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COMMENTS

COMPARATIVE NEGLIGENCE—THE DEVELOPING DOCTRINE
AND THE DEATH OF MAKI

It is a maxim among these lawyers that whatever hath been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against justice and the good reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions: and the judges never fail of directing accordingly.

Jonathan Swift, Gulliver's Travels

On July 26, 1967, the Illinois Appellate Court for the Second District, at what must be considered the open invitation of the Illinois Supreme Court to abolish the doctrine of contributory negligence, was directed to determine "whether, as a matter of justice and public policy, the rule should be changed." Upon this mandate, the appellate court in the case of Maki v. Frelk held that contributory negligence shall no longer bar recovery, and adopted instead a Wisconsin-type rule of comparative negligence. On petitions by the plaintiff for clarification of the operation of comparative negligence and by the defendant for review, the Illinois Supreme Court timidly reconsidered its hasty transfer and held "that such a far-reaching change if desirable should be made by the legislature." In handing down such a decision, the majority lost sight of sound reasoning and obvious facts: it ignored arguments of the gross injustice of the contributory negligence bar; it ignored the flagrant fact that our legislature, the instrument of "far reaching changes," had rejected nine reform bills, eight of which had been tabled in committee. The court chose to disregard the situation it had apparently been cognizant of in transferring cause—that the legislature because of factious

1 In transferring cause to the appellate court, the supreme court said, "In our opinion such a claim [referring to the appellant's arguments] does not give rise to a constitutional question of such a nature as to give this Court jurisdiction on direct appeal. There remains for consideration the question of whether, as a matter of justice and public policy, the rule should be changed," Maki v. Frelk, 85 Ill. App. 2d 439, 440, 229 N.E.2d 284, 285 (1967).

2 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967).


4 S.B. 158 (1937); H.B. 555 (1939); S.B. 513 (1955); H.B. 755 (1955); S.B. 551 (1957); H.B. 1960 (1957); H.B. 1140 (1959); S.B. 374 (1963); H.B. 636 (1965). This last bill had the support of the Illinois Judicial Conference and its Committee on Comparative Negligence.
makeup and certain lobbies was incapable of reforming the law, and that therefore, the duty to change, alter or abolish this judge-made rule devolved clearly and squarely upon the court. It is certainly sad commentary that, cloaked in a new guise of court-enforced legislative fiat, Gulliver’s maxim of *stare decisis* should become a twentieth century reality.

Notwithstanding *Maki*, eight states presently follow a form of comparative negligence in general negligence actions.⁵ Comparative negligence, or as it has been more aptly termed, damage apportionment,⁶ has been for the past century the dialectical nemesis of contributory negligence. Although the controversy had apparently subsided since 1955,⁷ the incidence of the *Maki* case and certain other recent developments point toward a resurgence of that theory in the law of negligence.

This comment will discuss the history and development of comparative negligence, including its present status in various jurisdictions, and endeavor to predict the future of the doctrine, particularly, whether the concept of comparative negligence represents a permanent stage in the evolution of negligence law or merely a transient stop on the way to compensation without regard to fault.

### HISTORY AND DEVELOPMENT OF COMPARATIVE NEGLIGENCE

Inasmuch as the history of comparative negligence is often read as the demise of the doctrine of contributory negligence, or alternatively, the concept of liability based on fault, any discussion of the former must include also the latter two.


⁶ Dean Prosser points out that the modern use of the term “comparative negligence” is something of a misnomer. The term as it was used in its early history in Illinois (discussed *infra*) was associated with degrees of negligence and a comparison of “slight,” “ordinary,” and “gross,” and did not involve, whether recovery was allowed or not, diminution of recoverable damages. Prosser suggests a better name for the modern concept of comparative negligence which contemplates both a comparison of causal negligence and a corresponding diminution of damages would be “damage apportionment” or “comparative damages.” *Prosser, Comparative Negligence*, 51 *Mich. L. Rev.* 465, n2 (1953).

⁷ The decade that followed the enactment of the original Arkansas statute (*infra* note 72) saw no further adoption of the comparative negligence rule in the other states.
The concept of fault is today the fundamental basis of negligence law. The law speaks in terms of legal duty and objective standards of care. Nevertheless, a category of negligent wrongs was completely foreign to the early common law. Liability for wrongdoing in Anglo-Saxon times represented a natural substitute for the vendetta or blood feud. The feud was bought off by composition, even though the injury was purely accidental, or inflicted in self defense. After the reign of Edward IV, the notion of proximate cause often crept into cases, and by the seventeenth century, the constant inquiry into the foreseeability of consequential injury gradually gave rise to the idea that liability was grounded upon negligence. By the eighteenth century, it was generally recognized that where an injury was unintended, in the absence of negligence, there should be no liability.

Butterfield v. Forrester

Although the vague outlines of the doctrine of contributory negligence were discernible in a few earlier decisions where the plaintiff was denied recovery because he was the sole cause of his own injury, causal negligence on the part of a plaintiff was not held to bar recovery until Butterfield v. Forrester. The plaintiff, riding home at dusk carelessly rode into a pole which the defendant negligently had left projecting on to the road. Lord Edinborough, speaking for the court held:

A party is not to cast himself upon an obstruction which has been made by fault of another, and avail himself of it, if he does not himself use common and ordinary caution. . . . One person being at fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

The analogy of the plaintiff casting "himself upon an obstruction" and the facility with which the court addresses itself to the problem, seems to emphasize the fact that the judges felt they were dealing with the familiar question of proximate causation rather than enunciating a new doctrine.


9 Holdsworth, id. at 379-80, 449-452.


12 Id. at 61, 103 Eng. Rep. at 927.

13 Many later cases seem to use the same line of reasoning. For example, in the case of Thomas v. Quartermaine, 18 Q.D.B. 685, 687, 56 L.J. Rep. N.S. 340, 349 (1887), the court asserts that the plaintiff's act having "severed the causal connection between the defendant's negligence and the accident, . . . the defendant's negligence accordingly
The rule of Butterfield v. Forrester was readily accepted by the courts in England and the United States, which often spoke of the doctrine as having always been part and parcel of the common law. This rapid assimilation coincided with the industrial revolution, a period when the economic needs of fledgling industries demanded such financial protection. The doctrine of contributory negligence, the fellow-servant rule, and voluntary assumption of risk served to limit the liability of infant industries; and at the same time provided a convenient means of controlling the distrusted, plaintiff-minded jury.

Admiralty

Admiralty had from the beginning charted a different course in regard to contributory fault. As early as the thirteenth century, the laws of Oleron, a small island off the west coast of France, declared that if two ships collide on the high seas, the total damages should be shared equally when it was impossible to fix the blame for the collision. England adopted a similar

is not the true proximate cause of the injury." James and other writers suggest that this sort of reasoning was strongly influenced by the medieval concept of causation which regarded the act closest in physical and chronological proximity as the singular cause. James, Contributory Negligence, 62 YALE L.J. 691, 693, 696 (1953); Philbrick, Loss Apportionment in Negligence Cases, 99 U. PA. L. REV. 572, 574 (1951); Turk, supra note 8, at 197.


Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824); Noyes v. Morristown, 1 Vt. 353 (1828); Aurora Branch R.R. Co. v. Grimes, 13 Ill. 585 (1852).

See, e.g., Railroad Co. v. Aspell, 23 Pa. 147, 149 (1854).

Fosser, Law of Torts § 64, at 428 (3d ed. 1964); Green, The Individual's Protection Under Negligence Law: Risk Acceptance, 47 U.L. REV. 751, 753 (1953); Malone, The Formative Era of Contributory Negligence, 41 Ill. L. REV. 151 (1946). Whatever functional motives the courts might have had for espousing the doctrine of contributory negligence, they expressed the following rationales in justifying its use: (a) The plaintiff is precluded from recovery because his contributory negligence has "severed" or "insulated" the defendant's negligence from the injury. Thomas v. Quartermaine, supra note 13; Fosser, supra, § 64, at 427; Harper and James, The Law of Torts, § 22.2 (1956). (b) The court will not aid a party who was himself in the wrong. Davis v. Guarnieri, 45 Ohio St. 470, 15 N.E. 350; Fosser, supra, § 64. (c) The doctrine will deter individuals from being careless. Schofield, Davies v. Mann: Theory of Contributory Negligence, 3 HARV. L. REV. 263, 270 (1890). (d) The plaintiff is barred under the maxim volenti non fit injuria. (i.e., By his own negligence, the plaintiff tacitly consents to all consequential results, and thus, in a sense, "assumes the risk" of the potential results of his own carelessness.) Fosser, supra, § 64; Harper and James, supra, § 22.2. (e) The mutuality of wrong involved would entitle each party alike, if they both were injured, to an action against the other, but it is impractical, if not impossible to apportion damages. Thus it is the policy of the law to leave the parties exactly as it found them. Bellefonte Ind. Ry. v. Snyder, 18 Ohio St. 339, 409 (1868); Harper and James, supra, § 22.2.

Marsden, Collisions at Sea 135 (8th ed. 1923); Turk, supra note 8, at 226.
rule of equal division in cases where the libellant was contributorily negligent. The time honored rusticum judicium was applied in cases of mutual fault until 1911 when a statute modeled after the rule of the Brussel's Maritime Convention was enacted. Although all other important maritime nations presently follow some form of the Brussel's Convention rule, which provides for apportionment of loss according to the proportion of fault, the United States continues to cling to the rule of equal division of damages.

AMELIORATION OF THE "HARSH" RULE OF CONTRIBUTORY NEGLIGENCE

Last Clear Chance. The courts have developed certain limitations on the applications of the rule of contributory negligence. In 1842, the English case of Davies v. Mann held that a plaintiff, though negligent, may recover where the defendant, in the exercise of due care, might have avoided the injury. While the so-called doctrine of last-clear-chance merely shifts the entire burden of loss from the negligent plaintiff to a defendant whose negligence followed that of the plaintiff, it has been consistently applied in situations of discovered or discoverable peril in the guise of a rule of proximate cause.


20 English Maritime Act, 1 and 2 Geo. 5, c. 57, § 1 (1911).

21 Where two vessels both at fault are involved in a collision, apportionment of damages in an admiralty proceeding brought by one vessel against the other is normally made by totaling the entire loss in one common mass and dividing such loss equally between the two vessels regardless of their respective degrees of fault. The Victory, 68 F. 400, 15 C.C.A. 490 (C.C.A., Va.); United States v. Atlantic Mutual Insurance Company, 343 U.S. 236 (1952); Ahlgren v. Red Star Towing and Transport Company Inc., 214 F.2d 618 (2d Cir. 1954). But see, N.H. Patterson & Sons, Ltd. v. City of Chicago, 209 F. Supp. 576 (N.D. Ill. 1962); 46 Marq. L. Rev. 532 (1963). See 11 U. Fla. L. Rev. 98 (1958), wherein the special set of exceptions which have developed in the United States in order to prevent the harsh results of a strict application of the division of damages rule is discussed.


23 (a) Discovered Peril: The defendant was negligent in placing himself in a situation of peril, but the defendant, realizing the danger, by the exercise of reasonable care could have avoided the injury. New York Central R.R. v. Thompson, 215 Ind. 652, 21 N.E.2d 625 (1939). Prosser, supra note 17, § 65 at 439-40; Harper and James, supra note 17, §§ 22.12, 22.13 at 1241-1255. (b) Discoverable Peril: The plaintiff was negligent in placing himself in a situation of peril, but the defendant in the exercise of reasonable precaution would have realized the danger and then, by exercising due care avoided the injury. Storr v. New York Cent. R.R., 261 N.Y. 348, 185 N.E. 407 (1933). Prosser, supra note 17, at 440; Harper and James, supra note 17, at 1241-55. On the point that the doctrine of last clear chance is merely a judicial "reaction formation" to the strict application
Recklessness. Since action characterized as "wilful," "wanton," or "reckless" misconduct is said to be qualitatively more grievous than negligence, connoting a "quasi intent," the courts have, by extension of the rule relating to intentional torts, unanimously held that contributory negligence is no defense to a claim for an injury caused by "wilful," "wanton," or "reckless" misconduct.

Burden of Proof. Another palliation of otherwise denied recovery was the gradual changes in the rules of pleading and burden of proof regarding contributory negligence. Today, the great majority of the common law jurisdictions consider contributory negligence an affirmative defense.

Absolute Liability. In a more indirect way, the absolute liability imposed under various statutes and the case law rule of strict liability for ultrahazardous activities also limits the application of contributory negligence.

Informal Jury Apportionment. Perhaps the most pervasive amelioration of the contributory negligence bars occurs whenever a negligence case gets to the

of the contributory negligence bar, see MacIntyre, The Rationale of Last Clear Chance, 53 Harv. L. Rev. 1225, 1226, 1251 (1940) wherein the author asserts that the whole last clear chance doctrine is only a disguised escape by way of comparative fault from contributory negligence as an actual bar. A recent case before the Maine Supreme Court reinforces this position. Positing that "the appearance and survival of the last clear chance doctrine is best explained by a frequently occurring dissatisfaction in the courts with the result of the contributory negligence rule," the court concludes "that the last clear chance doctrine is but a modification of the doctrine of contributory negligence," and therefore, when the Maine legislature enacted comparative negligence (infra notes 95-96, notes and text), "the last clear chance rule disappeared with contributory negligence and no longer exists as an absolute rule." Cushman v. Perkins, 37 U.S.L.W. 2197 (Me. Sup. Ct. Sept. 20, 1968).

24 Prosser, supra note 17, § 34 at 188.


26 Only Illinois, New York, Michigan, Iowa, Maine and Rhode Island still adhere to the "barbaric rule," placing the burden of pleading and proving freedom from contributory negligence on the plaintiff. Maine and New York have eliminated this rule in actions under their death statutes. Harper and James, supra note 17, § 22.11 at 1235-36; Prosser, supra note 17, § 64 at 426; Institute of Judicial Administration, Comparative Negligence, 3-UII (1955); Green, Illinois Negligence Law II, 39 Ill. L. Rev. 116, 125-130 (1944). A line of Illinois cases has recognized in death cases the presumption that the decedent obeyed "the natural human instincts prompting the preservation of life and avoidance of danger." Campbell v. Ragel, 7 Ill. App. 2d 301, 304, 129 N.E.2d 451, 452 (1955); Ill. Cent. R.R. v. Nowicki, 148 Ill. 29, 35 N.E. 358 (1893); Elgin, Joliet & E. R.R. v. Hoadley, 122 Ill. App. 165, aff'd, 220 Ill. 462, 77 N.E. 151 (1906). This presumption of a natural instinct of self preservation, in effect, reverses the burden of proving contributory negligence in certain death cases. The anomaly apparent is that the plaintiff only injured or maimed is presumed in Illinois to have had no such instinct.

27 Harper and James, supra note 17, § 22.7 at 1216-19, § 22.9, 1227; Symposium, Illinois Statutory Remedies for Personal Injury or Death, 1967 U. Ill. L.F. 1-116.
jury. Juries frequently refuse to find contributory negligence and instead bring in a compromised verdict. In at least one state, this propensity of juries has received official recognition. The jury's “instinctive” sense of comparative fault has been used repeatedly in arguments both for and against a system of comparative negligence.

THE ILLINOIS EXPERIMENT: THE “COMPARATIVE DEGREES” OF NEGLIGENCE THEORY

During the nineteenth century, Illinois, Kansas, and Tennessee developed a species of common law comparative negligence. In 1852, the Illinois

28 See Haeg v. Sprague, Warner & Co., 202 Minn. 425, 430, 281 N.W. 261, 263 (1938); Karcesky v. Laria, 382 Pa. 227, 114 A.2d 150, 154 (1955). In a survey of fifty-three Chicago-area trial lawyers taken for this paper, 89% of the respondents answered that such informal jury apportionment was a very common experience. See also, Margaric, Successful Handling of Casualty Claims 18 (1955); Burns, Comparative Negligence: A Law Professor Dissents, 51 Ill. Bar. J. 708, 717 (1963); Gilmore, Comparative Negligence from a Viewpoint of Casualty Insurance, 10 Ark. L. Rev. 82, 83 (1955); Prosser, supra note 6, at 469. See Siegel, Silent Growth of Comparative Negligence in Common Law Courts, 12 Clev.-Mar. L. Rev. 462 (1963) for an excellent discussion of the growth sub rosa of comparative negligence through the jury system.

29 The Pennsylvania courts have established that a plaintiff's motion for a new trial, based on the inadequacy of the damages may be denied on the ground that evidence of contributory negligence may have been used by the jury in returning an otherwise unjustifiably small verdict. O'Toole, Comparative Negligence; The Pennsylvania Proposal, 2 Vill. L. Rev. 474 (1957). See Karcesky v. Laria, 382 Pa. 227, 114 A.2d 150 (1955); Patterson v. Palley Mfg. Co., 360 Pa. 259, 61 A.2d 861 (1948); Carpenelli v. Scranton Bus. Co., 350 Pa. 184, 38 A.2d 44 (1944).


31 The Kansas view was in substance the same as Illinois' allowing recovery where plaintiff's negligence was slight or remote and the defendant's was gross or a proximate cause in comparison. Sawyer v. Sauer, 10 Kans. 351 (1872); abandoned in A.T. & S.F. R.R. v. Morgan, 31 Kan. 77, 1 P. 298 (1883). The Tennessee version, which is still followed today, has been called the "doctrine of remote contributory negligence." The courts have consistently held that contributory negligence which is a proximate cause of the injury bars recovery, but where the plaintiff's negligence contributed only remotely to his injuries, such negligence will be considered only for purposes of apportionment and mitigation of damages. The Supreme Court of Tennessee had expressly rejected the modern doctrine of comparative negligence, and in practical operation the Tennessee doctrine has operated only in situations where the defendant had a last clear chance. Ironically, in most states, so-called "remote contributory negligence" has no effect on recovery. Nash. & Chat. R.R. v. Carroll, 53 Tenn. 284 (1871); Whirley v. Whteeman, 38 Tenn. 610 (1858); East Tennessee, V. & G. Ry. v. Hull, 88 Tenn. 33, 12 S.W. 419
Supreme Court recognized the rule of *Butterfield v. Forrester* and placed the burden of proving freedom from contributory negligence upon the plaintiff. Six years later, Justice Breese, while giving lip service to *Butterfield*, found that “the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care, as manifested by both.”

The more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. In all cases, the degrees of negligence must be measured and considered, and wherever the plaintiff’s negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action.

Thus it was established, and for three decades held, that in cases of mutual fault, a plaintiff had to demonstrate he had taken ordinary precaution for his safety; but if he had done so and was guilty of only slight negligence in comparison, he was entitled to recover. The constricting ambits of ordinary care and slight negligence delimited the application of the doctrine to a rather narrow area and as a result, the definitions of “slight” and “gross” were a constant source of appellate litigation. In 1894, the theory of “comparative degrees” was unequivocally abandoned by the Illinois Supreme Court in *Lake Shore and Michigan Southern Railway v. Hession*. A number of factors appear to have contributed to the downfall of the “comparative degree theory,” primary among them the following: (1) the difficulty of defining degrees of negligence as slight, gross, or ordinary lead to an overburdening of the appellate courts and doctrinal confusion; (2) the impossibility of re-
conciling two essentially countervailing doctrines, comparative negligence and contributory negligence; (3) the failure of the doctrine to provide for apportionment of damages on the basis of fault; and (4) the substantial increase in the number of master-servant cases, during the 1880's. The court, fearing that the control of such cases might devolve to the jury, sought to limit any potential financial burden which might be placed on employers.  

STATUTES OF LIMITED APPLICATION ESPOUSING THE DOCTRINE OF COMPARATIVE NEGLIGENCE

Whatever the arguments over the merits of comparative negligence, the fact remains that a good deal of case law involving "special" comparative negligence statutes has evolved. The injustice worked by the contributory negligence bar in railroad accidents led to the enactment in 1908 of the Federal Employers' Liability Act, which applies to all actions brought by interstate railroad employees against their employers. The intent of F.E.L.A. is to grant some recovery for every injury which is caused in any part by the employer's negligence. In 1930, the United States Supreme Court held that the provisions of the F.E.L.A. were incorporated by reference into the Merchant Marine Act of 1920. At the same time the F.E.L.A. became the prototype for state legislation protecting intrastate railroad workers, and other laborers.

THE COMPARATIVE NEGLIGENCE STATES

The mid-nineteenth century Illinois doctrine was not what is now understood to be the doctrine of comparative negligence. The modern concept of

39 Green, supra note 37, at 47, 50-51; Maki v. Frelk, 85 Ill. App. 439, 229 N.E.2d 284 (1967).


42 The Supreme Court, in the case of Rodgers v. Missouri Pac. R.R.; 352 U.S. 500, 506-507 (1952), held that under the FELA, a plaintiff is entitled to recover if the defendant's negligence "played any part, even the slightest, in producing the injury or death for which damages are sought." See Philbrick, supra note 30, at 787.


comparative negligence involves apportionment of the damages according to the percentage of causal negligence attributable to each actor. Seven states have enacted comparative negligence statutes of general application. These comparative negligence statutes may be divided into three general types.

The "Pure" Form: The Mississippi System

Under the "pure" theory of comparative negligence, contributory negligence, no matter how great, does not bar recovery,\(^4^6\) except, in the rare instance, where such negligence is determined to be the sole proximate cause of the injury.\(^4^7\) A negligent plaintiff recovers a judgment equal to his total damages diminished in proportion to the amount of causal negligence attributable to him. Theoretically, a plaintiff 99 per-cent causally negligent can recover 1 per cent of his damages from the defendant. In 1910, Mississippi promulgated the first comparative negligence statute, and thus far has been the only state which has permanently adopted the "pure" form of comparative negligence.\(^4^8\) Under the Mississippi act, apportionment is required even where the negligence of the plaintiff exceeds that of the defendant or may be characterized as "gross" while the defendant's is merely "slight."\(^4^9\) Directed verdicts may only be granted for lack of proximate cause. Contributory negligence, being at most a partial or mitigatory defense, the court, having once determined mutual negligence which may as a matter of law be considered a proximate cause, must immediately submit the question to the jury for comparison and apportionment.\(^5^0\)


\(^{48}\) Miss. Laws 1910, ch. 135; Miss. Code Ann. § 1454 (1957) provides: "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." Puerto Rico and the Canal Zone have also adopted "pure" comparative negligence, supra note 5. See Panama R.R. v. Davies, 82 F.2d 123 (1936); Prosser, Comparative Negligence, 41 Cal. L. Rev. 1, 13-14 (1953); Institute of Judicial Administration, Comparative Negligence, 7-US8, at 4 (1959).

\(^{49}\) Supra note 47; Shell & Bufkin, Comparative Negligence in Mississippi, 27 Miss. L. J. 105, 112-13 (1955).

\(^{50}\) "The apportionment must be made if negligence of both parties is found, and it is error not to instruct the jury to make it." Prosser, supra note 48, at 14; Tindall v. Davis, 129 Miss. 30, 91 So. 701 (1922). Under the modified and the slight-gross forms of comparative negligence (discussed infra) the court must, in addition to considering negligence and proximate causality, make a preliminary comparison between the plaintiff's and defendant's respective quanta of negligence to determine whether as a matter of law the negligence of the former exceeds that of the latter. Thus, the defendant may still obtain a directed verdict.
The jury is instructed to consider the percentage of causal negligence attributable to each party and diminish the plaintiff's recovery or the defendant's counterclaim recovery in proportion to their respective contributing negligence. The Mississippi courts do not use special verdicts or interrogatories, and the jury returns a "lump sum" award. Under such a procedure, any contention as to how the jury arrived at their verdict or what quantum of causal negligence, if any, was attributed to the parties in the jury's computation is purely speculative; and the jury's award will be upheld where there is any credible evidence to sustain the apportionment. While the Mississippi system is a model of comparative negligence in the purest and most comprehensive form, it presents some difficult problems especially in regard to multi-party suits and multiple counterclaims and set-offs. For instance, a plaintiff brings suit against three defendants. The defendants each counterclaim against the plaintiff and each of the other defendants, and implead a fourth tortfeasor, not joined in the original complaint, for the purposes of contribution or indemnity. Assuming arguendo the jury is able to allocate the percentages of causal negligence, the mathematics alone of such an apportionment is enough to confound any jury.

Another disadvantage of the "pure" system especially in conjunction with statutes permitting liberal joinder and counterclaim, is that often after the representative insurance companies take their set-offs against each other, the injured claimant may be granted a net judgment which is only a fraction of his total actual damages or perhaps, not be granted any compensation at all.

**The Slight-Gross Theory: Nebraska and South Dakota**

In 1913, Nebraska enacted a comparative negligence statute. South Dakota, in 1941, adopted the Nebraska Act verbatim. The statute allows an appor-
tioned recovery notwithstanding contributory negligence where the plaintiff’s negligence is “slight” and the defendant’s negligence “gross” in comparison. The courts of both states are now in accord in rejecting the concept of definite “bailment-type” degrees of negligence. The “slightness” of the plaintiff’s negligence or the respective “grossness” of the defendant’s negligence can only be determined by comparing the two quanta of negligence. For instance, the Nebraska court has suggested that the ratio of one-to-six might comply with the statutory requirement that a plaintiff’s negligence be slight. On that basis, it is theoretically conceivable that the negligence of the plaintiff quantitatively falls below the failure to exercise ordinary due care, and nevertheless, might be considered comparatively “slight.”

Such liberal construction combined with the provision that “all questions of negligence are for the jury” would seem to assuage the rather constricting effect of the “slight-gross” categorization, but this has not been the result. The courts have frequently barred recovery because a plaintiff’s negligence was more than “slight.” Furthermore, the nebulous terms “slight” and “gross” have confused juries, led to excessive appeals, and, in practice, limited apportionment to a relatively small number of cases. Thus, while there is apportionment on the basis of percentage of total causal negligence in some cases, the actual effect of this modern “slight-gross theory” has

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 question of negligence and contributory negligence are for the jury.”


Patterson v. Kerr, 127 Neb. 73, 254 N.W. 704 (1934).


Supra note 57; Roberts v. Brown, 72 S.D. 479, 36 N.W.2d 665 (1949). Monasmith v. Cosden Oil Co., 124 Neb. 327, 331, 246 N.W. 623, 625 (1933) wherein the Nebraska Supreme Court asserted, “[A]nyone of common sense knows that slight negligence actually means small or little negligence and gross negligence means just what it indicates, gross or great negligence.”

Prosser, supra note 48, at 19-21.

Gruhb & Roper, Comparative Negligence, 32 Neb. L. Rev. 234 (1952).
been to mollify the doctrine of contributory negligence so that it is invoked only when the plaintiff's negligence is something more than "slight." In light of the functional purpose of comparative negligence (i.e., alleviating the hardship of the contributory negligence bar), the Nebraska and South Dakota version often result in an anomalous situation. In jurisdictions which recognize "degrees" of negligence or those that, in effect, treat gross negligence as wanton and willful misconduct, a slightly or ordinarily negligent plaintiff will recover all his damages from a grossly negligent defendant, but in Nebraska or South Dakota, he will recover diminished damages or nothing at all.

**The Modified Form: A Growing Trend**

Four states have adopted by statute the modified form of comparative negligence. With the exception of the Arkansas approach, the modified form permits recovery against each individual defendant only if the negligence of the defendant exceeds that of the plaintiff. For example, where the injury is caused by a single tortfeasor, a plaintiff found to be 25 or 49 per cent causally negligent can recover respectively 75 or 51 per-cent of his total damages, but a plaintiff found 50 per-cent negligent, or more, cannot recover.

**Georgia**

At about the same time Justice Breese was enunciating the Illinois "doctrine of comparative degrees," the Georgia court had begun the development of its own rule of comparative negligence. The Georgia doctrine had its origin in three cases involving railroad accidents decided in the "1850's." The codifiers of the Georgia Code of 1860-1862 incorporated the principles of these cases in two statutes. The first statute, though appearing to allow appor-
tionment only for injuries arising out of railroading accidents, was first extended to all negligence actions by rather remarkable judicial interpretation, and then limited in operation to cases where the plaintiff's negligence is less than that of the defendant. This limitation has been held to apply also in multiple defendant situations. The injured person cannot recover from any one defendant whose fault is less than or equal to his own, although each and all defendants found more negligent will be jointly and severally liable for the entire judgment.

The second statute, which had been applied in conjunction with the comparative negligence rule, has engrafted upon the latter's application what has been described as a "reverse" last clear chance doctrine. In summary, apportioned recovery is allowed where the plaintiff's lesser negligence concurred proximately with the defendant's greater negligence to cause his injury, but if a defendant's negligence is antecedent and the plaintiff, (a) knowing of the potential hazard, fails to exercise due care in avoiding the injury, or (b) negligent fails to discover the hazard, he will be barred from recovery.

Arkansas

In 1955, the Arkansas Legislature enacted a "pure" comparative negligence statute. After only two years in force, the legislature, finding the "pure"


69 GA. CODE ANN. § 105-603 (1956) provides: "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."


71 Supra note 70.

72 "Sec. 1—In all actions hereafter accruing for negligence resulting in personal injuries 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 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."
(statute had not been applied uniformly and had created "great confusion,") repealed it and substituted instead a "modified" comparative negligence statute. The 1955 Act, modeled after a draft proposed by Dean Prosser, seems to have been generally accepted by both judges and lawyers, and, as far as can be discerned from objective studies, had created no great upheaval in the procedural or substantive areas of negligence law. There is good reason to believe that insurance lobbyists constituted the main pressure for the change.

Sec. 2—In any action to which section one of this act applies, the Court shall make findings of fact or the jury shall return a special verdict which shall state:
(a) The amount of the damages which would have been recoverable if there had been no contributory negligence; and
(b) The extent to which such damages are diminished by reason of contributory negligence.

Sec. 3—All laws or parts of laws in conflict with this Act are hereby repealed.” (Ark. Acts 1955, No. 191)

Under section 2, a special verdict procedure was made mandatory, and under section 3, the doctrine of last clear chance was nullified. See Garner, Comparative Negligence and Discovered Peril, 10 Ark. L. Rev. 72 (1955); Comment, 30 Mo. L. Rev. 137, 142 (1965).

The Arkansas Legislature declared, “[T]here is a lack of understanding and uniformity on the application of the so-called ‘Comparative Negligence’ statute . . . and that with the law in its present state, great confusion and unfairness occurs (sic) in the trial of negligence cases, and emergency (sic) is declared to exist, and (the new Act) shall take effect . . . from and after the date of its passage.” Ark. Acts 1957, No. 296, sec. 4. See Note, 11 Ark. L. Rev. 391.

“Contributory negligence shall not bar recovery of damages for any injury, property damage or death where negligence of the person injured or killed is of less degree than negligence of any person, firm, or corporation causing such damage.
In all actions hereafter accruing for negligence resulting in personal injuries or wrongful death or injury to property, 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 the 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.”

Although there is no mention of the doctrine of last clear chance in the 1957 act, there is no indication it will be revived. There is no provision for the special verdict and it is no longer required but optional upon any party’s request, under § 27-1741.2.

See Prosser, supra note 48, at 37-38.

See Rosenberg, Comparative Negligence in Arkansas: A “Before and After” Survey, 13 Ark. L. Rev. 89 (1959), wherein the author concludes that the 1955 Act brought perceptible changes to personal injury litigation, but did not impose any drastic burden on the court or create any state of emergency. Regarding the 1957 Act, the bench and bar generally approved the “lesser negligence” requirement, but objected to the elimination of the mandatory special verdict.

See Gilmore, Comparative Negligence from a Viewpoint of Casualty Insurance, 10 Ark. L. Rev. 82 (1955); Schroeder, Negligence Claims—What To Do About Excessive Awards and Unmeritorious Claims Which Work Against the Public Interest, 8 Def. L.J. 91, 94-95 (1960); 2 Vill. L. Rev. 474, 475 (1957).
Whatever the reason, it is clear that the courts did not share the legislature's belief that the "Prosser Act" had created "great confusion and unfairness." In Walton v. Tull,78 considered five years after the "modified" act had gone into effect, the Arkansas Supreme Court was faced with a multiple defendant situation in which the lower court had refused to allow the plaintiff to recover against one of the defendants only equally negligent. While the 1957 Act appears to require that each "person, firm, or corporation"79 be found more negligent than the injured person (and the Wisconsin and Georgia courts have imposed such an interpretation upon their "modified" statutes), the supreme court held the plaintiff was not barred from recovering his apportioned damages from a joint defendant whose negligence was equal to his own. The court further suggested: "We are not convinced that the legislature meant to go any farther than to deny recovery to a plaintiff whose own negligence was at least 50 percent of the cause of his damages."80

If the dictum of Walton is followed, the net effect will be something of a compromise between the "modified" and "pure" operation of comparative negligence in multiple defendant situations. For example, a plaintiff found 40 per-cent contributorily negligent would recover from anyone, or all, of three joint defendants found each 20 per-cent negligent, but (contrary to the pure operation) if he is 50 per-cent negligent, or more, he would not recover.

In the common situation where there is only one tortfeasor, the Walton case has not been interpreted as altering the "modified" operation. A plaintiff is precluded from recovering any damages, if the plaintiff's causal negligence is greater than or equal to that of the sole defendant-tortfeasor.81

**Wisconsin**

A "modified" form of comparative negligence has existed in Wisconsin since its statutory adoption in 1931.82 The statute has been interpreted as imposing upon recovery the limitation that a plaintiff's negligence be less than each individual defendant, and where the injured person is found equally negligent or more, he is precluded from recovery. The doctrine of

79 Supra note 74.
80 Supra note 78 at 893, 356 S.W.2d at 26, 8 A.L.R.3d at 718.
82 Wis. Stat. Ann. 895.045 (1966) (formerly § 331.045) provides: "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 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."
last clear chance had been abolished in 1925. The conceptual purgation was completed in 1962 by interment of the doctrines of assumption of risk and gross negligence, and the establishment of a contribution rule allowing recovery in proportion to the percentage causal negligence attributable to the third party defendant. These changes in conjunction with the pervasive use of the special verdict have brought about a relatively uniform and smooth-working system of loss distribution on the basis of fault.

*The Growing Trend*

Even authorities who generally favor comparative negligence have criticized the “modified” approach. It has been labeled the “restatement” of the doctrine of contributory negligence in more liberal terms, explainable only as the obvious result of political compromise and expediency. Theoreticians have ardently pointed out the patent dissymmetry of a system which allows a plaintiff, 49 per-cent negligent, to recover 51 per-cent of his damages, yet bars completely a plaintiff found one per-cent more negligent. In a recent case before the Wisconsin Supreme Court, Chief Justice Hollows, concurring in his own *per curiam* opinion in order to recommend that the Wisconsin “modified” statute be amended to allow recovery whether the negligence of the plaintiff “be less than or more than 50 per-cent of the total,” observed: “There is nothing magic about being equally at fault so that one should lose all and the other win all.” Nevertheless, perhaps for those very imperfections, “modified” comparative negligence has succeeded in state legislatures (Georgia, Wisconsin, Arkansas and Maine) as a compromise with

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83 Switzer v. Detroit Investment Co., 188 Wis. 330, 206 N.W. 407 (1925). The fact that a defendant had a “last clear chance” to avoid the injury is now merely a fault to be weighed by the jury with other faults in comparing percentages of causal negligence. See Philbrick, supra note 13, at 809-810.


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

86 Id.


88 PROSSER, supra note 48, at 25.


90 Lawyer v. City of Park Falls, supra note 87.

91 Supra note 82.

92 Lawyer v. City of Park Falls, supra note 87, at 316, 151 N.W.2d at 72.

93 Supra note 87, at 316, 151 N.W.2d at 72.
powerful insurance interests\textsuperscript{94} where the "pure" form would have failed. In 1965, the Maine Legislature passed a "modified" statute,\textsuperscript{95} modeled in part after the English Contributory Negligence Act.\textsuperscript{96}

\section*{The Future of Comparative Negligence}

Although the Illinois experience with "modified" comparative negligence was extremely short-lived, the automobile accident crisis continues to demand a change.\textsuperscript{97} For, the contributory negligence bar is far from dead: In practice,

\textsuperscript{94} Supra note 77. "[I]t is an open secret that the chief resistance to the comparative negligence reform is from the insurance lobbies." Lambert, The Case for Comparative Negligence, 2 Tr. Law. Q. 16 (1965). This is explainable by the fact that comparative negligence either reduces the scope of or eliminates completely the most potent defense of the insurance counsel, the directed verdict. Under the "modified" form, a directed verdict may still be obtained and the Wisconsin court, for one, has made this very clear. Quady v. Sickl, 260 Wis. 348, 51 N.W.2d 3 (1952); Kornetzke v. Calumet County, 8 Wis. 2d 363, 99 N.W.2d 125 (1959); McNally v. Goodenough, 5 Wis. 2d 293, 92 N.W.2d 890 (1958).

\textsuperscript{95} Me. Rev. Stat. Ann., tit. 14, § 156 (supp. 1966) provides: "Where any person suffers death or damage as a result of his own fault and partly of the fault of any other person or persons, a claim in respect of that death or damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage. Where damages are recoverable by any person by virtue of this section subject to such reduction as is mentioned, the jury shall find and record the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced. Fault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence. If such claimant is found by the jury to be equally at fault, the claimant shall not recover."

A statute relating to damages for tortious conduct of charitable corporations (Me. Pub. Laws 1965, ch. 383) was also originally enacted as § 156 of title 14, but subsequently repealed (Me. Pub. Laws 1966, ch. 513, § 27) and reenacted as § 158 of the same title. The comparative negligence statute has not been repealed. However, to the present date, only one case (supra note 23) concerning that statute has as yet reached the appellate courts. See, Comment, 18 Me. L. Rev. 65 (1966).

\textsuperscript{96} The Maine Act is substantially identical to the English Law Reform (Contributory Negligence) Act of 1945, except that the phrase, "reduced to such extent as the jury thinks just and equitable" in the Maine Statute concerns "the court" not the jury in the English Act. The English Act is a "pure" type of statute and imposes no limitation in cases of equal negligence, the limitation in the Maine Act being, more or less, appended to the English Statute's language. English Law Reform Act of 1945, 8 and 9 Geo. 6, c. 28.

\textsuperscript{97} See Crisis in Car Insurance (1968).
it still produces harsh and unjust results,\textsuperscript{98} and its application promotes a disrespect for the workings of “justice” that instinctively compels jurors to seek a compromise solution.\textsuperscript{99} As Mr. Justice Ward, dissenting in \textit{Maki}, concludes, the tenability of the majority’s opinion “should not preclude this court from assuming” its “judicial responsibility.”\textsuperscript{100} The precedents of \textit{Molitor v. Kaneland Community Unit District},\textsuperscript{101} where the court renounced the doctrine of school district immunity, and \textit{Suvada v. White Motor Company},\textsuperscript{102} where the same court abolished the requirements of privity and negligence in product liability cases, stand in mute testimony to the ineffectacy of the majority’s argument. In answering the respondent’s arguments in \textit{Suvada} that “such far-reaching change” must come from the legislature, the State Supreme Court quoted its earlier decision in \textit{Molitor}.

The doctrine of school district immunity [privity and negligence] was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty to abolish that immunity, . . . ‘We closed our courtroom doors without legislative help, and we can likewise open them.’\textsuperscript{103}


\textsuperscript{99} See supra notes 28-30, text and notes; James, \textit{ Sufficiency of Evidence and Jury-Control Devices Available Before Verdict}, 47 VA. L. REV. 218 (1961). In Wisconsin, probably as much a result of the comprehensive use of the special verdict as the abolition of contributory negligence, juries have apparently found it much easier to conscientiously follow instructions, and have frequently denied recovery in very close cases. See, e.g., Van Wie v. Hill, 15 Wis. 2d 98, 112 N.W.2d 168 (1961) [P = 51%, D = 49%]; Ivy v. Tower Ins. Co., 32 Wis. 2d 231, 145 N.W.2d 214 (1966) [P = 50%, D = 50%]; Donahue v. Western Casualty & Surety Co., 268 Wis. 193, 67 N.W.2d 265 (1954) [P = 51%, D = 49%]; Frankland v. Peterson, 268 Wis. 394, 67 N.W.2d 865 (1955) [P = 50%, D = 50%].

\textsuperscript{100} \textit{Maki} v. \textit{Frelk}, 239 N.E.2d 445, 450 (Ill. 1968). See \textit{Maki} v. \textit{Frelk}, 85 Ill. App. 2d 439, 229 N.E.2d 284, 291 (1967); \textit{Molitor} v. \textit{Kaneland Community Unit Dist.}, 18 Ill. 2d 11, 25, 163 N.E.2d 89, 96 (1959), wherein the court asserts emphatically: “[W]hen it appears that public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to overrule these decisions and establish a rule consonant with our present day concept of right and justice.”

\textsuperscript{101} 18 Ill. 2d 11, 163 N.E.2d 89 (1959), cert. denied, 362 U.S. 968 (1960).

\textsuperscript{102} 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

Contributory negligence is the bedfellow of school district immunity and the privity-negligence requirements in product liability cases. It is an outmoded and anachronistic rule, hanging together by the mere force of stare decisis and insurance lobbies. The legislature has consistently refused to enact or even give adequate consideration to reform bills. Nevertheless, the rule of contributory negligence has not as yet been generally adopted (so as to be enacted) by any statute. The contributory negligence bar originated in the courts and was judicially adopted and perpetuated in Illinois. Therefore, the Illinois Supreme Court has the power and the duty to finally decapitate the doctrine. If the legislature cannot face up to modest reform, and the court, in its self-imposed impotence, cannot overturn a judge-made rule, then they may later have to accept a more radical automobile negligence insurance plan.

CONCLUSION

Comparative negligence is no maverick doctrine that has arisen out of the minds of Machiavellian personal injury lawyers or well-intentioned ("but inexperienced") compensation-oriented scholars. Its history is at least as long


105 While the majority in Maki v. Frelk, supra note 100, at 447, points out "that the General Assembly has incorporated the present doctrine of contributory negligence in statutes dealing with a number of particular subjects" (e.g., ILL. REV. STAT. ch. 24, §§ 1-4-5, 1-4-6, 1-4-4; ch. 121, §§ 385-86; ch. 70, § 2 [1967]), it is clear that there has been no general legislative enactment of the doctrine. If there would be such an enactment, the court could not even consider abrogating the rule unless the contributory negligence bar were found unconstitutional. See Maki v. Frelk, supra note 100, at 450 (Ward's dissent); Comment, Judicial Adoption of a Comparative Negligence Rule in Illinois, (1968) ILL. L.F. 351, 358. However, there is reason to fear that the legislature, now apprised of the threat to the rule, will generally enact the doctrine. Shortly after the supreme court's decision in Molitor (supra note 101), the legislature passed a series of statutes restoring prior immunities of some institutions and partly restoring immunities of school districts and nonprofit private schools. See Comment, Governmental Immunity in Illinois: The Molitor Decision and the Legislative Reaction, 54 NW. U.L. REV. 588, 597 (1959).


107 Keeton and O'Connell have proposed a "basic protection auto insurance package" which would eliminate all personal injury actions under $15,000. Companies would pay out to their own policy holders up to $5,000 for the "pain and suffering" and up to $10,000 for other damages (e.g., medical expenses, lost wages) without any consideration as to who was at fault. Where damages exceeded this amount, an action would be preserved to recover the excess. KEETON & O'CONNELL, AFTER CARS CRASH—THE NEED FOR LEGAL AND INSURANCE REFORM (1967); KEETON & O'CONNELL, Basic Protection Automobile Insurance, CRISIS IN CAR INSURANCE 40-93 (1968).