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JUDICIAL ADOPTION OF COMPARATIVE FAULT IN NEW MEXICO: THE TIME IS AT HAND

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INTRODUCTION

Traditional tort principles establish that a defendant will not be relieved of liability for the consequences of his negligence just because another person's negligence[1] combined with that of the defendant to cause the plaintiff's injury.[2] The common law has long recognized an exception to this rule. Where the plaintiff's injury is brought about not just by the defendant's negligence but also by the plaintiff's negligence, the defendant is relieved completely of liability.[3] This exception, of course, describes the doctrine of contributory negligence.[4] The traditional defense of contributory negligence has long been and remains the law in New Mexico.[5]

The contributory negligence defense is rooted firmly in eighteenth century ethical notions of individual liberty and responsibility and the nineteenth century solicitude for and protection of capital investment in newly developing industries.[6] Thus, the defense of contributory negligence may be viewed as a reflection of "the growth of an individualistic political and economic philosophy which regarded as a

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1. Of course, even if the concurrent cause is one of innocent origin, the same rule applies and the negligent defendant will be held liable for any injuries sustained by the plaintiff. *See* W. Prosser, Law of Torts §41, at 240-41 (4th ed. 1971); Restatement (Second) of Torts §439 (1965).

2. If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present. In particular, however, a defendant is not necessarily relieved of liability because the negligence of another person is also a contributing cause, and that other person, too, is to be held liable.

W. Prosser, Law of Torts §41, at 240-41 (4th ed. 1971). The law in New Mexico is the same. Srader v. Pecos Constr. Co., 71 N.M. 320, 327, 378 P.2d 364, 369 (1963); Crespin v. Albuquerque Gas & Elec. Co., 39 N.M. 473, 478, 50 P.2d 259, 262 (1935).

3. Restatement (Second) of Torts §§463, 467 (1965).

4. *See generally,* W. Prosser, Law of Torts §65, at 416-17 (4th ed. 1971).

5. *See, e.g.,* Moss v. Acuff, 57 N.M. 572, 573, 260 P.2d 1108, 1108 (1953); Werner v. City of Albuquerque, 89 N.M. 272, 274, 550 P.2d 284, 286 (Ct. App. 1976).

6. Contributory negligence as an independent defense is generally traced to the case of Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809). While antecedents to the defense have been noted, see F. Harper & F. James, Law of Torts §22.1, at 1195 (1956), it seems not coincidental that the defense came to full flower at the point of transition from eighteenth century ethics to nineteenth century economics.

great social good freedom of action, in nearly all directions, particularly on the part of the entrepreneurial class."[7] A philosophy exalting individual liberty and responsibility certainly provided ample justification for a rule that made a plaintiff bear the loss where the injury was at least in part the plaintiff's fault.[8]

While this philosophy of individual liberty and responsibility provided the climate for the advent of the contributory negligence defense, the common law's protection of the developing industrial revolution[9] explains the enthusiastic reception of contributory negligence into tort law.[10] As one commentator explains:

> Occasional holdings [of contributory negligence] in the United States were based on the Butterfield v. Forrester doctrine commencing in the 1820s; but it was not until the rapid growth of railroad transportation in the period from 1840-1900 that contributory negligence developed into the most commonly invoked defense in negligence actions. Railroads represented substantial capital investments not to be intruded on by judgments on behalf of the injured or dead.[11]

The contributory negligence defense has also been justified as a

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7. F. Harper & F. James, Law of Torts §22.1, at 1198 (1956). Harper and James go on to describe how these eighteenth century ethical notions were refined to meet the particular needs of the nineteenth century.

> Freedom of action, as understood by the representative philosophers of nineteenth century liberalism, meant freedom from state intervention–judicial or legislative. And a dominant theme throughout their writings is the close identification of material progress and industrial expansion with the laws of nature and the hand of God .... Armed with a social philosophy which relieved it of the care and responsibility for the less fortunate, flushed with visions of an ever-expanding economy, and reassured by its philosophers of the "righteousness" of their role in society, the entrepreneurial class, understandably enough, developed a certain impatience with legal obstacles to the continued march of industrial innovation.

Id. at 1198 n.22.

8. Harper and James have observed that while these ethical notions will support that part of the contributory negligence defense which makes the plaintiff's fault a matter of relevant concern in assessing the extent of liability, they do not support the "all-or-nothing" aspect of the defense which completely bars the plaintiff from recovery. *Id.* at 1198-99, 1207.

9. The law developed in a way which the power-holders of the day considered socially desirable. This way, in brief, was to frame rules friendly to the growth of young businesses; or at least rules judges thought would foster such growth. The rules put limits on enterprise liability. This was the thrust of the developing law of negligence ....

L. Friedman, A History of American Law 262 (1973); *see also* W. Prosser, Law of Torts §65, at 418 (4th ed. 1971).

10. Friedman identifies the development and expansion of the defense of contributory negligence with the expansion of the railroads in the United States. *See* L. Friedman, note 9 *supra*, at 412-13; *see also* F. Harper & F. James, Law of Torts §22.1, 1197-98 (1956).

11. 1 J. Dooley, Modern Tort Law §4.05 (1977) (footnote omitted).

reflection of judicial antagonism toward "plaintiff-minded" juries.[12] Juries made up of the plaintiff's neighbors were notoriously sympathetic to recovery by the plaintiff for injuries sustained at the hands of foreign railroads.[13] The contributory negligence doctrine became a potent tool for the judge to use in controlling the jury. As Friedman colorfully describes:

> The basic idea of contributory negligence was extremely simple. If the plaintiff was negligent himself, ever so slightly, he could not recover from defendant. This was a harsh doctrine, but extraordinarily useful. It became the favored method, by which judges kept tort claims from the deliberations of the jury. The trouble with the jury was that pitiful cases of crippled men suing giant corporations worked on their sympathies. Even men who respect general rules find it hard to resist bending them in individual, touching cases, particularly if victim or victim's next of kin stare into the jury box. For jurors—amateurs all—every case was a onetime cause. Juries showed a deep-dyed tendency to forget the facts that favored the defendant, and find for the plaintiff in personal-injury cases. But if the plaintiff was clearly negligent himself, there could be no recovery, there were no facts to be found, and the case could be taken from the jury and dismissed.[14]

Finally, it has been suggested that the contributory negligence defense served to impose liability on the party who could prevent the accident more efficiently in an economic sense.[15]

It is clear that the contributory negligence defense was compatible with the dominant social, ethical, and economic mores of the nineteenth century. In the twentieth century, however, the doctrine has not been without its critics.[16] The criticism centers primarily on the "all-or-nothing" aspect of the defense, which completely bars the plaintiff from recovery where his fault, no matter how slight, contributes to the injury.[17] Barring the plaintiff completely from recovery has been criticized as unduly harsh.[18] Further, it has been sug-

12. Malone, *The Formative Era of Contributory Negligence,* 41 Ill. L. Rev. 151, 156-58 (1946).

13. *See* F. Harper & F. James, Law of Torts § 22.1, at 1198 (1956).

14. L. Friedman, A History of American Law 412 (1973).

15. R. Posner, Economic Analysis of Law, § 6.3 (2d ed. 1977).

16. It seems fair to say that the doctrine is almost wholly discredited, at least among academics. The list of law review articles and other scholarly works criticizing the doctrine is too long to cite in full. The more influential articles include Green, *Illinois Negligence Law,* 39 Ill. L. Rev. 36, 116, 197 (1944-1945); Leflar, *The Declining Defense of Contributory Negligence,* 1 Ark. L. Rev. 1 (1946-1947); Prosser, *Comparative Negligence,* 51 Mich. L. Rev. 465 (1953).

17. *See, e.g.,* F. Harper & F. James, Law of Torts § 22.3, at 1207-08 (1956).

18. *See* W. Prosser, Law of Torts § 67, at 433 (4th ed. 1971); L. Green, Judge and Jury 119 (1930).

gested that completely barring a plaintiff from recovery is not wholly consistent with the underlying fault premise of negligence that one should be responsible for one's own conduct.[19] As a consequence of the perceived harshness of the contributory negligence bar to recovery, the courts have employed a variety of devices to mitigate the impact of the contributory negligence defense.[20] The doctrine of last clear chance[21] is viewed as such a mitigating device. Moreover, the courts have eliminated or substantially limited the defense of contributory negligence in products liability actions,[22] actions based on the defendant's aggravated conduct,[23] and other actions.[24] Less explicitly, the courts have also confined the contributory negligence defense through hostility to summary judgment on the issue[25] and distortions in the application of proximate cause rules to contributory negligence.[26]

The comparative fault doctrine[27] represents the most explicit and complete reaction against the classical contributory negligence defense. Like contributory negligence, comparative fault recognizes that the plaintiff's misconduct is relevant to the issue of liability arising from an accident.[28] Unlike contributory negligence, however, comparative fault abandons the "all-or-nothing" approach. Instead, the fault of the plaintiff is compared with that of the defendant for purposes of allocating the loss and dividing the damages.[29] Under comparative fault, therefore, a plaintiff's negligence contributing to the injury will not necessarily bar him from recovery. Rather, the extent of the defendant's liability to the plaintiff will be confined to that amount of the loss roughly attributable to the defendant's fault.

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19. [T]here is no justification—in either policy or doctrine—for the rule of contributory negligence, except for the feeling that if one man is to be held liable because of his fault, then the fault of him who seeks to enforce that liability should also be considered. But this notion does not require the all-or-nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim.

F. Harper & F. James, Law of Torts § 22.3, at 1207 (1956).

20. *See id.* at 1207-41; V. Schwartz, Comparative Negligence 5-9 (1974).

21. *See generally* W. Prosser, Law of Torts §66 (4th ed. 1971); F. Harper & F. James, Law of Torts 1241-63 (1956).

22. Restatement (Second) of Torts, §484 (1965).

23. *Id.* §482.

24. *Id.* §483; *see* Werner v. City of Albuquerque, 89 N.M. 272, 274, 550 P.2d 284, 286 (Ct. App. 1976).

25. *See* V. Schwartz, Comparative Negligence 6-7 (1974).

26. *Id.* at 8-9.

27. The more common label for the doctrine is "comparative negligence." However, in order to avoid confusion of the doctrine with contributory negligence and in recognition of the increasing application of the doctrine to actions other than negligence, I will use the label "comparative fault."

28. Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 465 n.2 (1953).

29. V. Schwartz, Comparative Negligence 31 (1974).

This is done by the fact finder who compares the respective faults of the plaintiff and defendant and divides the damages accordingly.

The contributory negligence defense, which flourished in the nineteenth century, must now be recognized as the minority rule, adhered to in an increasingly diminishing number of jurisdictions. Comparative fault has replaced contributory negligence in England,[30] parts of Canada,[31] Ireland,[32] New Zealand,[33] and parts of Australia.[34] In the United States, comparative fault is the majority rule by any standard. Thirty-three states[35] have abandoned the contributory negligence defense and have substituted for it some form of comparative fault. At least three-quarters of the population of the United States is governed by some form of general comparative fault system.[36] The federal courts apply comparative fault in admiralty[37] and Federal Employer's Liability Act[38] cases.

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30. Law Reform (Contributory Negligence) Act of 1945, 8 & 9 Geo. 6, c. 28.

31. *See* Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. Fla. L. Rev. 135, 154 n.109 (1958).

32. The contributory negligence defense was abolished in Ireland and comparative fault substituted by the Civil Liability Act of 1961. *See Contributory Negligence and the Civil Liability Act*, 77 Ir. Jur. 26 (1961).

33. Stat. N. Z. 3, at 29 (1947).

34. *See, e.g.*, Repr. Acts W. Austl. 23 (1947).

35. Alaska: Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Arkansas: Ark. Stat. Ann. §§27-1763 to -1765 (Repl. 1979); California: Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Colorado: Colo. Rev. Stat. §13-21-111 (1973 & Supp. 1978); Connecticut: Conn. Gen. Stat. Ann. §52-572(h) (West Supp. 1979); Florida: Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Georgia: Ga. Code Ann. §§94-703, 105-603 (1978); Hawaii: Haw. Rev. Stat. §663-31 (1976); Idaho: Idaho Code §§6-801, 802, 804 (1979); Kansas: Kan. Stat. Ann. §60-258(a) (1976); Maine: Me. Rev. Stat. Ann. tit. 14, §156 (Supp. 1978-1979); Massachusetts: Mass. Gen. Laws Ann. ch. 231, §85 (West Supp. 1979); Michigan: Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Minnesota: Minn. Stat. Ann. §604.01 (West Supp. 1979); Mississippi: Miss. Code Ann. §11-7-15 (1972); Montana: Mont. Rev. Codes Ann. §58.607.1 (Supp. 1975); Nebraska: Neb. Rev. Stat. §25-1151 (1975); Nevada: Nev. Rev. Stat. §41.141 (1977); New Hampshire: N.H. Rev. Stat. Ann. §507:7-a (Supp. 1977); New Jersey: N.J. Stat. Ann. §2A:15-5.1 to -5.3 (West. Supp. 1979-1980); New York: N.Y. Civ. Prac. Law §§1411-1413 (McKinney 1976); North Dakota: N.D. Cent. Code §9-10-07 (1975); Oklahoma: Okla. Stat. Ann. tit. 23 §§13, 14 (West. Supp. 1979-1980); Oregon: Or. Rev. Stat. §§18.470, 18.475, 18.480, 18.485, 18.490 (1977); Pennsylvania: 42 Pa. Cons. Stat. Ann. §7102 (Purdon 1979 Pamphlet); Rhode Island: R.I. Gen. Laws §9-20-4, 4.1 (Supp. 1978); South Dakota: S.D. Compiled Laws Ann. §20-9-2 (1967); Texas: Tex. Rev. Civ. Stat. Ann. art. 2212(a) (Vernon Supp. 1978-1979); Utah: Utah Code Ann. §§78-27-37, 38, 41 (1977); Vermont: Vt. Stat. Ann. tit. 12, §1036 (1973); Washington: Wash. Rev. Code Ann. §4.22.010 (Supp. 1978); Wisconsin: Wis. Stat. Ann. §895.045 (West Supp. 1978-1979); Wyoming: Wyo. Stat. §1-1-109 (1977).

36. Included in the states adopting comparative fault are some of our most populous states. California (19,953,134); New York (18,241,266); Pennsylvania (11,793,909); Texas (11,196,730); and Michigan (8,875,083) themselves account for more than one-third of the nation's population. *1970 United States Census*, in The World Almanac & Book of Facts 1979 (1978).

37. United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

38. 45 U.S.C. §53 (1976).

Indeed, the substitution of comparative fault principles for the contributory negligence defense has accelerated in recent years. Of the thirty-three states adopting comparative fault, twenty-seven have done so since 1965,[39] and seventeen since 1972.[40]

New Mexico's continued fidelity to the contributory negligence bar to recovery isolates the state from all but one[41] of its neighboring states. Utah,[42] Colorado,[43] Oklahoma,[44] and Texas[45] all have adopted comparative fault principles. New Mexico's adherence to the contributory negligence defense has not been for want of the opportunity to abandon the rule. Since 1957, the New Mexico legislature has considered bills to enact comparative fault no less than six times.[46] The latest attempt was in 1977, when a House Bill providing for a comparative fault system passed the House of Representatives, received a "do pass" recommendation in the Senate Judiciary Committee, and was then killed in the Senate Finance Committee.[47]

In 1974, the New Mexico Supreme Court was presented with the opportunity to abandon the contributory negligence bar to recovery and adopt comparative fault principles. In *Syroid v. Albuquerque Gravel Products Co.*,[48] the plaintiff was injured in an automobile accident. The plaintiff alleged that the accident was caused by the defendant's negligence in design of the roadway. The defendant pled the plaintiff's contributory negligence as a defense. The plaintiff moved to strike the defense on the basis that the contributory negligence defense should be abandoned and that the plaintiff's contributory misconduct should be considered only for purposes of mitigating damages. The trial court denied the motion to strike the

39. Alaska (1975), California (1975), Colorado (1971), Connecticut (1973), Florida (1973), Hawaii (1969), Idaho (1971), Kansas (1974), Maine (1965), Massachusetts (1969), Michigan (1979), Minnesota (1969), Montana (1975), Nevada (1973), New Hampshire (1969), New Jersey (1973), New York (1975), North Dakota (1973), Oklahoma (1973), Oregon (1971), Pennsylvania (1976), Rhode Island (1971), Texas (1973), Utah (1973), Vermont (1969), Washington (1973), Wyoming (1973). *See* note 35 *supra* for statutory citations.

40. Alaska, California, Connecticut, Florida, Kansas, Michigan, Montana, Nevada, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, Texas, Utah, Washington, Wyoming.

41. Arizona, alone of New Mexico's neighbors, retains the contributory negligence defense. Ariz. Const. art. 18, § 5.

42. Utah Code Ann. § § 78-27-37, 38, 41 (1977).

43. Colo. Rev. Stat. § 13-21-111 (1973 & Supp. 1978).

44. Okla. Stat. Ann. tit. 23 § § 13, 14 (West Supp. 1979-1980).

45. Tex. Rev. Civ. Stat. Ann. art. 2212(a) (Vernon Supp. 1978-1979).

46. *See* H.B. 75, 33d Leg., 1st Sess. (1977); H.B. 187, 30th Leg., 1st Sess. (1971); S.B. 178, 29th Leg., 1st Sess. (1969); H.B. 266, 26th Leg., 1st Sess. (1963); S.B. 166, 25th Leg., 1st Sess. (1961); S.B. 108, 23d Leg., 1st Sess. (1957).

47. *See* Journal of the Senate of New Mexico, 33d Leg., 1st Sess. 739.

48. 86 N.M. 235, 522 P.2d 570 (1974).

defense but certified the question for interlocutory review.[49] The question was certified to the supreme court[50] which granted review. A sharply divided court[51] held that the contributory negligence defense would be retained.

> After careful consideration and weighing of the possible benefits to the administration of justice which might reasonably be expected from the adoption of comparative negligence as against the probable harm which might reasonably result from the abandonment of contributory negligence, we feel the better course to pursue is to retain our existing doctrine of contributory negligence.[52]

The *Syroid* decision stands as the last time the highest appellate court of any state has refused to adopt comparative fault principles judicially.[53] Since *Syroid,* the supreme courts of California,[54] Alaska,[55] and Michigan[56] have adopted comparative fault. In addition, the supreme courts of Texas[57] and New Hampshire[58] have adopted comparative fault principles to reach situations not already covered by their states' comparative fault statutes.

These developments strongly suggest that the eventual adoption of comparative fault principles in New Mexico is inevitable and that the time for such a change is at hand. Whatever were the merits of the *Syroid* decision when it was decided, subsequent events have undermined its authority.[59] After a brief description of the different types of comparative fault systems, the remainder of this article will explore the issues involved in judicial adoption of comparative fault principles: (1) whether the court is an appropriate agency to effect the change from contributory negligence to comparative fault, and (2) whether the contributory negligence doctrine should be repudiated.

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49. N.M. Stat. Ann. § 39-3-4 (1978).
50. N.M. Stat. Ann. § 34-5-14 (1978).
51. The majority opinion by Justice Oman was concurred in by Justices Montoya and Martinez. Chief Justice McManus and Justice Stephenson dissented. None of the five justices who participated in the *Syroid* decision remains on the court.
52. 86 N.M. at 237, 522 P.2d at 572.
53. Since *Syroid,* one intermediate appellate court has refused to adopt comparative fault principles. *See* Chandler v. Mattox, 544 S.W.2d 85 (Mo. Ct. App. 1976).
54. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
55. *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975).
56. *See* Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979).
57. General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977).
58. Thibault v. Sears, Roebuck & Co., 119 N.H. ____, 395 A.2d 843 (1978).
59. Recently, the New Mexico Supreme Court, in dicta, indicated its continued adherence to the contributory negligence defense. *See* Commercial Union Assurance Cos. v. Western Farm Bureau Ins. Cos., 18 N.M. St. B. Bull. 830, 831 (Nov. 15, 1979). This case is discussed in the text at notes 196-210 *infra.*

TYPES OF COMPARATIVE FAULT SYSTEMS

The term "comparative fault" encompasses a variety of systems that apportion the costs of an accident according to the relative faults of the parties. The systems extant in the United States differ in two areas. First, there are two different ways a state may treat the plaintiff when his fault is greater than that of the defendant. Some states[60] have adopted a "pure" form of comparative fault whereby a plaintiff may recover from a defendant even if the plaintiff's fault was greater than that of the defendant. On the other hand, some states[61] have adopted a "modified" form of comparative fault whereby the plaintiff will be barred completely from recovery if his fault is found to be of a certain degree, as compared to that of the defendant.

Second, the extent of application of the comparative fault system differs. Some states[62] have given their comparative fault principles expansive application, extending the concept to such areas as strict tort liability[63] and nuisance[64] and using the new comparative fault regime as an opportunity to abandon prior common law distinctions.[65] Other states,[66] however, have chosen to confine the application of their newly adopted comparative fault principles to actions that traditionally sounded in negligence.

"Pure" vs. "Modified" Comparative Fault

While, of course, there is only one kind of pure comparative fault system, there are three different modified comparative fault systems. There is the "slight/gross" system in which the plaintiff remains barred from recovery unless his contributory fault is "slight" as compared to the defendant's "gross" fault.[67] Where the plaintiff's fault is slight and the defendant's gross, the plaintiff is allowed to recover, but his damages are diminished in an amount attributable to his fault.

60. *See, e.g.*, New York Civ. Prac. Law §1411 (McKinney 1976); *see generally* V. Schwartz, Comparative Negligence 46-47 (1974).

61. *See, e.g.*, Wis. Stat. Ann. §895.045 (West Supp. 1978-1979); *see generally* V. Schwartz, Comparative Negligence 32-33 (1974).

62. *See, e.g.*, New York Civ. Prac. Law §1411 (McKinney 1976); Me. Rev. Stat. tit. 14, §156 (Supp. 1978-1979).

63. *See* Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

64. *See* Schiro v. Omental Realty Co., 272 Wis. 537, 76 N.W.2d 355 (1956).

65. *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 825, 532 P.2d 1226, 1241, 119 Cal. Rptr. 858, 873 (1975).

66. *See, e.g.*, Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974).

67. *See* Neb. Rev. Stat. §25-1151 (Supp. 1978); S.D. Comp. Laws Ann. §20-9-2 (1967).

The second type of modified system bars the plaintiff from recovery where his fault is equal to, or greater than, the defendant's.[68] Thus, if a fact finder were to determine that the plaintiff and the defendant were equally at fault, the plaintiff would be barred from recovery. The third type of modified system allows a plaintiff to recover damages unless his fault was greater than that of the defendant.[69] Thus, if the fact finder were to find the plaintiff and the defendant equally culpable, the plaintiff would be allowed to recover, but his damages would be reduced in an amount attributable to his own fault.

The "slight/gross" system has been adopted in only two states.[70] Both states adopted comparative fault quite early[71] in the experiment; the particular formulation they chose may be viewed as reflecting a hesitancy in their commitment to the new order. The modified approach to comparative fault is dominated by the latter two types of systems which differ only with respect to whether the plaintiff should be allowed any recovery where the plaintiff and defendant are equally at fault in the accident. Since a finding that the plaintiff and defendant are equally at fault in an accident is quite common,[72] this difference is of considerable importance.

Of these latter two variants, the system which barred the plaintiff from recovery where he and the defendant were equally at fault originally was the more popular.[73] Recently, however, the trend appears to be moving in favor of allowing the plaintiff to recover where his fault is equal to the defendant's. The most recent legislative adoptions of comparative fault have enacted this system,[74] and some states that originally followed the former system have amended their statutes to allow the plaintiff to recover where both parties were equally at fault.[75] A likely reason for this trend is that allowing the plaintiff recovery is perceived to be more consonant with the underlying premises of comparative fault.[76] Additionally, in those states in which the jury is prohibited from being informed of the

68. *See, e.g.*, Colo. Rev. Stat. §13-21-111 (1973 & Supp. 1978); Utah Code Ann. §78-27-37 (1977).

69. *See, e.g.*, N.H. Rev. Stat. Ann. §507:7-a (Supp. 1971); Vt. Stat. Ann. tit. 12, §1036 (1973).

70. The two states adopting the "slight/gross" system are Nebraska and South Dakota. *See* note 67 *supra.*

71. *See* 1913 Neb. Laws, ch. 124; 1941 S.D. Sess. Laws, ch. 160.

72. *See* Fleming, *Forword to Comparative Negligence At Last–By Judicial Choice*, 64 Calif. L. Rev. 239, 245 (1976).

73. *See* V. Schwartz, Comparative Fault 76 (1974).

74. *See, e.g.*, 42 Pa. Cons. Stat. Ann. §7102 (Purdon 1979 Pamphlet).

75. *See, e.g.*, 1971 Wis. Laws, ch. 47.

76. *See* text at notes 101-02 *infra.*

legal effect of its deliberation,[77] the former system is perceived to be particularly prejudicial to plaintiffs.[78]

As between pure and modified comparative fault systems, the courts and the commentators clearly prefer the pure system of comparative fault. Every court that has adopted comparative fault judicially has elected to have the pure form.[79] In selecting the pure form of comparative fault, the California Supreme Court noted:

> We have concluded that the "pure" form of comparative negligence is that which should be adopted in this state. In our view the [modified] system simply shifts the lottery aspect of the contributory negligence rule to a different ground . . . . In effect "such a rule distorts the very principle it recognizes, i.e., that persons are responsible for their acts to the extent their fault contributes to an injurious result. The [modified system] simply lowers, but does not eliminate, the bar of contributory negligence . . . ."[80]

In electing to have a pure form of comparative fault, the Michigan Supreme Court considered that a modified form created an unjust enrichment of the defendant by allowing him to avoid having to pay for injuries he had caused.[81] The Alaska Supreme Court noted that the pure comparative fault system "is the simplest to administer and [the one] which is best calculated to bring about substantial justice in negligence cases."[82] Most commentators also have found the pure form of comparative fault to be more compatible with the underlying premises of comparative fault.[83]

Application of Comparative Fault Beyond Negligence Actions

Among the existing comparative fault systems, there are substantial differences in the application of the systems beyond negligence actions. Each state judicially adopting comparative fault has given

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77. *See, e.g.*, Avery v. Wadlington, 186 Colo. 158, 526 P.2d 295 (1974).

78. *See* Fleming, *supra* note 72, at 245.

79. *See* Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

80. Li v. Yellow Cab Co., 13 Cal. 3d 804, 827-28, 532 P.2d 1226, 1242-43, 119 Cal. Rptr. 858, 874-75 (1975) (footnotes omitted).

81. Placek v. City of Sterling Heights, 405 Mich. 638, ____, 275 N.W.2d 511, 519 (1979) (quoting Kirby v. Lawson, 400 Mich. 585, 643, 256 N.W.2d 400, 427-28 (1977).

82. Kaatz v. State, 540 P.2d 1037, 1044 (Alaska 1975).

83. *See, e.g.*, Fleming, *supra* note 72, at 246-47; Schwartz, *Judicial Adoption of Comparative Negligence–The Supreme Court of California Takes a Historical Stand,* 51 Ind. L.J. 281, 288 (1976).

the principles expansive application beyond traditional negligence actions.[84]

Where the comparative fault system has been adopted by legislative action, the application of comparative fault beyond negligence actions depends on statutory construction and the perception by the courts of the policies underlying the comparative fault principles. Some comparative fault statutes are written in broad terms, evidencing a legislative intent for expansive application. Thus, New York's statute, by its terms, applies "in any action to recover damages for personal injury, injury to property, or wrongful death."[85] The legislative reports accompanying the act clearly establish a legislative intent to give the act the widest possible application. "[T]his [statute] is applicable not only to negligence actions, but to all actions brought to recover damages for personal injury, injury to property or wrongful death whatever the legal theory upon which the suit is based."[86]

Even when the statute is written in terms of "negligence,"[87] some courts have found the policies underlying comparative fault to warrant a wider application and have construed the statutes to have application beyond negligence.[88] Thus, in construing the Kansas comparative fault statute[89] to apply to strict tort liability actions, a federal district court reasoned:

> We must remember that the "business" or "society" which bears the cost of a plaintiff's strict liability recovery refers in reality to other users of the manufacturer's product since the cost is inevitably passed on. Why is it desirable to transfer to these third parties the cost of that part of a plaintiff's injury which is attributable to his own culpable conduct? . . .
>
> . . . The same equitable considerations which underlie comparative liability and militate against barring a culpable plaintiff must also work in favor of a defendant who does not bear all the blame for the injury.[90]

84. *See* Butaud v. Suburban Marine Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Mich. Comp. Laws Ann. § §600.2945-.2949 (Supp. 1979-1980).

85. N.Y. Civ. Prac. Law § 1411 (McKinney 1976).

86. McKinney's 1975 Session Laws of New York at 1484.

87. *See, e.g.*, Hawaii Rev. Stat. §663-31 (1976).

88. *See, e.g.*, Dippel v. Sciano, 37 Wis. 2d 443, ____, 155 N.W.2d 55, 64 (1967); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 603 (D. Idaho 1976); Stueve v. American Honda Motors Co., 457 F. Supp. 740, 754 (D. Kan. 1978).

89. Kan. Stat. Ann. §60-258(a) (1976), which provides, in pertinent part that "contributory negligence . . . shall not bar [a] party . . . from recovering damages for negligence . . . ."

90. Stueve v. American Honda Motors Co., 457 F. Supp. 740, 754 (D. Kan. 1978).

Some courts have construed their comparative fault statutes narrowly, confining the application of the statute to traditional negligence actions.[91] Even in these instances, however, the impetus toward wider application of comparative fault principles could not be restrained. Thus the supreme courts of New Hampshire[92] and Texas[93] construed their comparative fault statutes to apply only to negligence actions and refused to apply the statutes to strict tort liability actions. Both courts went on, however, to adopt judicially comparative fault concepts to govern strict tort liability actions.

Occasionally, a court's narrow construction of its state's strict tort liability statute provokes a response by the legislature. Thus, in 1976 the Connecticut Supreme Court construed the Connecticut statute not to apply to strict tort liability actions.[94] The next year, the Connecticut legislature enacted a statute that extended comparative fault principles to such actions.[95]

While differences remain among the jurisdictions concerning the application of comparative fault principles, a definite trend may be discerned. The legislatures are expanding the application of comparative fault either through expansive wording of original enactments[96] or through later amendments[97] explicitly designed to extend the scope of the preexisting statute. The courts are taking a similarly expansive approach. Where comparative fault principles are adopted through judicial decision, expansive application appears inevitable.[98] In construing comparative fault statutes, the courts typically construe the statutes broadly.[99] Even when the courts feel constrained by the statutory language, they have moved on their own to extend the reach of comparative fault.[100]

Common Characteristics Among Comparative Fault Systems

While there is a wide variety of comparative fault systems, they all share three common characteristics. First, comparative fault is designed to facilitate recovery by plaintiffs. Just as the contributory negligence defense reflected the nineteenth century protectionist

91. *See, e.g.,* Kinard v. Coats Co., 37 Colo. App. 555, 553 P.2d 835 (1976); Brown v. Link Belt Corp., 565 F.2d 1107 (9th Cir. 1977).
92. Thibault v. Sears, Roebuck & Co., 119 N.H. ____, 395 A.2d 843 (1978).
93. General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977).
94. Hoelter v. Mohawk Servs., Inc., 170 Conn. 495, 365 A.2d 1064 (1976).
95. Conn. Gen. Stat. Ann. § 52-572(1) (West Supp. 1979).
96. *See, e.g.,* N.Y. Civ. Prac. Law § 1411 (McKinney 1976).
97. *See* 1975 Or. Laws, ch. 599.
98. *See* text at notes 84 *supra.*
99. *See* text at notes 87-90 *supra.*
100. *See* text at notes 92-93 *supra.*

attitude toward industrial defendants,[101] comparative fault reflects the distinctly twentieth century preference for compensation.[102]

Second, comparative fault systems emphasize fault as a basis for defining the scope of liability. One of the criticisms of the contributory negligence defense is the recognition that barring the plaintiff from recovery often relieves the defendant from responsibility for injuries occasioned by the defendant's fault. As such, contributory negligence is inconsistent with fault-based liability.[103] Comparative fault is intended to reaffirm and emphasize fault as the basis of liability. In this respect, comparative fault may be at cross-currents with the twentieth century trend toward liability based on no-fault concepts.[104]

Finally, comparative fault reflects a shift in the balance of responsibilities between the judge and the jury in accident litigation. The contributory negligence defense arose out of an antagonism toward the jury and was used as a tool by judges to exercise control over jury discretion.[105] Comparative fault necessarily reposes more responsibility in the jury. Under comparative fault systems, more cases go to the jury and the scope of jury discretion is widened.

JUDICIAL ADOPTION OF COMPARATIVE FAULT PRINCIPLES

Comparative fault has been around for a long time. The doctrine has been applied in actions under certain federal statutes[106] and in at least three states[107] since the beginning of the twentieth century. It was not until the 1960's, however, that comparative fault principles "turned the corner" and were widely adopted.[108] These early experiments were all effected through legislative enactment.[109]

The legislative approach to adoption of comparative fault principles has been criticized as "arduous, unpredictable, and full of

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101. *See* text at notes 9-11 *supra.*

102. *See* Restatement (Second) of Torts §402A, Comment c (1965).

103. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 811, 532 P.2d 1226, 1230, 119 Cal. Rptr. 858, 862 (1975).

104. *See* Kinard v. Coats Co., Inc., 37 Colo. App. 555, ____, 553 P.2d 835, 837 (1976).

105. *See* text at notes 12-14 *supra.*

106. Comparative fault has been applied pursuant to the Jones Act, 46 U.S.C. §688 (1976) and the Federal Employers' Liability Act, 45 U.S.C. §53 (1976), since 1920 and 1908, respectively.

107. Georgia's adoption of comparative fault dates back to the nineteenth century. *See* Ga. Code §§2914, 2979 (1863). Mississippi first adopted comparative fault in 1910. *See* 1910 Miss. Laws, ch. 135. Nebraska adopted comparative fault in 1913. *See* 1913 Neb. Laws, ch. 124.

108. *See* V. Schwartz, Comparative Negligence 11-16 (1974).

109. *Id.*

snares and chicanery."[110] Until the late 1960's, however, judicial adoption of comparative fault was nothing more than an academic's pipedream.[111] In 1967, the intermediate appellate court[112] in Illinois, at the invitation of the supreme court,[113] considered whether comparative fault principles should be adopted judicially. The court accepted the supreme court's invitation and held that it would substitute comparative fault principles for the preexisting contributory negligence defense.[114] On appeal again to the supreme court, the court had second thoughts and reversed, holding that change to comparative fault must await legislative action.[115]

While the judicial adoption of comparative fault in Illinois was stillborn, it did serve to focus considerable attention on the issue by the leading tort scholars and commentators of the day.[116] Such attention portended further attempts at judicial adoption which were not long in coming. In 1973, the Supreme Court of Florida responded favorably to the notion and adopted comparative fault principles. In *Hoffman v. Jones*,[117] the court considered the change from the contributory negligence defense to comparative fault principles to be within the province of the court:

> We are, therefore, of the opinion that we do have the power and authority to reexamine the position we have taken in regard to contributory negligence and to alter the rule we have adopted previously in light of current "social and economic customs" and modern "conceptions of right and justice."[118]

The Florida Supreme Court's judicial adoption of comparative fault clearly broke the logjam and encouraged litigants to raise the issue in other courts. In 1975, the California Supreme Court held that the substitution of comparative fault principles for the contributory negligence defense was a matter that could be accomplished through judicial decision. In *Li v. Yellow Cab Co.*,[119] the court adopted a pure form of comparative fault. The commentators wel-

110. Fleming, *supra* note 72, at 241.

111. *See, e.g.*, Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 Minn. L. Rev. 265, 304-07 (1963); Keeton, *Creative Continuity in the Law of Torts*, 75 Harv. L. Rev. 463, 508-09 (1962).

112. Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967).

113. *Id.* at ____, 229 N.E.2d at 285.

114. *Id.* at ____, 229 N.E.2d at 291.

115. Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

116. *See, e.g.*, Symposium, *Comments on Maki v. Frelk–Comparative v. Contributory Negligence: Should the Court or Legislature Decide?* 21 Vand. L. Rev. 889 (1968).

117. 280 So. 2d 431 (Fla. 1973).

118. *Id.* at 436.

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

comed the *Li* decision not only for the cogency of its opinion but also for the prestige of the court.[120]

After the California Supreme Court's decision in *Li,* two more jurisdictions adopted comparative fault by judicial decision. In *Kaatz v. State,*[121] decided shortly after *Li,* the Supreme Court of Alaska adopted comparative fault principles. In *Kirby v. Larson,*[122] three justices[123] of the Michigan Supreme Court, writing the opinion of the court, purported to adopt comparative fault principles. The opinion relied heavily on the decisions of the Florida, Alaska, and California courts.[124] Two years later, the Michigan Supreme Court reaffirmed the *Kirby* decision and held that the contributory negligence bar to recovery would be replaced with comparative fault principles.[125]

Four cases do not make a trend, and the six years since the Florida Supreme Court's decision in *Hoffman v. Jones*[126] hardly provide an opportunity for extensive consideration of, and reflection on, the issues raised by judicial adoption of comparative fault. This does not mean, however, that no conclusions may be drawn from the experience since the *Hoffman* decision. It is certainly fair to say that the decisions have lent a legitimacy to the claim that judicial adoption of comparative fault is appropriate. Moreover, there can be no doubt that the various factors involved in judicial adoption now receive more careful consideration than they received ten years ago. Finally, it can safely be predicted that more litigants will raise the issue in coming years.

The cases establish the framework for analyzing the claim that the judiciary ought to substitute comparative fault principles for the preexisting contributory negligence bar to recovery. Two issues arise when the claim is presented: (1) Is the court an appropriate agency to effect the substitution? and (2) Should the contributory negligence bar to recovery be repudiated? When the New Mexico Supreme Court considered the question of judicial adoption of comparative fault in *Syroid v. Albuquerque Gravel Products Co.,*[127] the court employed that analysis.

In rejecting the invitation to adopt comparative fault principles, the

120. *See, e.g.,* Fleming, *supra* note 72, at 274.
121. 540 P.2d 1037 (Alaska 1975).
122. 400 Mich. 585, 256 N.W.2d 400 (1977).
123. The court was evenly split on the issue, with one justice not participating.
124. 400 Mich. at ____, 256 N.W.2d at 421-25.
125. Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979).
126. 280 So. 2d 431 (Fla. 1973).
127. 86 N.M. 235, 522 P.2d 570 (1974).

court rested its decision on the second issue. The court felt it unnecessary to consider whether a court is the proper agency to substitute comparative fault for contributory negligence[128] and, instead, refused to repudiate the contributory negligence defense.

The court advanced six reasons why the contributory negligence defense should not be rejected. *First,* the court noted that only one court had rejected the contributory negligence doctrine and that at least five courts had retained contributory negligence in response to the challenge.[129] *Second,* the court pointed out that only twenty-one states had adopted comparative fault principles, of which only four had adopted comparative fault in its pure form.[130] *Third,* the court was unconvinced that the contributory negligence defense was as "harsh as has been imagined and urged by its critics."[131] The court pointed to several existing common law developments that served to mitigate the harshness of the contributory negligence defense.[132] *Fourth,* the court concluded that the contributory negligence defense was a more workable system than a comparative fault system.[133] The court emphasized that it considered it to be impossible for a jury to determine "precise percentage of culpable negligence of each of the tortfeasors."[134] *Fifth,* the court chastised the proponents of the comparative fault principle for addressing only the defects in the contributory negligence defense and for failing to demonstrate affirmatively the superiority of comparative fault.[135] *Finally,* the court appeared to infer from the failure of the legislature to pass any of the comparative fault legislative proposals a policy judgment by the legislature against comparative fault.[136]

Is the Court a Proper Agency to Effect the Change?

The question of the propriety of judicial adoption of comparative fault is one that has excited considerable attention among academics.[137] When the courts are convinced that the contributory negligence defense is discredited, however, they have expressed little reluctance to take on the task themselves.[138]

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128. *Id.* at 235-36, 522 P.2d at 570-71.
129. *Id.* at 236, 522 P.2d at 571.
130. *Id.* at 237, 522 P.2d at 572.
131. *Id.*
132. *Id.* at 237-38, 522 P.2d at 572-73.
133. *Id.* at 238, 522 P.2d at 573.
134. *Id.*
135. *Id.*
136. *Id.*
137. *See, e.g.,* V. Schwartz, Comparative Negligence 351-65 (1974); Fleming, *supra* note 72, at 273-82.
138. *See* cases cited at note 79 *supra.*

The arguments that support the power of the court to effect a change from contributory negligence to comparative fault appear overwhelming. The obvious point of departure in any analysis lies in the recognition that the courts, as well as the legislature, retain the power to alter the common law.[139] It is universally recognized that the contributory negligence doctrine arose in and was nourished by common law courts.[140] For the courts to claim that the burden of correcting the defects and inequities created by a doctrine of the court's own making seems unreasonable. As the Florida Supreme Court stated in *Hoffman v. Jones*[141] in adopting comparative fault: "Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule."[142]

The New Mexico courts consistently have recognized the power of common law courts to alter common law rules when those rules are in need of change. Indeed, in the area of tort law, the New Mexico courts have taken a particularly activist role. Over the past ten years, the New Mexico courts have abolished such traditional tort defenses as sovereign immunity[143] and interspousal tort immunity.[144] The supreme court also has invalidated the "Guest Statute"[145] and abolished the defense of assumption of the risk in negligence actions and merged that defense into the contributory negligence defense.[146] The court's activism has not been confined to the elimination or modification of defenses. In *Stang v. Hertz Corp.*,[147] the supreme court adopted strict tort liability as a theory governing a manufacturer's or seller's liability for injuries sustained through defective products.

In abolishing the defense of sovereign immunity, the New Mexico Supreme Court traversed the issue of the power of the court to alter long-standing common law rules.[148] The court noted that the defense of sovereign immunity was a creation of the judiciary "and, therefore, can also be put to rest by the judiciary."[149] The court then addressed the contention that the statute[150] declaring the com-

139. *See* Placek v. City of Sterling Heights, 405 Mich. 638, 644, 275 N.W.2d 511, 517 (1979); United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975).
140. *See* Kaatz v. State, 540 P.2d 1037, 1047 (Alaska 1975).
141. 280 So. 2d 431 (Fla. 1973).
142. *Id.* at 436 (citation omitted) (emphasis removed).
143. Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975).
144. Maestas v. Overton, 87 N.M. 213, 531 P.2d 947 (1975).
145. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).
146. Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971).
147. 83 N.M. 730, 497 P.2d 732 (1972).
148. Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975).
149. *Id.* at 590, 544 P.2d at 1155.
150. N.M. Stat. Ann. §38-1-3 (1978).

mon law to be the rule of practice in New Mexico withdrew from the courts the ability to alter preexisting common law rules.

> Defendant contends the common law rule must be applied because by statute the common law rule is the rule of practice and decision in New Mexico. [Citations omitted.] The answer is that *the common law is not the rule of practice and decision if "inapplicable to conditions in New Mexico." . . . If the common law is not "applicable to our conditions and circumstances" it is not to be given effect.*[151]

Over the past decade the New Mexico courts have demonstrated clearly that they see themselves as playing a primary role in the shaping of common law rules governing tort actions. It seems unlikely that the court will retreat from that role now and abdicate its power in this area to the legislature.

Recognizing that the courts have the power to adopt comparative fault does not end the inquiry, however. It remains to be determined whether the court is a better agency than the legislature to effect the change to comparative fault. Resolution of this question involves inquiries into three areas: (1) whether the court or the legislature is better able to understand the problem, (2) whether the court or the legislature is better able to fashion and implement a solution, and (3) whether the court or the legislature is more capable of ensuring fairness to all interested parties.

One noted commentator has suggested that the problems involved in the decision whether to substitute comparative fault for the contributory negligence defense are uniquely within the court's understanding. In commenting on the California Supreme Court's adoption of comparative fault in *Li v. Yellow Cab Co.*,[152] Professor John Fleming stated: "[O]n the question of contributory negligence, one cannot very well dispute the unique judicial experience and preoccupation, after daily confrontation with it over more than a century and a record of continuing refiguration . . . . In a nutshell, this is preeminently lawyer's law."[153]

Additionally, the courts are uniquely capable of understanding the virtues of comparative fault. As discussed elsewhere,[154] the primary virtues of comparative fault may be found in its consonancy with the underlying fault premise of negligence. It is the courts that are

151. 88 N.M. at 590, 544 P.2d at 1155 (quoting from Flores v. Flores, 84 N.M. 601, 603, 506 P.2d 345, 347 (Ct. App. 1973).

152. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

153. Fleming, *supra* note 72, at 279-80.

154. *See* text accompanying note 19 *supra.*

charged with the primary administration of negligence law. In that capacity, they must inquire constantly into the fault premises of negligence and the application of those premises to varying circumstances. Certainly, as between the courts and the legislature, it is the courts that have the greater claim to expertise. Finally, any problem created by the implementation of a newly adopted comparative fault system will most likely arise in judicial administration of the new system (*e.g.*, application to torts other than negligence, modifications of related doctrines, accommodating the shift of responsibility between judge and jury). Again, with respect to these problems, the courts clearly appear the more appropriate forum for consideration.

One of the most persistent arguments in favor of deferring to legislative action in the adoption of comparative fault principles is that the implementation of an entirely new regime, such as comparative fault, is a particularly legislative activity.[155] Proponents of this argument identify the adoption of a comparative fault system as a reform requiring extensive consideration of a wide variety of problems. They conclude that such consideration is fundamentally inconsistent with the primary judicial function of deciding the particular controversy before the court. They argue that courts should never undertake a task that cannot be fully accomplished in the case before the court. Under this argument, the legislature is the only body that can accomplish such an extensive implementation through a comprehensive statute.[156]

Experience has not borne out the validity of this argument. Careful reflection on the judicial process reveals that inherent in judicial decision-making is the potential that a particular decision will have widespread ramifications and will open up new questions to be answered.[157] Courts are not wholly incapable of dealing with the ramifications of, and loose ends created by, their own decisions. As one commentator noted:

> [C]ourts can . . . anticipate several of the most important of these questions and thus dispose with the need for having them later explored at the cost of future litigants. Far from deserving rebuke for dealing with hypotheticals, this practice reveals courts as being on occasion at least as well equipped as legislatures in laying down a reasonably comprehensive blueprint of reform.[158]

155. *See* V. Schwartz, Comparative Negligence § 21.6, at 354-55 (1974).

156. *See* Fleming, *supra* note 72, at 280.

157. The United States Supreme Court's decision in Brown v. Board of Educ., 347 U.S. 483 (1954), is a good example of such a case. In *Brown*, the Supreme Court expressly reserved for later consideration the "problems of considerable complexity" involved in applying its decision that racial segregation in public school education was unconstitutional. 347 U.S. at 495.

158. Fleming, *supra* note 72, at 281.

Moreover, it is not all that clear that all ramifications of the adoption of comparative fault need be addressed in advance and that all loose ends need be tied up. It is well recognized that the adoption of comparative fault will require numerous refinements and adjustments in collateral doctrines.[159] At least some of these questions may best be resolved in the context of specific controversies which will highlight any conflicting interests and policies. Dealing with these problems on an ad hoc basis over an extended period of time will allow the courts to gain experience in the problems inherent in the administration of the new system and the policies underlying it.

Finally, the optimism that legislative adoption of comparative fault will be accomplished through sweeping and comprehensive statutory schemes appears unjustified. "[A]lmost all comparative negligence statutes are also in the briefest conceivable form and leave the very same ancillary questions likewise to the courts for future solution."[160] Even where the legislature has attempted to address specific problems of application,[161] this has not obviated the need for judicial intervention.[162]

The third factor to be considered in determining the relative superiority of the court or the legislature as the agency to adopt comparative fault principles is the consideration of which body is more capable of ensuring fairness to the parties affected by the adoption and implementation of comparative fault. Two elements of fairness are involved here: (1) whether the system adopted is a fair one, and (2) whether the population is given a fair opportunity to adjust to the new system.

Most observers identify the pure form of comparative fault as fairer than the modified systems.[163] Every court which has adopted comparative fault judicially has chosen the pure form. On the other hand, the modified form is more popular with the legislatures.[164] It

159. *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 823-29, 532 P.2d 1226, 1239-44, 119 Cal. Rptr. 858, 871-76 (1976).

160. Fleming, *supra* note 72, at 281. A good example is the New York comparative fault statute, N.Y. Civ. Prac. Law §1411 (McKinney 1976), which provides, in full:

> In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

161. *See* 1973 Mass. Acts ch. 1123.

162. *See* Graci v. Damon, 78 Mass. App. Ct. Adv. Sh. 273, 374 N.E.2d 311, *aff'd*, 78 Mass. Adv. Sh. 3129, 383 N.E.2d 842 (1978).

163. *See, e.g.*, Fleming, *supra* note 72, at 246-47.

164. *Id.* at 244.

is at least a reasonable inference that the courts, free of lobbyists and pressure groups, are institutionally more capable of selecting the fairer comparative fault system.

It is sometimes contended that the legislature, with its ability to postpone the application of the newly adopted comparative fault system through a purely prospective statute, is inherently more capable than the courts in providing interested parties with a fair opportunity to adjust to the new system.[165] This argument hardly seems persuasive. First, it is doubtful whether there is any extensive reliance on the contributory negligence defense requiring time for accommodation.[166] The most likely arena in which accommodation will be necessary is in the courts, where lawyers, judges, and juries will have to adjust to the new system. The courts are at least equally as capable as the legislature in identifying the necessary accommodations to be made in the litigation process and in implementing them.

Even where time may be needed in order for parties to accommodate the newly adopted comparative fault system, the courts are not without the ability to provide such time. All the courts which have judicially adopted comparative fault have employed a limited retroactive application.[167] In the rare situation where the courts have determined that purely prospective application of the new rule is warranted, the courts have accorded their decisions purely prospective effect.[168]

In conclusion, there appears to be little controversy over the issue of whether the courts are appropriate agencies to effect the change from the contributory negligence defense to comparative fault. The real issue is whether the court or the legislature is the better agency

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165. *Id.* at 281.

166. In Godfrey v. State, 84 Wash. 2d 959, ____, 530 P.2d 630, 632 (1975), the court addressed the point in a different context.

> "Turning to the instant case, it must be noted that respondent does not argue that it, or any other defendant, would have relied on the common law bar to recovery provided by contributory negligence when committing the alleged tort of negligence. It almost goes without saying that the existence or lack of such an affirmative defense has no effect on the every day conduct of individuals. Defendants do not act less negligently or more so because of the presence or absence of an affirmative defense of contributory negligence. One cannot have a vested right in a tort defense the merits of which cannot be determined until trial and upon which he does not and cannot rely in the initial injury to a plaintiff.

167. *See* Placek v. City of Sterling Heights, 405 Mich. 638, ____, 275 N.W.2d 511, 520-22 (1979); Kaatz v. State, 540 P.2d 1037, 1050 (Alaska 1975); Li v. Yellow Cab Co., 18 Cal. 3d 804, 830, 532 P.2d 1226, 1244, 119 Cal. Rptr. 858, 876 (1975); Hoffman v. Jones, 280 So. 2d 431, 439-40 (Fla. 1973).

168. *Cf.* Hicks v. State, 88 N.M. 588, 593-94, 544 P.2d 1153, 1158-59 (1976) (prospective effect given to overruling governmental immunity from tort liability).

to effect the change. It seems clear that the court is particularly well suited for that purpose.

Should the Contributory Negligence Defense Be Repudiated?

The second issue that must be addressed by a court considering judicial adoption of comparative fault principles is whether the contributory negligence defense should be repudiated. Resolution of this issue involves a balancing of the respective defects and virtues of the contributory negligence defense and the comparative fault doctrine. The court must also consider whether the doctrine of stare decisis should dissuade the court from repudiating the contributory negligence defense. Finally, the court must consider the effect of the refusal of the legislature to enact comparative fault legislation.

The criticisms of the contributory negligence defense have already been described.[169] The primary benefits of the contributory negligence defense are found in the simplicity of its administration and the claim that the contributory negligence defense is less costly to society.

There is no doubt that the contributory negligence defense is an easier system to operate than is the comparative fault doctrine. The all-or-nothing approach of the contributory negligence defense creates relatively simple issues for the jury to resolve. While the question of whether the plaintiff's conduct constituted contributory negligence or not may be a difficult one, once that is determined, the jury's work is exceedingly simple: the plaintiff wins or loses. On the other hand, the comparative fault doctrine introduces several other issues that must be resolved by the jury. Not only must the jury determine whether the plaintiff was at fault, but if it does so determine, it must determine the following issues: (1) the degree of the plaintiff's culpability as compared to the defendant's (and perhaps third parties'),[170] (2) the assignment of a percentage to the respective faults of the parties, and (3) the application of the relative culpability to the damages sustained in order to apportion the loss. Critics of comparative fault have identified at least the first two of these additional issues as difficult, if not impossible, for the jury to decide.[171] Added to these difficulties is consideration of the administrative problems that necessarily arise in the transition from contributory negligence to comparative fault.

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169. *See* text at notes 16-19 *supra.*

170. The administration of comparative fault in the context of joint tortfeasors or third-party practice has been and is considered to be very complicated. *See* note 182 *infra* and text accompanying the note.

171. *See, e.g.,* V. Schwartz, Comparative Negligence §21.1, at 335-36 (1974).

Proponents of retaining the contributory negligence defense also claim that the existing system is less costly to society than is comparative fault.[172] It has been suggested that comparative fault adds to societal costs in two ways. First, it causes an increase in automobile insurance rates.[173] Second, it is claimed that the new issues raised by comparative fault serve to complicate trials and hence discourage settlements because parties can no longer make accurate assessments of the value of the cases.[174]

The perceived virtues of the comparative fault doctrine are several. First, it has been noted that adoption of comparative fault "diminishes the need to employ rules which are designed to ameliorate the harshness of the contributory negligence rule."[175] Another practical virtue of comparative fault is that it brings the articulated doctrine in line with what juries are doing in fact in many cases.[176] As such, the courts can provide juries with both guidance and discipline in their practice of apportioning losses.

While these practical virtues are not insignificant, the courts adopting comparative negligence have focused on more theoretical virtues. First, the courts have perceived comparative fault to be more in harmony with the premises of a fault-based system such as negligence. As the Supreme Court of California stated in adopting comparative fault: "The basic objection to the [contributory negligence] doctrine—grounded on the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability—remains irresistable to reason and all intelligent notions of fairness."[177] In addition to being in harmony with the theoretical bases of negligence, comparative fault, in facilitating plaintiff recovery, is more consonant with the twentieth century preference for compensation of accident victims.[178]

Finally, the courts have perceived comparative fault as the "fairer"[179] system. The Supreme Court of Florida stated this perception best:

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172. *See id.* at 336-38.

173. *See* Fleming, *supra* note 72, at 242. This argument has been thoroughly repudiated in Peck, *Comparative Negligence and Automobile Liability Insurance,* 58 Mich. L. Rev. 689, 726-28 (1960).

174. *See* V. Schwartz, Comparative Negligence § 21.1, at 337 (1974). *But see* Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey,* 36 N.Y. St. B.J. 457, 474-75 (1964).

175. Kaatz v. State, 540 P.2d 1037, 1047 (Alaska 1975).

176. *See* Fleming, *supra* note 72, at 242-43.

177. Li v. Yellow Cab Co., 18 Cal. 3d 804, 812, 532 P.2d 1226, 1231, 119 Cal. Rptr. 858, 863 (1975).

178. *See* text at notes 103-04 *supra.*

179. "In truth, not so much 'reason' (a theoretical concept) as 'fairness' (a value judgment) supports [the adoption of comparative fault]." Fleming, *supra* note 72, at 241.

> Perhaps the best argument in favor of the movement from contributory to comparative negligence is that the latter is simply a more equitable system of determining liability and a more socially desirable method of loss distribution. The injustice which occurs when a plaintiff suffers severe injuries as a result of an accident for which he is only slightly responsible, and is thereby denied any damages, is readily apparent. The rule of contributory negligence is a harsh one which either places the burden of a loss for which [two parties] are responsible upon only one party or relegates to Lady Luck the determination of the damages for which each of two negligent parties will be liable. When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party.[180]

The chief defect of the comparative fault doctrine lies in its perceived difficulty in administration. It has been suggested that comparative fault raises issues that will be difficult, if not impossible, for a jury to determine. "[D]eciding rough degrees of negligence, is one thing, but deciding precise percentages of negligence requires an expertise not found in most jurors or judges, if in fact it is possible for anyone to honestly and intelligently make such decisions."[181] Furthermore, the conceded complexity of the administration of comparative fault in the context of cases involving multiple defendants or third-party practice has been advanced as a reason for not adopting comparative fault.[182]

In weighing the relative advantages and disadvantages of the two systems, courts have had little difficulty in concluding that the comparative fault system is superior. As one commentator noted concerning the adoption of comparative fault by the California Supreme Court: "It is no doubt more bemusing than surprising that Justice Sullivan, speaking for the court in *Li*, regarded the superiority of comparative negligence over the all-or-nothing rule as so self-evident as not to call for more than a perfunctory explanation."[183]

Even conceding the superiority of the comparative fault system, the question remains whether the principle of stare decisis should prevent the judicial repudiation of the contributory negligence defense and the substitution of comparative fault. Stare decisis is perceived as

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180. Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973).

181. Syroid v. Albuquerque Gravel Prods. Co., 86 N.M. 235, 238, 522 P.2d 570, 573 (1974).

182. *See id.* at 237, 522 P.2d at 572; V. Schwartz, Comparative Negligence §21.1 at 336 (1974).

183. Fleming, *supra* note 72, at 241.

protecting two interests: (1) the reasonable reliance by people on the preexisting rule, and (2) the conserving of judicial resources by discouraging relitigation of decided issues.[184] Neither of these reasons, however, supports the retention of the contributory negligence defense. Certainly, it is unrealistic to believe that people conduct their affairs in reliance on the contributory negligence defense.[185] Moreover, it is unlikely that advocates of comparative fault are going to be discouraged from their mounting assault on the contributory negligence defense. The momentum created by the recent judicial and legislative adoptions of comparative fault appears too strong.

Finally, the failure of the legislators to adopt comparative fault must be considered. It has been suggested that legislative inaction in the face of the mounting criticism of the contributory negligence defense and the repeated opportunities to act constitutes a tacit approval of the defense.[186] Courts have often recognized, however, that legislative silence is inherently ambiguous and a treacherous basis for conjecture. "As a practical matter, there are a variety of reasons why bills or ideas do or do not become law and it is not the role of the courts to guess what legislative silence means."[187]

As the foregoing demonstrates, the case for judicial repudiation of the contributory negligence defense rests on substantial bases. Comparative fault principles are clearly superior to the contributory negligence defense. Neither stare decisis nor the silence of the legislature militates against judicial repudiation of contributory negligence.

Finally, events which have taken place since the New Mexico Supreme Court's refusal to repudiate the contributory negligence defense[188] have seriously undermined the force of the decision. In *Syroid,* the supreme court relied, in part, on the fact that only one court had adopted comparative fault judicially and that five courts had rejected the invitation.[189] Since that time, however, the balance has shifted radically. Three more courts have repudiated the contributory negligence defense and have adopted comparative fault.[190] In addition, two other courts have adopted comparative fault judi-

184. *See* H. Hart & A. Sacks, The Legal Process 587-88 (tent. ed. 1958).

185. *See* Godfrey v. State, 84 Wash. 2d 959, ____, 530 P.2d 630, 632 (1975).

186. *See* Kirby v. Larson, 400 Mich. 585, ____, 256 N.W.2d 400, 420 (1977).

187. *Id.; see* Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting) ("[T]o draw any inference of tacit approval from the non-action by Congress is to appeal to unreality.")

188. Syroid v. Albuquerque Gravel Prods. Co., 86 N.M. 235, 522 P.2d 570 (1974).

189. *Id.* at 236, 522 P.2d at 571.

190. Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1974); Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 18 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

cially to reach actions not covered by their comparative fault statutes.[191] With respect to the five jurisdictions, relied on by the *Syroid* court, in which courts had refused to adopt comparative fault judicially, four of those jurisdictions now have adopted comparative fault, either by statute[192] or judicial opinion.[193] When *Syroid* was decided, only twenty-one jurisdictions had adopted comparative fault principles.[194] Presently, thirty-three jurisdictions recognize comparative fault.[195]

Recently, the New Mexico Supreme Court was presented with an excellent opportunity to indicate that it recognized that circumstances had changed since *Syroid.* Rather than signaling a different attitude toward contributory negligence, however, the court expressed continued adherence to the defense. In *Commercial Union Assurance Cos. v. Western Farm Bureau Insurance Cos.*,[196] the court was called on to construe the meaning of the term "pro rata share"[197] in the Uniform Contribution Among Tortfeasors Act.[198] The plaintiff's intestate had fallen into a well on the land owned by the insurance companies' insureds and had died. The plaintiff's claim was settled and the remaining controversy concerned the respective responsibilities of the four landowners. One group of landowners claimed that under the contribution statute, the "pro rata share," for which joint tortfeasors were responsible, meant equal shares. The other group of landowners argued that "pro rata share" should be construed so that "their liability is proportionate to their . . . interest in the property."[199] Under this reasoning, the group of defendants whose interest in the property amounted to only twenty percent ownership would be responsible, under the contribution statute, for twenty percent of the recovery by the plaintiff.

The supreme court rejected this construction and held that "pro rata share" "means 'equal shares' when applied to the right of contribution between tenants in common."[200] This conclusion is unremarkable, except for the court's reference to the *Syroid* decision in reaching its result.

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191. *See* Thibault v. Sears, Roebuck & Co., 119 N.H. ____, 395 A.2d 843 (1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977).

192. North Dakota, Oregon and Utah. *See* note 35 *supra* for statutory citations.

193. Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979).

194. *See* Syroid v. Albuquerque Gravel Prods. Co., 86 N.M. 235, 236-37, 522 P.2d 570, 571-72 (1974).

195. *See supra* note 35.

196. 18 N.M. St. B. Bull. 830, 830-31 (Nov. 15, 1979).

197. N.M. Stat. Ann. §41-3-2 (1978).

198. *Id.* §§41-3-1 to -8.

199. 18 N.M. St. B. Bull. 830, 831 (Nov. 15, 1979).

200. *Id.*

> It is well established that ours is a jurisdiction which adheres to the doctrine of contributory negligence as a bar to recovery in a tort action. *Syroid v. Albuquerque Gravel Products Co.*, 86 N.M. 235, 522 P.2d 570 (1974). This is based on the perception that justice is best served by not comparing degrees of negligence or fault. *Id.* While the instant case involves the relationship between defendants *inter se* rather than between defendants and plaintiffs, the same principle applies.[201]

The *Commercial Union* case, of course, involves a question of statutory construction and, as a question of statutory construction, the decision of the court appears unquestionably correct. The New Mexico contribution statute is derived from the Uniform Contribution Among Tortfeasors Act, published in 1939 by the National Conference of Commissioners on Uniform State Laws.[202] The 1939 Act contained an optional provision which expressly allowed for consideration of relative fault in determining "pro rata" shares under the Act: "When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata share."[203] This optional provision was not included in the Act, as adopted in New Mexico.

The New Mexico legislature's rejection of the above-quoted provision, in adopting the Uniform Act, evinces a clear legislative attitude that by "pro rata," equal shares was intended. This construction is consistent with the vast majority of cases construing the term.[204]

While the court's decision in *Commercial Union* may be correct, its reliance on *Syroid* in its reasoning seems misplaced. First, the appellants in *Commercial Union* did not seek a construction of "pro rata share" based on relative culpability, but rather based on relative ownership interest in the property. As such, the relevance of *Syroid*, which addresses the merits of apportionment based on relative culpability, is unclear. Second, what was at issue in *Syroid* was whether the court would exercise its common law discretion to replace contributory negligence with comparative fault; the issue in *Commercial*

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201. *Id.*

202. *See* 12 Uniform Laws Annotated, 57, 62 (1975). The 1939 Act was withdrawn in 1955 and a new version was substituted. *See id.* New Mexico adheres to the 1939 version.

203. Uniform Contribution Among Joint Tortfeasors Act § 2(4) (1939 version), in 12 Uniform Laws Annotated 57 (1975). The 1955 version of the Act deleted section 2(4) and in its stead expressly provided that "in determining the pro rata shares . . . their relative degrees of fault shall not be considered . . . ." Uniform Contribution Among Joint Tortfeasors Act § 2 (1975).

204. *See, e.g.*, Celotex Corp. v. Campbell Roofing & Metal Works, Inc., 352 So. 2d 1316, 1319 (Miss. 1977); W. Prosser, Law of Torts § 50, at 310 (4th ed. 1971).

Union was one of statutory construction and not common law discretion. Finally, the *Syroid* court held that there would be no apportionment of damages between the parties (plaintiff and defendant) at fault in an accident. In *Commercial Union,* apportionment of damages among the parties at fault (all defendants) had been established and the only question was on what basis apportionment would be made. As such, it is difficult to see how "the same principle applies"[205] in *Syroid* and *Commercial Union.* The court's failure to recognize that the *Syroid* decision is substantially unrelated to the issue as posed in *Commercial Union* suggests that the court failed to consider carefully the relationship of the two cases or the interests involved. As such, the *Commercial Union* dicta need not be read as a strong or well considered affirmation of the contributory negligence defense in New Mexico.

Equally unfortunate as the dicta in *Commercial Union* about the contributory negligence defense is the opportunity the court missed to retreat from *Syroid.* The court could have reached the same result in *Commercial Union* by confining its reasoning to traditional statutory construction analysis. This would have allowed the court to reach the desired result and still recognize the substantial change in circumstances since its *Syroid* decision. Such an approach would have had two effects. First, it would have provided the court with a relatively painless opportunity to signal a more receptive attitude toward comparative fault. Second, a clear signal by the court could have had the beneficial impact of nudging the legislature in the direction of comparative fault principles.[206] Thus, the New York Court of Appeals' decision in *Dole v. Dow Chemical Co.,*[207] adopting equitable indemnification based on relative culpability, is recognized as having moved the New York legislature toward enacting its comparative fault statute.[208] Similarly, the Supreme Court of Hawaii's

205. 18 N.M. St. B. Bull. 830, 831 (Nov. 15, 1979).

206. One commentator has suggested that this role of the court is particularly important in the area of comparative fault.

> The correct perspective therefore is to view the creative judicial role not as a confrontation but as an assistance to the legislature in the continuous task of defining and redefining the norms of society. The notorious inertia of the legislative body, especially in the field of private law, can often be overcome only as a result of a stimulus from the courts. This "admonitory function" of prodding the legislature to confront a pressing problem and to decide whether to accept, qualify or reject the court's proposed solution, is illustrated by several well-known episodes in California and elsewhere.

Fleming, *supra* note 72, at 275 (footnote omitted).

207. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

208. *See* 13th Annual Judicial Conference Report on CPLR, in McKinney's 1975 Session Laws of New York at 1480-81.

clear signal that it would have been receptive to an argument in favor of substituting comparative fault for the contributory negligence defense[209] has been characterized as prompting the Hawaii legislature to adopt comparative fault legislation.[210]

At the time *Syroid* was decided, comparative fault was a minority rule, albeit a substantial minority. Moreover, judicial adoption of comparative fault was almost wholly without precedent. The radically altered state of affairs since *Syroid* presents an entirely different context within which the issue of judicial adoption must be decided. Comparative fault is not only a majority rule, but has gained a momentum that makes its ultimate triumph inevitable. Since *Syroid,* the judicial adoption of comparative fault has acquired respectability and is supported by prestigious precedent. The question no longer appears to be whether comparative fault will be adopted in New Mexico, but rather when and how it will be adopted. Given the superiority of comparative fault over the contributory negligence defense, adoption of comparative fault at the earliest opportunity seems appropriate. Moreover, not only is the court an appropriate agency to accomplish the change, it may be the better agency to do so. Clearly, the time is ripe for judicial adoption of comparative fault.

209. *See* Loui v. Oakley, 50 Hawaii 260, 265 n.5, 438 P.2d 393, 397 n.5 (1968) ("It may be time to reconsider the applicability of the doctrine of contributory negligence . . . .").

210. *See* V. Schwartz, Comparative Negligence § 1.5, at 17 (1974).