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Torts—Comparative Negligence—A Court Moves to Strike the Arbitrary Doctrine of Contributory Negligence

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TORTS—COMPARATIVE NEGLIGENCE—A COURT MOVES TO STRIKE THE ARBITRARY DOCTRINE OF CONTRIBUTORY NEGLIGENCE

Plaintiff's decedent died in an intersection collision. Plaintiff commenced an action under the Illinois Wrongful Death Act,[1] but instead of alleging decedent had exercised "ordinary" care at the time of the accident, the plaintiff pleaded decedent was less negligent than the defendant. The case was dismissed for failure to state a cause of action. Plaintiff appealed directly to the Supreme Court of Illinois on state and federal constitutional grounds. The court found no constitutional issue raised and declined to exercise jurisdiction. However, it remanded the case to the Appellate Division, second department, to consider whether, as a matter of justice and public policy, the Illinois rule of contributory negligence should be changed. The Appellate Division *held*, the strict doctrine of contributory negligence is abolished in favor of the Wisconsin system of comparative negligence and apportionment of damages. Since the contributory negligence rule was created by the courts, it is within their province to change it. A plaintiff will not be barred from recovery providing his fault was not as great as the defendant's. Damages shall be diminished in proportion to the amount of negligence attributable to the plaintiff. *Maki v. Frelk*, 229 N.E.2d 284 (Ill. App. 1967).

In nearly all state jurisdictions, a plaintiff's contributory negligence[2] precludes his recovery completely.[3] This result has been severely criticized.[4] The early doctrinal history of contributory negligence provides little insight into why it evolved as an absolute barrier to the plaintiff's case. Its introduction into the common law is attributed to the English case of *Butterfield v. Forrester*,[5] where it was said, "A Party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right."[6] However, it is likely that in *Forrester* and its progeny,[7] the decision to deny the plaintiff relief was based in proximate cause rather than contributory negligence.[8] The doctrine

1. Ill. Rev. Stat. ch. 70, § 1 & 2 (1960).

2. Restatement (Second) of Torts § 463 (1965) defines contributory negligence as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm."

3. Forty-two states, with minor variances, follow this rule.

4. *See, e.g.*, F. Harper & F. James, The Law of Torts 1194 (1956) (there is no logical reason why the plaintiff should be denied all recovery); 1 Thompson, Commentaries on the Law of Negligence §§ 155-72 (1901) (the contributory negligence rule has no place in an enlightened system of jurisprudence); Green, *Illinois Negligence Law*, 39 Ill. L. Rev. 36, 37 (1944) (contributory negligence is "the harshest doctrine of the nineteenth century known to the common law"); Turk, *Comparative Negligence on the March*, 28 Chi.-Kent L. Rev. 189, 201 (1950) ("[T]he . . . rule has ceased to conform to those fundamental ideals of justice which exist today.").

5. 11 East. 60, 103 Eng. Rep. 926 (1809).

6. Ellenborough, C.J., *id.* at 61, 103 Eng. Rep. at 927.

7. Bridge v. Grand Junction Rw., 3 M & W 248 (1858); Tuff v. Warman, 5 C.B. (N.S.) 585 (1858).

8. The *Forrester* court cited no authority for its decision nor did it explain the legal principles which led to denying the plaintiff relief. Rather, it discussed its refusal to grant

is probably best explained as a by-product of the economic upheaval of the 19th Century. Its ready adoption in the United States[9] coincided with the growth of industry and railroads during the formative period of the industrial revolution, as it provided a convenient method to subsidize infant facilities by insulating them from many inevitable and costly injury claims.[10] The doctrine also conformed to the developing political and social philosophy of self-reliance and hard individualism which underscored Nineteenth Century American thought.[11] To these ends, courts were willing to check juries whose provincial mold was well suited to resolving disputes between neighbors, but who became "incurably plaintiff minded" when dealing with wealthy and impersonal corporations.[12] Many jurisdictions required the plaintiff to affirmatively prove his freedom from fault, thereby assisting the court to terminate cases as a matter of law.[13]

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recovery "with a glibness suggesting that it felt it was on familiar territory." Malone, *Comparative Negligence-Louisiana's Forgotten Heritage*, 6 La. L. Rev. 125, 126 (1945). This suggests reliance on the causation principle which had been in use by the courts since early Anglo-Saxon times. *Cf.*, 3 W. Holdsworth, A History of English Law 378-80 (3d ed. 1923); *see also* Weaver v. Ward, Hobart 134, 80 Eng. Rep. 284 (K.B. 1617) (liability was grounded on the theory the actor should pay for damages he caused, without regard to fault); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315 (1894). Further, in *Forrester* as in other early contributory negligence cases, the plaintiff's negligence occurred later in time than the defendant's and the courts emphasized the fact the damage was "authored" entirely by the plaintiff: "If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault." Bayley, J., Butterfield v. Forrester, 11 East. 60, 61, 103 Eng. Rep. 926-27 (1809). The likelihood that the early contributory negligence cases were decided on a theory of proximate cause offers some explanation why the all or nothing rule was seen to result from them. *See also* Bohlen, *Contributory Negligence*, 21 Harv. L. Rev. 233, 236 (1908). Moreover, in choosing what effect to give to the plaintiff's negligence, precedent in ancient or early continental law for denying all relief was obscure. *See* Turk, *Comparative Negligence on the March*, 28 Chi.-Kent L. Rev. 189, 208-45 (1950); Mole & Wilson, *A Study of Comparative Negligence*, 17 Cornell L.Q. 333, 337-38 (1932). But maritime law offered the solution of apportioning the damages. *See* R. Marsden, A Treatise On the Law of Collisions at Sea (8th ed. 1923); *see also* Raisin v. Mitchell, 9 C. & P. 613, 173 Eng. Rep. 979 (C.P. 1839), in which a jury found for the plaintiff but reduced damages were allowed as there was fault on both sides.

9. The first cases to apply the rule were Smith v. Smith, 19 Mass. (2 Pick.) 621, 13 Am. Dec. 464 (1824); Washburn v. Tracy, 2 D. Chip. (Vt.) 128, 15 Am. Dec. 661 (1824); *see also* Bush v. Brainard, 1 Cow. (N.Y.) 78, 13 Am. Dec. 513 (1923). The doctrine was quick to gain acceptance. In 1854 a Pennsylvania court stated it had been the "rule from time immemorial, and it is not likely to be changed in all time to come." Pa. R.R. v. Aspell, 23 Pa. 147, 149, 62 Am. Dec. 323, 324 (1854).

10. Malone, *The Formative Period of Contributory Negligence*, 41 Ill. L. Rev. 151, 153-58 (1946); *see also*, F. Harper & F. James, *supra* note 4, at 1197.

11. *See* R. Hofstadter, Social Darwinism in American Thought 1860-1915 (1945).

12. Malone, *supra* note 10 at 153-55 (1946); *see also*, Barculo, J. in Haring v. New York and Erie R.R., 13 Barb. 2, 15 (N.Y. 1853): "We cannot shut our eyes to the fact that in certain controversies between the weak and the strong—between an humble individual and a gigantic corporation, the sympathies of the human mind naturally . . . run to the assistance . . . of the feeble." Smith, J., in Ernst v. Hudson River R.R., 24 How. Prac. 97, 106-07 (N.Y. 1862): "Their verdicts are . . . many times founded on mistakes . . . and other errors, which make it indispensable . . . that a power of supervision and review of the verdicts should exist in the courts, and . . . be exercised with . . . firmness."

13. *E.g.*, Spencer v. Utica & Schenectady R.R., 5 Barb. 337, 338 (N.Y. 1849); Burdick v. Worrall, 4 Barb. 596 (N.Y. 1848); Chicago, Burlington and Quincy R.R. v. Levy, 160 Ill. 385, 43 N.E. 357 (1895; Calumet Iron & Steel Co. v. Martin, 115 Ill. 385, 3 N.E. 356 (1885).

Numerous theories have been advanced to explain why a negligent plaintiff should be denied recovery. The most common explanation is that the plaintiff's fault is an intervening senior cause which shields the defendant's liability.[14] This view perhaps has relevance to early contributory negligence cases,[15] but as a modern rationale it is generally discredited.[16] For if the plaintiff's conduct is the sole proximate cause of his injury, contributory negligence properly should not even be considered.[17] Further, though causation and contributory negligence are necessarily interconnected,[18] it has been stated that this fails to justify denying the plaintiff relief even if his conduct was a causal factor in producing the damage.[19] Other reasons suggested for the absolute defense are the rules against contribution between joint tortfeasors,[20] the clean hands doctrine[21] and assumption of risk.[22] It has also been stated the rule has a penal basis,[23] that it serves to deter careless conduct,[24] and that the contributory negligence doctrine exists because it would be impracticable to apportion damages, particularly where juries are concerned.[25] However, it is almost universally agreed

14. Thomas v. Quartermaine, 18 Q.B.D. 685, 697 (1887); *see also* Ware v. Saufley, 194 Ky. 53, 237 S.W. 1060 (1922); Gilman v. Central Vermont Ry. 93 Vt. 340, 107 A. 122 (1919); Winfield, Torts 414 (4th ed. 1948).

15. *See* cases cited *supra* notes 5 and 7.

16. It is usually dismissed on the reasoning that if the cars of a negligent *X* and contributorily negligent *Y* collide, injuring bystander Z, Z may sue both *X* and *Y*, demonstrating that *X*'s liability is not insulated by *Y*'s contributory negligence. Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 468 (1953); F. Harper & F. James, *supra* note 4, at 1200; *see also* Lotesto v. Baker, 246 Ill. App. 425 77 N.E.2d 539 (1927); Fraser v. Flanders, 248 Mass. 62, 142 N.E. 836 (1924).

17. F. Harper & F. James, *supra* note 4, at 1200.

18. The plaintiff's negligence must be a legal cause of his injury for the doctrine to operate. *See supra* note 2.

19. *See* J. Fleming, The Law of Torts 216-17 (2nd ed. 1961); Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. Rev. 3, 11-13 (1927).

20. J. Bishop, Commentaries on the Non-Contract Law, § 460 (1st ed. 1889). *But see* F. Harper & F. James, *supra* note 4 at 1202-03 (This fails as an explanation because the two rules serve opposed policies; the no-contribution rule assists a plaintiff to recover, promoting a wider distribution of loss, while contributory negligence is a defendant's doctrine and acts to narrow the loss distribution.).

21. Davis v. Guarnieri, 45 Ohio St. 470, 15 N.E. 350 (1887). *But see* F. Harper & F. James, *supra* note 4, at 1203 (There is no merit to this view for in many instances a negligent plaintiff may recover, as in last clear chance and reckless conduct cases.).

22. *See* Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 Harv. L. Rev. 457, 459 (1895). *But see* F. Harper & F. James, *supra* note 4, at 1201 (The two rules cover different areas: assumption of risk negatives the defendant's duty and may involve reasonable conduct by the plaintiff. Contributory negligence is a defense to a breach of duty and only involves unreasonable plaintiffs conduct. Further, assumption of risk operates when there is a deliberate acceptance of peril, while contributory negligence frequently involves an inadvertent failure to recognize danger.).

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

24. Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 Harv. L. Rev. 263, 270 (1890). *But see* James, *Contributory Negligence*, 62 Yale L.J. 691 (1953) (Contributory negligence is not a deterrent, rather it hampers accident prevention by inviting carelessness.).

25. Lowndes, *Contributory Negligence*, 22 Geo. L.J. 674, 683-85 (1934). *But see* F. Harper & F. James, *supra* note 4, at 1206-07 (Apportioning damages is not harder for juries, nor would the results be less exact than determining proximate cause or the scope of risk created by a party's conduct. Further, juries have been successfully apportioning damages under FELA and state apportionment statutes.).

that "no one has ever succeeded in justifying [contributory negligence] as a policy, and no one ever will."[26]

Early attempts to restrict the contributory fault doctrine were initiated by the Supreme Court of Illinois in 1858.[27] In a series of cases, it was established that a plaintiff would not be barred if his negligence was "slight" and the defendant's negligence "gross" in comparison.[28] Though styled comparative negligence, no apportionment of damages accompanied the doctrine; the plaintiff, if given the benefit of the test, was permitted full recovery.[29] However, determining vague quantitative degrees of negligence proved unworkable, resulting in numerous appeals and reversals.[30] By 1894 the doctrine was overruled and strict contributory negligence re-established.[31] Four other states attempted a similar approach, but without success.[32]

Other rules created to ameliorate contributory negligence have proved more lasting. The most significant legal restriction on contributory fault is the doctrine of last clear chance.[33] Generally, a plaintiff may fully recover despite his own fault if he can show the defendant had the last opportunity to avoid the accident.[34] Yet the doctrine's effect in undermining contributory negligence is limited. It is inapplicable to the majority of mutual fault cases, for the defendant's negligence must follow the plaintiff's in point of time for the rule to operate.[35] Moreover, critics of contributory negligence find the last opportunity rule equally arbitrary and unjustifiable, as it places full liability in an opposite direction by disregarding the plaintiff's negligence.[36] A second plaintiff's rule prohibits the contributory negligence defense where a defendant's conduct approaches intent to the level of being "reckless," "wanton" or "willful,"[37] unless the plaintiff's conduct can be similarly categorized.[38] Third, contributory negligence has been disallowed where the defendant's conduct violates a statute designed to

26. Prosser, *supra* note 16, at 469 (1953).

27. Galena and Chicago Union R.R. v. Jacobs, 20 Ill. 478 (1858).

28. Wabash R.R. v. Henks, 91 Ill. 406 (1879); I.C.R.R. v. Hammer, 85 Ill. 526 (1877); Quinn v. Donovan, 85 Ill. 194 (1877); I.C.R.R. v. Cragin, 71 Ill. 177 (1873).

29. *See, e.g.*, cases cited *supra* note 28.

30. *See* Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N.E. 456 (1885), listing cases reversed due to confusion generated by the doctrine.

31. Lake Shore & M.S.Ry. v. Hession, 150 Ill. 546, 37 N.E. 905 (1894).

32. *Kansas:* Sawyer v. Sauer, 10 Kan. 466 (1872); Pacific R.R. v. Houts, 12 Kan. 328 (1873), *overruled in* Atchison, T. & S.F.R.R. v. Morgan, 31 Kan. 77, 1 P. 298 (1883), *and* Missouri Pac. Ry. Co. v. Walters, 78 Kan. 39, 96 P. 346 (1908). *Oregon:* Bequette v. People's Transportation Co., 2 Ore. 200 (1867), *overruled implicitly in* Hamerlynck v. Banfield, 36 Ore. 436, 59 P. 712 (1900). *Tennessee:* East Tenn. R.R. v. Gurley, 12 Lea (80 Tenn.) 46, 55 (1883), *overruled in* East Tenn. V. & G.Ry. v. Hull, 88 Tenn. 33, 12 S.W. 419 (1889); *Wisconsin:* Stucke v. Milwaukee & Miss. R.R., 9 Wis. 202 (1859), *overruled in* Bolin v. Chicago, St. P.M. & O.Ry., 108 Wis. 333, 84 N.W. 446 (1900).

33. The rule originated in the case of Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842).

34. A full treatment of the last clear chance doctrine is beyond the scope of this note. *See* Restatement (Second) of Torts §§ 479 (helpless plaintiff), 480 (inattentive plaintiff) (1965).

35. *See id.* §§ 479, 480.

36. *See* Prosser, *supra* note 16, at 474.

37. Restatement, *supra* note 34, at § 482.

38. *Id.* § 482.

protect persons considered unable to protect themselves, and the plaintiff is in the protected class.[39] Finally, where the injury is caused by conduct deemed "ultra hazardous" the defendant is held strictly liable, precluding the contributory negligence claim.[40]

Compromise jury verdicts also significantly restrict the contributory negligence doctrine.[41] A negligent plaintiff is often awarded damages though his recovery is reduced to reflect his fault.[42] "We blind our eyes to the obvious reality that in many cases juries [apportion damages] in spite of us."[43] However, Dean Prosser notes:

> There are still juries which understand and respect the court's instructions on contributory negligence, just as there are other juries which throw them out the window. . . . Above all there are many directed verdict cases where the plaintiff's negligence, however slight it may be . . . is still clear beyond dispute, and the court has no choice but to declare it as a matter of law.[44]

Another approach to mitigate the seemingly unjust result of contributory negligence has been to adopt a damage apportionment or comparative negligence system.

Comparative negligence[45] refers to a system of apportioning damages between mutually negligent parties according to their proportionate share of causal fault. Generally, it operates to diminish rather than preclude a negligent plaintiff's recovery.[46] The United States is the last stronghold of contributory negligence; all other common law jurisdictions,[47] and most civil law systems,[48] utilize various forms of damage apportionment in negligence actions.

The Federal Employer's Liability Act was first major apportionment

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39. *Id.* § 483.
40. *Id.* § 484.
41. *See* Prosser *supra* note 16, at 469; *see also* F. Harper & F. James, *supra* note 4, at 1228.
42. H. Kalven, Report on the Jury Project 28 (1955).
43. Holt, J., in Haeq v. Sprague, Warner & Co., 202 Minn. 425, 430, 281 N.W. 261, 263 (1938); *see also* J. Ulman, A Judge Takes the Stand 30-34 (1933).
44. Prosser, *supra* note 16 at 469.
45. The term comparative negligence is misleading. Properly, it refers to a comparison of degrees of negligence between the parties to determine if the plaintiff will be allowed all or no recovery. *See* text accompanying *supra* notes 28-30. In the modern sense, however, it refers to a damage apportionment system whereby damages recoverable by a negligent plaintiff are diminished in proportion to his share of causal fault. The term is further complicated as it is also used to describe apportionment methods utilized in several states which operate only after the respective negligence of the parties is compared. *See* text accompanying *infra* notes 61-66.
46. *See* text accompanying *infra* notes 61-66.
47. *See, e.g.*, England: Law Reform Act of 1945, 8 & 9 Geo. 6, c. 28; Canada: Alta. Rev. Stat. c. 56 (1955); B.C. Rev. Stat. c. 74 (1960); Man. Rev. Stat. c. 266 (1954); N.B. Rev. Stat. c. 36 (1952); [1954] N.S. Stat. c. 51; Ont. Rev. Stat. c. 261 (1960); [1951] P.E.I. Stat. c. 30; Quebec apportions damages without a statute. *See, e.g.*, Nicholis Chemical Co. v. Lefebvre, 42 Can. S. Ct. 402 (1909).
New Zealand: (1947) N.Z. Stat. No. 3 at 29.
Australia: (1947) West. Aust. Stat. No. 23.
Puerto Rico: P.R. Laws Ann., tit. 31 § 5141 (Supp. 1957).
48. All of continental Europe apportions damages. *See*, Turk *supra* note 4 at 238-44.

legislation in this country.[49] The Act applies to all actions brought by interstate railroad workers injured through the negligence of their employers,[50] and it has provided the impetus for numerous state employer liability acts covering intrastate railroad workers and other labor groups. These statutes nullified the defense of contributory negligence but reduced recovery according to the relative proportions of fault displayed by the parties.[51] The apportionment approach was also ultilized in subsequent federal legislation.[52] Most state legislatures have resisted appeals to enact general comparative negligence statutes.[53] Courts, while recognizing the superiority of the doctrine, have refused to judicially establish comparative negligence on the ground that the job is one for the legislature.

> It would be hard to imagine a case more illustrative of the truth that, in operation, the rule of comparative negligence would serve justice more faithfully than that of contributory negligence. . . . But as long as the legislature refuses to substitute the rule of comparative negligence for that of contributory negligence we have no option to enforce the law in a proper case.[54]

However, seven states utilizing three different theories presently have apportionment statutes applicable to all negligence actions.[55] Mississippi operates under a "pure" form of comparative negligence, permitting the plaintiff some recovery regardless of the proportion of fault attributed to him, so long as the

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49. 35 Stat. 66 (1908), *now* 45 U.S.C. § 53 (1964) which provides:
[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

50. The original 1906 Act was held unconstitutional as it applied to workers engaged in intrastate commerce. Employers' Liability Cases, 207 U.S. 463 (1908). The present statute, limited to interstate workers, was upheld in the Second Employers' Liability Cases, 223 U.S. 1 (1912).

51. Prosser, *supra* note 16 at nn. 27, 28.

52. The FELA provision, quoted at *supra* note 49, was incorporated by reference into the Jones Act and Merchant Marine Act. Mar. 4, 1915, ch. 153, § 20, 38 Stat. 1185; June 5, 1920, ch. 250, § 33, 41 Stat. L. 1007, now 46 U.S.C. 688 (1964).

53. Among the articles discussing and urging the adoption of various comparative negligence bills which have been before the New York Legislature are: Note, 25 Fordham L. Rev. 184 (1956); Teller, *Proposed Comparative Negligence Law and Contribution Among Joint Tortfeasors*, 5 Bklyn. Barrister 1000-04 (Jan. 1954); Kreindler, *Comparative Negligence in New York*, 11 Bar Bull. 81 (N.Y. Co. Law. Ass'n) (1953); Note, 22 N.Y.U.L.Q. Rev. 458 (1947); Mole & Wilson, *A Study of Comparative Negligence*, 17 Cornell L.Q. 333 (1932); *see also* bills before the Pennsylvania legislature mentioned in O'Toole, *Comparative Negligence: The Pennsylvania Proposal*, 2 Vill. L. Rev. 474 (1957). Sherman, *Comparative Negligence*, 60 Dick. L. Rev. 79 (1955); Note, 17 Temple L.Q. 276 (1943); For proposals in other states, *see, e.g.*, Dean & Hancock, *Comparative Negligence*, 8 Ala. L. Rev. 71 (1955); 30 Chi. B. Rec. 391 (1949); Neef, *Comparative Negligence*, 27 Mich. S.B.J. 34 (May, 1948).

54. Haeq v. Sprague, Warner & Co., 202 Minn. 425, 430, 281 N.W. 261, 263 (1938); Henthorne v. Hopwood, 218 Ore. 336, 338 P.2d 373, 375 (1959).

55. Ark. Stat. Ann. § 27.1730.2 (1961); Ga. Code § 105-603 (1956); Me. Rev. Stat. Ann. tit. 14, § 156 (Supp. 1965); Miss. Code Ann. § 1454 (1942); Neb. Rev. Stat. § 25-1151 (1956); S. D. Code § 47.0304(1) (Supp. 1960); Wis. Stat. Ann. § 331.045 (1958).

defendant is found negligent.[56] Thus, if a plaintiff is 50 per cent negligent and has damages of $10,000, the defendant, assuming he has no damages, will be liable for $5,000. If the defendant in this situation has damages and counterclaims, a set-off occurs. A plaintiff under this system may pursue his cause of action in all cases where the contributory negligence doctrine would have barred him completely.[57] The other two forms of comparative negligence are more limited, requiring a preliminary comparison of the negligence of the parties before apportionment is allowed. Two states permit apportionment only when the contributory negligence of the plaintiff is found to be "slight" and the defendant's "gross" in comparison.[58] Wisconsin[59] and three other states[60] utilize a "percentage of fault," or modified comparative negligence approach; apportionment is permitted only if the plaintiff's fault is found to have been less than the defendant's. Contributory negligence still operates under these statutes when the plaintiff's negligence is found to be equal to or greater than the fault of the defendant. This aspect of Wisconsin's system has been called "absurd" because its effect is to allow a substantial recovery to a plaintiff found 49 per cent negligent, but bars him completely if he is found 50 per cent negligent.[61] Once the plaintiff clears this barrier his recovery is "diminished in the proportion to the amount of negligence attributable to [him]."[62] The Wisconsin

56. Miss. Code. Ann. § 1454 (1942) 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.

57. *See, e.g.*, Pevey v. Alexander Pool Co., 244 Miss. 25, 139 So. 2d 847 (1962) (Contributory negligence is not a bar to a cause of action in Mississippi.); Cobb v. Williams, 228 Miss. 418, 90 So. 2d 17 (1956).

58. Neb. Rev. Stat. § 25-1151 (1956); S. D. Code § 47.0304(1) (Supp. 1960). The Nebraska statute provides in part: "[T]he 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 . . . ." This form of comparative negligence is extremely limited. Only in a minority of cases will the plaintiff's negligence be "slight" and the defendant's "gross" in comparison. For the treatment given this test by the courts of the two states *see, e.g.*, Brackman v. Brackman, 169 Neb. 650, 100 N.W.2d 774 (1960); Malcolm v. Dox, 169 Neb. 539, 100 N.W.2d 538 (1960); Allen v. Kavanaugh, 160 Neb. 645, 71 N.W.2d 119 (1955); Ford v. Robinson, 76 S.D. 457, 80 N.W.2d 471 (1957); Friese v. Gulbrandson, 69 S.D. 179, 8 N.W.2d 438 (1943).

59. Wis. Stat. Ann. § 331.045 (1958) 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.

60. Ark. Stat. Ann. § 27.1730.2 (1961); Ga. Code § 105-603 (1956); Me. Rev. Stat. Ann. tit. 14, § 156 (Supp. 1965).

61. C. Gregory, Legislative Loss Distribution in Negligence Actions 64 (1936); *see also* Campbell, *Wisconsin Law Governing Automobile Accidents—Part II*, 1962 Wis. L. Rev. 557, 569.

62. Wis. Stat. Ann. § 331.045 (1958).

Supreme Court, in *Cameron v. Union Automobile Insurance Co.*,[63] interpreted this provision to mean the plaintiff's percentage of fault acts to reduce his recovery by the proportion it bears to the total negligence of the parties. Thus if the plaintiff is found 25 per cent negligent, he may recover 75 per cent of his damages. No set-off would occur if the defendant also has damages; he is precluded as his negligence is greater than the plaintiff's.[64] Damage apportionment becomes more complex where multiple defendants are involved. In *Walker v. Kroger Grocery and Baking Co.*,[65] it was stated that damages may be recovered only from those defendants adjudged more negligent than the plaintiff. Thus, for example, if the plantiff is found 25 per cent at fault, D1 20 per cent and D2 55 per cent negligent, no recovery may be had against D1, but D2 will be liable for 75 per cent of the plaintiff's damages. It has also been held the plaintiff may proceed to collect his entire damages from any of the defendants adjudged liable to him, but subsequent contribution among defendants is determined according to their proportionate share of causal fault.[66] And, in *Johnsen v. Pierce*,[67] it was established that any negligence imputed to the plaintiff is added to his own negligence to determine his percentage of fault with respect to all defendants in the action.

Wisconsin utilizes a special verdict procedure in administering its comparative negligence system.[68] A series of specific questions pertaining to the negligence of the parties, their percentage of fault, and damages are submitted to the jury.[69] The jury is not told the effect of its answers. In *DeGroot v. Van Akkeren*,[70] it was held reversible error to read the apportionment statute to the jury. Once the jury returns its answers, the court apportions the damages and enters the verdict. Though exercising some control over the jury through the special verdict, in *Kohler v. Dumke*[71] the court reiterated its refusal to set out mechanical formulae for the jury to follow in deciding the ratio by which the combined negligence of the parties should be distributed. Only in the "rare" case will the court intervene to deny the plaintiff recovery as a matter of law, because his negligence is greater than the defendant's.[72]

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63. 211 Wis. 405, 247 N.W. 453 (1933) (per curiam).
64. Wis. Stat. Ann. § 331.045 (1958).
65. 214 Wis. 519, 535-36, 252 N.W. 721-28 (1934).
66. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). Thus if *D1* is 80% negligent and *D2* found 20% negligent, *P* may collect his whole damages from either *D1* or *D2* or both. But if *D2* pays the entire amount, *D1* will be liable to him in a contribution action for 20 per cent of that amount. The 50% plaintiff bar rule, in text accompany *supra* note 61, does not apply to contribution.
67. 262 Wis. 367, 55 N.W.2d 394 (1952) (the fault share of the parties was *P*, 10%, *D1*, 45% and *D2*, 45%, with the negligence of *D1* imputed to *P*. Thus *P*'s share of fault became 55% which barred her action completely as her proportion of fault was greater than both the defendants).
68. Wis. Stat. Ann. § 270.27 (1958).
69. The general form is set out in Prosser, *supra* note 16, at 497-98.
70. 224 Wis. 105, 273 N.W. 725 (1937).
71. 13 Wis. 2d 211, 216, 108 N.W.2d 581, 584 (1961).
72. *See, e.g.*, Korleski v. Lane, 10 Wis. 2d 163, 102 N.W.2d 234 (1960); Wasilowski v. Chicago North West. Ry., 259 Wis. 522, 525, 49 N.W.2d 481, 482 (1951).

In the instant case, the court determined the Wisconsin approach to be superior to the common law rule of contributory negligence, since apportionment produces a more just and socially desirable distribution of loss. Justice Moran, writing for a unanimous court, reasoned that the party most responsible for the injury should bear the primary liability. As a corollary, a plaintiff who is secondarily negligent should be permitted to recover in proportion to his freedom from fault. The inequities of the contributory negligence rule were treated as self-evident. After an examination of the rule's history in Illinois, the court concluded that the historical purpose of protecting the growth of industry and railroads no longer provided a valid justification for retaining the contributory negligent doctrine. Defendant urged that exchanging the common law rule for a comparative fault and damage apportionment system would have the effect of discouraging pre-trial settlements, congest the calendar with cases of questionable liability, and result in higher insurance rates. These arguments were discounted:

> In determining the public policy of this state we are not impressed by the arguments pertaining to administrative and procedural problems. Substantive rights are involved in our determination and even, were the more desirable rule to result in increased administrative complications, expense or delay we would feel it should be adopted and that suitable steps be taken to resolve the resulting procedural problems.[73]

Further, the court listed purported procedural merits of comparative negligence as enumerated in a 1962 committee report of the Illinois Judicial Conference.[74] It was stated an apportionment system would encourage pre-trial settlements and jury waivers, and would tend to eliminate the need for trial specialists and docket delays. The court did not indicate whether it agreed with these contentions. Justice Moran did suggest, however, that a comparative negligence system would "eliminate the need for continued adherence to the fictions of 'active-passive' or 'primary-secondary' negligence, for actions for contribution or indemnification will fall under the same rule as original actions for the recovery of damage."[75]

In choosing the form of comparative negligence to be adopted, the Wisconsin approach was found "closest to our needs," and in conformity with "present day concepts of equality, justice and sensibility."[76] The court concluded the system had proved satisfactory in Wisconsin and that the special verdict procedures utilized there could be adopted in Illinois. Though the pure form of comparative negligence followed in Mississippi was cursorily examined, it was not stated why the Wisconsin system offered the more suitable approach. The court noted, it was not "unmindful that the Wisconsin rule has been criticized as being absurd in that a plaintiff almost as negligent as a defendant may recover a substantial

73. Maki v. Frelk, 229 N.E.2d 284, 290 (Ill. App. 1967).
74. W. Atten and D. Burrell, Should Illinois Adopt a Comparative Negligence Statute, 51 Ill. B.J. 194, 197-98 (1962).
75. Maki v. Frelk, 229 N.E.2d 284, 290 (Ill. App. 1967).
76. *Id.* at 290.

portion of his damages but may not recover a cent if both parties are equally negligent."[77]

The most significant aspect of the holding was that the abolishment of the strict contributory negligence rule should properly be undertaken by the courts. Indeed, the court reasoned it was "duty bound" to make the change:

> The doctrine of contributory negligence was created by the courts, not by the legislature. If we have created it, and if it does not meet the needs of present day life, then we are duty bound to abolish it.[78]

Though noting other state courts had taken contrary positions, the court found precedent for its view in *Molitor v. Kaneland Com. Unit. Dist.*[79] There, the Illinois Supreme Court overruled the doctrine of school district immunity, despite arguments that the change should be left to the legislature.

The contributory negligence rule, despite its administrative simplicity, cannot be justified today in either legal principle or policy. The best that can be said for the doctrine—that it is not as bad as it seems because juries have the good sense to disregard it—is merely another argument for its abolition. Though the rule has retained its place in American civil law, its eventual demise is inevitable. The increase in negligence litigation, spurred particularly by automobile accident cases, points to the need for a system capable of equitably and efficiently handling mutual fault situations while providing for a more acceptable distribution of loss. The only serious questions are who should make the change, and what form the change should take.

It would be desirable for comparative negligence to be promulgated legislatively. Several forms of apportionment are available to replace contributory negligence, and choosing the most appropriate is purely a policy decision. Further, more than just the rule of contributory negligence should be changed. Various areas of negligence law, such as contribution[80] and the last clear chance doctrine,[81] should also be revised or rejected to create an integrated and consistent apportionment system. Similarly, procedural devices such as the special verdict[82] and a method for dealing with suits involving multiple parties should be introduced into an apportionment system.[83] It is noteworthy, however, that

77. *Id.* at 291.
78. *Id.*
79. 18 Ill. 2d 11, 25, 163 N.E.2d 89, 96 (1959).
80. If the plaintiff does not bring this action against all possible defendants, those defendants in the action should be permitted to join others who may also be liable to the plaintiff. The plaintiff should still be permitted to secure a full recovery from any of the defendants. *See* C. Gregory, *supra* note 61, at 38-39. But in actions for contribution, the liability of the unpaid defendants should rest on their respective proportion of fault determined in the original action. *See* text accompanying *supra* note 66. But no defendant should be absolved of liability because his fault was less than the plaintiff's.
81. The last clear chance rule should be abolished. Its purpose, to protect the plaintiff from the contributory negligence bar, would be served by apportioning damages.
82. *See* text accompanying *supra* notes 68 and 69. This provides an important check on the jury and lessens the likelihood of arbitrary verdicts.
83. *See* C. Gregory, *supra* note 61, at 88-113, discussing methods for handling multiple party litigation.

those legislatures which enacted comparative negligence statutes have been content to leave the problem of resolving inconsistencies to the courts.[84]

But courts should not be precluded from entering the field. The position taken in the instant case—that courts may make the change—is valid to the extent contributory negligence remains in case law form. Courts should not be bound to administer mechanically a judge-made law which not only fails to serve the purpose for which it was designed, but also works substantial injustice.

In the instant case, the central reasons espoused by the courts for establishing comparative negligence in Illinois were to promote an equitable distribution of loss by ending the arbitrary doctrine that a negligent plaintiff be denied all recovery. Yet the Wisconsin system, while a substantial improvement over the strict rule of contributory negligence, does not fully conform to this goal. Contributory negligence will still bar a plaintiff if his proportion of fault in causing the injury was greater than the defendant's. In short, the Wisconsin approach is a compromise between the strict rule and a complete apportionment system. It may seem logical to deny recovery if the plaintiff's conduct was the senior cause of his injury, but in a system of negligence based on fault, with the central consideration aimed at achieving a wide and fair distribution of loss, it frequently is more logical to hold a party liable for the damages caused by his proportionate share of negligence. This theory is embodied in the Federal Employers' Liability Act and Mississippi approach. A plaintiff is allowed some recovery whatever his proportion of fault, so long as part of the damage was caused by the defendant's negligence. Thus, if the plaintiff is 90 per cent negligent, the defendant will be liable for the injury he caused or 10 per cent of the plantiff's damages. Under the Wisconsin system, the plaintiff will recover nothing and the defendant who shared in causing the injury is allowed to go free. Further, under the full apportionate approach, if the defendant also suffered damages in the accident, his liability to the plaintiff would be reduced even though his share of fault may be greater than the plaintiff's. The result is equitable since each party pays for the damage attributable to his share of fault. It is also socially desirable, as a full loss distribution is achieved. This system, coupled with a careful integration of conflicting negligence law such as contribution and last clear chance, as well as the special verdict and a provision for apportionment between multiple defendants, would embody the most comprehensive approach to comparative negligence.

But the court in the instant case hardly considered the more liberal form of comparative negligence. Rather, it chose to turn to the Wisconsin approach even while admitting that system, in at least one respect, was inherently absurd. Yet the very fact the court was willing to adopt the more limited Wisconsin system was a major step. Indeed, no court in modern times has gone so far in this area. The end result is theoretically not as perfect a system of apportionment as could

84. *See supra* note 55 and text accompanying *supra* notes 65-67.

have been adopted. Nevertheless, it represents a major improvment over the strict doctrine of contributory negligence.

ARTHUR M. GELLMAN

TORTS—LIBEL—ABSOLUTE PRIVILEGE OF MUNICIPAL OFFICIALS

Plaintiffs, two teachers at Queens College, had repeatedly charged they were denied promotion because of religious discrimination. The President of Queens College, defendant Stoke, with the approval of the New York City Board of Higher Education, issued a press release denying anti-Catholic discrimination at the college and attributing plaintiffs' inability to obtain promotions to their lack of suitable qualifications for advancement. Plaintiffs sued for libel alleging they were defamed by the press release. Defendants' motion for summary judgment based on absolute privilege was denied by the trial court. The appellate division reversed the ruling on the motion and dismissed the case. The New York Court of Appeals, one judge dissenting, *held*, the New York City Board of Higher Education is an important agency of municipal government with substantial duties and responsibilities affecting a large number of people, and issuance of the press release was a proper exercise of discretion because of the widespread publicity which the charges of bias at Queens College had received. Therefore the Board and President Stoke were entitled to invoke absolute privilege as a complete bar to the suit. Lombardo v. Stoke, 18 N.Y.2d 394, 222 N.E.2d 721, 276 N.Y.S.2d 97 (1966).

The law of defamation recognizes truth and privilege as its two principal defenses. The establishment of either acts as a complete bar to a suit for libel.[1] The defense of privilege is further divisible into absolute privilege[2] and qualified privilege.[3] If an individual's statements are absolutely privileged, he is protected from liability for defamation even though his statements were made maliciously.[4] By contrast, if a person possesses only a qualified privilege, the immunity can be defeated by proof that his statements contain an element of malice.[5] Proof of actual malice requires the plaintiff to show personal spite or ill will, or culpable recklessness or negligence on the part of defendant.[6] The doctrine of absolute privilege was first extended by constitutional mandate and judicial decision to the legislative[7] and judicial[8] branches of government. Executive immunity developed

1. *See generally* W. Prosser, Torts § 109, at 795 (3d ed. 1964).
2. *See, e.g.*, Spalding v. Vilas, 161 U.S. 483 (1896).
3. Ashcroft v. Hammond, 197 N.Y. 488, 90 N.E. 1117 (1910).
4. *See* 1 Fowler Harper & Fleming James Jr., Torts § 5.21, at 420 (1956).
5. For the distinction between absolute privilege and qualified privilege in defamation *see id.*
6. Shapiro v. Health Ins. Plan of Greater N.Y., 7 N.Y.2d 56, 61, 163 N.E.2d 333, 336, 194 N.Y.S.2d 509, 513 (1959).
7. U.S. Const. art. I, § 6; for a discussion of absolute privilege in defamation suits concerning the legislative branch *see* Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 Colum. L. Rev. 131 (1910).