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Comparative v. Contributory Negligence: The Effect of Plaintiff's Fault

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COMPARATIVE v. CONTRIBUTORY NEGLIGENCE: THE EFFECT OF PLAINTIFF'S FAULT

The American judicial system is revolutionizing tort law. Prime targets of this "judicial activism"[1] are a number of outdated common law and statutory provisions. Examples are guest statutes,[2] the doctrine of sovereign immunity,[3] privity of contract[4] and classification of plaintiffs as invitees and licensees.[5] Perhaps the most far-reaching change in the common law, however, has been judicial adoption of comparative negligence,[6] potentially affecting all classes of tort cases.

The New Mexico Supreme Court has taken an active part in tort reform, as exemplified by its 1973 adoption of strict tort liability.[7] The most recent examples of the Court's activism are its September 1975 decisions eliminating sovereign immunity[8] and the guest statute[9] as defenses to tort actions. Within the past four years, however, both the Court[10] and the state legislature[11] have refused

1. Comment, *Judicial Activism in Tort Reform: the Guest Statute Exemplar and a Proposal for Comparative Negligence,* 21 U.C.L.A. L. Rev. 1566 (1974).

2. Brown v. Merlo, 8 Cal.3d 855, 106 Cal. Rptr. 388, 506 P.2d 212 (1973); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1972); Johnson v. Hasset, 217 N.W.2d 771 (N.D. 1974).

3. *See, e.g.,* Nelms v. Laird, 442 F.2d 1163 (4th Cir. 1971); Evans v. Board of County Comm'rs, 482 P.2d 968 (Colo. 1971); Flournoy v. School Dist. No. 1, 482 P.2d 966 (Colo. 1971); Krause v. State, 28 Ohio App.2d, 274 N.E.2d 321 (1971); Becker v. Beaudoin, 106 R.I. 562, 107 R.I. 838, 261 A.2d 896 (1970).

4. *See, e.g.,* Mulder v. Parke, Davis & Co., 288 Minn. 332, 181 N.W.2d 882 (1970), expanded on rehearing per curiam; 288 Minn. 339, 181 N.W.2d 887 (1970); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); State Stove Manufacturing Co. v. Hodges, 189 So.2d 113 (Miss. 1966).

5. *See, e.g.,* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972); Rowland v. Christian, 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973).

6. Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). *Cf.* Loui v. Oakley, 50 Hawaii 260, 438 P.3d 393 (1968).

7. Stang v. Hertz, 83 N.M. 730, 497 P.2d 732 (1972).

8. Hicks v. State, 14 N.M. St. B. Bull. 956 (1975).

9. McGeehan v. Bunch, 540 P.2d 238 (N.M. 1975).

10. Syroid v. Albuquerque Gravel Products Co., 86 N.M. 235, 522 P.2d 570 (1974). For previous decisions rejecting adoption of comparative negligence, *see* Jones v. Pollock, 72 N.M. 315, 383 P.2d 271 (1963); Rose v. Grisolano, 56 N.M. 25, 239 P.2d 719 (1952); Gray v. Esslinger, 46 N.M. 421, 130 P.2d 24, *rehearing denied,* 46 N.M. 492, 131 P.2d 981

to adopt the doctrine of comparative negligence, contrary to the trend in the majority of American[12] and foreign[13] jurisdictions. In light of this trend and the social change it reflects this Comment urges that New Mexico adopt comparative negligence to replace the present rules governing the right of recovery of plaintiffs who contributed to their own injuries.

This Comment will focus on three questions: (1) Is comparative negligence superior in theory and practice to our present system; (2) Is judicial adoption appropriate; and (3) What system of comparative negligence would best meet New Mexico's needs?

IS COMPARATIVE NEGLIGENCE SUPERIOR?

Comparative negligence reduces a plaintiff's damages in tort cases in proportion to the extent of his contributory fault. Contributory negligence bars any recovery by a plaintiff based on the mere existence of such fault. In a 1974 decision, *Syroid v. Albuquerque Gravel Products Co.*,[14] the New Mexico Supreme Court made it clear that it would not adopt comparative negligence on the basis of the shortcomings of contributory negligence alone, absent a clear showing of the former's superiority.[15] Nevertheless, these shortcomings point up the present need for change in negligence law.

Contributory Negligence: the Need for Change

Contributory negligence bars recovery by a negligent plaintiff, without regard to the extent of his fault. A plaintiff whose negligence contributes only marginally to his injury recovers the same amount as one whose negligence is substantial when compared with that of the defendant: nothing. Very little need be said here concerning the failure of contributory negligence to meet present social needs.[16] The doctrine spawns a harshness which, although arguably

(1942). *Cf.* Selgado v. Commercial Warehouse Co., 86 N.M. 633, 638-639, 526 P.2d 430 (Ct. App. 1974), suggesting mitigation of damages on stronger proof of plaintiff's negligence.

11. H.B. 187, 30th Leg., 1st Sess. (1971). The state legislature previously rejected four other bills proposing comparative negligence, S.B. 178, 29th Leg., 1st Sess. (1969); H.B. 266, 26th Leg., 1st Sess. (1969); H.B. 266, 26th Leg., 1st Sess. (1963); S.B. 166, 25th Leg., 1st Sess. (1961); S.B. 108, 23rd Leg., 1st Sess. (1957).

12. *See* Li v. Yellow Cab Co., 13 Cal.3d 804, 812, 813, 119 Cal. Rptr. 858, 864, 532 P.2d 1226, 1232 (1975). For further discussion of adoption by American jurisdictions, *see* V. Schwartz, Comparative Negligence § 1.1 (1974); Henry, *Why Not Comparative Negligence in Washington?*, 14-20 Comparative Negligence Monograph (A.T.L.A., 1970).

13. *See* Henry, *supra* note 12, at 9-10.

14. 86 N.M. 235, 522 P.2d 570 (1974).

15. *Id.* at 238.

16. Numerous articles have been written detailing the failures of contributory negligence *See, e.g.*, Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465 (1953); Turk, *Comparative*

necessary in the Industrial Revolution of the 19th century,[17] now lacks a defensible rationale.[18] Industry no longer needs court protection;[19] today the courts' "ward" should be the average man.

To mitigate this harshness courts have refused to apply the contributory negligence bar where the defendant engaged in wilful misconduct,[20] violated a safety statute,[21] or where he had the last clear chance to avoid the accident.[22] Underlying each of these

Negligence on the March, 28 Chi. Kent L. Rev. 189 (1950); Haugh, *Comparative Negligence: A Reform Long Overdue,* 49 Ore. L. Rev. 38 (1969).

17. Annotation, *Comparative Negligence,* 32 A.L.R.3d 463, 471 (1970) states:
> [T]his explanation is based on the idea that economic expansion has required that the infant industries, especially railroads, be protected from oversympathetic juries who regarded these corporation defendants as intruders, as well as immensely rich.

18. Turk, *supra* note 16, at 201-202, described the problem as follows:
> In an age when men are pitted against the power and speed of machines ... the harshness of ... [contributory negligence] ... becomes overwhelming.... The scrambling of pedestrians, motor vehicles, streetcars, railroad trains and passengers in one pile of mechanized traffic, all in a hurry, presents an every-day occurrence. All human beings, because of their imperfections, are what the law would style "negligent" at some time or another. ... To call such a result harsh is to use a mild expression, to say the least.

19. Industry is now protected not only by its size, but also by workmen's compensation statutes and liability insurance. Note, *Illinois Appellate Court Adopts Comparative Negligence Doctrine,* 43 Notre Dame Lawyer 422, 424 (1968).

Nevertheless, an argument for continuing protection of industry might be predicated upon recent economic problems; it should be noted, however, that even at its inception, the contributory negligence doctrine represented a misapplication of the fault concept to justify policies of *laissez faire* capitalism:

> The equating of negligence with fault, and fault with morality, has been mentioned as an influential factor in tort liability.... The victim whose careless conduct contributed to his own hurt cut himself off from the court's protection.... Why did the courts penalize the victim so severely and let the defendant go free? This severity cannot be justified on any basis of morality. ... [T]he concept of negligence and the whole array of assumed risk, contributory negligence, proximate cause ..., ostensibly based on fault, represent a flight from morality and are based upon the demands of a revolutionary environment which captured the minds of judges and the people they served....
>
> How these defenses and those kindred to them which place the risks of injury entirely upon the victim and allow the initial wrongdoer to go free is one of the anomalies of twentieth century tort law.... Throughout the period when negligence doctrines were being developed in such profusion the courts talked endlessly about fault, but what they were doing was freeing enterprise from liability for the common welfare at the expense of its victims and attempting to justify their harshness toward the victims and their wide departure from early common law by cloaking their doctrines in terms of morality.

Green, *The Thrust of Tort Law, Part I, The Influence of Environment,* 64 W.Va. L. Rev. 1, 12-15 (1961). *See also* Isaacs, *Fault and Liability,* 31 Harv. L. Rev. 954 (1918).

20. Restatement (Second) of Torts § § 481, 482 (1965). *See* Schwartz, *supra* note 12, at § 5.1; 32 A.L.R.3d, *supra* note 17, at 491; Prosser, *supra* note 16, at 470.

21. Restatement, *supra* note 20, at § 483. *See* Schwartz, *supra* note 12, at § 6.1; 32 A.L.R.3d, *supra* note 17, at 491-492; Prosser, *supra* note 16, at 470-471.

22. Restatement, *supra* note 20, at § § 479-480.

exceptions is the theory that it is inequitable to deny a plaintiff recovery where the defendant is so clearly at fault. It is, however, equally inequitable to "visit the entire loss caused by the fault of two parties"[23] on the defendant rather than upon the plaintiff. Though these exceptions mitigate the rule's harshness somewhat, they fail to address the primary reason for their adoption: courts' recognition that the contributory negligence doctrine is, in these situations, patently unfair.

Jury disregard of contributory negligence instructions exemplifies the doctrine's failure to comport with notions of fairness. Dean Prosser has commented:

> Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence . . . [b]ut the process is at best a haphazard and most unsatisfactory one.[24]

Toleration of this jury lawlessness threatens public respect for a system of jurisprudence which condones it. And compromised jury verdicts indicate forcefully that the stated law no longer comports with prevalent moral concepts.[25]

Like sovereign immunity, eliminated as a tort defense,[26] contributory negligence is doctrinally "archaic,"[27] and its continuing validity is at best doubtful.[28] Its harshness in application has led to several limitations, which serve only to lessen its harsh results, not to eliminate them.[29] The logic which led to discarding sovereign immunity as a defense applies with full force to the contributory negligence bar.

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23. Prosser, *supra* note 16, at 469.

24. *Id.* at 468.

25. *See* Wade, *Comments on Maki v. Frelk,* 21 Vand. L. Rev. 938, 944 (1968); James, *Comments on Maki v. Frelk,* 21 Vand. L. Rev. 891, 895 (1968). *But see* Kalven, *Comments on Maki v. Frelk,* 21 Vand. L. Rev. 897, 901-904 (1968).

26. Hicks v. State, 14 N.M. St. B. Bull. 956 (1975).

27. *Id.* at 957.

> The original justification for the doctrine of sovereign immunity was the archaic view that "the sovereign can do no wrong." It is hardly necessary for this court to spend time to refute this feudalistic contention.

28. *Id., quoting* City of Albuquerque v. Garcia, 84 N.M. 776, 778, 508 P.2d 585, 587 (1973):

> As to sovereign immunity, that doctrine, insofar as it has been created by courts, seems headed for a deserved repose. Courts and scholars can find little reason for it, and its historical basis is of doubtful validity.

29. *See, e.g.,* N.M. Stat. Ann. § § 5-6-18 through 22 (1953), which provides for state or municipal purchase of liability insurance and concomitant waiver of the sovereign immunity defense. ". . . these statutory schemes were in harmony with the common law doctrine of sovereign immunity, but had the effect of lessening, to a certain extent, the oftentimes harsh results of that doctrine." Hicks v. State, 14 N.M. St. B. Bull. 956, 957 (1975).

Comparative Negligence: the Logical Alternative

Comparative negligence allows a negligent plaintiff to recover a portion of the cost of his injury. Although treated somewhat differently under the various forms of the doctrine,[30] in general plaintiff's contributory fault is assigned a percentage of the total fault by the trier of fact. Plaintiff's total damages are then reduced by that percentage.[31] Thus, a plaintiff whose total damages are determined to be $1000, and who is deemed by the trier of fact to be 30 per cent at fault, would recover $700.

The superiority of comparative negligence has been increasingly recognized by American jurisdictions.[32] Two recent court decisions from respected jurisdictions signal the need for change. In *Hoffman v. Jones,*[33] decided four days after the answer brief was filed in *Syroid,* the Florida Supreme Court adopted comparative negligence. The Court questioned the continuing validity of contributory negligence[34] and added:

> Perhaps the best argument in favor of the movement . . . is that . . . [comparative negligence] . . . is simply a more equitable system of determining liability and a more socially desirable method of loss distribution. . . . When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion he has caused the other party.[35]

After recognizing the trend toward "almost universal adoption of comparative negligence,"[36] the court concluded:

> In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.[37]

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30. *See* text accompanying notes 89-102, *infra.*
31. Schwartz, *supra* note 12, at § 2.1.
32. Professor Schwartz observed:
    Comparative negligence is truly on the march! In 1950 . . . only five American jurisdictions applied comparative negligence in one form or another to negligence actions generally. . . . By April of 1974, comparative negligence will have replaced contributory negligence in at least twenty-six states and Puerto Rico. Undoubtedly, comparative negligence will be the prevailing doctrine in the United States by the end of 1975, and the march of comparative negligence may well have turned into a stampede by the end of the 1970's.
Id. at 1-3.
33. 280 So.2d 431 (Fla., 1973).
34. *Id.* at 437.
35. *Id.*
36. *Id.* at 438.
37. *Id.*

California added its name to the list of comparative negligence states with the 1975 decision in *Li v. Yellow Cab Co.*[38] The California Supreme Court in unequivocal terms declared contributory negligence to be "inequitable in its operation because it fails to distribute responsibility in proportion to fault."[39] Justice Sullivan for the majority[40] emphasized the "theoretical and practical considerations"[41] which have led to the trend toward comparative negligence. He said:

> We are persuaded that logic, practical experience, and fundamental justice counsel against the retention of . . . [contributory negligence] . . . it should be replaced in this state by a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to the extent of their causal responsibility.[42]

Both the *Hoffman* and *Li* courts noted that comparative negligence better comports with the central theme of American tort law—liability based on fault.[43] But practical considerations, beyond the theoretical superiority relied upon in those cases, further compel adoption of the comparative system. Since the system avoids the all-or-nothing nature of contributory negligence, juries will be able to follow *both* the law stated in jury instructions and community concepts of fairness.[44] Another potential benefit is a more favorable public perception of the legal system.[45] The system may also encourage out-of-court settlements.[46] Under the present system, damage anticipation is complicated by the possibility that a negligent

38. 13 Cal.3d 804, 119 Cal. Rptr. 858, 862, 532 P.2d 1226, 1230 (1975).

39. *Id.* at 862.

40. Neither dissenting Justice disagreed with the majority opinion regarding the superiority of comparative negligence. Mosk, J. dissented only on the question of retroactive application of the new rule. Clark, J. dissented on grounds of judicial deferrence to the legislature. *Id.* at 1245-47, 119 Cal. Rptr. 877-79.

41. *Id.* at 1232, 119 Cal. Rptr. at 804.

42. *Id.*

43. Fault-based liability, which developed in America in the late nineteenth century, is embodied in the principle that wrongdoers should pay for their wrongs. *See* O. Holmes, The Common Law 79-80 (1881); Fletcher, *Fairness and Utility in Tort Theory,* 85 Harv. L. Rev. 537, 539 (1972). *See also* Green, *supra* note 19, at 11-14; Isaacs, *supra* note 19, at 954.

44. *See* note 25, *supra.*

45. The United States Supreme Court has long been concerned with public perceptions of judicial integrity and fairness. *See* Elkins v. U.S., 364 U.S. 206, 222-23 (1960); Mapp v. Ohio, 367 U.S. 643, 659 (1961).

46. An increase in settlements, both prior to and during trial, was reported in a study of the effect of comparative negligence in the Arkansas court system. Thomson, *Comparative Negligence–A Survey of the Arkansas Experience,* 22 Ark. L. Rev. 692 (1969); the Thomson study confirmed results of a prior study upon which it was based, Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey,* 13 Ark. L. Rev. 89 (1959).

defendant may be relieved of any pecuniary liability upon proof of insubstantial plaintiff's contributory negligence. Under the comparative system, the negligent defendant can at best reduce the amount he must pay, reducing the attractiveness of litigation. Finally, comparative negligence requires only one general rule of apportionment to deal with negligence actions. The courts themselves might benefit most from this.[47] For example, courts need not place the full burden on the grossly negligent defendant under a system of comparative negligence. The trier of fact will take the extent of the defendant's negligence into consideration as a factor in determining the *proportionate* fault of the parties.[48]

Opponents of comparative negligence claim that its implementation would be difficult.[49] But the experience of jurisdictions applying comparative negligence suggests otherwise. It does not significantly increase the burden of personal injury litigation handled by the courts.[50] It does not affect the length of trial or the preference for jury trials.[51] It has not demonstrably affected insurance rates.[52] It does not impose an impossible task of apportionment on juries or courts.[53]

47.

> The absolute nature of the contributory negligence defense pushed courts into arbitrary resolutions when they have been faced with problems such as how to give fair treatment to a defendant when a plaintiff negligently failed to wear an available seatbelt or carelessly used a defective product.

Schwartz, *Comparative Negligence: Oiling the System,* 11 Trial 58, 59 (Jul/Aug. 1975).

48. *See* Schwartz, *supra* note 12, at § 5.3.

49. *See, e.g.,* Burrell, *Should Illinois Adopt a Comparative Negligence Statute: No!,* 51 Ill. Bar J. 195, 206-210 (Nov. 1962). The Illinois Court of Appeals was not impressed by arguments pertaining to administrative problems. The Court stated:

> . . . were the more desirable rule to result in increased administrative complications, expense or delay, we feel it should be adopted and that suitable steps should be taken to resolve the resulting procedural problems.

Maki v. Frelk, 85 Ill.App.2d 439, 229 N.E.2d 284, 290, *rev'd* 40 Ill.2d 193, 239 N.E.2d 445 (1967).

50. The Thompson study found that Arkansas attorneys accepted personal injury cases for plaintiffs whose cases they would have rejected had the contributory negligence bar to compensation remained in effect. This needed extension of the scope of the law's protection did not increase courtroom litigation. Rather, the study suggested, the parties received their day in court out of court, through negotiation and settlement. Thomson, *supra* note 46, at 713.

51. *Id.*

52. Peck, *Comparative Negligence and Automobile Liability Insurance,* 58 Mich. L. Rev. 688 (1960).

53.

> Here there is empirical evidence and it tends to abate such concerns. Mississippi has functioned well with comparative negligence for over sixty years, and Wisconsin has weathered any untoward complications for more than forty years. No state that has adopted comparative negligence has abandoned it and retreated to the contributory negligence rule. Further, courts in all states have

The foregoing is not intended to imply, however, that implementation of comparative negligence will be an effortless procedure. Before the system can work smoothly several questions pertaining to its application to specific areas must be answered. For convenience of analysis, these areas have been grouped as follows: (1) the status of common law exceptions to contributory negligence; (2) the effect of comparative negligence on other tort doctrines; and (3) other considerations.

Comparative negligence, by avoiding the harshness of contributory negligence, eliminates the need for court-formulated exceptions to the latter.[54] Since plaintiff is no longer barred from recovery, the blameworthiness of defendant's conduct need only be a *factor* for jury consideration in assessing proportion of fault. Further, the plaintiff's contributory fault may also be considered, since its effect on plaintiff's recovery is no longer devastating, and to exclude consideration of it would be inequitable to the defendant. Thus, in Wisconsin, juries may now apportion damages where a defendant is grossly negligent,[55] rather than award full damages to the plaintiff.[56] The same result may also be achieved[57] when plaintiff's conduct, or that of both the parties, is grossly negligent.[58] For the same reason, last clear chance has been abolished by several courts in comparative negligence jurisdictions.[59]

Comparative negligence remains useful in cases brought under other tort doctrines. In strict tort liability cases, comparative negligence will provide a more equitable result than the present defenses

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been able to apply comparative negligence under the Federal Employers Liability Act. [footnote omitted].

Schwartz, *supra* note 12, at 336-337.

54. *See* Note, *Torts: Comparative Negligence + Implied Assumption of the Risk = Injustice,* 27 Okla. L. Rev. 549 (1974); Comment, *Voluntary Assumption of Risk and the Texas Comparative Negligence Statute,* 26 Baylor L. Rev. 543 (1974); Comment, *The Doctrine of Last Clear Chance–Should It Survive the Adoption of Comparative Negligence in Texas?,* 6 Tex. Tech L. Rev. 131 (1974); Schwartz, *supra* note 12, at Ch. 5, 6, 7, 9; Timmons & Silvis, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law,* 28 U. Miami L. Rev. 737, 757-775 (1974).

55. *See, e.g.,* Schulze v. Kleeber, 10 Wis.2d 540, 103 N.W.2d 560 (1960); Alsteen v. Gehl, 21 Wis.2d 349, 124 N.W.2d 312 (1963).

56. Note that apportionment of damages is unlikely where defendant's conduct is intentional. *See* Schwartz, *supra* note 12, at § 5.2.

57. With the exception of some cases in modified comparative negligence jurisdictions. *See* discussion, *infra.*

58. *See, e.g.,* McClellan v. Illinois Cent. R. Co., 204 Miss. 432, 37 So.2d 738 (1948); Gulf & S.I.R. Co. v. Bond, 181 Miss. 254, 179 So.2d 355 (1938).

59. *See* Hoffman v. Jones, 280 So.2d 431, 438 (Fla. 1974); Li v. Yellow Cab Co., 119 Cal. Rptr. 858, 875, 532 P.2d 1226, 1243 (1975); Cushman v. Perkins, 245 A.2d 846 (Maine 1968).

to strict liability based on plaintiff's behavior.[60] One writer has noted:

> The purpose underlying strict products liability would not seem to be frustrated by a simultaneous application of comparative negligence, [sic] in fact it would seem to be furthered. The manufacturer would still be held accountable for all harm which his defective products cause, but the inequitable results of holding the manufacturer liable for that part of the harm caused by the consumer's own contributory conduct and of totally denying recovery to a consumer who is held to have "assumed the risk" or "misused the product" even though he was probably less at fault than the manufacturer, would be eliminated. The end result would be a much desirable system in which the only consideration would be what loss was proximately caused by whose conduct.[61]

New Mexico presently allows for contribution among joint tortfeasors,[62] holding each jointly and severally liable for plaintiff's damages.[63] With the adoption of comparative negligence, it is clear that comparison of fault must be between that of plaintiff and the aggregate of multiple defendants, thus preserving joint liability of the defendants.[64] Retention of several liability raises a more difficult question. If retained, and the judgment cannot be collected from one of the joint tortfeasors for some reason, the remaining tortfeasors,

60. *See* Schwartz, *supra* note 12, at § 12.2.

61. Feinberg, *The Applicability of a Comparative Negligence Defense In A Strict Products Liability Suit Based on 402A Of The Restatement Of Torts 2D (Can Oil and Water Mix?)*, 42 Ins. Couns. J. 39, 52 (1975), suggests two steps which must be taken prior to application of comparative negligence to these cases:

> It must first be recognized that Section 402A is a fault concept and does not impose absolute liability.... Section 402A's standards must be violated before liability can be imposed, and it must be proven that the injuries were proximately caused by this conduct before liability for them is imposed. Thus, the consumer's own conduct which either contributed to or solely caused the injury must be taken into account in determining what injuries were proximately caused by the manufacturer's violation of Section 402A's standard. Secondly, the court ... must be willing to examine ... [the consumer's contributory conduct] ... with the purpose to determine what portion, if any, of the injury was proximately caused by such conduct. In order to properly effectuate this goal, the traditional categories of assumption of the risk, contributory negligence, and misuse must be abandoned and all contributory conduct must be considered under the general heading of contributory negligence of fault. Once these two steps are taken it becomes an easy task to apply a comparative negligence rule to strict products liability cases. *Id.* at 52-53.

See also Corbett, *Doctrine of Strict Liability Meets a Comparative Negligence Statute*, 17 DePaul L. Rev. 614 (1968).

62. Uniform Contribution Among Tortfeasors Act, N.M. Stat. Ann. §§ 24-1-11 to 24-1-18 (1953).

63. N.M. Stat. Ann. § 24-1-11 (1953).

64. *See* Schwartz, *supra* note 12, at §§ 16.6-16.8.

through contribution, must pay more than the amount dictated by their percentage of fault. Should several liability be eliminated and a tortfeasor be judgment proof, the plaintiff would recover less than he should. Regardless of which option is chosen, contribution should be retained to provide a greater possibility for equitable distribution in damage apportionment and satisfaction.[65]

Where two parties, both at fault, seek damages from each other a setoff procedure would seem particularly appropriate under comparative negligence. Should both be found partially at fault for their respective injuries, both would be able to plead comparative negligence. To simplify satisfaction of verdicts, the party whose monetary liability is deemed larger would pay the difference between the damage awards.[66] Finally, in all comparative negligence cases the use of special verdicts reduces the risk of jury misapplication of the correct standard, especially in complex, multiparty cases.[67] By granting to trial courts broad discretion over the content of special verdicts,[68] they can be tailored to the requirements of individual cases.

In summary, comparative negligence seems the superior doctrine when analyzed in terms of theoretical bases and practical advantages. Its superiority clearly outweighs any problems of application which may arise. Any effort which must be expended to perfect a comparative negligence system for New Mexico should be looked upon as a reasonable price for increased fairness in tort law.

JUDICIAL ADOPTION

Although the *Syroid* court declined to adopt comparative negligence, it did not foreclose the possibility of subsequent judicial adoption.[69] Judicial adoption poses two questions: (1) Does the

65. The foregoing is intended only as a starting point for discussion. For detailed analysis of the effect of comparative negligence on other tort doctrines, with suggested solutions, *see* Schwartz, *supra* note 12, at 185-218.

66. *See* Schwartz, *supra* note 12, at 319-324.

67. The use of special verdicts was recently authorized in Florida. Hoffman v. Jones, 280 So.2d 431, 439 (Fla. 1974). For further discussion of this matter, *see* Schwartz, *supra* note 12, at § 17.4.

68. The simplest special verdict requires that the jury answer in writing only two questions: (1) What percentage of total fault is to be attributed to the plaintiff, and (2) What amount of damages would the plaintiff receive had he not been at fault at all? *See* Schwartz, *supra* note 12, at 282-283.

69.

> We do not decide whether this urged replacement should be accomplished by this Court or by the Legislature, since we decline to repudiate the doctrine of contributory negligence.

Syroid v. Alb. Gravel Products, 86 N.M. 235, 236, 522 P.2d 570, 571 (1974).

Court have the power to adopt the proposed system, and (2) Even if it does, should such action be left to the legislature?

The common law history of contributory negligence provides guidance for answering the first question. The doctrine originated at King's Bench in the English courts,[70] was later adopted in this country by American courts,[71] and was first applied in New Mexico by judicial decision.[72] Court-created contributory negligence is subject to court review.[73] This power is clearly demonstrated by the court-created limitations on the doctrine.[74]

Judicial power to modify common law rules is limited by subsequent legislative ratification,[75] but New Mexico contributory negligence has not been so ratified. The only New Mexico statutes relating to contributory negligence *eliminate* the defense in workmen's compensation cases,[76] they do not ratify judicial adoption. Similarly, ratification should not be inferred from the legislature's rejection of bills proposing adoption of comparative negligence.[77]

70. Butterfield v. Forrester, 11 East 60, 103 Eng. Reprint 926 (1809).

71. Smith v. Smith, 19 Mass. (2 Pick.) 621, 13 Am. Dec. 464 (1825); Washburn v. Tracy, 2 D. Chip 128 (Vt. 1824). *See* 32 A.L.R.3d, *supra* note 17, at § 3.

72. Alexander v. Tennessee & Los Cerillos Gold & Silver Mining Co., 3 N.M. 255, 3 P. 735 (1884). For other cases applying contributory negligence in New Mexico, *see* Syroid v. Albuquerque Gravel Products, 86 N.M. 235, 237, 522 P.2d 570, 572 (1974).

73. The Florida Court included in its opinion several considerations which led it to change a common law rule. Hoffman v. Jones, 280 So.2d 431, 435-36 (Fla. 1974). They are not dissimilar to those which are found in Syroid v. Albuquerque Gravel Products, 86 N.M. 235, 237, 522 P.2d 570, 572 (1974). *See also* Hicks v. State, 14 N.M. St. B. Bull. 956 (1975).

74. *See* text accompanying notes 20-22, *supra. See, e.g.,* Thayer v. Denver & Rio Grande R.R. Co., 21 N.M. 330, 154 P. 691 (1916); Gray v. Esslinger, 46 N.M. 421, 130 P.2d 24, *rehearing denied* 46 N.M. 492, 131 P.2d 981 (1942).

75. The limitation is based on the constitutional doctrine of separation of powers. Note that even this bar to judicial action was circumvented in *Hoffman* and *Li* through interpretation of legislative intent.

> . . . it was not the intention of the Legislature . . . to insulate . . . [the common law] . . . from further judicial development; rather it was . . . to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.

Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal. Rptr. 858, 865, 532 P.2d 1226, 1233 (1975).

76. The Workmen's Compensation Act, N.M. Stat. Ann. § 59-10-5 (1953); The Occupational Disease Disablement Law, N.M. Stat. Ann. § 59-11-6 (1953); *cf.* Federal Employers Liability Act, 45 U.S.C. § 53 (1970); Hicks v. State, 14 N.M. St. B. Bull. 956 (1975).

77. *See* note 11, *supra.* Professor James provides an alternate influence:

> Juries, which are not caught up in the cross currents of power politics, probably speak for the community sense of fairness more faithfully than do legislatures. Consistent jury acceptance of proportional negligence, therefore, suggests that legislative failure to enact this reform reflects inertia rather than community sentiment.

Comments on Maki v. Frelk, supra note 25, at 895. *See also* American Trucking Association, Inc. v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397, 416-417 (1967):

> . . . it is true that the attention of Congress had been called to the need for

Only two of the bills reached the floor of either chamber for final passage; both subsequently were killed upon judiciary committee action of the other chamber. In no instance was a bill debated on the floors of both houses.

A review of recent decisions in New Mexico and other jurisdictions fully demonstrates judicial power to change the common law. In *Stang v. Hertz,*[78] the Court adopted a new system for determining recovery in products liability cases, which eliminated the common law need for privity of contract. In *Flores v. Flores,*[79] a 1973 case questioning common law interspousal tort immunity the Court said, "If the common law is not 'applicable to our condition and circumstances' it is not to be given effect."[80] In *Hicks v. State,*[81] the Court, citing a statement by Justice Cardozo,[82] described its power to change the common law in these terms:

> Sovereign immunity was born out of the judicial branch of government, and it is the same branch which may dispose of the doctrine. . . . We concede that there was ample authority which influenced our predecessors in adopting and upholding the doctrine of sovereign immunity. We also say that there is better reasoned authority to overturn it. We simply conclude that its continuance is causing a great degree of injustice.[83]

Hoffman and *Li* similarly exemplify that where common law change is mandated by changing social norms, judicial power to act is clear,[84] and courts may be better suited to effect such change than legislatures.

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action . . . [W]e do not regard this (Congressional rejection) as legislative history . . .

accord The Permian Basin Area Rate Cases, 390 U.S. 747, 780 (1968).

78. 83 N.M. 730, 497 P.2d 732 (1972).

79. 84 N.M. 601, 506 P.2d 345 (Ct. App. 1973).

80. *Id.* at 603.

81. 14 N.M. St. B. Bull. 956 (1975).

82. Cardozo, The Growth of the Law 136-37 (1924),

> A rule which in its origins was the creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by the courts when the mores have so changed that perpetuation of the rule would do injustice to the social conscience.

83. Hicks v. State, 14 N.M. St. B. Bull. 956 (1975). *See also* Green, *The Thrust of Tort Law, Part II: Judicial Law Making,* 64 W.Va. L. Rev. 115, 140 (1962),

> If a court is convinced that justice calls for a pattern of decision different from some decision made by it or some other court under somewhat similar facts at a different period of time, it has the responsibility to do justice in the case before it, and if need be, rectify its formulation of the law. No society could long endure under law that could not be made to respond to the needs of its members.

84. *See, e.g.,* Hoffman v. Jones, 280 So.2d 431, 435 (Fla. 1974) *quoting* Hargrove v. Town of Cocoa Beach, 96 So.2d 130, 132 (Fla. 1957),

> [T]he courts should be alive to the demands of justice. We can see no neces-

The court need not wait for legislative action. The legislative process is complex and time-consuming; any bill is subject to considerations other than the merits of what it proposes.[85] Further, legislatures which have adopted comparative negligence statutes often provide no more detailed guidance for their application than the courts can provide themselves.[86] Trial court judges have been considered capable of administering a newly-adopted comparative negligence system and have been granted broad discretion to handle problem situations as they arose.[87]

Clearly, the legislature is also an appropriate vehicle to effect the change. Ideally, the legislature and the judiciary ought to cooperate in adopting and implementing a workable system.[88]

COMPARATIVE NEGLIGENCE FOR NEW MEXICO

Application of comparative negligence has taken several differing forms. The two most prominent are the "pure" and "modified" forms.[89] Neither form requires that a plaintiff be without fault. Under both the trier of fact must assign a percentage of fault to each party. The two systems achieve different results only when the percentage of fault assigned to the plaintiff exceeds that assigned to the defendant.

As its name implies, pure comparative negligence fully implements the principle of liability based on fault. It provides for reduction of plaintiff's damages in proportion to the amount of negligence attributed to him, even should it exceed the defendant's. The hypothetical plaintiff who was 30 percent at fault[90] recovers $700

sity for insisting on legislative action in a matter the courts themselves originated.

Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal. Rptr. 858, 864-871, 508 P.2d 1226, 1282-1239 (1975). For other examples of court-made changes in tort law, *see* Keeton, *Creative Continuity in the Law of Torts*, 75 Harv. L. Rev. 463 (1962).

85. Comment, 21 U.C.L.A. L. Rev. 1566, *supra* note 1, at 1593; James, *supra* note 25, at 895; Green, *supra* note 83, at 117-18.

86. *See* Schwartz, *supra* note 12, Appendix B, for a compilation of the various comparative negligence statutes of general application in this country. *See also* Leflar, *Comments on Maki v. Frelk*, 21 Vand. L. Rev. 918, 922-923 (1968).

87. Hoffman v. Jones, 280 So.2d 431, 439-40 (Fla. 1974); Li v. Yellow Cab Co., 73 Cal.3d 804, 119 Cal. Rptr. 858, 874, 532 P.2d 1226, 1242 (1975).

88. Note the recent change in composition of the New Mexico Supreme Court, which voted 3-2 against adoption in *Syroid*. One of the Justices voting against adoption, Justice Martinez, has recently retired from the Court. The remaining Justices stood 2-2 on the question. Should their position remain unchanged, any future proposal for judicial adoption of comparative negligence will depend on the position of newly-appointed Justice Sosa.

89. The two other forms, termed "equal division" and "slight-gross," have received little support in this country. For detailed discussions of all four forms, *see* Schwartz, *supra* note 12, at 43-82.

90. *See* text accompanying rule 31, *supra*.

of his $1000 damages. Were he found to be 60 percent at fault, under the pure form his recovery would be $400. Pure comparative negligence has been employed in Mississippi since 1910,[91] and has been adopted by statute in Rhode Island[92] and Washington.[93] It determines the effect of plaintiff's fault under the Federal Employers Liability Act,[94] and is also the form adopted judicially by Florida[95] and California.[96]

Modified comparative negligence, by comparison, apportions damages in the same way provided plaintiff's fault is found to be less than a specified portion, usually 50 percent or 51 percent of total fault. If the plaintiff's negligence exceeds the specified limit, his claim will be barred, just as under contributory negligence. Its proponents contend that modified comparative negligence better comports with notions of fairness which deem it unjust to give the greater wrongdoer a cause of action against the lesser.[97] The hypothetical plaintiff who is 30 percent at fault under the modified form still recovers $700 of his $1000 damages. The result is different from that derived under the pure form, however, when the plaintiff is 60 percent at fault. Such a plaintiff does not recover the $400 which the pure form allows him; instead he is barred from any recovery.

The logic which recommends comparative over contributory negligence[98] similarly recommends the pure form. It comports better with the theory underlying tort compensation. If the objective is to apportion the cost of the accident to the persons who brought it about by reference to the extent of their fault, there is no valid justification for discarding that theory when fault exceeds 50 percent.[99] The modified form, by setting an upper limit for com-

91. Miss. Laws, Ch. 135 (1910), *as amended,* Miss. Laws, Ch. 312 (1920); Miss. Code Annot. § 11-7-75 (1972).

92. R.I. Gen. Laws Annot. § 9-20-4 (1956).

93. Wash. Rev. Code Ann. 4.22.010 (Supp. 1974).

94. 45 U.S.C. § 53 (1970).

95. Hoffman v. Jones, 280 So.2d 431 (Fla. 1974).

96. Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975).

97. *See* Campbell, *Recent Developments of Tort Law in Wisconsin* 76-77 in Comparative Negligence Monograph (Schwartz, ed. 1970). Contrary to this assumption, a negligent plaintiff under pure comparative negligence recovers only that portion of his damages attributable to the defendant.

98. *See* text accompanying notes 14-68 *supra.*

99. *See* Campbell, *supra* note 97, at 77:

> The 50% bar has frequently been supported as a happy compromise which will pacify both the proponents and the opponents of . . . comparative negligence law. It is, however, a compromise with principle.

Id. Prosser adds:

> It appears impossible to justify the rule on any basis except one of pure political compromise.

parison, defeats this objective when the plaintiff's fault exceeds the statutory limit.[100] In effect, it merely "shifts the lottery aspect of the contributory negligence rule to a different ground."[101]

Practical considerations also indicate the superiority of the pure form. Law, by necessity, retains an element of imprecision. Barring plaintiff's recovery on the basis of such hairsplitting retains the harshness which characterizes the contributory negligence system. Wisconsin's experience demonstrates that there is fertile ground for appeal when fault hovers near 50 percent.[102] The pure form avoids burdening appellate courts with "one percent" cases fostered by the modified form. Parties are less likely to appeal if the effect would be only a marginal increase or decrease in damages than if there is a possibility that liability may be avoided entirely. And the pure form seems better suited to promoting out of court settlements because the defendant cannot avoid all liability by virtue of a percentage point in the jury's verdict. Modified comparative negligence would retain some of the uncertainty of its predecessor.

Should the parties, however, opt for litigation, the pure form simplifies the task of the court. It applies one rule which determines the result whenever more than one party is at fault. By comparison, Wisconsin, a modified comparative negligence state, found it necessary to discard its modified approach when faced with the problem of contribution among tortfeasors.[103] The pure form was imported in such cases.

CONCLUSION

The New Mexico Supreme Court has previously declared that this state will follow the lead of other states in tort reform "if the leader is going in the right direction."[104] A majority of American jurisdic-

Supra note 16, at 494. *See also* Keeton, *Comments on Maki v. Frelk*, 21 Vand. L. Rev. 906, 911 (1968).

100. Lawver v. Park Falls, 35 Wis.2d 308, 151 N.W.2d 68 (1967) (Hallowe, C. J., concurring).

101. Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal. Rptr. 858, 874, 532 P.2d 1226, 1242 (1975).

102. Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal. Rptr. 858, 875, 532 P.3d 1226, 1242 (1975).

103. Wisconsin changed from equal division to comparative apportionment amongst tortfeasors by judicial decision. Bielski v. Schulze, 16 Wis. 1, 114 N.W.2d 105 (1962). As Schwartz points out:

> It is important to note in jurisdictions that have comparative negligence legislation similar to Wisconsin's that the Wisconsin Supreme Court has ruled . . . that its "modified" comparative negligence statute has no application to the doctrine of contribution.

Supra note 12, at 48.

104. Stang v. Hertz, 83 N.M. 730, 735, 497 P.2d 732, 737 (1972).

tions now compare fault to apportion damages in tort cases. The history of the doctrine and recent precedent demonstrate that the leaders are going in the right direction. It is time for New Mexico to follow that lead.

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