219 HJ HB 176 COMPARATIVE NEGLIGENCE (FILE #2)

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adopted in only nine jurisdictions;[224] and so much opposition to it has developed that the Commissioners now have withdrawn it for further study and possible redrafting.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 atrempt 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).

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[226] Brown v. Haertel, 210 Wis. 354, 24
Wis. 365, 251 N.W. 435 (1933); Homerdi
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).

[228] Bohlmann v. Penn Electric Corp., 232

[229] Kirchen v. Tisler, 255 Wis. 208, 38

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 them[226] 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 others[227] 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 (1938).

[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
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> (b) the extent to which such damages are diminished by reason of such contributory negligence.

RESTRAINTS OF INTERESTS

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* The writer is indebted to
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† Member, Michigan Bar; P

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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

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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 judiciary[6] — 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 (1949).

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

4. *Id.* at 506–09.

5. Seavey, Cogitations on Torts 52–72 (1954).

6. *E.g.*, Cahill, Judicial Legislation 140–60 (1952); Green, *The Thrust of Tort Law: Part II Judicial Law Making*, 64 W. Va. L. Rev. 115, 121 (1962); James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 Buffalo 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. 1942) (Frank, J., concurring).

10. *E.g.*, Cooperrider, *A Comment on "The Law of Torts,"* 56 Mich. L. Rev. 1201 (1958).

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, 143 Colo. 240, 353 P.2d 609 (1960); Levesque v. Levesque, 99 N.H. 147, 106 A.2d 563 (1954); Reimann v. Monmouth Consol. Water Co., 9 N.J. 134, 87 A.2d 325 (1952); 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 30 (1958); Memorial Hosp. Inc. v. Oakes, 200 Va. 878, 108 S.E.2d 388 (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, 96 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, 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, 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 618 (1962); Kojis v. Doctors Hosp., 12 Wis. 2d 367, 107 N.W.2d 131 (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, 775 (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 66–68.

15. *E.g.*, Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929); see Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289 (1940).

16. *E.g.*, State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. App. 2d 330, 240 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 (1958).

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 (1961).

19. See Peck, *Parental Liability for Wilful and Malicious Acts of Children*, 36 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 $502,000, were for tort.
>
> In each of the Seventy-fourth and Seventy-fifth Congresses over 2,500 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 $826,000.
>
> 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 realties 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

troduced and referred to the Claims Committee, 593 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 $905,353.06.

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

21. Kernan v. American Dredging Co., 355 U.S. 426, 437 (1958), 34 Wash. L. Rev. 108 (1959).

22. Fahey v. Mallonee, 332 U.S. 245, 250-53 (1947); *cf.* NLRB v. Radio Eng'rs, 364 U.S. 573, 582-83 (1961).

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 legislators[23] 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 occupation[25] 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 memberships 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 scale[30] 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 $3,900 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 87 (1962) [hereinafter cited as BOOK OF THE STATES 1962–1963]. See generally BABCOCK, STATE AND LOCAL GOVERNMENT AND POLITICS 163 (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).

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 services[36] 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 & Sunderland, *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 204, 206 (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 1962–1963, 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 BABCOCK, *op. cit. supra* note 30, at 183; MCKEAN, *op. cit. supra* note 35, at 42.

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 10 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*, 58 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. B. G. Corp., 130 F.2d 290, 296 (2d Cir. 1942) (Frank, J., concurring); Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 40, 163 N.E.2d 89, 103 (1959) (Davis, J., dissenting); Reimann v. Monmouth 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. 338, 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 235 (1961). The report of the Senate was equally uncommunicative, using almost identical language. SENATE JOURNAL OF THE 37TH LEGISLATURE OF THE STATE OF WASHINGTON 740 (1961). 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. 340, 365 (1954). See also Cohen, *Hearing on a Bill: Legislative Folklore*, 37 MINN. L. REV. 34, 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 379; 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.

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 committees[57] 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 is sur-

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 160, 162; Cohen, *supra* note 54, at 37–38 (1952).

57. AMERICAN STATE LEGISLATURES 96. See also BABCOCK, *op. cit. supra* note 30, at 189 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, 534 (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 Colgm. 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).

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-oriented[66] 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. 162 (1957).

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

65. *Id.* at 63–64.

66. AMERICAN STATE LEGISLATURES 142–44.

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 1956[72] 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.L.F. 221–34 (1955).
75. Note, 29 N.Y.S.B. Bull. 193–244 (1957).
76. Note, 31 N.Y.S.B. Bull. 150–91 (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 729, 219 N.Y.S.2d 34 (1961) (relying upon a 1956 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.[82]

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 process[83] 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.[84] One scholarly state legislator came to believe after two legislative sessions that outside group pressures accounted for 90 percent of what was done.[85] The authors of an Illinois study concluded that non-legislators sometimes exert more influence on legislative decisions than do members.[86] Moreover, the amateur legislators, who make up a considerable part of state legislatures, may find it difficult to identify the various pressure groups,[87] 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,[88] a pressure group or lobby can

82. *Id.* at 133.

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

84. *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.

85. MCKEAN, *op. cit. supra* note 35, at 218.

86. 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.

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

88. 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. Stein & Gove, *op. cit. supra* note 51, at 48.

91. Truman, *op. cit. supra* note 48, at 363; 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 30 (1958); Memorial Hosp. v. Oakes, 200 Va. 873, 108 S.E.2d 383 (1959). *But cf.* Schutte v. Missionaries of La Salette Corp., 352 S.W.2d 636 (Mo. 1961).

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 Thrust 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 (1958), for a list of 104 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 Changing*, 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. 289 (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 1940, 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).

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 (1958) (Musmanno, J., dissenting).

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

105. *Id.* at 47.

> The agencies, unlike the aliens, have ready and persuasive access to th 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 618 (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 subdivisions[110] and one bill[111] 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 statute[115] 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. 34, § 301.1 (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. 1681, § 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. 1681, § 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. 1681, § 820.2. This provision seems to encompass the subsequent, more specific exemptions. Cal. Sess. Laws 1963, ch. 1681, §§ 820.2–821.8. Two final sections grant immunity from liability for funds stolen from

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. 268, 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 (1962), and Stevens v. City of St. Clair Shores, 366 Mich. 341, 115 N.W.2d 69 (1962), 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, § 8.1 (1961).

the conduct of school district affairs . . . ." During the same legislative session another bill[113] 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. 469, 493–94, 280 P.2d 301, 303 (1955); *cf.* Memorial Hosp., Inc. v. Oakes, 200 Va. 678, 889, 108 S.E.2d 388, 396 (1959).

Editors Note: Subsequent to the completion of this Article, the Oregon Supreme Court, in Hungerford v. Portland Sanitarium & Benevolent Ass'n, 354 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).

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 inference[126] but others have refused

121. *E.g.*, Hernandez v. County of Yuma, 91 Ariz. 35, 369 P.2d 271 (1962).

122. Wycko v. Gnodtke, 361 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, 361 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., 362 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. 29, 141 A.2d 276 (1958); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (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 (1950).

128. Muskopf v. Corning Hosp. Dist., 55 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 89 (1959); Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962).

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

130. Garner v. Teamsters Union, 346 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).

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 64 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.*[134] 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 Hoadly, 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. 1063, 1065 (1954).

138. Roth v. Local 1460, Retail Clerks Union, 216 Ind. 363, 24 N.E.2d 280 (1939), *rev'd on other grounds*, 218 Ind. 275, 31 N.E.2d 986 (1941); Gazzam v. Building Serv. Employees, 20 Wash. 2d 488, 188 P.2d 97 (1947); *cf.* Lauf v. Shinner & Co., 303 U.S. 323 (1938).

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

lize a statute as the base for a creative venture; for example the nited States Supreme Court recently announced that the Fed- al Employers Liability Act created only a framework within hich the courts were left to evolve, much in the manner of the mmon law, a system of principles to compensate injured em- oyees consistent with the changing realities of the railroad dustry.[140] In short, courts can remain creative even while work- g within a statutory scheme.

Assuming that courts can and do withstand the counterattack n their reforms, they face problems within their own walls. Having acknowledged their creative role, they should expect a re- ponse from those with an interest in producing change. The or- anized interests that function as legislative lobbies might well ndertake experimental litigation to produce changes consistent ith their objectives. If the appellate court might play its crea- ive role in any case coming before it, interest groups may well onclude that they cannot ignore pending cases involving princi- les of law important to them. At the present time such groups o participate as amici in significant cases, but only where the ignificance of the case appears from the lack of controlling prece- ent or the convergence of conflicting precedents in the context of he pending case. Unless the courts develop some signaling device, uch as setting the case for re-argument and inviting amicus riefs, they can expect an increase in the applications to partici- ate as amicus. Even with the use of such a device, as case re- orts indicate,[141] courts will receive what they might consider the ixed blessing of numerous briefs and oral arguments. While the atter rests within their control, it is unlikely that courts would ant to refuse such assistance in the new role they have openly ssumed.

If the courts undertake a creative role, they can expect pres- sure 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 ('958).

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. 1962) 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*, 76 HARV. L. REV. 233 (1962).

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 recovery[145] 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, [1888] 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 [1953] 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. 323 (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.[148] 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 reform[149] 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, 849 P.2d 457, 11 Cal. Rep. 89 (1961); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957) (municipal immunity from tort liability); Spanel v. Mounds View School Dist., 118 N.W.2d 795 (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, 219 N.Y.S.2d 34 (1961) (liability for injury from negligently induced fright); Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 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 636, 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. 97 (1962); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961); Hargrove v. Town of Cocoa Beach, 96 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, 219 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 (1956). 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).

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 arrangement 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. Corning 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 nonliability for certain discretionary acts of governmental officials. This court also announced on the same day, two new rules creating inter-spousal liability for both negligent[154] 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 Florida[156] and Wisconsin[157] 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 26, 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. 299 (1952); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (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 26, 30, 115 N.W.2d 618, 625–26 (1962).

The Minnesota Supreme Court, in Spanel v. Mounds View School Dist., 118 N.W.2d 795, 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. 198, 203 (1963).

160. See note 14 *supra*.

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. Lumber 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 906, 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 26, 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, 99 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 131, 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); Parker 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 131, 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. 184 (1954); Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962).

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 COL. 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 Atl. 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.[175]

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

173. Indeed, the Washington statute waiving sovereign immunity, WASH. REV. CODE § 4.92.090, 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. 159.

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

175. 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).

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 1858[177] 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 CHI.-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. 892 (1894).

179. Arkansas adopted a comparative negligence statute in 1955, Ark. Acts 1955, No. 190, amended by Ark. Acts 1957, No. 206. 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, 35th Reg. Sess. (1957); S. 352, 33d Reg. Sess. (1953); H.R. 28, 33d Reg. Sess. (1951); Averbach, *Comparative Negligence Legislation: A Cure for Our Congested Courts*, 19 ALBANY L. REV. 4, 13 (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 (1956) (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. 333, 337–38 (1932); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (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*, 26 UTAH B. BULL. 109 (1956); 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*, 13 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. Hawn*, 346 U.S. 406, 408–09 (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.

184. SEAVEY, COGITATIONS ON TORTS 55–56 (1954); Keeton, *supra* note 150, 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, 836 (1962).

185. Morris, *supra* note 161, at 554; Peck, *supra* note 161, at 689. Compare Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 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

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 239, 176 N.E.2d 729, 219 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 239, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

192. See NEW YORK LAW REVISION COMM'N, REPORT 381–82 (1936).

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. 1955); 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* decision[195] 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*, 26 MINN. L. REV. 573 (1942).

197. Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960).

198. Vascoe v. Ford, 212 Miss. 870, 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. 7 *passim* (1959).

201. See Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L.J. 212 (1958).

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 Source 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*, 59 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.

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.

[1] What 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).

[2] E.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); Varnum, "Comparative Negligence in Automobile Cases," 24 INS. COUNSEL J. 60 (1957).

[3] E.g., Averbach, "Comparative Negligence Legislation: A Cure for Our Congested Courts," 19 ALBANY L. REV. 4 (1955); Bress, "Comparative Negligence: Let Us Hearken 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 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. BUL. 288 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 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.

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[18] Wis. Stat. (1957) §§85.93,
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[19] 4 A.L.R. (2d) 764 at 765
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[21] See 2 HARPER AND JAMES,
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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 basis[21] 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," 1949 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 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.

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[27] U.S. DEPT. OF HEALTH, EDUCATIO
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[28] TRAFFIC SAFETY, p. 34 (Decembe
[29] Letter from the National Safety
[30] DESILVA, WHY WE HAVE AUTO
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).

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[34] Mole and Wilson, "A Study of C
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Negligence Cases," 99 UNIV. PA. L. REV.
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[35] The better discussions of this deve
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[36] Ga. Code Ann. (1935) §94-703: "Cons
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[37] Ga. Code Ann. (1935) §105-603: "If the
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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 language[36] 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 provision[37] 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 CHI-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 CHI-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 doctrine[38] 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 (1959). 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, 88 S.E. (2d) 6 (1955).

42 Miss. Code Ann. (1942) §1455: "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).

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 508 (1953).

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[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 (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 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 508 (1953).

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 Lellar 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 copy[58] of a law adopted in Nebraska in 1913.[59] The statute pro-

54 Rosenberg, "Comparative Negligence in Arkansas: A 'Before and After' Survey," 13 ARK. L. REV. 89 at 108 (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 CHI-KENT L. REV. 304 at 313-317 (1950).

56 East Tennessee, V. & G. Ry. Co. v. Hull, 88 Tenn. 33, 12 S.W. 419 (1889). Cf. Atlantic Coastline R. Co. v. Smith, (6th Cir. 1959) 264 F. (2d) 426 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 discussions[60] 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 four[61] or one to six[62] might comply with the requirement that plaintiff's negligence be slight, the concensus 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); Pleuls 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).

TABLE I

NEBRASKA-SOUTH DAKOTA COMPARISON

State	Class I-A[1] Premium Rate	Policy Claim[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, 1958, 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[2] Property Damage Claim Frequency	1954-1956[3] 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	(8) 1.04	(5) 842.	(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.

Automobile Bureau of Casualty Underwriters. property damage excluded—National Bureau of Casualty Underwriters.
[1] Amount of losses in excess of $5,000 for property damage excluded—National Bureau of Casualty Underwriters.
[2] Average amount of losses per insured car on basic limits basis—National Bureau of Casualty Underwriters.

the result is a statistic indicating the frequency of that type of claim per death. Thus,

$$\frac{\text{Claims}}{\text{1,000 Insured Autos}} \div \frac{\text{Deaths}}{\text{1,000 Registered Autos}} =$$

$$\frac{\text{Claims}}{\text{~~1,000~~ ~~Insured~~ ~~Autos~~}} \times \frac{\text{~~1,000~~ ~~Registered~~ ~~Autos~~}}{\text{Deaths}} = \frac{\text{Claims}}{\text{Deaths}}$$

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 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	1954-1956 Total Pure Premium	1950 Urban-Rural Population Ratio
Arkansas	(5) 5.78	(5) 23.71	(5) $755.	(4) $135.	(6) $24.74	(5) .62
Louisiana	(2) 8.81	(3) 29.15	(6) 745.	(2) 137.	(3) 31.25	(2) 1.21
Mississippi	(6) 5.51	(6) 18.84	(1) 939.	(1) 139.	(4) 26.65	(6) .39
Missouri	(1) 12.59	(1) 37.04	(4) 828.	(6) 127.	(1) 40.55	(1) 1.66
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) .59
Georgia	(5) 5.86	(5) 23.46	(6) 738.	(2) 138.	(4) 24.64	(2) .81
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) 1.66
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) .62
Tennessee	(2) 8.10	(1) 33.10	(2) 901.	(4) 131.	(1) 32.71	(3) .59
Mississippi	(5) 5.51	(5) 18.84	(1) 939.	(1) 139.	(3) 26.65	(5) .62
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) 1.21
Tennessee	(2) 8.10	(1) 33.10	(2) 901.	(4) 131.	(1) 32.71	(2) .59
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.[97] 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

97 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.

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.

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—ƒ7.5—%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—ƒ7.6—%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	ƒ6.3—1957—U/R.39	&1.9
Missouri	$57.80—ƒ7.7—&2.8—*1030—§40.09—@71.1—11786—U/R1.60	%6.2—D/R2.70	
Oklahoma	$38.66—*837—11499—U/R1.01	ƒ6.1—%6.2—&1.8—§24.08—@27.7—D/R2.45	
Tennessee	$39.79—ƒ8.2—%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—ƒ6.5—%8.2—&1.9—*766—§24.82—@23.7—11338—D/R3.24—U/R.83.

Neighboring State	Rate Is: Higher	Lower	Same
Alabama	$37.30—ƒ6.8—%8.6—*776—@25.1	&1.8—§24.05—11185—D/R3.11—U/R.78	
Florida	*860—@37.1—11666—U/R1.90	$42.63—ƒ6.4—%6.6—&1.8—§24.48—D/R2.32	
North Carolina		$30.50—ƒ6.4—%7.7—*759—§23.66—@21.5—11254—D/R2.86—U/R.51	&1.9
South Carolina	%9.4—*813—§25.34	$34.00—ƒ5.5—@17.6—11117—D/R3.14—U/R.58	&1.9
Tennessee	$39.79—ƒ8.2—&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—ƒ6.3—%8.1—&1.9—*968—§27.20—@29.6—1957—D/R3.45—U/R.39.

Neighboring State	Rate Is: Higher	Lower	Same
Alabama	ƒ6.8—%8.6—11185—U/R.78	$37.30—&1.8—*776—§24.05—@25.1—D/R3.11	
Arkansas	ƒ7.5—11071—U/R.49	$38.08—%6.9—*777—§25.03—@28.6—D/R3.29	&1.9
Louisiana	$47.78—ƒ7.6—&3.0—§36.99—11344—U/R1.21	%7.5—*798—@26.9—D/R2.95	
Tennessee	$39.79—ƒ8.2—&2.0—*975—§30.90—11264—U/R.79	%8.0—@23.6—D/R2.84	

D. WISCONSIN

Remainder of State Comparison

Wisconsin Figures: $40.56—ƒ7.4—%7.0—&2.3—*911—§29.93—@52.6—I1760—D/R2.40—U/R1.37.

Neighboring State Rate Is:	Higher	Lower	Same
Illinois	ƒ8.4—§30.35—@89.8—I2243—U/R3.46	$34.38—%6.8—&2.1—*869—D/R2.24	
Iowa	ƒ7.8	$28.31—%5.5—&1.4—*856—§21.55—@45.4—I1580—D/R1.98—U/R.91	
Michigan	ƒ9.8—%7.1—I2132—U/R2.41	$37.18—&2.0—*697—§27.26—@36.0—D/R2.04	
Minnesota	*972—@98.7	$37.00—ƒ7.2—%4.8—&1.8—§26.27—I1675—D/R1.67—U/R1.20	

Code:
$—Remainder of State Premium, adjusted to July 1, 1958.
ƒ—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.
I—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 w[illegible]k, 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.