by the jury, most courts have ignored it.

33. These hypothetical situations are based on the facts of *Hallows*.

34. The case law supports this procedure of comparing the plaintiff's negligence to the defendant's. See *Pearson Appliance Store*, 155 Neb. 433, 210 Wis. 659, 246 N.W. 433 (1955).

35. See *Yazoo & M.V. R.R. v. O*

Comparative Negligence

face. While no cases to the contrary have been found, Chief Justice Hallows argued in a recent dissenting opinion that a statutory modification of Wisconsin's comparative negligence rule to allow recovery by the plaintiff so long as his negligence was "not greater than" the defendant's was remedial in character and should have been applied to pending causes of action.³²

B. Application of the Pure Comparative Negligence Statute to Specific Factual Situations

The operation of a pure comparative negligence statute can be demonstrated by reference to certain hypothetical situations.³³

Case 1: Plaintiff is guilty of lesser negligence in a two-party action and defendant sustains no damage. Plaintiff sustains \$10,000 damage. The jury finds plaintiff twenty-five percent at fault and defendant seventy-five percent at fault. Plaintiff's recovery is determined by comparing his negligence with the total negligence involved and reducing his recovery accordingly;³⁴ thus, plaintiff's negligence is twenty-five percent of the total, so he recovers seventy-five percent of his damages, or \$7,500.

Case 2: Plaintiff is guilty of greater negligence in a two-party action and the defendant sustains no damages. Plaintiff sustains \$10,000 damage. The jury finds plaintiff sixty percent at fault, defendant forty percent. Plaintiff's negligence is sixty percent of the total, so plaintiff's damages of \$10,000 are reduced by sixty percent and he recovers \$4,000.³⁵ Plaintiff would have had no recovery in a modified comparative negligence jurisdiction.

Case 3: Plaintiff is more negligent than one of two defendants in a three party situation. Defendant number one (D-1) and defendant number two (D-2) sustain no damage and plaintiff sustains \$10,000

32. *Holzem v. Mueller*, 54 Wis. 2d 388, 195 N.W.2d 635 (1972) (Hallows, C.J., dissenting). Hallows further points out that a defendant, "has no vested rights in a tort defense, the merits of which are not determined until trial and upon which he did not and could not very well rely in causing injury to the plaintiff." *Id.* at 641. While the argument has merit, most courts have ignored it, giving no reason for doing so.

33. These hypothetical situations are taken from Schwartz, *supra* note 9, at 122-25.

34. The case law supports this method of calculation rather than the now discredited procedure of comparing the plaintiff's negligence to that of the defendant. See *Murray v. Pearson Appliance Store*, 155 Neb. 860, 54 N.W.2d 250 (1954); *Cameron v. Union Auto. Ins. Co.*, 210 Wis. 659, 246 N.W. 420 (1933).

35. See *Yazoo & M.V. R.R. v. Carroll*, 103 Miss. 830, 60 So. 1013 (1912).

damage. Suppose plaintiff was forty percent negligent, *D-1* was ten percent negligent and *D-2* fifty percent negligent. Plaintiff's damages of \$10,000 are reduced by his share of the total negligence, forty percent, and he obtains a judgment against *D-1* and *D-2* for \$6,000. *D-1* and *D-2* will be jointly and severally liable to plaintiff; no right of contribution exists between joint tortfeasors in Washington.³⁶

Case 4: A two-party action in which both parties sustain damages. Automobiles owned and driven by *A* and *B* collide. Each sustains \$10,000 damage. *A* sues *B* and *B* files a counterclaim. *A* is found forty percent negligent and *B* is found sixty percent negligent. *A*'s negligence is forty percent of the total, so his damages of \$10,000 are reduced by forty percent and *A* is entitled to recover \$6,000 from *B*. Likewise, *B*'s damages of \$10,000 are reduced by sixty percent and *B* is entitled to recover \$4,000 from *A*. The question of setoff between *A* and *B* is discussed later.³⁷

Case 5: Vicarious liability. Assume that a servant negligently drives his master's truck within the scope of his employment, and it collides with a car being negligently driven by defendant. Servant is guilty of twenty-five percent of the negligence, and defendant is guilty of seventy-five percent of the negligence. The master may recover his damages from the defendant, less twenty-five percent. Similarly, defendant may recover his damages from the master, less seventy-five percent. If the master is assumed not to be negligent in entrusting the truck to the servant, the calculations simply are performed between the servant and defendant, and the master is then substituted for the servant to determine his recovery.³⁸ But if the master were negligent in entrusting the truck to the servant, perhaps knowing that the servant was drunk, the master's recovery would be reduced by his own personal negligence plus that of his servant imputed to him under the doctrine of respondeat superior.³⁹

C. Standard of Apportionment

A primary question arising under a comparative negligence statute

36. See discussion of contribution in text accompanying notes 14-17 *infra*.

37. See discussion of setoff in text accompanying notes 67-71 *infra*.

38. See Dobbs, *Act 191 Comparative Negligence*, 9 ARK. L. REV. 357, 379 (1955) [hereinafter cited as Dobbs].

39. *Id.*

is whether it is the relative negligence that should be the basis for apportionment. In some cases reduce damages in proportion among commentators is apportionment should be apportioned among parties.⁴¹ This is the position where comparative negligence is compared not to the total negligence, or the number of negligent parties, but upon each party's relative negligence causing the accident.⁴² Certain jurisdictions apply the same percentage of negligence to each party if each is guilty of the same kind of negligence. There is a distinction between the extent of negligence in the accident and the extent to which the negligence is beyond the ken of the jury.

D. Special Verdicts

The special verdict has been used to determine comparative negligence concept.⁴⁴ Used to determine as findings of fact the percentage of negligence at fault, the jury applies the law and apportionment.

40. Baird v. Harrington, 202 Mich. 101 (1924).

41. See Prosser, *supra* note 15, at note 38, at 361; and Bouchard, *Apportionment of Damages*, 54 Mass. L.Q. 125 (1972) [hereinafter cited as Bouchard].

42. Grana v. Summerford, 12 W. Va. 101 (1878).

43. Strupp v. Farmers Mutual A. & M. Ins. Co., 100 Ark. 101 (1915).

44. HERT & HERT, *supra* note 2, at 101.

45. See Maloney, *supra* note 15, at 101.

1. In operating his automobile, was the defendant Smith negligent?

2. If you answer Question 1 'Yes', was the defendant Smith negligent a cause of the collision? Yes.

3. In operating his automobile, was the plaintiff Jones negligent at the intersection? Yes.

4. If you answer Question 3 'Yes', was the plaintiff Jones negligent a cause of the collision? Yes.

5. If you answer all of the above questions 'Yes', what percentage of the total negligence is attributable to plaintiff Jones? 40 percent.

is whether it is the relative degree of causation or of fault which should be the basis for apportionment of damages. Although some cases reduce damages in proportion to causation,⁴⁰ the preferred position among commentators is that once sufficient causation is established, apportionment should be based on the comparative fault of the parties.⁴¹ This is the position of the Wisconsin court; it has held that negligence is compared not on the basis of the kind or character of causal negligence, or the number of respects in which the parties were negligent, but upon each party's contribution to the total negligence causing the accident.⁴² Certainly the jury is not required to attribute the same percentage of negligence to each party merely because each is guilty of the same kind of negligence.⁴³ In any event, a refined distinction between the extent to which the defendant's fault caused the accident and the extent to which he was negligent is likely to be beyond the ken of the jury.

D. Special Verdicts

The special verdict has been called the cornerstone of the comparative negligence concept.⁴⁴ Under a special verdict, the jury is required to determine as findings of fact the total amount of damages and the percentage of negligence attributable to each party; the judge then applies the law and apportions the damages.⁴⁵ This procedure is

40. *Baird v. Harrington*, 202 Miss. 112, 30 So. 2d 82 (1947).

41. See Prosser, *supra* note 15, at 481; Schwartz, *supra* note 9, at 125; Dobbs, *supra* note 38, at 361; and Bouchard, *Apportionment of Damages Under Comparative Negligence*, 54 MASS. L.Q. 125 (1972) [hereinafter cited as Bouchard].

42. *Grana v. Summerford*, 12 Wis. 2d 517, 107 N.W. 2d 463 (1961).

43. *Strupp v. Farmers Mutual Auto. Ins. Co.*, 14 Wis. 2d 158, 109 N.W.2d 660 (1961).

44. HEFT & HEFT, *supra* note 2, § 8.10.

45. See Maloney, *supra* note 15, at 171-72; Prosser poses a series of specific questions and answers which might appear in a typical case under a special verdict procedure:

1. In operating his automobile at the time of and immediately preceding the collision, was the defendant Smith negligent with respect to the operation of his car? Yes.

2. If you answer Question 1 'Yes,' then answer this: Was the defendant Smith's negligence a cause of the collision? Yes.

3. In operating his automobile at the time of and immediately preceding the collision, was the plaintiff Jones negligent with respect to failure to stop before entering the intersection? Yes.

4. If you answer Question 3 'Yes,' then answer this: Was the plaintiff Jones's negligence a cause of the collision? Yes.

5. If you answer all of the above Questions 1, 2, 3, and 4 'yes,' then answer this: What percentage of the total negligence was attributable to defendant Smith? 60 percent. To plaintiff Jones? 40 percent.

useful to assure that the jury does not apportion damages on some basis other than a comparison of fault.

Most commentators support the use of special verdicts, especially with the pure form of comparative negligence.⁴⁶ Although the Washington Act does not require special verdicts,⁴⁷ Washington courts have discretionary power to require a jury to return a special verdict.⁴⁸ In addition to the value of special verdicts as an aid to apportionment, a special verdict requires the jury to find the facts without regard to the actual outcome of the case.⁴⁹ It is claimed that this procedure provides a method for controlling the jury in order to prevent excess sympathy, prejudice, or bias from tainting the fact finding process.⁵⁰ Also, the special verdict makes it possible to localize error and save sound portions of a verdict, whereas a defect in part of a general verdict destroys the whole verdict.⁵¹

Although it is difficult in cases containing numerous complex issues to formulate satisfactory special verdicts either in the form of fact questions or fact findings,⁵² a general verdict does not insure that the jury understood or followed instructions.⁵³ Nevertheless, special verdicts have been opposed as making it difficult for juries to reach

agreement,⁵⁴ and as limiting the operation of justice.⁵⁵

E. Multiple Parties

Multiple wrongdoers are joined in a lawsuit when they cause, and the injured party is damaged by, the acts of multiple parties.⁵⁶ In theory, the only way to handle a multiple party accident through a single lawsuit is to bring all parties into court in a single lawsuit. To allocate the damages based on the fault of each party, the plaintiffs will do well to avoid the danger of jury confusion in multiple party cases.⁵⁷

F. Effect on Conflict of Laws

There is no uniform rule for the choice of law conflicts between comparative negligence and those applying the pure negligence statute. Some courts have held that the statute is in effect where the forum court is.⁵⁸ The rationale is that comparative negligence, by granting a common law to persons consistent with the substantive rights of litigants,⁵⁹ is a traditional conflict of laws rule where the wrong occurred.

6. What is the amount of damages plaintiff Jones has sustained? \$10,000. Prosser, *supra* note 15, at 497-98.

46. Ghiardi and Hogan, *Comparative Negligence*, 18 DEFENSE L.J. 537 (1969); Kirchen, *Unfairness of "Mississippi Type" Comparative Negligence*, 2 FOR THE DEFENSE 66 (1970); HEFT & HEFT, *supra* note 2, § 8.10; Prosser, *supra* note 15, at 497; Maloney, *supra* note 15, at 171-72; Bouchard, *supra* note 41; Note, *Comparative Negligence, A Look at the South Dakota Approach*, 14 S.D. L. REV. 92 (1969).

Mississippi utilizes general verdicts rather than special verdicts in applying its pure comparative negligence statute. Such use of general verdicts in comparative negligence actions has been criticized on the ground that it is not possible to determine whether the jury does, in fact, diminish the recovery it awards in proportion to the negligence attributed to the person injured. See HEFT & HEFT, *supra* note 2, § 3.310.

47. See text accompanying note 3 *supra*.

48. (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answers or may submit written forms of the several special findings which might properly be made under the pleadings and evidence WASH. SUPER. CT. (CIV.) R. 49 (1972).

49. See HEFT & HEFT, *supra* note 2, § 8.10.

50. See Maloney, *supra* note 15, at 171-72.

51. See Driver, *The Special Verdict—Theory and Practice*, 26 WASH. L. REV. 21, 22 (1951) [hereinafter cited as Driver].

52. See Driver, *supra* note 51, at 24; HEFT & HEFT, *supra* note 2, § 1.70; Schwartz, *supra* note 9, at 134.

53. See HEFT & HEFT, *supra* note 2, § 1.70.

54. See Driver, *supra* note 51.

55. 5 J. MOORE, FEDERAL PRACTICE & PROCEDURE § 100.02 (1973).

56. See Maloney, *supra* note 15.

57. Multiple party cases are difficult to handle because of the complexity of the fault and assessment of damages in the typical jury, especially with only one lawyer. They may approach a complexity in the allocation process. See Prosser, *supra* note 15, at 497.

58. See cases collected at 57 *supra*.

59. See Mississippi Power & Light Co. v. Shipowners & Merchants, 1934, classifying Mississippi's comparative negligence statute as a traditional conflict of laws rule.

60. See Chisum v. Phelps, 228 N.Y. 252, 169 N.E. 27 (1927).

61. See RESTATEMENT OF CONFLICTS OF LAWS § 389 (1934).

Comparative Negligence

agreement,⁵⁴ and as limiting the historic role of juries in the administration of justice.⁵⁵

E. Multiple Parties

Multiple wrongdoers are jointly and severally liable for the injuries they cause, and the injured party has the right to join them as defendants.⁵⁶ In theory, the only satisfactory method of dealing with a multiple party accident through comparative negligence is to bring all the parties into court in a single action, apportion the fault and then allocate the damages based on this apportionment. However, in practice plaintiffs will do well to avoid whenever possible the complexities and danger of jury confusion inherent in the joinder of multiple defendants.⁵⁷

F. Effect on Conflict of Laws

There is no uniform rule by which forum courts have resolved choice of law conflicts between jurisdictions embracing comparative negligence and those applying the common law rule of contributory negligence.⁵⁸ Some courts have held that if a comparative negligence statute is in effect where the tort occurred, it must be applied by the forum court.⁵⁹ The rationale of these decisions is that comparative negligence, by granting a right of recovery not recognized by the common law to persons contributorily negligent, directly affects substantive rights of litigants;⁶⁰ consequently, if such a court follows the traditional conflict of laws rule that the substantive law of the place where the wrong occurred governs the action,⁶¹ it will look to that law

54. See *Driver*, *supra* note 51, at 134.

55. 5 J. MOORE, *FEDERAL PRACTICE* § 49.05 (1960).

56. See *Maloney*, *supra* note 15, at 164-65.

57. Multiple party cases are often extremely complex factually. Apportionment of fault and assessment of damages involving three or more parties is a monumental task for the typical jury, especially with only limited time available. When special verdicts are used, they may approach a complexity and number which render the jury totally ineffective in the allocation process. See *Prosser*, *supra* note 15, at 503-04.

58. See cases collected at 57 AM. JUR. 2d, *Negligence* § 430 (1971).

59. See *Mississippi Power & Light Co. v. Whitescarver*, 63 F.2d 928, 929 (5th Cir. 1934), classifying Mississippi's comparative negligence statute as substantive; see also *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal. 2d 365, 159 P.2d 1, 8 (1945).

60. See *Chisum v. Phelps*, 228 Ark. 936, 311 S.W.2d 297 (1958); *Fitzpatrick v. International Ry.*, 252 N.Y. 127, 169 N.E. 112 (1929).

61. See *RESTATEMENT OF CONFLICTS* § 377 (1934).

in determining whether the doctrine of contributory negligence or comparative negligence will control.⁶² The Washington court follows the traditional place of wrong rule,⁶³ but since it has not yet characterized comparative negligence as a matter of substance or procedure, it is impossible to predict how the court will apply the law in such a case.

The Mississippi court has replaced the traditional, inflexible conflict of laws rule in tort cases with what is known as the "most significant relationship rule."⁶⁴ Using this doctrine, the court will apply its own comparative negligence law where the forum state has a more significant relationship to the occurrence and parties, even though the accident causing the injuries took place in another state adhering to the common law contributory negligence doctrine.⁶⁵ Conversely, under some modern conflicts rules, the court may decide to apply a comparative negligence statute of the place of the wrong, rather than the common law rule of the forum, on the ground that the foreign jurisdiction has a stronger interest in having its law applied than does the forum.⁶⁶

G. Setoff

Under Washington law, the court has discretion to allow a setoff of one judgment against another when warranted by considerations of equity.⁶⁷ Some commentators oppose the use of setoffs in conjunction with the pure form of comparative negligence,⁶⁸ and Rhode Island has responded to this criticism by incorporating in its pure comparative negligence statute a provision prohibiting setoffs.⁶⁹

62. See *Tri-State Transit Co. v. Monday*, 194 Miss. 714, 12 So. 2d 920, 922 (1943); *Mississippi Power & Light Co. v. Whitescarver*, *supra* note 59; *Chism v. Phelps*, *supra* note 60; *Fitzpatrick v. International Ry.*, *supra* note 60.

63. See *Maag v. Voykovich*, 46 Wn. 2d 302, 280 P.2d 680 (1955); *Stone Machinery Co. v. Kessler*, 1 Wn. App. 750, 460 P.2d 651 (1970).

64. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

65. See *Mitchell v. Craft*, 211 So. 2d 509, 516 (Miss. 1968).

66. See *Frummer v. Hilton Hotels Int'l.* 60 Misc. 2d 840, 304 N.Y.S.2d 335, 344 (N.Y. App. 1969).

67. See *Spokane Security Finance Co. v. Bevans*, 172 Wash. 418, 20 P.2d 31, 32 (1933).

68. See *Flynn*, *supra* note 21, at 52; *Schwartz*, *supra* note 9, at 126. Counterclaims, and, consequently, setoff problems, do not arise in connection with the "not as great as" and "slight-gross" forms of comparative negligence, as the plaintiff is permitted to recover only if his contributory negligence is less than that of the other party, thus precluding recovery by the other party. See 11 ARK. L. REV. 71, 74 (1956).

69. See R.I. GEN. LAWS § 9-20-4.1 (1956).

Whether setoff is permitted in the context of insurance claims found equally at fault and comparative negligence each with the other party's insurer. If judgments would cancel each other out to insurance companies, what is the effect of the pure comparative negligence rule?

Proponents of setoff, on the other hand, argue that the defendant's insurer can not be expected to pay more vigorously in the absence of a setoff. If the defendant's insurer would not ultimately be responsible for the plaintiff's judgment. The defendant's counterclaim on behalf of the defendant when the plaintiff's judgment is based on the defendant's policy and reached the plaintiff's insurer.

Encumbering the pure comparative negligence rule would result in insurance companies apportioned to their assets. If the defendant's insurer is expected from the comparative negligence statute to ignore part of the plaintiff's judgment.

IV. COMPARATIVE NEGLIGENCE ON COMMON LAW

Aside from these changes, the change to comparative negligence has resulted in the application of such concepts as last clear chance, degrees of negligence. In Virginia, the last clear chance and indemnification seem to be the most frequently employed.

A. Last Clear Chance

Before the adoption of comparative negligence, the tools most frequently employed were the last clear chance and indemnification.

70. See *Flynn*, *supra* note 21.

71. See *Dobbs*, *Comparative*

Whether setoff is permitted or not becomes important, of course, in the context of insurance claims. If both plaintiff and defendant were found equally at fault and sustained equal damages, under pure comparative negligence each would recover one-half of his damages from the other party's insurer. If setoffs are permitted, however, the two judgments would cancel each other out. This result, although pleasing to insurance companies, would negate much of the intended advantage of the pure comparative negligence rule.⁷⁰

Proponents of setoff, on the other hand, suggest that the defendant's insurer can not be expected to argue its client's counterclaim vigorously in the absence of setoff, because proof of its client's damages would not ultimately benefit the insurer by reducing or cancelling the plaintiff's judgment. The insurer's failure to establish a strong counterclaim on behalf of his client could be very damaging to a defendant when the plaintiff's recovery exceeded the limits of the defendant's policy and reached him personally.⁷¹

Encumbering the pure comparative negligence rule with setoff would result in insurance companies paying less than the total damages apportioned to their assureds; this vitiates the recovery of damages expected from the comparison of negligence and allows the liability insurer to ignore part of the risk it contracted to bear.

IV. COMPARATIVE NEGLIGENCE AND ITS EFFECT ON COMMON LAW CONCEPTS

Aside from these changes in the mechanics of negligence law, the change to comparative negligence also may arouse controversy over the application of such traditional common law doctrines and concepts as last clear chance, assumption of risk, *res ipsa loquitur* and degrees of negligence. In Washington, the application of contribution and indemnification seem well settled.

A. Last Clear Chance

Before the adoption of comparative negligence statutes, one of the tools most frequently employed to overcome the contributory negli-

70. See Flynn, *supra* note 21, at 52.

71. See Dobbs, *Comparative Negligence*, 9 *ARK. L. REV.* 357, 383 (1955).

not be justified on the usual ground that the defendant was the proximate cause of the accident. Because of the doctrine's logical inconsistency in this third class of cases and because its application in all three classes of cases has the effect of placing the *entire* loss on the defendant despite the plaintiff's negligence, most writers have urged the doctrine be discarded with the passage of comparative negligence statutes.⁷⁷

Nevertheless, not all states which have adopted comparative negligence statutes have done away with the doctrine. Last clear chance and comparative negligence exist side by side in Nebraska,⁷⁸ South Dakota,⁷⁹ and Georgia.⁸⁰ In Arkansas⁸¹ and Mississippi⁸² it is unclear whether the doctrine has been retained. The Wisconsin Supreme

less, the Washington court held the doctrine applicable to such a situation and the railway was held liable. *Locke* is cited in James, *supra* note 75, at 713.

The *Locke* decision was subsequently followed in *Norton v. City of Seattle*, 113 Wash. 408, 194 P. 373 (1920), another street car accident case wherein a deaf and dumb child darted out in front of the streetcar and although seen, was struck anyway when all the gripman did was to sound the gong without slowing down.

77. See, e.g., PROSSER, *supra* note 72, at 427; James, *supra* note 75; and MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1946). In Professor MacIntyre's words, "The whole last clear chance doctrine is only a disguised escape, by way of comparative fault, from contributory negligence as an absolute bar, and serves no useful purpose in jurisdictions which have enacted apportionment statutes." *Id.* at 1251.

78. See *Bezdek v. Patrick*, 170 Neb. 522, 103 N.W.2d 318 (1960).

79. See *Ulach v. Wyman*, 78 S.D. 504, 104 N.W.2d 817 (1960).

80. *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 88 S.E. 2d 6 (1955). The Georgia result, it should be noted, is dictated by the peculiarity of that state's statute which declares:

If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.

GA. CODE ANN. § 105-603 (1968).

The first sentence of the quoted statute has been construed as a plaintiff's last clear chance doctrine. See *Southern Ry. v. Wilbanks*, 67 F.2d 424 (5th Cir. 1933); *United States v. Fleming*, 115 F.2d 314 (5th Cir. 1940). The second sentence is the basis for comparative negligence in Georgia. For an article criticizing the retention of last clear chance in Georgia, see Note, 1 GA. B.J. 500, 505 (1964), wherein the author states that the statute, by retaining the last clear chance doctrine, encroaches on and to that extent impairs the symmetry of the rule of comparative negligence.

81. See *Ed Hopson Produce Co. v. Munoz*, 230 Ark. 179, 321 S.W.2d 203 (1959) (dicta indicating that, had the factual situation been one in which the doctrine of "discovered peril" (the equivalent of last clear chance) could properly have been applied, the trial judge would have erred in refusing to instruct the jury on the doctrine). *But see Reppeto v. Raymond*, 172 F. Supp. 786 (W.D. Ark. 1959) (dicta).

82. Several federal courts construing the Mississippi statute have concluded that the doctrine, while of diminished importance, is still alive in that state. See *Illinois Central R.R. v. Underwood*, 235 F.2d 868 (5th Cir. 1956), and *Brand v. Baker*, 324 F.2d 213 (5th Cir. 1963), in which the court assumed the doctrine applied but found it inapplicable to the factual situations before the court.

Comparative Negligence

ically dissimilar contexts.⁸⁹ Despite some apparent vacillation,⁹⁰ the Washington court has recognized the doctrine in most situations. Nevertheless, in the master-servant setting the doctrine has been explicitly abrogated⁹¹ and there are indications it will also be held to be unavailing in others.⁹² Where the doctrine does survive, the Washington court until recently had compounded the confusion by distinguishing assumption of risk from the closely analogous if not identical maxim of *volenti non fit injuria*, holding that the former applies to cases involving an express consensual acceptance of a risk known or unknown at the time of agreement, while the latter applies only to a unilateral assumption of a known risk.⁹³

With the adoption of a comparative negligence statute, assumption of risk logically should be abandoned; the plaintiff's voluntary exposure to an appreciated risk merely should increase his proportion of fault for computation purposes. Nevertheless, this reasoning has not been uniformly adopted by the courts. Mississippi,⁹⁴ Georgia,⁹⁵ South

89. Dean Prosser divides assumption of risk into three main categories: (1) where the plaintiff in advance has given his consent to relieve the defendant of a legal duty towards him; (2) where the plaintiff voluntarily enters into some relation with the defendant, with knowledge the defendant will not protect him against risk; and (3) where the plaintiff already is aware of the risk created by the defendant's negligence but nevertheless proceeds to encounter it. PROSSER, *supra* note 72, at 439.

90. It was thought at one time that the doctrine had been put to rest in Washington. In *Feignbaum v. Brink*, 66 Wn. 2d 125, 401 P.2d 642 (1965), the court held the doctrine of assumption of risk unavailable in a landlord-tenant situation where the lessor was under a duty to repair and maintain common areas. Language in the case indicated that the court might have been willing to abrogate the doctrine completely. A case decided soon after *Feignbaum*, however, makes clear that a broad reading of the decision would be incorrect and that the doctrine has survived. See *e.g.*, *Perry v. Seattle School Dist.*, 66 Wn. 2d 800, 405 P.2d 589 (1971).

91. *Siragusa v. Swedish Hosp.* 60 Wn. 2d 310, 373 P.2d 767 (1962). In *Siragusa* plaintiff nurse was injured at her place of employment when a door with a hook on it was unexpectedly opened by a patient and the hook struck her on the upper portion of her back. In reversing the judgment of dismissal in favor of the defendant hospital, the court held that if an employer negligently fails in his duty to furnish his employees with a reasonably safe place to work, the employee will not be denied recovery simply because he was aware or should have known of the dangerous condition. Rather, knowledge and voluntary exposure to the risk were held properly considered as factors in determining whether the employee was contributorily negligent.

92. See, *e.g.*, *Feignbaum v. Brink*, *supra* note 90.

93. See *Hogenson v. Service Armament Co.*, 77 Wn. 2d 209, 215 n.2, 461 P.2d 311 (1969). See also *Walsh v. West Coast Coal Mines*, 31 Wn. 2d 396, 197 P.2d 233 (1948); *Bailey v. Safeway Stores*, 55 Wn. 2d 730, 349 P.2d 1077 (1960). But see *Lyons v. Redding Construction Co.*, 83 Wn. 2d 86, 515 P.2d 821 (1973).

94. While Mississippi retains the doctrine in most cases, the Legislature has made the doctrine inapplicable in the master-servant relationship. See Miss. CODE ANN. § 1456 (1917). For a recent Mississippi decision to the effect that assumption of risk will still be applied absent such a relationship, see *United Roofing and Siding Co. v. Seefeld*, 222 So. 2d 406 (Miss. 1969).

95. In Georgia the assumption of risk by the plaintiff or plaintiff's deceased is an-

Dakota,⁹⁶ and Arkansas⁹⁷ all apparently retain the doctrine as a complete bar to recovery. Wisconsin has abolished it. Because the opinions by the Wisconsin court provide the most lucid analysis, this note will deal only with the experience of that state.

Wisconsin's abandonment of assumption of risk had its genesis in *McConville v. State Farm Mutual Automobile Insurance Co.*,⁹⁸ in which a guest in the defendant's car sued the driver for injuries sustained as a result of negligent driving. Both the plaintiff and defendant had been drinking at a tavern shortly before the accident and were on

other instance, along with last clear chance, where the comparison under the statute will not be made. When the plaintiff knowingly and voluntarily puts himself in obvious peril or exposure to injury without some reason of necessity or propriety in so doing he may not recover notwithstanding the fact the defendant negligently injured him. For statements of this general proposition, see *Columbia R.R. v. Asbell*, 133 Ga. 573, 66 S.E. 902 (1909); *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 88 S.E.2d 6 (1955); and, more recently, *Henry Grady Hotel Corp. v. Watts*, 119 Ga. App. 251, 167 S.E.2d 205 (1969).

96. Actually the authority in South Dakota is very weak. *Raverty v. Goetz*, 82 S.D. 192, 143 N.W. 2d 859 (1966), does make passing reference, however, to the fact that defendant's negligence, plaintiff's negligence, proximate causation and assumption of risk are all matters to be decided by the trier of fact.

97. Although there are no reported Arkansas state court cases in which the doctrine has been challenged, several federal courts in Arkansas reluctantly have held that the doctrine retains its vitality. The leading case is *Harris v. Hercules, Inc.*, 328 F. Supp. 360 (E.D. Ark. 1971), *aff'd*, 455 F.2d 267 (8th Cir. 1972), in which an action was brought for personal injuries sustained by the plaintiff when the boom of a crane he was operating came into contact with an uninsulated high voltage power line. Plaintiff squarely presented the court with the argument that with the adoption of the comparative statute Arkansas would preclude use of the doctrine as a complete bar to recovery. While recognizing that assumption of risk was inconsistent with the philosophy of comparative negligence, Judge Eisele felt bound by the state courts' seemingly uncritical acceptance of the doctrine and held that the plaintiff was completely barred from recovery.

As Judge Eisele points out, language in two Arkansas state cases, *J. Paul Smith Co. v. Tipton*, 237 Ark. 486, 374 S.W.2d 176 (1964), and *Hass v. Kessell*, 245 Ark. 361, 432 S.W.2d 842 (1968), indicate that assumption of risk would not be applicable to a guest's suit against his host. The judge is correct in his conclusion, however, that this reading would be inconsistent with the actual disposition of the claim that arose in those cases and with language in other state cases.

The Eighth Circuit reluctantly affirmed *Harris*, noting that two federal judges in Arkansas were now in agreement that assumption of risk was still viable in Arkansas and that an appellate court should defer to a local federal judge's view of state law rather than seek to substitute its own rule. The other decision referred to is *Rhoads v. Service Machines Co.*, 329 F. Supp. 367 (E.D. Ark. 1971) wherein Judge Henley unequivocally states:

The Arkansas comparative negligence statute . . . did not abolish the common law defense of assumption of risk, and it now seems established in Arkansas that in most tort situations assumption of risk, if established, is a complete defense to an injured person's claim for damages.

Id., at 371 n.2.

98. 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

their way to a Christmas party. The driver was eighty-five percent negligent. However, the plaintiff was held a guest's assumption of risk and thus barred from recovery. The court held a guest's assumption of risk was a complete bar to a guest's exposure of himself to such conduct was negligent driving. Although the Wisconsin statute. Although *McConville v. State Farm Mutual Automobile Insurance Co.*,⁹⁹ the subsequent case law has applied the rule to products liability. The rule is applied by a user of consumer products who exercises reasonable care, could be compared to the defendant.

Unfortunately, in neither case was the doctrine well articulated. In *McConville*, the court stated that the doctrine of risk, "in all probability, is a complete bar to the statute since it continues to be a very important, and very common, defense to a plaintiff."¹⁰¹ Additionally, those states which have retained the doctrine, a good negligence statute, a good defense to a plaintiff which at least one federal court has held should be extended to areas where it does, nothing to a strict liability and contributory negligence statute, and anomalous results."¹⁰²

The Washington Supreme

99. The court noted also that the use of the automobile are a mere supplicant, 113 N.W.2d at 374. 100. 37 Wis. 2d 443, 155 N.W.2d 100. The plaintiff was skidding a pool table along the edge of the pool, one of the legs collapsed, crushing the plaintiff's leg. The manufacturer.

While the strict liability defense was available to the plaintiff, *McConville v. State Farm Mutual Automobile Insurance Co.*, 57 Wis. 2d 371, 201 N.W.2d 100, subject to the comparative negligence statute, *Snap-On Tools Corp.*, 339 F. Supp. 101.

101. See PROSSER, *supra* note 99, at 101. 102. See *Harris*, 328 F. Supp. 360.

Comparative Negligence

their way to a Christmas party when it occurred. The jury found the driver eighty-five percent negligent and the plaintiff guest fifteen percent negligent. However, it also found the guest to have assumed the risk and thus barred from recovery. The Wisconsin court reversed and held a guest's assumption of risk no longer to be a separate defense; if a guest's exposure of himself to a particular hazard was unreasonable, such conduct was negligent and subject to the comparative negligence statute. Although *McConville* dealt with only the host-guest situations,⁹⁹ the subsequent case of *Dippel v. Sciano*¹⁰⁰ extended the rule to products liability. The court observed that assumption of risk by a user of consumer products, resulting from a failure to exercise reasonable care, could be considered negligence by the plaintiff to be compared to the defendant's negligence.

Unfortunately, in neither decision was the best reason for abrogating the doctrine well articulated—the fact that retention of assumption of risk, “in all probability . . . defeats the basic intention of the statute since it continues an absolute bar in the case of one important, and very common, type of negligent conduct on the part of the plaintiff.”¹⁰¹ Additionally, it could have been pointed out that in those states which have retained both the doctrine and a comparative negligence statute, a good deal of confusion has reigned, confusion which at least one federal judge has described as “the natural result of permitting the utilization of the assumption of risk doctrine to be extended to areas where it should have no applicability, adding, as it does, nothing to a straightforward analysis in terms of negligence and contributory negligence—nothing, that is, except confusion and anomalous results.”¹⁰²

The Washington Supreme Court has apparently accepted this rea-

99. The court noted also that present day customs and community attitudes toward the use of the automobile are out of line with the old notion that a guest rides as a mere supplicant, 113 N.W.2d at 16.

100. 37 Wis. 2d 443, 155 N.W. 2d 55 (1967). In *Dippel* the plaintiff and others were skidding a pool table along a tavern floor to get it into a playing position. One of the legs collapsed, crushing plaintiff's foot, and he sued both the tavern owner and the manufacturer.

While the strict liability discussion in *Dippel* is dicta, a later case, *Gies v. Nissen Corp.*, 57 Wis. 2d 371, 204 N.W. 2d 519 (1973), held products liability actions were subject to the comparative negligence rule. For the same holding, see *Hagenbuck v. Snap-On-Tools Corp.*, 339 F. Supp. 676 (W.D. N.H. 1972).

101. See PROSSER, *supra* note 72, at 457.

102. See *Harris*, 328 F. Supp. at 364.

soning as well as of Wisconsin's interpretation of its statute in *McConville*, and has indicated in dicta that the doctrine will be abandoned once the new Act becomes effective.¹⁰³ Again, it should be emphasized that those elements which have constituted assumption of risk will still be considered by the jury, but in a weighing of fault rather than as an absolute bar to recovery.

C. *Res Ipsa Loquitur*

Under the doctrine of *res ipsa loquitur*, in certain circumstances the trier of fact is allowed, but not compelled, to infer that the defendant was negligent. Three conditions generally are required for the doctrine to apply: (1) The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence, (2) it must be caused by an agency or instrumentality within the "exclusive control" of the defendant and (3) it must not be caused by any voluntary act or contribution on the part of the plaintiff.¹⁰⁴

The Wisconsin court held in *Turk v. H. C. Prange Co.*¹⁰⁵ that passage of the comparative negligence statute negated the third requirement of the doctrine and that negligence by the plaintiff is considered in comparing the respective negligences rather than in applying *res ipsa loquitur*. A federal court in Mississippi,¹⁰⁶ on the other hand, took the position that *res ipsa loquitur* was not applicable in an action where the evidence indicated that the plaintiff's deceased had been contributorily negligent.

In Washington, where the primary effect of the doctrine is to protect the plaintiff from a nonsuit, the Wisconsin approach, retaining

only the first two elements. Probably, the reason for the third to permit a case to go to the jury is barred from recovery because of the passage of the new Act this

D. *Degrees of Negligence*

It is well-established in Washington that the negligence of a plaintiff does not bar his recovery by the defendant. While other jurisdictions in Washington the leading case has been consistently followed. It is logical that comparative negligence conduct is subject to comparison under the doctrine to mitigate his own liability for negligence. To show that the plaintiff was contributorily negligent.

On the other hand, "willful and wanton" negligence has been defined as including a conscious awareness that injury would be caused, not the same as "gross" negligence. Negligence has been defined as fa

103. See *Lyons v. Redding Construction Co.*, 83 Wn. 2d 86, 95-96, 515 P.2d 821, 826 (1973).

104. W. PROSSER, LAW OF TORTS, § 39 (3d ed. 1964); 9 J. WIGMORE, EVIDENCE § 2509 (3d ed. 1940). The Washington court, while cognizant of the pitfalls of such a formulation, has accepted the stated requirements. See, e.g., *Horner v. Northern Pac. Beneficial Ass'n. Hosp., Inc.*, 62 Wn. 2d 351, 382 P.2d 518 (1963); *Miles v. St. Regis Paper Co.*, 77 Wn. 2d 828, 467 P.2d 307 (1970).

105. 18 Wis. 2d 547, 119 N.W.2d 365 (1963). In *Turk* a mother was injured when she fell while attempting to release her son whose galosh had become caught in a department store escalator. See also Ghiardi, *Res Ipsa Loquitur in Wisconsin*, 39 MARQ. L. REV. 361 (1956). For more recent Wisconsin cases following the *Turk* decision, see *Fehrman v. Smir*, 20 Wis. 2d 1, 121 N.W.2d 255 (1963) (medical malpractice); *Welch v. Neisius*, 35 Wis. 2d 682, 151 N.W.2d 735 (1967) (fertilizer bags fell on plaintiff).

106. *Fournier v. United States*, 220 F. Supp. 752 (S.D. Miss. 1963).

107. See *Zukowsky v. Brown* points out that in some instances absent exculpatory evidence presents a directed verdict. In other cases a presumption arises which the defendant must rebut. Finally, there can be cases where the defendant's negligence is the sole cause of the injury.

108. See, e.g., *Billingsly v. Arkansas* interpreting Arkansas law. Judge Black of the Arkansas "willful and wanton" negligence is thus subject to that state's comparative negligence rule. The purpose of a comparative negligence is a judicial characterization of negligence. See also the Arkansas state court decision, 875 (1966), quoted in *Billingsly*.

109. 42 Wn. 2d 676, 258 P.2d 1000. Wanton misconduct on the ground that the act plus conscious awareness of the consequences of the act is characterized by intent to cause injury.

110. The *Addison* court defined "willful and wanton" negligence. *Id.* at 684 n.110, 258 P.2d at 466.

111. See, e.g., *Hansen v. Paul*

Comparative Negligence

only the first two elements of the doctrine, is preferable.¹⁰⁷ Presumably, the reason for the third requirement was that little reason exists to permit a case to go to the jury on *res ipsa loquitur* if the plaintiff is barred from recovery because of his contributory negligence. With the passage of the new Act this rationale is no longer present.

D. Degrees of Negligence

It is well established in Washington that the contributory negligence of a plaintiff does not bar his recovery for "wilful or wanton" conduct by the defendant. While other jurisdictions take a contrary view,¹⁰⁸ in Washington the leading case of *Adkisson v. Seattle*¹⁰⁹ has been consistently followed. It is logical to assume, therefore, that under comparative negligence conduct which is wilful or wanton will not be subject to comparison under the Act. A defendant can scarcely seek to mitigate his own liability for striking the plaintiff by attempting to show that the plaintiff was clumsy.

On the other hand, "wilful or wanton" misconduct—which has been defined as including a mental state of intention or at least conscious awareness that injury would "likely" or "probably" result—is not the same as "gross" negligence.¹¹⁰ In Washington, gross negligence has been defined as failure to exercise "slight care."¹¹¹

107. See *Zukowsky v. Brown*, 79 Wn. 2d 586, 488 P.2d 269 (1971). The court points out that in some instances the effect is stronger. For example, in some cases, absent exculpatory evidence presented by the defendant, the plaintiff is entitled to a directed verdict. In other cases the inference of negligence is so strong that a legal presumption arises which the defendant must overcome by a preponderance of evidence. Finally, there can be cases where the presumption is conclusive.

108. See, e.g., *Billingsly v. Westrac Co.*, 365 F.2d 619 (8th Cir. 1966), interpreting Arkansas law. Judge Blackmun, writing for the court, stated that as used in Arkansas "wilful and wanton" are viewed simply as a brand of negligence and are thus subject to that state's comparative negligence law. Judge Blackmun noted in passing that "the purpose of a comparative negligence statute is thwarted whenever there is a judicial characterization of an act as something other than negligence." *Id.* at 623. See also the Arkansas state case of *Harkrider v. Cox*, 232 Ark. 165, 334 S.W.2d 875 (1966), quoted in *Billingsly*.

109. 42 Wn. 2d 676, 258 P.2d 461 (1953). The court distinguished wilful from wanton misconduct on the grounds that the former is characterized by an intent to do the act plus conscious awareness that it will probably cause injury while the latter is characterized by intent to do the act plus total indifference as to whether the act will cause injury.

110. The *Adkisson* court defined "wilfulness" and "wantonness" in these terms. *Id.* at 684 n.110, 258 P.2d at 466.

111. See, e.g., *Hansen v. Pauley*, 67 Wn. 2d 345, 407 P.2d 811 (1965).

The distinction between "wilful or wanton" misconduct and "gross" negligence, seemingly slight, becomes important chiefly for purposes of the Washington host-guest statute which allows a guest to recover for either "intentional" misconduct or "gross negligence."¹¹² Adoption of the new Act is likely to cause some confusion, because while "intentional" misconduct seems identical to "wilful and wanton" misconduct and thus not subject to comparison, "gross" negligence is still a form of negligence and thus should be subject to comparison.¹¹³ This distinction may require the trier of fact to specify whether the guest is allowed to recover because the host's conduct was "intentional" or because it was "grossly negligent." Only in the latter case should comparison with any negligence by the guest be made.

E. Contribution and Indemnification

Indemnification and contribution are two postjudgment methods by which a losing defendant can shift the burden of liability to another party. Indemnification shifts the entire liability imposed by a judgment onto the shoulders of the indemnifier;¹¹⁴ contribution shifts only

112. WASH. REV. CODE § 46.08.080 (1863) provides:

No person transported by the owner or operator of a motor vehicle as an invited guest or licensee, without payment for such transportation, shall have cause of action for damages against such owner or operator for injuries, death or loss, in the case of accident, unless the accident was intentional on the part of the owner or operator, or the result of said owner's or operator's gross negligence or intoxication, and unless the proof of the cause of action is corroborated by competent evidence or testimony independent of, or in addition to, the testimony of the parties to the action; Provided, That this section shall not relieve any owner or operator of a motor vehicle from liability while it is being demonstrated to a prospective purchaser.

113. See *Stevens v. Murphy*, 69 Wn. 2d 939, 947-48, 421 P.2d 668, 673 (1966), where the court stated: "Gross negligence . . . differs in *kind* from 'willful misconduct'; the former, by definition, is still negligence—a lack of care—although of a degree substantially greater than that which adheres in ordinary negligence." (emphasis added) *Stevens* involved an action by a child against his parent wherein the court held that in order to recover against the parent, the child must show wilful or wanton misconduct rather than simply gross negligence. There is no reason to believe, however, that the meaning of wilful and wanton will differ under the host-guest statute. See, e.g., *Nist v. Tudor*, 67 Wn. 2d 322, 407 P.2d 798 (1965).

114. In Washington, when the tortfeasors who have caused injury to a third person are not *in pari delicto*, the negligence of one being primary or active while the negligence of the other is passive, if the party guilty of the passive negligence is held liable he is entitled to indemnity from the wrongdoer guilty of the primary negligence. See, e.g., *Rufener v. Scott*, 46 Wn. 2d 240, 280 P.2d 240 (1955). If on the other hand the party guilty of active negligence is held liable, he is not entitled to indemnity from the tortfeasor guilty of only passive negligence. See, e.g., *Reefers Queen Co. v. Marine Construction*, 73 Wn. 2d 783, 440 P.2d 453 (1968).

a portion of the loss. An injured party's shoes after the negligent party has been apportioned have no effect on indemnification.

Contribution, in those jurisdictions, is a portion of the liability for a tort by only one of two or more joint tortfeasors to a pro rata contribution from each. For example, if three parties are liable and one is entitled to \$4,000 from each, a pro rata contribution has been made in three instances, that all the tortfeasors share the anomaly of having a comparative contribution which imposes on each a percentage less of his degree of fault, than the contribution of each share of the total percentage of negligence attributed to each.

Washington courts, however, apply a pro rata rule of contribution. Therefore, it will be possible for a negligent and damaged to the extent of his loss to proceed against D-1 who is fifty percent negligent and seek contribution from D-2 who is ninety percent negligent and an unjust outcome, even with comparative tortfeasors, by comparing the percentage of that defendant he has chosen.

115. See *Bielski v. Schulze*, 16

116. See, e.g., *City of Tacoma v. Peterson & Co.*, 99 Wn. 2d 100, 678 P.2d 100 (1974). Contribution has been criticized because it shifts the entire burden of a loss, for which only one party is responsible to be shouldered onto the shoulders of the other party, the levy of execution, the existence of a tortfeasor or his collusion with the other wrongdoer.

117. See Note, *Comparative Negligence*, 596 (1973) and Campbell, *Ten Years of Comparative Negligence*, 289. As these articles point out, the current comparative negligence statute

Comparative Negligence

a portion of the loss. An indemnifier simply steps into the indemnified party's shoes after the negligence between the plaintiff and the indemnified party has been apportioned. Thus, the comparative statute should have no effect on indemnification.

Contribution, in those jurisdictions which permit it, shifts only a portion of the liability for a judgment. When judgment is had against only one of two or more joint tortfeasors, the party held liable is entitled to a pro rata contribution from each of the other liable parties (for example, if three parties are liable and one is forced to pay \$12,000, he is entitled to \$4,000 from each of the other two parties). This rule of pro rata contribution has been criticized for its premise, false in many instances, that all the tortfeasors were equally at fault. To prevent the anomaly of having a comparative negligence statute but a rule of contribution which imposes on each defendant a pro rata liability regardless of his degree of fault, the Wisconsin court has adopted a rule that the contribution of each should be apportioned according to the percentage of negligence attributed to each.¹¹⁵

Washington courts, however, have not accepted even the traditional pro rata rule of contribution.¹¹⁶ Unless the present rule is changed, therefore, it will be possible for a plaintiff who is five percent negligent and damaged to the extent of \$10,000 by *D-1* and *D-2* to proceed against *D-1* who is five percent negligent rather than *D-2* who is ninety percent negligent and recover \$9,500. *D-1* will be unable to seek contribution from *D-2*. The court might mitigate this obviously unjust outcome, even without permitting contribution among tortfeasors, by comparing the plaintiff's negligence only with the negligence of that defendant he has chosen to hold responsible.¹¹⁷

115. See *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

116. See, e.g., *City of Tacoma v. Bonnell*, 65 Wash. 505, 118 P. 642 (1911); *Seattle v. Peterson & Co.*, 99 Wash. 533, 170 P. 140 (1918). This rule against contribution has been criticized by PROSSER, *supra* note 72, at 307, as permitting "the entire burden of a loss, for which two defendants were equally, unintentionally responsible to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free."

117. See Note, *Comparative Negligence in Wyoming*, 8 LAND & WATER L. REV. 596 (1973) and Campbell, *Ten Years of Comparative Negligence*, 141 WIS. L. REV. 289. As these articles point out, the common law rule of joint and several liability, not comparative negligence statutes, produces such an unjust result.

V. CONCLUSION

Washington's new Act initially will raise a number of issues not encountered in a state which adheres to the old rule of contributory negligence. While empirical research indicates that litigation reaching the actual trial stage is not likely to increase dramatically, important questions arise about the Act's future effect on what previously had been considered well established doctrine or practice. Fortunately, Washington's Bar and Bench will be able to draw upon the practical experience and judicial decisions of sister states which already possess substantial experience with the comparative negligence concept. The law of these foreign jurisdictions can not provide pat answers to all of the issues, of course; indeed, when these states have addressed the issues at all, they have come to varying conclusions. This note has attempted only to identify and discuss some of the ramifications of the new Act, and to provide counsel with authority and arguments on both sides of issues which soon will be litigated in Washington.

Joel E. Smith

Alan D. Campbell

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ically dissimilar contexts.⁸⁹ Despite some apparent vacillation,⁹⁰ the Washington court has recognized the doctrine in most situations. Nevertheless, in the master-servant setting the doctrine has been explicitly abrogated⁹¹ and there are indications it will also be held to be unavailing in others.⁹² Where the doctrine does survive, the Washington court until recently had compounded the confusion by distinguishing assumption of risk from the closely analogous if not identical maxim of *volenti non fit injuria*, holding that the former applies to cases involving an express consensual acceptance of a risk known or unknown at the time of agreement, while the latter applies only to a unilateral assumption of a known risk.⁹³

With the adoption of a comparative negligence statute, assumption of risk logically should be abandoned; the plaintiff's voluntary exposure to an appreciated risk merely should increase his proportion of fault for computation purposes. Nevertheless, this reasoning has not been uniformly adopted by the courts. Mississippi,⁹⁴ Georgia,⁹⁵ South

89. Dean Prosser divides assumption of risk into three main categories: (1) where the plaintiff in advance has given his consent to relieve the defendant of a legal duty towards him; (2) where the plaintiff voluntarily enters into some relation with the defendant, with knowledge the defendant will not protect him against risk; and (3) where the plaintiff already is aware of the risk created by the defendant's negligence but nevertheless proceeds to encounter it. PROSSER, *supra* note 72, at 439.

90. It was thought at one time that the doctrine had been put to rest in Washington. In *Feignbaum v. Brink*, 66 Wn. 2d 125, 401 P.2d 642 (1965), the court held the doctrine of assumption of risk unavailable in a landlord-tenant situation where the lessor was under a duty to repair and maintain common areas. Language in the case indicated that the court might have been willing to abrogate the doctrine completely. A case decided soon after *Feignbaum*, however, makes clear that a broad reading of the decision would be incorrect and that the doctrine has survived. See *e.g.*, *Perry v. Seattle School Dist.*, 66 Wn. 2d 800, 405 P.2d 589 (1971).

91. *Siragusa v. Swedish Hosp.*, 60 Wn. 2d 310, 373 P.2d 767 (1962). In *Siragusa* plaintiff nurse was injured at her place of employment when a door with a hook on it was unexpectedly opened by a patient and the hook struck her on the upper portion of her back. In reversing the judgment of dismissal in favor of the defendant hospital, the court held that if an employer negligently fails in his duty to furnish his employees with a reasonably safe place to work, the employee will not be denied recovery simply because he was aware or should have known of the dangerous condition. Rather, knowledge and voluntary exposure to the risk were held properly considered as factors in determining whether the employee was contributorily negligent.

92. See, *e.g.*, *Feignbaum v. Brink*, *supra* note 90.

93. See *Hogenson v. Service Armament Co.*, 77 Wn. 2d 209, 215 n.2, 461 P.2d 311 (1969). See also *Walsh v. West Coast Coal Mines*, 31 Wn. 2d 396, 197 P.2d 233 (1948); *Bailey v. Safeway Stores*, 55 Wn. 2d 730, 349 P.2d 1077 (1960). But see *Lyons v. Redding Construction Co.*, 83 Wn. 2d 86, 515 P.2d 821 (1973).

94. While Mississippi retains the doctrine in most cases, the Legislature has made the doctrine inapplicable in the master-servant relationship. See MISS. CODE ANN. § 1456 (1917). For a recent Mississippi decision to the effect that assumption of risk will still be applied absent such a relationship, see *United Roofing and Siding Co. v. Seefeld*, 222 So. 2d 406 (Miss. 1969).

95. In Georgia the assumption of risk by the plaintiff or plaintiff's deceased is an

adverse witnesses or the right to inspect documents unless the parolee has indicated previously that he will physically harm an informant if the informant's identity is disclosed. Third, pending the Board's review of the hearing record, the parolee should not be returned to prison but should be confined in the area where he normally resides. If the Board decides to revoke parole, the Board should meet with the parolee to discuss mitigating factors and disposition alternatives before making the final decision to reimprison the parolee.

GLENN R. NELSON*

Comparative Negligence Legislation: Continuing Controversy Over The Doctrine of Assumption Of the Risk in Oregon

The Oregon legislature has enacted a comparative negligence statute which, unlike similar statutes passed by other states,¹ explicitly abolishes assumption of the risk, along with contributory negligence, as a total bar to recovery:

Contributory negligence, including assumption of the risk, shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property if such negligence contributing to the injury was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of such negligence attributable to the person recovering.²

The statute's reference to assumption of the risk has created a major interpretive task for Oregon courts. If viewed as a doctrine conceptually

* Third-year student, School of Law, University of Oregon.

¹ The legislature of Wisconsin, from which Oregon borrowed its comparative negligence statute, made no mention of assumption of the risk in the language of its statute but left the initiative to the courts, which subsequently abolished assumption of the risk by judicial fiat in *McConville v. State Farm Mut. Auto Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14, 19 (1962). The Wisconsin court held that "[c]onsent seems not to be a satisfactory basis for retaining the doctrine of assumption of risk. The consequences of an automobile accident to a guest may be so disastrous that it would be contrary to public policy to hold that an individual who consents by implication to a dangerous situation will go uncompensated for his injuries."

² ORS 18.470 (1973).

distinct from the doctrine of contributory negligence, assumption of the risk is abrogated as a bar to plaintiff's recovery. If, on the other hand, assumption of the risk as used in the statute is viewed as essentially the same as contributory negligence, it is abrogated only to the extent that it comprises contributory negligence.

The doctrine of assumption of the risk has not been defined consistently by Oregon courts. This comment examines past judicial attempts to isolate a clear concept of the assumption of the risk doctrine. The consistency of judicial interpretation of the assumption of the risk doctrine is explored, and the statute's effect upon the doctrine is examined. Such analysis suggests that Oregon's comparative negligence statute operates upon only the contributory negligence sense of assumption of the risk, not only allowing a court to compare plaintiff's unreasonable conduct with defendant's negligence to arrive at an apportionment of recovery, but also allowing a plaintiff's consent to assumption of risks inherent in an activity to bar totally his recovery for resulting damages.

I

THE RESTATEMENT IMPLIED CONSENT CONCEPT

Intense debate concerning the existence and substance of assumption of the risk resulted in no uniform definition of the phrase in the *Restatement (Second) of Torts*.³ Instead, the *Restatement* notes four separate substantial bars to recovery which frequently have been found under the rubric of assumption of the risk.⁴ Two of the bars to recovery are based upon the plaintiff's implied consent to a risk.⁵

³ For a description of the division in scholarly opinion during the proceedings, see *Haleska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 378 n.3 (Tex. 1963); James, *Assumption of the Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 188 (1968).

⁴ RESTATEMENT (SECOND) OF TORTS, § 496A, comment c at 561-62 (1965):

"1. In its simplest form, assumption of risk means that the plaintiff has given his express consent to relieve the defendant of an obligation to exercise due care for his protection, and agrees to take his chances as to injury from a known or possible risk. . . .

"2. A second, and closely related meaning is that the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility and to take his own chances. . . .

"3. In a third type of situation the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it. . . . He may not be negligent in doing so, since his decision may be an entirely reasonable one, because the risk is relatively slight in comparison with the utility of his own conduct. . . .

"4. To be distinguished from these three situations is the fourth, in which the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence. . . ."

⁵ "[The] plaintiff has entered voluntarily into some relation with the defendant

The *Restatement* focuses the *Restatement* of the plaintiff. The hazards and therefore

The *Restatement* of plaintiff's manifestation of defendant's duty and adhering to the *Restatement* matter of law if circuit court the implication of

The implied consent cases in which the encounter a palpable plaintiffs who chose timorous may stay at entry into an deny compensation of the premise that who receive injury in

Arguably, Oregon implied consent as a consented to unreasonable. but only reduces the compared to the defendant part of assumption a dramatic policy choice

which he knows to involve agreeing to relieve the RESTATEMENT (SECOND

⁶ "No wrong is done Eldredge stated *volenti* so far as tort law (as do as he pleases with his tory Notes § 893 at 72-Draft No. 9).

⁷ See note 4 *supra*.

⁸ *Murphy v. Steeple* (1929).

⁹ Professor Eldredge law is that a defendant plaintiff's consent is not

¹⁰ ORS 18.470 (1973)

The *Restatement* formulation in terms of implied consent has its origins in the maxim *volenti non fit injuria*.⁶ Adoption of the maxim focuses the *Restatement* formulation entirely upon the manifestations of the plaintiff. The test becomes whether the plaintiff understood the hazards and therefore could be found to have accepted the risk voluntarily.

The *Restatement* defines assumption of the risk with reference to the plaintiff's manifestations alone and does not include a weighing of the defendant's duty and fault.⁷ The effect is that in a jurisdiction strictly adhering to the *Restatement* formulation a court may bar recovery as a matter of law if circumstances surrounding the hazard sufficiently warrant the implication of plaintiff's consent to the presence of the risk.

The implied consent concept has been a great aid to courts in resolving cases in which the essence of the activity requires the participants to encounter a palpable risk. Justice Cardozo offered a ready answer to plaintiffs who chose to engage in adventure with apparent risks: "the timorous may stay at home."⁸ If participants did not abstain from voluntary entry into an activity inherently involving a risk, the law would deny compensation for resulting injury. Such doctrine is the corollary of the premise that tort law will allow recovery to reasonable persons who receive injury in a non-consensual situation.⁹

Arguably, Oregon's comparative negligence provision¹⁰ removes implied consent as a total bar and allows recovery to those who have consented to unreasonable conduct so long as the other party was even more unreasonable. If implied consent no longer totally bars recovery but only reduces the plaintiff's damages to the extent of his negligence compared to the defendant's under a theory which makes implied consent part of assumption of the risk, the Oregon legislation will have made a dramatic policy choice favoring compensation for every victim.

which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances." RESTATEMENT (SECOND) OF TORTS, § 496A, comment c (2) at 561 (1965).

⁶ "No wrong is done to one who consents." *Id.*, comment b at 560-61. Professor Eldredge stated *volenti non fit injuria* is based upon the individualistic concept that so far as tort law (as distinct from criminal law) is concerned, a person is free to do as he pleases with his own body. RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 893 at 72-73 (Tent. Draft No. 9, 1963) [hereinafter cited as Tent. Draft No. 9].

⁷ See note 4 *supra*.

⁸ *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173, 174 (1929).

⁹ Professor Eldredge comments, "One of the fundamental principles of tort law is that a defendant who harmed the plaintiff's body or his property with the plaintiff's consent is not a tortfeasor at all." Tent. Draft No. 9, *supra* note 6, at 73.

¹⁰ ORS 18.470 (1973).

II

PRIOR OREGON FORMULATIONS OF ASSUMPTION OF THE RISK

A. Early Focus on Plaintiff's Conduct

Past Oregon decisions contain a variety of conceptual tools used by the court to recognize the plaintiff's implied consent. In finding that the plaintiff had accepted a hazard, the court typically focused upon the relationship between the plaintiff and the hazard. If the risk was "inherent and obvious" rather than "extraordinary,"¹¹ or if the plaintiff was "experienced" instead of "inexperienced,"¹² the court found adequate grounds for implying consent to confront the hazard and for relieving the defendant who failed to protect the plaintiff even though the defendant's conduct may have created the hazard.

The Supreme Court of Oregon recognized such a circumstance in *Hunt v. Portland Baseball Club*,¹³ when a spectator chose to sit in an unscreened section of a baseball stadium and subsequently was struck by a foul ball. The court disallowed recovery on grounds that plaintiff was intimately familiar with baseball, had witnessed others being struck by foul balls, had anticipated being struck himself, and therefore as a matter of law had consented to remain within the area of risk. This rationale for barring plaintiff's recovery is consistent with the *Restatement* formula of implied consent. However, the court further suggested that the case could have been decided on the issue of duty, although the court carefully avoided equating the defense of plaintiff's assumption of the risk with the duty issue. In *Hunt* the court discounted the duty issue to reach the more familiar bar of implied consent by stating, "[i]f the defendant should have provided screening for the plaintiff's protection, the plaintiff was fully aware of the lack of protection, and yet stayed in the ball park."¹⁴ The finding of implied consent made it unnecessary to decide the question of defendant's duty and fault.

Hunt adopted a standard from *C.J.S.* to be used in determining conditions under which assumption of the risk may be found. "[I]t is only when the risk exists in spite of the exercise of due care or when the risk results from negligence which is obvious that it is assumed by the person injured . . ."¹⁵ One may infer that the court viewed assumption of the risk as distinct from the duty issue. Under the rubric of assumption of the risk, the plaintiff may not recover either in the "no duty" situation or in a "duty" situation where the defendant's failure to discharge a duty

¹¹ See, e.g., *Vendrell v. School Dist. No. 26C*, 233 Or. 1, 376 P.2d 406 (1962).

¹² See, e.g., *Whipple v. Salvation Army*, 261 Or. 453, 495 P.2d 739 (1972).

¹³ 207 Or. 337, 296 P.2d 495 (1956).

¹⁴ *Id.* at 345, 296 P.2d at 498.

¹⁵ *Id.* at 347, 296 P.2d at 499, citing 65 C.J.S. *Negligence* § 174 (1950), now appearing as 65A C.J.S. *Negligence* § 174 (1966).

owed the plaintiff was actions, and not those risk issue.

B. Reappraisal

In *Hunt*, the court record disclosed no risk of injury. The court thus relying more heavily on the balancing consideration of the plaintiff's preference in *Beals*.¹⁶ *Ritter* sought to distinguish the mere isolated two senses of detriment of conceptual of assumption of the risk which was merely a re-negligence.¹⁷ Assumption of the risk to a plaintiff who consented to a hazard which the defendant had no duty to protect the plaintiff's assumption of the defendant's lack of duty court referred to the first sense of the primary sense act. The significance of

¹⁶ See *RESTATEMENT (SECOND) OF TORTS* § 496, *Restatement* formulation, plaintiff's conduct; i.e., plaintiff's willingness to accept as distinct from negligence which asks what should a reasonable person do. 17 207 Or. at 355, 296 P.2d 495. 18 225 Or. 504, 358 P.2d 495. 19 *Id.* at 514, 520-21, 358 P.2d 495. *Ritter* took its doctrinal basis from the "primary" and "secondary" senses of the doctrine, advocating the abolition of the extreme individualism of the state that the "primary" sense of the defendant's lack of duty and the "secondary" sense is but a re-negligence. See 2 F. HARPER & JAMES W. FRANKLIN, *THE LAW OF NEGLIGENCE* (hereinafter cited as HARPER & FRANKLIN).

²⁰ See 2 HARPER & FRANKLIN, *supra* note 16, at § 10, illustrating a situation of contributory negligence." Apr. 16, 1971 on file in the Records of H.B. 1343.

owed the plaintiff was obvious to the plaintiff.¹⁶ Thus the plaintiff's actions, and not those of the defendant, control the assumption of the risk issue.

B. Reappraisal of the Focus on Plaintiff's Conduct

In *Hunt*, the court presented two grounds for barring recovery: the record disclosed no negligence, and plaintiff impliedly had assumed the risk of injury. The court indicated preference for the second ground, thus relying more heavily upon plaintiff's implied consent and subordinating consideration of defendant's duty and fault.¹⁷ The court repudiated this preference in a reappraisal of *Hunt* included in *Ritter v. Beals*.¹⁸ *Ritter* sought a definition of a "pure" assumption of the risk distinct from the mere duplication of contributory negligence. The court isolated two senses of assumption of the risk often intertwined to the detriment of conceptual clarity. The court held that a "primary" sense of assumption of the risk existed apart from the "secondary" sense which was merely a redundant reference to the plaintiff's contributory negligence.¹⁶ Assumption of the risk, in its primary sense, denies relief to a plaintiff who consciously, and perhaps reasonably, has encountered a hazard which the defendant had a right to create, and against which the defendant had no duty to protect the plaintiff. In its primary sense, the plaintiff's assumption of the risk is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk.²⁰ The court referred to the facts of *Hunt* as an archetypal situation in which the primary sense acted as a bar to recovery.

The significance of the court's synthesis in *Ritter* lies in its positive

¹⁶ See RESTATEMENT (SECOND) OF TORTS, comment e at 564 (1965). In the *Restatement* formulation, assumption of the risk entails a subjective test of the plaintiff's conduct; i.e., what the plaintiff in fact knows, understands, and is willing to accept as distinguished from the objective test of contributory negligence which asks what should have been obvious to the plaintiff.

¹⁷ 207 Or. at 355, 296 P.2d at 502.

¹⁸ 225 Or. 504, 358 P.2d 1080 (1961).

¹⁹ *Id.* at 514, 520-21, 358 P.2d at 1084-85, 1087-83. Justice Goodwin's opinion in *Ritter* took its doctrinal inspiration from Harper and James, who distinguished the "primary" and "secondary" senses of assumption of the risk as a prelude to advocating the abolition of all senses of the doctrine as merely "a heritage of the extreme individualism of the early industrial revolution." Harper and James state that the "primary" sense of assumption of the risk is "only the counterpart of the defendant's lack of duty to protect the plaintiff from a risk" and the "secondary" sense is but a redundant reference to the plaintiff's contributory negligence. See 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 21.8, at 1163-64 (1955) [hereinafter cited as HARPER & JAMES].

²⁰ See 2 HARPER & JAMES, *supra* note 19. Justice Denecke identified *Ritter* as illustrating a situation where assumption of the risk is "just another name for contributory negligence." Letter from Justice Denecke to Rep. Norma Paulus, Apr. 16, 1971 on file in the Archives Division of the Oregon State Library in the Records of H.B. 1343, 56th Or. Leg. Ass'y (1971).

assurance that the doctrine of assumption of the risk is distinct and independent from the doctrine of contributory negligence. When the legislature adopted the principle that "contributory negligence, including assumption of the risk, shall not bar recovery . . .,"²¹ either it did heed the separation between assumption of the risk and contributory negligence expounded in *Ritter*, or it intended to abrogate the bar of assumption of the risk in its primary sense as well as the sense included within contributory negligence. Therefore, the statute could have abrogated assumption of the risk only in its "secondary" sense as an inexact and superfluous reference to contributory negligence,²² or the statute could have abrogated assumption of the risk in its entirety, both in its "pure" primary sense defined in *Ritter* and in its secondary sense.²³

Determination of which interpretation of the statute is more appropriate depends in part upon detailed examination of the "primary sense" definition of assumption of the risk. *Ritter* relied more heavily upon the defendant's duty and fault, whereas *Hunt* had relied upon an implication of consent by the plaintiff as a matter of law. This revision signaled a change in analytical perspective amounting to the creation of a new definition of assumption of the risk at variance with the *Restatement* "implied consent" formula.²⁴ The court in *Ritter* stated that its focus

²¹ ORS 18.470 (1973).

²² This interpretation would prevent the inaccurate use of assumption of the risk to refer to situations in which the plaintiff acts unreasonably and is contributorily negligent yet also would allow the court to adhere to the *Restatement* implied consent formula.

²³ This interpretation would achieve the Harper and James objective of abolishing the phrase and concept of assumption of the risk under the rationale that assumption of the risk is purely duplicative of the other more widely understood concepts of scope of duty and contributory negligence.

As a third alternative, the court could limit *Ritter* to its facts and thus confine the Harper and James thesis to the context of an employer-employee case where assumption of the risk as a defense recently has been disfavored. This alternative is unlikely in view of Justice Goodwin's use of *Hunt*, a case which fell clearly outside the employer-employee context, as an illustration of the Harper and James thesis which he was expounding in *Ritter*.

²⁴ Tent. Draft No. 9, *supra* note 6, at 79. There Professor Prosser claimed such a categorization of assumption of the risk as either duty or contributory negligence "throws into the ashcan the language of thousands of cases." *But see* James, *Assumption of the Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968). James compares the position of the *Restatement of Torts*, which had no separate section concerning assumption of the risk, with that of the *Restatement (Second)*, which chose to give assumption of the risk a distinct existence. Professor Bohlen, the reporter for the original *Restatement*, argued that implied assumption of the risk deserved no recognition as a separate defense. Bohlen, as well as James, believed the key issue in "primary" assumption of the risk is whether the defendant had a legal right to expose the plaintiff to a risk. Both commentators point out that this is properly an issue of the scope of duty to be pleaded and proven by the plaintiff. Prosser, the prevailing theorist in *Restatement (Second)*, took the opposite position.

in barring recovery upon fault of the defendant. *Ritter* reappraisal of places a great burden of proof upon the defendant necessary to determine predictability of tort liability upon the Harper and James alternatives of any duty for cases or to other factors.

Ritter has raised the issue in Oregon because the duty issue.²⁵ A recent problem under the *Restatement* the statute simply reads false and confusing in its "primary" sense of a duty issue at the time rather than to discard an implied contributory negligence.

The long-standing risk has any conceptual value vehemently by common Eldridge at the time Prosser, whose theory that the duty issue de-

²⁵ 225 Or. at 514, 358 P.2d 100.

²⁶ 225 Or. 504, 358 P.2d 100, § 21.5, at 1184. In their spectator liability and concealed spectator of the defendant. This conclusion rests upon commonly known, the Harper and James are the obvious to the attention true key to such a situation parties and their result recovery in the situation defendant has a right to the Harper and James risk, the court may find that the defendant had a duty.

²⁷ 225 Or. at 513, 358 P.2d 100, § 21.1, at 116 (1956).

²⁸ See Comment, *Civil Law*, 8 WILL. L.J. 37, 4 and *Procedural Problems*.

²⁹ Comment, *supra* note 28.

³⁰ See note 3 *supra* at 116.

in barring recovery under assumption of the risk was upon the duty and fault of the defendant rather than the actions of the plaintiff.²⁵ The *Ritter* reappraisal of *Hunt* is deceptively simple,²⁶ but the duty analysis places a great burden of discretion upon the courts. The judicial discretion necessary to determine the duty issue unavoidably diminishes the predictability of tort law. *Ritter*, in its reappraisal of *Hunt*, relied heavily upon the Harper and James treatise²⁷ but failed to elaborate the variables of any duty formula which might be applied to spectator liability cases or to other fact situations.

Ritter has raised the argument that assumption of the risk vanished in Oregon because the doctrine has become only a semantic guise for the duty issue.²⁸ A recent comment²⁹ analyzed the assumption of the risk problem under the Oregon comparative negligence statute by arguing the statute simply removed the phrase "assumption of the risk" as a false and confusing reference to the duty issue. If indeed the "pure" or "primary" sense of assumption of the risk was a mere reference to the duty issue at the time of the legislation, the statute had no further effect than to discard an empty label, subsume assumption of the risk under contributory negligence, and apportion it.

The long-standing controversy concerning whether assumption of the risk has any conceptual identity separate from the duty issue was argued vehemently by commentators such as Professors Prosser, Malone, and Eldridge at the time the *Restatement of Torts (Second)* was drafted.³⁰ Prosser, whose theories eventually prevailed in the *Restatement*, argued that the duty issue does not and should not encompass all the considera-

²⁵ 225 Or. at 514, 358 P.2d at 1088.

²⁶ 225 Or. 504, 358 P.2d 1080 (1961). See 2 HARPER & JAMES, *supra* note 19, § 21.5, at 1184. In their treatise, Harper and James specifically analyze ballpark spectator liability and conclude that the owner owes no duty to warn the experienced spectator of the dangers of foul balls in the unscreened part of the bleachers. This conclusion rests upon the fact that such risks are "so customary, obvious, and commonly known, the defendant need give no warning of them." However, Harper and James are quick to add that by no means all the dangers which would be obvious to the attentive or experienced are thus assumed. They find that the true key to such a situation lies in the character of the relationship between the parties and their resulting duties. As a matter of law, the court should bar recovery in the situation wherein the plaintiff takes a risk voluntarily and the defendant has a right to force him with the dilemma of "take it or leave it." Under the Harper and James argument, even though a plaintiff may choose to accept a risk, the court may find when the plaintiff is young, inexperienced, or handicapped that the defendant had no legal right to confront the plaintiff with the risk.

²⁷ 225 Or. at 513, 358 P.2d at 1084, citing 2 HARPER & JAMES, *supra* note 19, § 21.1, at 116 (1956).

²⁸ See Comment, *Comparative Negligence in Oregon: A New Era in Tort Law*, 8 WILL. L.J. 37, 43 (1972); Note, *Torts—Assumption of Risk—Substantive and Procedural Problems in Oregon*, 46 OR. L. REV. 219 (1967).

²⁹ Comment, *supra* note 28.

³⁰ See note 3 *supra* and accompanying text.

tions inherent in the affirmative defense of assumption of the risk,³¹ relying upon the simple distinction that while the duty issue refers to the defendant's manifestations and reasonable expectations, assumption of the risk measures the subsequent conduct of the plaintiff.³²

Did the Oregon court indicate its intent in *Ritter* to align itself with the dissenters to the *Restatement* formulation?³³ The language of the decision forces the conclusion that the Oregon court decided assumption of the risk in its pure sense was merely a surrogate for the duty issue. However, the decisions following *Ritter* returned to the pre-*Ritter* analysis of the plaintiff's implied consent.

C. Applications of Assumption of the Risk

The court handed down *Vendrell v. School District No. 26C*³⁴ one year after *Ritter* identified assumption of the risk as an alter ego of the duty issue. The decision barred recovery for head injuries incurred by plaintiff during a school-sponsored football game. Although the court made passing mention of the duty issue, it based its holding on an implication of consent by plaintiff to the possibility of injury.³⁵ Citing the obviousness of the risk inherent in contact football and plaintiff's familiarity with the activity, the court implied consent to the risk from plaintiff's voluntary participation in the sport.

³¹ Tent. Draft No. 9, *supra* note 6, at 79: "Duty is sufficiently complex when it is confined to the conduct of the defendant. If it is to be extended to include a defense arising from the subsequent conduct of the plaintiff, it becomes such an overworked word that it falls of its own weight."

³² "Duty is a matter of what the defendant should reasonably expect, while assumption of the risk is a matter of what the plaintiff in fact knows and is willing to accept." *Id.*

³³ See James, *supra* note 24, at 194. But see Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 154-59 (1961). James is one of the foremost dissenters. He fears that Prosser's and Keeton's retention of assumption of the risk in the *Restatement* would bar the knowing but careful plaintiff from recovering for harm caused by the defendant's negligence. Thus, even when it is found that the defendant owed a duty to the plaintiff, which the defendant breached, assumption of the risk still might bar the plaintiff's recovery if the plaintiff had manifested acceptance of the risk created by the defendant's breach. James' worry seems overwrought. Consenting to a risk created by another's breach of duty is clearly contributory negligence on the plaintiff's part; under the comparative negligence statute contributory negligence would be compared to reduce the plaintiff's recovery but not necessarily bar recovery. Arguably, the spectre which James feels haunts the *Restatement* implied consent formula in fact does not exist under the comparative negligence statute.

³⁴ 233 Or. 1, 376 P.2d 406 (1962).

³⁵ *Id.* at 19, 376 P.2d at 414. But see Note, *supra* note 28, at 223-24, which argues that the court decided *Vendrell* as being a matter of duty by finding the relationship of the plaintiff to the defendant was one of free association with concomitant limited duties. Although this is undeniably a plausible thesis, the court's language in *Vendrell* did not discuss "limited duty" but rather spoke in terms of risks which were "obvious and inherent" to the plaintiff. This type of analysis lays a foundation for barring recovery under the *Restatement* implied consent formula.

Further doubt on the decisions. *Franks v. S* implied consent formula sport who clearly reco acceptance of the gan which the rules of the the court could have participant's duty, the the measure of the pa of *Square Dance Clu* years after *Ritter* had alter ego of the duty defense entirely in te and based the decisio sent was sufficient.

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³⁶ 251 Or. 98, 444 P

³⁷ 258 Or. 302, 482

³⁸ 263 Or. 612, 503

³⁹ "Since [the dece cause the rope to pas in that maneuver." 263

Further doubt on the duty analysis of *Ritter* is cast by other later decisions. *Franks v. Smith*,³⁶ based squarely upon the *Restatement's* implied consent formula, denied recovery to a participant in a dangerous sport who clearly recognizes the risks involved, emphasizing plaintiff's acceptance of the game's rules as an implied consent to injury from which the rules of the game cannot or will not protect him. Although the court could have discussed the rules as defining the extent of each participant's duty, the court instead referred to the rules as indicating the measure of the participant's consent. *Thayer v. Oregon Federation of Square Dance Clubs*³⁷ also failed to apply the *Ritter* definition. Ten years after *Ritter* had characterized assumption of the risk as a mere alter ego of the duty issue, the court responded to an assertion of the defense entirely in terms of the *Restatement* implied consent formula and based the decision upon whether plaintiff's manifestation of consent was sufficient.

Thayer illustrates the court's ability to avoid the harshness of implied consent as a bar to recovery. Plaintiff suffered injury when she tripped upon an uneven floor while dancing. The decision turned on analysis of what plaintiff expected when she had begun dancing. Although plaintiff assumed the risks inherent in square dancing, such as being kicked by another dancer, she did not assume the risk of a faulty and uneven floor.

The court used a similar characterization of risks as "inherent" or "extraordinary" in *McDonald v. Hanneson*.³⁸ Plaintiff's deceased was sitting on a swimming float when defendants caused a water ski tow rope to pass over the float and choke the deceased. Defendants raised the defense of assumption of the risk premised upon the deceased's implied consent to the hazards of a moving ski rope as a normal risk of water skiing. The trial court instructed that the deceased had assumed the "normal risk of injury incident to the sport." The appellate court reversed and remanded for a new trial on the ground that there was no evidence that the risk created by such a boat maneuver was a normal risk inherent in water skiing of which plaintiff was aware.³⁹ Evaluating the "awareness" of the plaintiff is indicative of the subjective test found in the *Restatement* implied consent formulation of assumption of the risk. Although *Ritter* had portrayed "pure" assumption of the risk as only a matter of duty, the court in *McDonald* returned to the *Restatement* focus.

³⁶ 251 Or. 98, 444 P.2d 954 (1963).

³⁷ 258 Or. 302, 482 P.2d 717 (1971).

³⁸ 263 Or. 612, 503 P.2d 674 (1972).

³⁹ "Since [the deceased] was completely unaware that [defendants] would cause the rope to pass over the float she could hardly assume the risk inherent in that maneuver." 263 Or. at 617, 503 P.2d at 676.

The approach to the assumption of the risk issue in *Thayer* and *McDonald* gives court and counsel great latitude because of the opportunity to characterize the alleged risks as either broad-ranging and inherent or quite particularized and extraordinary. The question as to whether conduct in engaging in an activity can be taken to imply that the risk is assumed is answered under the approach in *Thayer* and *McDonald* by the court's risk-characterization process. This approach dominates four recent assumption of the risk decisions⁴⁰ and is far afield from the announcement in *Ritter* that assumption of the risk is best decided through a duty analysis.

*Whipple v. Salvation Army*⁴¹ reaffirmed the conceptual importance to defendant of finding an implied consent by the plaintiff. It held that plaintiff's implied consent excused an otherwise existing duty of defendant.

Plaintiff correctly contends that because there is an inherent danger of injury in football, defendant did owe him a duty not to allow or encourage him to play unless the plaintiff realized the danger involved.⁴²

This statement is hard to reconcile with the *Ritter* characterization of assumption of the risk as merely synonymous with the duty issue.⁴³ By indicating that whenever there is implied consent there can be no duty, *Whipple* not only did not diminish the function and potency of implied consent, but rather indicated that the presence of implied consent becomes entirely determinative of the duty issue. This relationship between implied consent and duty is not one of mere equivalence.⁴⁴ The court in effect abandoned the theoretical underpinning of *Ritter* and returned to the *Restatement* formula under which the plaintiff's manifestations may relieve defendant of a duty otherwise owed. The plaintiff's manifestations, rather than the duties of the defendant, remained dispositive of whether assumption of the risk barred recovery.

Vendrell, McDonald, and Whipple each demonstrate the same reli-

⁴⁰ *Schroeder v. Blitz-Weinhard Co.*, 96 Or. Adv. Sh. 210, 504 P.2d 719 (1972); *McDonald v. Hanneson*, 263 Or. 612, 503 P.2d 674 (1972); *Whipple v. Salvation Army*, 261 Or. 453, 495 P.2d 739 (1972); *Thayer v. Oregon Fed'n of Square Dance Clubs*, 258 Or. 302, 482 P.2d 717 (1971).

⁴¹ 261 Or. 453, 495 P.2d 739 (1972).

⁴² *Id.* at 460-61, 495 P.2d at 743 (emphasis added).

⁴³ See Tent. Draft No. 9, *supra* note 6, § 496C, comment e at 77. Professor Malone found no legal logic in equating knowledge by the plaintiff with the absence of duty on the defendant's part.

⁴⁴ "The boundaries of the defendant's duty to act do not . . . coincide . . . with those of the plaintiff's assumption of the risk . . . Thus one who supplies a defective chattel for the use of another may be under a duty to make it safe, to warn the other of the defect, or otherwise to protect him, because it may be expected that he will not discover the defect. When the other does discover it and nevertheless proceeds quite voluntarily to make use of the chattel, he may assume the risk." Tent. Draft No. 9, *supra* note 6, comment e at 97.

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⁵⁰ See *McDonald v. H Oregon Fed'n of Square I*

ance by the court upon the conceptual distinctions peculiar to implied consent, between "experienced" and "inexperienced" plaintiffs and between "inherent" and "extraordinary" risks. Analysis of assumption of the risk in terms of the plaintiff's implied consent in these cases after *Ritter* undercuts the court's announcement in *Ritter* that assumption of the risk is merely a matter of the defendant's duty. *Vendrell* offered this summary of the plaintiff's position vis-à-vis tort law: "[Football] draws to the game the manly; they accept its risks, blows, clashes, and injuries without whimper."⁴⁵ The echo of the Cardozo maxim "the timorous may stay at home"⁴⁶ is distinct. Clearly the court found it imperative to resuscitate the implied consent formula of assumption of the risk.

This conceptual system is adequate to insure that the plaintiff's consent is implied only in circumstances in which the plaintiff voluntarily and knowingly⁴⁷ agrees to the proximity of a hazard. Thus, properly applied an implication of consent should not work harshly against recovery by plaintiffs who could not recognize the nature and magnitude of the risk. Furthermore, barring recovery by a plaintiff who truly realizes the risk and intends to face that risk does no violence to the basic purpose of tort law—to compensate injuries resulting from a non-consensual situation.⁴⁸

D. A Suggested Application of Implied Consent

Implied consent as a bar to recovery has been subject to criticism as a harsh and inequitable barrier. Through F.E.L.A. legislation⁴⁹ Congress abrogated the defense in certain employer-employee relationships. In the absence of legislative action, courts have devised a judicial test which insures against the harsh application of the implied consent bar. Many jurisdictions, including Oregon, have lessened the harshness of the doctrine through the recognition of two characteristics which defeat an implication of consent: the inexperience of the plaintiff and the extraordinary nature of the risk.⁵⁰

Implied consent as a bar to recovery has been most harsh when inappropriately applied. The implied consent formula of assumption of the risk is appropriate only to the resolution of certain well defined situations where the essence or attraction of the activity entered into by the plaintiff depends in a substantial degree upon the likelihood of

⁴⁵ *Vendrell v. School Dist. No. 26C*, 233 Or. 1, 15, 376 P.2d 406, 413 (1962).

⁴⁶ *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173, 174 (1929).

⁴⁷ See RESTATEMENT (SECOND) OF TORTS § 496E (1965).

⁴⁸ Tent. Draft No. 9, *supra* note 6, Explanatory Notes § 893 at 73.

⁴⁹ Federal Employers Liability Act, 45 U.S.C. § 51 *et. seq.* (1970); section 54 deals with assumption of risks of employment.

⁵⁰ See *McDonald v. Hanneson*, 263 Or. 612, 503 P.2d 674 (1972); *Thayer v. Oregon Fed'n of Square Dance Clubs*, 258 Or. 302, 482 P.2d 717 (1971).

hazard. Purposeful encounter with hazard was the situation of *Murphy v. Steeplechase Amusement Co.*,⁵¹ a classic illustration of implied consent, or *volenti non fit injuria* as the doctrine then was denominated. Chief Judge Cardozo characterized the jerking of an amusement machine as the very hazard which was invited and foreseen. "There would have been no point to the whole thing, no adventure about it, if the risk had not been there."⁵² Regrettably, the Oregon court has applied the implied consent doctrine as a bar to recovery in cases where the hazard was merely incidental and not the "point, adventure, or meaning of the activity."⁵³

The patron of a ballpark who sits in the open bleachers is not properly a "volunteer" under the doctrine of *volenti non fit injuria* because he went to the ballpark to watch rather than dodge. Consideration of the implied consent doctrine was beside the point in *Thayer* because the square dancer was not properly a "volunteer" in the situation. The significance of her dancing did not depend on treading upon an uneven floor. If, on the other hand, she had been a sabre dancer whose performance derived significance from the avoidance of upright blades, the court properly should have barred the dancer's recovery under the implied consent formula.

The occasional misapplication of a doctrine, however, is not indicative of the doctrine's invalidity. The recognition that the court could have resolved several assumption of the risk cases through the duty issue does not advise the complete abrogation of the implied consent formula. The *Restatement* implied consent formula is uniquely appropriate to situations analogous to the facts of *Murphy* and *Vendrell* where a body clash, one of the integral features of the activity, resulted in injury to the participant. In the context of football, the participant's endurance of repeated body contact in a large measure comprises the significance society attributes to participation in the sport. If the individual will seek glory and society's recognition in such a manner, the function of tort law arguably is to defer to the individual's freedom to

⁵¹ 250 N.Y. 479, 166 N.E. 173 (1929).

⁵² 166 N.E. at 174.

⁵³ *Schroeder v. Blitz-Weinhard Co.*, 96 Or. Adv. Sh. 210, 504 P.2d 719 (1972), is a prime example of the court's misapplication of the implied consent formula of assumption of the risk. Plaintiff, a deliveryman, sued the premises owner for injuries when he was tipped off a hoist upon which he had caught a ride. The court held that the plaintiff was contributorily negligent in electing to ride a hoist meant only to handle materials. The court went on to hold, however, that the plaintiff "voluntarily assumed the obvious risk involved in the unorthodox maneuver." *Id.* at 215, 504 P.2d at 721. Under the *Restatement* contributory negligence alone is the bar to recovery based upon a plaintiff's unreasonable act toward himself. The court's misapplication of assumption of the risk to this fact situation ignores not only the legal learning of *Ritter* but the *Restatement* formulation as well.

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encounter risk and his self-responsibility for the resulting injury. The purposeful and intentional encountering of risk gives rise to the proper application of implied consent as a bar to recovery.

IV

THE FUTURE OF ASSUMPTION OF THE RISK IN OREGON: THREE POSITIONS FOR THE COURT

A. Total Abrogation

Implied consent as a bar to recovery in some cases has operated as harshly against the plaintiff as has the bar of contributory negligence. The interpretive problem caused by inclusion of assumption of the risk within the statute's purview is whether the statute abolished the capacity of both doctrines to operate as *absolute* bars to recovery. One interpretation would restrict the court from considering the plaintiff's implied consent in determining whether he should be barred totally from a recovery.⁵⁴ The statute may render the subjective test of the plaintiff's manifestations of implied consent irrelevant, much as the statute rendered negligence on the part of the plaintiff irrelevant, so long as the plaintiff's negligence toward himself was less than the negligence of others toward him.

In the alternative, the court may classify a plaintiff's implied consent as merely a manifestation by the plaintiff of negligence toward himself. Thus the jury would compare the plaintiff's implied consent with the defendant's negligence in reducing the plaintiff's recovery. It should be noted that such an interpretation would create a new hybrid of implied consent in view of the *Restatement's* position that a plaintiff impliedly may consent to a hazard without being negligent toward himself.⁵⁵

A recent comment on *Ritter* has suggested, assuming a total abrogation of the implied consent formula of assumption of the risk, that the court will resolve liability problems solely through a duty analysis.⁵⁶

⁵⁴ See F. Pozzi, *Comparative Negligence*, September, 1971 (a paper available from the Oregon State Bar, Portland, Oregon). Pozzi maintains that the House Judiciary Committee discussions indicate legislative intent to overrule past cases where the plaintiff's recovery was barred by assumption of the risk. "I think the discussion in [The House Judiciary Committee] leaves no doubt that the legislature meant to overrule *Vendrell* and other decisions of our Supreme Court (such as *Hunt*) which have held as a matter of law in various situations that a plaintiff cannot recover because he has assumed risks in the activity upon which he is engaged."

⁵⁵ "In a third type of situation the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it . . . He may not be negligent in doing so, since his decision may be an entirely reasonable one, because the risk is relatively slight in comparison with the utility of his own conduct." *RESTATEMENT (SECOND) OF TORTS*, § 496A, comment c at 89 (1965).

⁵⁶ Comment, *supra* note 28.

The duty formula, however, by balancing the utility of the activity against the foreseeability and magnitude of the injury, may fail to resolve adequately future implied consent cases similar to *Vendrell*. Football does not have an indispensable social utility. Non-contact sports serve the purpose of physical conditioning equally as well and naturally produce less drastic injuries. The school district reasonably should foresee that through its act of sponsoring the sport and encouraging participation, participants may suffer injuries of a serious magnitude. Thus, by a strict application of the duty formula, a duty may fall upon a defendant which sponsors an activity of low social utility yet with a high likelihood of serious injury to a number of victims.

If by total abrogation of assumption of the risk the comparative negligence statute has limited the court to a duty analysis, the court must move toward a much broader approach to risk-sharing and indemnification in the context of public school sports injuries. Other fact situations as well may yield contrary results when resolved by the court as matters of duty rather than as ones of implied consent by the plaintiff. Total abrogation of assumption of the risk promises to alter the boundaries between recovery and no recovery by overturning the previous complete barrier of implied consent.

*B. Non-Abrogation: Operation of the Statute
Upon Both Senses of Assumption of the Risk*

Under this position of non-abrogation assumption of the risk is retained, but the comparative negligence statute operates to require the comparison and apportionment of assumption of the risk. The court faces a great interpretive pitfall if under the statute it attempts to compare and apportion the "primary" sense of assumption of the risk in like manner as the plaintiff's contributory negligence. If the primary sense of assumption of the risk is equivalent to the duty issue, the court will be faced with the impossible conceptual task of apportioning duty. If, on the other hand, assumption of the risk is understood to refer to the *Restatement* implied consent formula, the court must engage in the equal folly of attempting to apportion and compare the effect of the plaintiff's implied consent.

Consent is either totally present or totally absent. The implied consent of the player in *Vendrell* to body clashes cannot be apportioned. His consent either entirely absolves the defendant or is entirely irrelevant. Courts may allow consenting persons to recover under revised tort principles, but no logic supports allowing a recovery of one-half or one-third or one-fourth the damages based upon an arbitrary fraction apportioned according to plaintiff's implied consent.

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*C. Non-Abrogation: Operation of the
Statute Only Upon the "Secondary" or
Contributory Negligence Sense of Assumption of the Risk*

This position harks back to Justice Goodwin's opinion in *Ritter* espousing the Harper and James distinction between the primary and secondary senses of assumption of the risk. The court may retain assumption of the risk in the primary sense (essentially implied consent) while bringing the secondary sense (essentially contributory negligence) under the operation of the statute.⁶⁷ Because the secondary sense refers to the plaintiff's unreasonable conduct, the court will have no difficulty in comparing it with the defendant's negligence to arrive at an apportionment of recovery.

At the same time, the operation of the statute upon the secondary sense of assumption of the risk will dispel the confusion incurred by the commingling of contributory negligence and assumption of the risk in past decisions. That conduct of the plaintiff which can be compared and apportioned is properly denominated contributory negligence. In its decisions applying the comparative negligence statute, the court may retire the notion of plaintiff's assumption of the risk in the secondary sense by recognizing only the "plaintiff's compared negligence." This correction in terminology is essential to the conceptual clarity of both doctrines.

CONCLUSION

The operation of the statute upon only the secondary sense of assumption of the risk avoids the problem of throwing into the ashcan the language and authority of assumption of the risk cases decided over the last fifteen years. Moreover, the court may continue to speak of the plaintiff's implied consent based upon judicial characterization of risks as "inherent and obvious." Because the statute would operate only upon the secondary sense, the court is not required to determine whether the substance of the "primary" sense is solely duty or whether the *Restatement* implied consent formula demands an independent and viable existence.

RICHARD A. WYMAN*

⁶⁷ Recently, in *Bailey v. Stevens Auto Sales, Inc.*, 97 Or. Adv. Sh. 974, 977, 512 P.2d 1331, 1332 (1973), the Oregon court harkened back to the Harper and James concept of the primary and secondary senses of assumption of the risk, abandoning once again the *Restatement* position. The court held that separate instructions to the jury on assumption of the risk and contributory negligence constituted reversible error, saying: "if an instruction upon assumption of the risk is given when assumption of the risk is used in its secondary sense and an instruction upon contributory negligence is given as well, defendants secure a double instruction on the same issue." The improper instruction was essentially the *Restatement* formulation of implied assumption of the risk. *RESTATEMENT (SECOND) OF TORTS* § 496C (1965).

* Third-year student, School of Law, University of Oregon.