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FOREWORD: COMPARATIVE NEGLIGENCE AT LAST—BY JUDICIAL CHOICE

John G. Fleming†

Comparative negligence, once the Cinderella of American law, is at long last blossoming into a princess. Until the late 1960's only a handful of states had taken the embrace, and that mostly many years before.¹ Not so much legislative inertia as a rigorous lobby mounted by the insurance industry and defense organizations had for generations successfully blocked persistent efforts at reform. This scene underwent a dramatic change when no-fault plans were unveiled. Opponents of these plans sought to retrieve the substance of the common law fault system by half-heartedly offering for sacrifice such notorious culprits as the absolute bar of contributory negligence.² Moreover, in jurisdictions

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¹ Statutes of general application obtained in only six states:
   MISS. CODE ANN. tit. 11-7-15 (1972) (first enacted 1910).
   REV. STAT. NEB. ch. 25-1151 (1964 reissue) (first enacted 1913).
   ARK. STAT. ANN. tit. 27-1763 to -1765 (1966) (which nonetheless retains com-
   parative negligence).
   In addition, there were statutes applicable only to a specific type of accident, primarily
   in the field of work injuries, e.g., the Federal Employers' Liability Act (FELA), 45
   MICH. L. REV. 465 (1953), in Prosser, SELECTED TOPICS ON THE LAW OF TORTS 1
   (1953); V. Schwartz, COMPARATIVE NEGLIGENCE §§ 1.1-1.7 (1974) [hereinafter cited as
   Schwartz].

² Representative is the Defense Research Institute's (DRI) report, Responsible
   Reform—A Program to Improve the Liability Reparations System (Oct. 1969), which
which, despite this tactic, adopted no-fault automobile plans, the old rule lost much of its erstwhile efficacy and was no longer worth a protracted rearguard action. In the result, since 1969, 21 additional statutory adoptions of comparative negligence took place.

Recognized that considerable debate existed on the merits of contributory versus comparative negligence and reasserted the position that:

the determination of whether or not the rule of contributory negligence should be abandoned is a matter for local determination, but that the Wisconsin comparative negligence rule and procedures should be adopted if the contributory negligence rule is to be discarded.

Id. at 23. The same sentiment was again expressed in Responsible Reform—An Update 15 (March 1972). Also see Krause, No-Fault's Alternative—The Case for Comparative Negligence and Compulsory Arbitration, 44 N.Y. St. B.J. 535 (1972).

3. Of the 21 states having adopted comparative negligence since 1969 by statute (see note 4 infra), 13 also have no-fault coverage:

HAWAII REV. STAT. ch. 294-1 to 41 (Supp. 1974).
MASS. GEN. LAWS ANN. ch. 90, § 34A-O (Supp. 1975).
MINN. STAT. ANN. § 65B.41-B.49 (Supp. 1975).
COLO. REV. STAT. tit. 10-4-701 to 723 (1973).
CONN. STAT. ANN. tit. 38-319 to 351a (Supp. 1975).
UTAH CODE ANN. §§ 31-41-1 to 13.4 (1974 Repl.).
KAN. STAT. ANN. ch. 40-3101 to 3121 (Supp. 1974).
ORE. REV. STAT. § 743.786 to 835 (Supp. 1974).

VERNON'S ANN. TEX. STAT. art. 5.06-3 (Supp. 1974).

To this list should be added two of the three judicial adoptions in states with no-fault plans. Elk Cotton Mills v. Grant, 140 Ga. 727, 79 S.E. 836 (1913); Christian v. Macon Ry. & Light Co., 120 Ga. 314, 47 S.E. 923 (1904); GA. CODE ANN. tit. 56-34016 to -34136 (Supp. 1975). See SCHWARTZ, supra note 1, at 12. Hoffman v. Jones, 280 So. 2d 413 (Fla. 1973); FLA. STAT. ANN. §§ 627.730-.741 (Supp. 1975). Among the six earlier adherents two have since adopted no-fault plans:

ARK. STAT. ANN. §§ 66-4014 to -4021.

4. 1969
MINN. STAT. ANN. § 604.01 (Supp. 1975).

1970
1971

1973
CONN. STAT. ANN. tit. 52-572h (Supp. 1975).
NEV. REV. STAT. ch. 41.141 (1973).
VERNON'S TEX. CIV. STAT. art. 2212a, § 1 (Supp. 1974).
But the legislative path is arduous, unpredictable and full of snares and chicanery. Proponents of reform have therefore not neglected the possibility of enticing the courts into the role of burying the anachronistic defense of contributory negligence. After almost succeeding in Illinois, the first judicial adoption of comparative negligence actually occurred in 1973 in Florida. In probably the most dramatic California appellate decision of 1975, *Li v. Yellow Cab Co.*, the Supreme Court of California has now delivered the same coup de main and thereby added a new landmark decision to the long list from *Muskopf* and *Greenman* to *Dillon v. Legg* and *Rowland v. Christian*.

### I. The Reasons for Change

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. It was sufficient to say that "in a system in which liability is based on fault, the extent of fault should govern the extent of liability"—a postulate based alike on "reason and all intelligent notions of fairness." In truth, not so much "reason" (a theoretical concept) as "fairness" (a value judgment) supports that imperative. That the appeal to reason or logic is rhetorical rather than serious can be revealed by a moment's reflection. It is not otherwise regarded as at all incompatible with the philosophy of the fault system that a negligent defendant should be liable to an innocent plaintiff to an

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7. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (infliction of emotional distress).
8. 13 Cal. 3d at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863.
extent quite incommensurate with his fault: thus, in an individualistic
system like ours, the extent of liability is determined by how much
damage happens to ensue, not by how much the defendant was at fault.
Nor does it necessarily follow that a negligent plaintiff should be
permitted to recover a share of his loss corresponding to the defendant's
fault.

What has really come to be viewed with distaste is the harshness of
the common law rule rather than its incongruity. Undoubtedly, in its
origin and heyday, it served a well-calculated social and economic
function, which was to reduce the cost of compensation in the interest of
free enterprise. Yet not only have industry and other typical defend-
ants long ceased to be regarded as in need of such a disguised subsidy,
but there is a widespread consensus today that compensation of accident
victims is a desirable social goal that can best be accomplished by loss
spreading through the conduit of liability insurance, thereby passing the
cost to the consumer public. In two of the three important accident
areas—work-related injuries and those caused by defective products—
the plaintiff's contributory fault has long been ruled irrelevant, so that
the defense in any event has played a lingering role only in road and
other residuary accidents and in that sense has become incongruous not
only with contemporary social values but also with the broad trend of
accident law in the United States. An additional reminder has been the
well-publicized fact that, as the civil law countries of the world long
rejected their Roman law heritage, the all-or-nothing rule, and even
the common law jurisdictions of the British Commonwealth had one-by-
one followed the English lead by adopting comparative negligence,
America had become the last hold-out of this by now archaic rule.

An additional, transcendent factor militating for reform has been the
demoralizing effect of the broadscale flouting of the stalemate rule
by juries. Many have observed the proclivity of juries to "compromise"
by returning verdicts for the plaintiff but substantially reducing the
damages, often to the point of awarding no damages at all for pain

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14. Workmen's Compensation benefits are due regardless of fault by the worker or absence of fault by his employer. Contributory negligence, as long as it completely defeated recovery, has been most widely held not to be a defense to strict products liability. See text accompanying notes 111-120 infra.


and suffering. This tendency has not only demonstrated the truism that apportionment of loss has corresponded with the intuitive sense of popular justice; to the extent that it has been condoned by the courts, it has also created a credibility gap between the "official" law, as reflected in jury instructions and the books, and the law as practiced in the courtroom. While one of the vaunted benefits of the jury system is that it can act as a corrective of legal rules in need of reform, a healthy legal system requires that the properly accredited lawmakers heed the hint and take responsibility for bringing the law once more into line with contemporary demands. In Justice Sullivan's words, "it is manifest that this state of affairs, viewed from the standpoint of the health and vitality of the legal process, can only detract from public confidence in the ability of the law and legal institutions to assign liability on a just and consistent basis." Indeed, the price for inaction is apt to be exacted in loss not only of morale but also of administrative efficiency, as evidenced in this context by ambiguous judicial compromises and by the inevitable corollary of frivolous appeals. One need only be reminded of the dispiriting record of the "last clear chance" escape hatch, compounded by competing versions of actual, unconscious and constructive last clear chance, and in any event irremediably flawed by the all-or-nothing requirement of the common law, which necessitated throwing the whole loss—this time—on the defendant instead of the plaintiff, despite their shared fault.

By comparison to these flaws, the credentials of the status quo look paltry. On the theoretical side, the contributory negligence bar has been explained on the spurious ground that it was but an application of proximate cause or of the public policy against contribution among tortfeasors. No more persuasive has been the argument that contributory negligence promotes self-protective care and thus prevents accidents: for one thing, the sanction seems unduly harsh and, for another, it would be more effective if it fell on or deterred both plaintiff and defendant. More serious perhaps was the defense prognosis that


18. This has been true despite our cultural addiction to the "all-or-nothing" resolution of conflicts. See Coons, Approaches to Court Imposed Compromise—The Uses of Doubt and Reason, 58 Nw. U.L. Rev. 750 (1964).

19. 13 Cal. 3d at 812, 532 P.2d at 1231, 119 Cal. Rptr. at 863 (emphasis added).


21. Although Professor Posner admits that the all-or-nothing rule fails to be de-
a change to comparative negligence would lead to a substantial increase of insurance rates. This appears not to have been borne out by verifiable experience; nor indeed was there any reason why it should have been supported by the facts, considering that the cases where a plaintiff would have gone empty-handed under the old regime are probably matched by those where compassion need now no longer be exercised by excusing the plaintiff completely.

But recognition that comparative negligence better achieves contemporary social goals is not alone dispositive. Also addressed must be the questions of (1) how comparative negligence would be implemented in detailed application to the contemporary negligence scene, and (2) which institution, legislature or court, should undertake the reform?

II. The New Regime of Comparative Negligence

The court in Li, conscious of its role as lawmaker, went beyond mere reversal of the judgment entered by the trial court for the defendant on a jury finding of the plaintiff's contributory negligence. It also offered some basic guidelines for the future application of comparative negligence and indicated potential pitfalls as well. Specifically it addressed itself to the following problems: (1) "pure" comparative negligence versus the "50 percent" rule; (2) administrative problems posed by multiple-party accidents; (3) the future of "last clear chance"; and (4) the future relation between contributory negligence and voluntary assumption of risk.

a. "Pure" Comparative Negligence

Unquestionably, the adoption of the "pure" form in preference to the "50 percent" system was the most significant subsidiary decision of the Li court, since the latter form of comparative negligence, rather than the former, enjoys both the overwhelming following among the statutes and the qualified recommendation of the defense lobby. Indeed, it is
not at all conjectural to surmise that had the California legislature eventually enacted a comparative negligence statute, it would have adopted the "50 percent" model. In fact, the court's own contrary choice in this respect, far more than its adoption of comparative negligence itself, belies any realistic hypothesis that it was merely anticipating the probable legislative intent. 24

The "50 percent" rule appears in two versions. Its more popular variant, the "Wisconsin rule" permits apportionment only in favor of plaintiffs whose fault is less than the defendant's. 25 This completely bars a plaintiff equally at fault with the defendant—a very common finding which either reflects reality or the frequent inability of the fact-finder to make any finer distinction. The resulting prejudice to plaintiffs is compounded by the practice rule in some states requiring that the jury be kept in ignorance as to the legal consequence of a finding of 50 percent liability. 26 Moreover, in accidents with more than two partici-
pants at fault, the Wisconsin rule\textsuperscript{27} compares the plaintiff's fault with that of each defendant separately, so that even if plaintiff's share is less than the defendants' aggregate but more than that of each defendant separately, he fails to recover. Thus, if A's share of liability is 35 percent, B's 35 percent, and C's 30 percent, C can recover a share of his damages,\textsuperscript{28} but neither A nor B can recover.

The other variant of the "50 percent" rule, which was pioneered by New Hampshire in 1969 and which gained attention especially after Wisconsin switched to it in 1971,\textsuperscript{29} disqualifies only plaintiffs whose fault was greater than the defendant's so that, at least in case of equal division, plaintiffs and defendants can still recover an aliquot part from each other.

The justification for either version is slim, being based primarily on the moral argument that it is unjust to permit one more at fault in an accident to recover from one less culpable.\textsuperscript{30} Moreover, where both have sustained damage, as is quite likely in automobile collisions, the one more at fault may well have suffered the greater loss so that he would in the end come off better than the other.\textsuperscript{31} All the same, the "50 percent" rule sets up an extraneous limitation to the implementation of the policy underlying comparative negligence, to the effect that in cases of multiple fault, responsibility should be shared proportionately: "it
simply lowers, but does not eliminate, the bar of contributory negligence.\textsuperscript{32}

What pragmatic reasons, then, account for the widespread support of the "50 percent" rule in this country? Prominent, of course, is the belief that it reduces substantially the cost for defendants. Most claims are settled not in court but by negotiation; and insurance adjusters command a formidable trump card in a rule that would bar a plaintiff completely rather than just reduce his damages. The rule therefore not only completely disqualifies plaintiffs found to have been 50 percent or 51 percent at fault, but it also helps to depress the damages a plaintiff can hope to squeeze out of the pitiless purse of the defendant's insurer.

A more technical problem with "pure" comparative negligence centers on the adjustment of counterclaims. The "pure" type of longest operation in this country, the Federal Employers' Liability Act (FELA), existing since 1908, significantly does not raise the issue since it is highly unlikely that a railroad, sued for personal injury or death of an employee, will counterclaim against the plaintiff. The situation is very different, however, in case of automobile and many other types of accident. For example, suppose that A, 25 percent at fault, suffered $500 damage, while B, 75 percent at fault, suffered $1500 damage. Accordingly, A can claim $375 from B and B $375 from A. As already noted, the very idea that B, who is far more at fault, might maintain any claim whatever sticks like a fishbone in the moral throat of the "50 percenters." Worse yet, is A to lose all rights to recovery as the result of setting-off B's claim against him? If that is so, "pure" apportionment is apt to afford even less compensation in practice than is the "50 percent" version; for under the latter, at least, A would have recovered $375 from B's liability insurer, leaving only $1625 of the aggregate loss, instead of the total $2000, to be borne unaided by the accident victims. The only sensible solution from the point of view of compensation and loss spreading is therefore to proscribe set-off under "pure" comparative negligence law whenever the participants are insured.\textsuperscript{33}

Without set-off, A would recover $375 from B's insurer and B $375 from A's, so that ultimately $750 of the total loss of $2000 would be compensated. This is a great deal better than $0 pursuant to set-off under a "pure" apportionment or $375 under the "50 percent" type. Mindful of this result, the Rhode Island statute provides that "there shall

\textsuperscript{32} Juenger, Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae, 18 Wayne L. Rev. 3 (1972), quoted in Li, 13 Cal. 3d at 828, 532 P.2d at 1243, 119 Cal. Rptr. at 875 (1975).

\textsuperscript{33} See the panel discussion between Professor Leffar and Judge Wolfe, Panel on Comparative Negligence and Liability Insurance, 11 Ark. L. Rev. 71 (1957). Liability insurers generally have a bigger stake in set-off than do casualty insurers, but set-off tends to eliminate many small subrogation claims by casualty insurers—a desirable result.
be no set-off of damages between the respective parties."34 While not expressly confined to insured parties, its practical effect is necessarily so.35 A bill currently before the California legislature is in the same terms.36 The Irish statute, drafted by Professor Glanville Williams, who also authored a celebrated textbook on the subject,37 specifically abrogates set-off only by insurance companies.38 Elsewhere in the Commonwealth, information on the subject is sparse, but set-off does not appear to be exacted in practice.39

Whether qualifying under a "pure" or modified comparative negligence law system, the plaintiff's recovery will be assessed in proportion to his own share of responsibility.40 Whatever the ambiguity lurking in the last-mentioned criterion, it clearly reflects a preference for an individualized and graduated assessment to any arbitrary allocation of shares, such as equal division. The latter is of course a familiar feature of contribution between tortfeasors, though one which presents a particularly vexing problem of integration with an "unequal division" rule of comparative negligence.41 The 50-50 rule also used to prevail under admiralty law, until it was successively displaced, first by statutes in its application to personal injury and death,42 and at last also by a recent United States Supreme Court decision in its application to property damage in maritime collisions.43 As that Court pointed out, any conceivable administrative advantage of such a hard-and-fast rule is cons-

35. Schwartz, supra note 1, § 19.3, at 322 makes unnecessarily heavy weather over this provision. A Florida decision has ruled against set-off by liability insurers in Bournazion v. Styvesant Ins. Co., 303 So. 2d 71 (Fla. App. 1974). But the reasoning is peculiar to Florida law which permits direct suit against liability insurers who can only be defendants in the action or cross-action.
36. Calif. A.B. 586 would amend Cal. Code Civ. Proc. § 666 (West Supp. 1975) by replacing sub-section (c) with: "(c) Anything in this section or any other statute to the contrary notwithstanding, in any action in which the law of comparative negligence applies there shall be no set-off of damages between any parties to such action."
37. G. Williams, Joint Torts and Contributory Negligence (1951) [hereinafter cited as Williams]. The work contains a model statute which inspired the Irish Civil Liability Act 1961 and is therefore commonly called the Glanville Williams Act.
40. Many statutes use the term "in proportion." This does not mean, however, that if $A$ was 25 percent at fault and $B$ 75 percent, $A$ can recover only two-thirds rather than three-fourths. Southern Ry. v. Neely, 284 F.2d 633, 638 (5th Cir. 1960) (Ga. law).
41. See text accompanying notes 50-67 infra.
43. United States v. Reliable Transfer Co., 95 S. Ct. 1708 (1975). See Note, Apportionment of Damages in Collisions at Sea, 50 Wash. L. Rev. 933 (1975). Note that former President Nixon's "strict constructionist" appointees concurred in this unanimous decision of the Court!
pletely outweighed by its potential unfairness and the temptation to avoid it in grosser cases by stratagem.\textsuperscript{44}

Almost all American comparative negligence statutes call for a comparison of either "fault" or "negligence."\textsuperscript{45} Similarly, the \textit{Li} court, after an earlier \textit{lapsus calami}, was at pains to emphasize that fault, not causation, was the only proper criterion.\textsuperscript{46} This prescription fortunately dispenses with the shifts to which some foreign courts have been put in reconciling a statutory provision expressed in terms of causation with the general feeling that fault should at least be a relevant, if not the exclusive, factor in apportioning shares.\textsuperscript{47}

If the relatively long British experience is any guide,\textsuperscript{48} culpability should be measured by the degree of departure from the standard of conduct required by law rather than by \textit{moral} blameworthiness: a drunken motorist is to be disciplined not for his intoxication but for his negligence. No less relevant in measuring responsibility is the gravity of the risk created by each party. In situations, for instance, where even slight negligence is fraught with exceptional peril to others, the main blame must fall on the person who created that danger or brought to the accident the dangerous subject matter. This danger factor is also relevant in considering whether the conduct of each individual entailed a risk merely to himself or also, and perhaps only, to others. That explains why, in claims by injured pedestrians, a heavier share of responsibility usually falls on the motorist, although the degree of carelessness (in the narrow sense) by each party to the accident may have been equal.

Admittedly, the task of apportionment cannot be entirely insulated

\textsuperscript{44} In this context the so-called "major-minor" fault doctrine served the same function at sea as the last opportunity rule did on land.

\textsuperscript{45} Only the Maine statute, \textit{Me. Rev. Stat. tit. 14, § 156 (Supp. 1975)}, adopted the British formula of requiring reduction "to the extent deemed just and equitable, having regard to the claimant's share of responsibility for the damage . . . ." The term "responsibility" is open to a wider construction than are fault or negligence and, in particular, poses less difficulty where the defendant is liable strictly rather than for negligence. See text accompanying notes 111-20 infra.

\textsuperscript{46} The opinion, as originally published, contained a passage fixing the parties' liability "in direct proportion to the extent of their causal responsibility." 119 Cal. Rptr. at 864. But a later passage emphasized that "fault and culpability are the quantities to be measured, not mere physical causation." \textit{Id.} at 872. These passages were later corrected. 14 Cal. 3d 103a-d (Advance Sheets). In the first passage, "fault" was substituted for "causal responsibility" and a footnote was added to the effect that "fault" was synonymous with "negligence" in the accepted legal sense." 14 Cal. 3d 103a-d n.6a. The second passage was deleted.

\textsuperscript{47} The problem has proved particularly vexing to German courts. \textit{See W. Rother, Haftungsbeschränkung im Schadensrecht 42-79 (1965)}; Honoré, \textit{supra} note 15, at 17, 121-24.

from the personal attitudes and prejudices of individual jurors. But that is also true of other issues traditionally allocated to the jury in negligence litigation. Moreover, "the utilization of special verdicts or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards and appropriate reverence." 49

b. Administrative Problems: Multiple Parties

Among unresolved matters left to the future, the Li court identified two administrative problems which have been given much play by opponents of comparative negligence. 50 Both concern multiple parties, to which passing reference has already been made. Indeed, Prosser viewed the prospect of entrusting multiple-party problems to the Ameri-

49. 13 Cal. 3d at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872. Statutes in four states (Colo., Hawaii, Mass. and N.J.) require the use of special verdicts; in six more states (Idaho, Minn., Nev., N.D., Utah, Wyo.) special verdicts are required at the request of either party. For citations, see notes 1 and 4 supra. Nearly all states, including California, permit special verdicts at the discretion of the trial judge. The Li court was content "for the present" to leave the matter in that posture. Id. at 824 n.18, 532 P.2d at n.18, 119 Cal. Rptr. at n.18. Calif. S.B. 494, 1975-76 Reg. Sess. (Senator Grunsky) would mandate special verdicts. On the other hand, the New Hampshire and Vermont statutes specifically call for general verdicts, and those in Mississippi, Rhode Island and Maine appear to exclude special verdicts. Also consider Schwartz, supra note 1, ch. 17; Alken, Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulations, 53 Marq. L. Rev. 293 (1970). The link between special verdicts and blindfolding the jury has been already noted. See note 26, supra. Special verdicts, in addition to controlling jury bias, also help to reveal jury confusion or poor arithmetic. For example, in Black v. McCabe, [1964] North Ire. L.R. 1, the jury assessed the plaintiff's damages at £1,450 (which they reduced to £1000) and the defendant's damages at £120 (which they reduced to £90). This placed the plaintiff's responsibility at about 75 percent and the defendant's at 69 percent. Only in special circumstances may the aggregate of faults exceed 100 percent—as, for example, where some of the plaintiff's fault did not cause injury to the defendant but only to himself. E.g., Hanly v. Berlin, [1975] Qd. R. 52 (where two cars sideswiped each other due to the fault of both drivers and one of them sustained injury to his elbow, which had been negligently protruding over the open window sill—the accident fault was divided 40:60, but the plaintiff suffered an additional 10 percent reduction for his elbow injury). In Wisconsin this is misleadingly known as the distinction between "active and passive" negligence. Vroman v. Kemptke, 34 Wis. 2d 680, 150 N.W.2d 423 (1967). The English statute, Law Reform (Contributory Negligence) Act, 8 & 9 Geo. 6, c. 28, § 1 (1945), which refers to "shares of responsibility" has also been thought to require deference to causation, at least in addition to (if not in lieu of) fault. Stapley v. Gypsum Mines, [1953] A.C. 663, 682, trenchantly criticized by Williams, The Two Negligent Servants, 17 Mod. L. Rev. 66 (1954). But as one commentator exclaimed, speaking of the same problem in relation to "comparative contribution," "Causation itself is difficult enough; degrees of causation would really be a nightmare." Chapman, Apportionment of Liability between Tortfeasors, 64 Law Q. Rev. 26, 28 (1948). An illustration of its possible relevance would be the case of a child, just capable of negligence, dashing into the path of an automobile. To its negligible fault should perhaps be added a factor for its equal share in causing the accident, in arriving at its "share of responsibility" for the damage.

50. 13 Cal. 3d at 823-24, 532 P.2d at 1239-40, 119 Cal. Rptr. at 871-72.
can jury with such apprehension as to cast a blight on the very feasibility of introducing comparative negligence into the general accident law. As he saw it, the fact that these problems have not proved daunting to British and Canadian law offers no real encouragement because the civil jury has been virtually displaced in those countries by professional and capable judges.\footnote{51}

1. Contribution. The central problem concerns the relationship between comparative negligence and contribution. Suppose A, B and C are involved in a collision, injuring A. A recovers a judgment against B and C in which responsibility for his damages of $5000 are allocated in the proportion of 30 percent to A, 50 percent to B and 20 percent to C. Two questions arise: (1) how much can A recover from C—20 percent or 70 percent of $5000; and (2) if C has to pay 70 percent, can he claim contribution from B, and if so, for how much—35 percent or 50 percent of $5000?

With regard to the first question, it must be noted that the accepted common law principle has hitherto been that concurrent tortfeasors liable for the same damage are liable \textit{in solidum} ("entire liability"), each being liable for the total amount regardless of the shared responsibility of his co-tortfeasors.\footnote{52} This result is only fair, since there would be no justification for exposing an \textit{innocent} plaintiff to the risk of being unable to collect a portion from one of the co-defendants: in other words, if one of the co-defendants is insolvent that risk should be borne by his co-tortfeasoer rather than by the plaintiff. But if the plaintiff is himself at fault, his "equity" is no greater than that of the co-defendants, and it would be a perfectly defensible solution to make him share that risk. This seems particularly desirable when, as in the suggested example, the solvent defendant, C, was only 20 percent at fault, compared with the 50 percent liability of his co-defendant B and the 30 percent fault of plaintiff A.\footnote{53} The risk of B's insolvency may be distributed in two ways: one limits A's claim against B and C to their respective shares of responsibility, the other distributes B's share between A and C in proportion to their own shares. Under the first method, A could only

\footnotesize{\begin{itemize}
\item \footnote{51} Prosser, \textit{The Law of Torts} § 67, at 438 (4th ed. 1971).
\item \footnote{52} Id. at 292-98. "Entire liability" is sometimes misnamed "joint and several liability." The latter means that joint defendants may be sued jointly or separately, i.e., severally.
\item \footnote{53} In "50 percent" jurisdictions, this contingency argues for measuring A's negligence against B and C separately so as to free C from all liability. See note 27 supra. See the dissent in Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20 (1962). In that case the majority consoled itself with the thought that "we cannot adopt a narrow construction of our comparative negligence statute in the vain hope of avoiding inequitable situations due to insolvency. Obviously either the plaintiff or the solvent defendant must suffer, and the loss has traditionally fallen upon the wrongdoer." \textit{Id}. at 894, 356 S.W.2d at 26.
\end{itemize}}
recover from C 20 percent of his damages, under the second method he could recover only 40 percent. The first method appears to be mandated by the New Hampshire, Vermont, and Kansas statutes; the second was deliberately chosen in the sophisticated Irish statute drafted by Professor Glanville Williams.

With regard to the second question, suppose that A has recovered 70 percent from C, and B is solvent, can C recover contribution from B and, if so, for how much? Here again, a great deal of diversity prevails. About half the states still retain the common law rule against contribution; among the remainder some allow contribution in accordance with the relative degrees of fault of the tortfeasors, but the majority have adopted the rule of the 1955 Uniform Contribution Act, prescribing

54. See Schwartz, supra note 1, at 264. The Vermont statute reads: "Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed." VT. STAT. ANN. tit. 12, § 1036 (1973). The New Hampshire statute is virtually identical. N.H. REV. STAT. ANN. ch. 507, § 7-9 (Supp. 1973).

On the other hand some statutes—for example, those in New Jersey, N.J.S.A. tit. 2A:15-5.3 (Supp. 1975), and North Dakota, N.D. CENT. CODE tit. 32-38-01 (1960)—have specifically preserved the "entire" liability rule.

55. Civil Liability Act 1961, 1961 Acts of the Oireachtas c. 41, § 38, at 1403. The idea was first suggested by C. Gregory, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTION 77-79 (1936), the first systematic (American) study of contribution among tortfeasors and comparative negligence. It corresponds substantially to the rule applicable where one of more than two defendants is insolvent: thus, if A, without fault, is injured by B, C, and D, and D is insolvent, the shares of B and C are ratably increased to absorb D's portion. RESTATEMENT OF RESTITUTION § 85, comment h at 384; 64 A.L.R. 224; Williams, supra note 37, § 48. This is probably also the California rule. (Tucker v. Nicholson, 12 Cal. 2d 427, 433-34, 84 P.2d 1045, 1049 (1938).) It is expressly incorporated in section 3(c) of the model statute, proposed by Braun, Contribution: A Fresh Look, 50 CALIF. ST. B.J. 166 (1975) (hereinafter cited as Braun).

Analogous distribution also appears to be the better rule in 50 percent jurisdictions in order to spread the share of a defendant who is excused. Suppose P is 20 percent at fault, D₁ 40 percent, D₂ 30 percent, and D₃ 10 percent. P cannot recover from D₃, whose share is spread proportionately among P, D₁, and D₂. Hence, P's share becomes 20/90, D₁'s 40/90, and D₂'s 30/90. Comment, Comparative Negligence and Comparative Contribution in Maine: The Need for Guidelines, 24 ME. L. REV. 243, 246-48 (1972).

56. The 1939 version of the Uniform Contribution Act, in HANDBOOK OF THE NAT'L CONF. OF COMM. ON UNIFORM STATE LAWS 244 (1939), provided, as an alternative to pro rata shares, unequal division "when there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution . . . ." Arkansas, Delaware, Hawaii, South Dakota and Utah adopted that alternative. Ark. STAT. ANN. § 34-1002 (1962); Del. Code Ann. tit. 10, § 6302 (1974); Hawaii Rev. Stat. § 663-12 (Supp. 1974); S.D. COMP. LAWS ANN. § 15-8-15 (1967); Utah Code Ann. § 78-27-34 (1975). Idaho, Minnesota, New Jersey, North Dakota and Texas adopted "pure" comparative contribution at the same time and in the same statutes as comparative negligence. The latter is also the British rule and is followed in most of the rest of the world.
equal division. That rule is, of course, based on a theory of causation, in contrast to comparative negligence, which is based on fault. This incompatibility results in an indefensible allocation of shares, especially where more than one participant in the accident suffers damages and cross-claims are made.

If (to revert to the previous illustration) A, 30 percent at fault, had recovered 70 percent from C, contribution in equal shares would allow C to recover from B only 35 percent rather than 50 percent, B's share of the total fault for the accident. Just, as in this example, C would in the end shoulder an excessive share, B would escape with less than his proper share if A had executed judgment against him (in which event he could have recovered 35 percent from C, 15 percent more than his due).

The position in California in these respects is obscure but not beyond redemption by bold and imaginative judicial statecraft. The stumbling block is the state Contribution Act, reluctantly enacted in 1958, which permits contribution only between tortfeasors liable under a joint judgment and prescribes the rule of equal division. The Act still leaves it entirely to the whim of a plaintiff how the burden as between several tortfeasors is to be borne, since he may choose to sue only one of them to judgment and that one cannot even (as in Michigan) implead the other(s) for contribution. How can this statutory scheme be brought into harmony with the new rule of comparative negligence?

The most obvious and best method would, of course, be to legislate "comparative contribution," contribution in proportion to the parties' negligence. Failing that, there is, fortunately, ample precedent even for a judicial initiative on a broad front. In minor key is the Wisconsin story, which underscores the tie between comparative negligence and contribution. Wisconsin had judicially developed a rule of contribution in equal shares before adopting a comparative negligence statute in 1931. In Bielski v. Schulze, however, the Wisconsin Supreme Court

57. Section 2(a) specifically directs that the parties' "relative degrees of fault shall not be considered." 12 UNIF. LAWS ANN. 63 (1975).
59. This was expressly authorized by MICH. COMP. LAWS ANN. § 600.2925 (1974) [the Michigan Contribution Act]. Since 1974 the requirement of a joint judgment has been dropped. Id.
61. See note 56 supra.
62. 16 Wis. 2d 1, 114 N.W. 2d 105 (1962). Maine followed the same course in Packard v. Whitten, 274 A.2d 169 (Me. 1971); and so did the Third Circuit for the
reversed its earlier position and substituted a rule of contribution in accordance with the tortfeasors' shares of fault ("comparative contribution"), partly in recognition of its greater fairness, but partly also in deference to the comparative negligence rule. Admittedly, the court could have pretended a deference to the legislative preference—and it was in any event merely reversing a prior judicially created doctrine—but it felt and responded to the need for harmonization of the two regimes.

A much bolder assault was mounted by the New York Court of Appeals in *Dole v. Dow Chemical Co.* Here the plaintiff's husband, employed by Urban, was overcome by poisonous fumes while fumigating a storage bin with a chemical supplied by the defendant. The plaintiff's wrongful death action against the defendant's alleged negligence in not properly labeling the fumigant so as to warn users; the defendants cross-complained against Urban, seeking an indemnity (if held liable) for its negligence in failing to follow instructions on the label and thus contributing to its employee's death. The difficulty facing Dow in its third-party complaint was that the New York contribution statute, like the Californian, authorizes contribution only between tortfeasors held liable in a joint judgment—here joint judgment was precluded by the immunity provision of the New York Workmen's Compensation Act, barring tort recovery against an employer "on account of such injury or death." Still, according to a widely accepted construction, this immunity does not protect against claims for indemnity (as distinct from contribution) on the sophistical ground that indemnity is based not on the personal injury cause of action, but on the relation between indemnitor and indemnitee (here supplier and user of the harmful product). Unfortunately, Dow's indemnity claim seemed jeopardized by the requirement that the claimant's negligence must have


63. In Wisconsin, contribution had been judicially created in 1918 (*Ellis v. Chicago & N.W. Ry.*, 167 Wis. 392, 167 N.W. 1048 (1918)), but comparative negligence was introduced by statute in 1931.

64. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), noted in 53 A.L.R.3d 175. *Dole* has been the subject of a great deal of law review comment. See, e.g., 58 Cornell L.Q. 602 (1973); 42 N.Y.U.L. Rev. 815 (1972); 24 Syracuse L. Rev. 462-70, 551-56 (1973).

been "passive" and the indemnitor's "active." However, undaunted the court of appeals invented a form of "partial indemnity" for those, like Dow, who could not hope to satisfy that exacting requirement: the court created an indemnity with the remarkable attribute of allowing recovery which, though not a full recovery, was apportioned to the respective degrees of fault of the parties. In thus denying Urban's motion to dismiss Dow's third-party complaint, the court flouted at least three statutory rules: (1) it countenanced contribution under the false label of "indemnity" in violation of the Contribution Act's requirement of a joint judgment; (2) such contribution was to be apportioned to the parties' shares of responsibility, in violation of the Contribution Act's requirement of equal division; and (3) it gave the go-by to the immunity provision of the New York Workmen's Compensation Act by enlarging the court-created exception for indemnity by brazenly mislabeling contribution "partial indemnity."

While this tour de force probably has no equal even in an era that has become accustomed to cynical manipulation of language in public life, far less in the way of violence to the statutory norm is needed in the California context. For the only statutory rule requiring judicial qualification is the equal division rule of the California contribution statute in a situation obviously uncontemplated at the time of its enactment: -the situation where the plaintiff also bears a share of responsibility and has become entitled to an apportioned award. Better still,

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67. The Dole court was justified in drawing attention to occasional distortions of the "active-passive" criterion by some courts, but was less than frank in interpreting these distortions "as an attempt at realignment of the rule"). The courts that distorted the criterion were operating against the background of the unreformed common law rule against contribution and understood that indemnity meant a complete shifting of the loss. By contrast, the Dole court was faced with a contribution statute and laid an axe to the uniformly understood distinction between contribution (sharing) and indemnity (shifting). The "active-passive" criterion is discussed in Note, Contribution and Indemnity in California, 57 CALIF. L. REV. 490 (1969), commenting especially on United Airlines v. Wiener, 355 F.2d 379 (9th Cir. 1964).
Nor is Herrero v. Atkinson, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1st Dist. 1964) a case where the court "although using the language of indemnity, . . . actually applied the principles of equitable contribution, quite like the partial indemnification or comparative negligence of Dole." Braun, supra note 55, at 202. Herrero shifted the whole loss caused by the malpractice from the tortfeasor to the negligent physician, while Dole shared it between "indemnitor" and "indemnitee." The first was therefore a case of true indemnity for a divisible part of the loss, the second a case of contribution, the sharing of an indivisible loss. Cf. Niles v. City of San Rafael, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1st Dist. 1974).
The sauciness of Dole is all the more difficult to reconcile with the same court's cautious refusal only 1 year later in Cudling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973) to extend apportionment to contributory negligence, a context in which the legislature had largely withheld its voice.
of course, would be a *general* abrogation of the equal division rule, but that reform would be widely regarded as falling more properly to the province of the legislature. A model bill along those lines has (once again) been recently proposed.\(^7\)

A final option for accomplishing a correct distribution of shares that would altogether sidestep the problem of contribution is to abandon the "entire liability" rule, previously considered. Limiting P's claim to only D1's apportioned share would thus solve not only the problem of D2's insolvency but also the problem posed either by a "no contribution" rule\(^7\) or, as in California, by a pro rata contribution rule. This solution would not be ideal, since it would apportion shares on the principle of fault when the plaintiff was contributorily negligent but would still apportion shares on the pro rata principle when he was not. But it has two attractions: first, the incongruity is less obvious, and second, this solution could be imposed more easily by the courts since it would involve a modification merely of the judicially created "entire liability" rule instead of the *statutory* pro rata rule of contribution.

2. *The Absent Tortfeasor.* Another problem connected with multiple parties, which the *Li* court identified as deserving the most serious future consideration, arises when all responsible parties are not brought before the court. As Justice Sullivan observed, "[i]t may be difficult for the jury to evaluate relative fault in such circumstances, and to compound this difficulty such an evaluation would not be res judicata in a subsequent suit against the absent wrongdoer."\(^7\)

Fortunately, the virtual absence of case law from other jurisdictions (including the British Commonwealth) suggests that the problem's theoretical difficulty is not matched by its practical importance. The apportionment among defendants in accordance with their negligence "when a judgment is rendered against more than one defendant in any such action." "Such action" seems to refer to an action in which a plaintiff's recovery is reduced by reason of his contributory negligence.

A more general measure would require apportionment in all contribution claims, as in Utah. See note 55 *supra.*


72. 13 Cal. 3d at 823, 532 P.2d at 1240, 119 Cal. Rptr. at 872.
reason for this is presumably either that plaintiffs usually prefer to sue all possible defendants in one proceeding or that the defendant(s) sued will bring in any others in third-party proceedings. Moreover, in California the range of possible options in dealing with this problem is somewhat narrowed by reason of the present statutory rule authorizing contribution only between tortfeasors held liable in a joint judgment.

There are two alternatives: the loss could be divided either between the plaintiff and all the tortfeasors or only among the parties to the action. A brief discussion of their respective merits\textsuperscript{73} follows.

Assume, for the sake of simplicity, that P, D\textsubscript{1} and D\textsubscript{2} share responsibility equally for P's damage. If the loss is to be divided under the first alternative, how much P can claim from D\textsubscript{1} (whom he alone sues) will depend on whether D\textsubscript{1} is held liable \textit{in solidum} or only for his own share. Under the first hypothesis, he can recover two-thirds from D\textsubscript{1}, under the second only one-third. The former, as we have already discussed, has the disadvantage of placing the risk of D\textsubscript{2}'s insolvency wholly on D\textsubscript{1} instead of sharing it between P and D\textsubscript{1}; in addition, its unfairness would be increased in California by the rule that D\textsubscript{1} could not, under the extant contribution act, recover D\textsubscript{2}'s share in the absence of a joint judgment.\textsuperscript{74}

Under the second alternative—dividing the loss only between the parties to the action—P will recover from D\textsubscript{1} one-half of his loss. This is more than the one-third under the preceding alternative, but less than the two-thirds he could have recovered by suing D\textsubscript{1} and D\textsubscript{2} jointly: this result provides him with an incentive to join all possible defendants in one action (desirable for reasons of administrative economy and to

\textsuperscript{73} These are thoroughly canvassed by Williams, \textit{supra} note 37, \S 110, on which the following exposition heavily relies.

Since Gregory, \textit{supra} note 55, at 85-87, 94-98, American contributions to this topic are few and not particularly revealing; so far there appears to be virtually no case law. Some statutes, requiring the jury to determine the percentages of negligence attributable to \textit{each of the parties}, could be interpreted to mandate the second alternative. On the other hand, one commentator boldly announces that “the common trend among comparative negligence jurisdictions is to consider all causal negligence”. Note, \textit{Comparative Negligence—A Look at the New Kansas Statute}, 23 \textit{KAN. L. REV.} 113, 129 n.103 (1974).

\textsuperscript{74} Wisconsin has adopted the first alternative as well as the \textit{in solidum} principle, but allows contribution even in the absence of a joint judgment. Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934). But failure to instruct the jury to compare the plaintiff's negligence also with that of an absent tortfeasor (e.g. the plaintiff's own driver) cannot, under that posture, prejudice the defendant and give him ground for appeal, since proper instruction might in fact have raised his liability from one-half to two-thirds. Hardware Mutual Cas. Co. v. Harry Crow & Son, 6 Wis. 2d 396, 94 N.W.2d 577 (1959); Ross v. Koberstein, 220 Wis. 73, 264 N.W. 642 (1936). It would be otherwise in a jurisdiction which imposes only individual liability, since D\textsubscript{1} might then have been liable only for one-third instead of one-half. Schwartz, \textit{supra} note 1, \S 16.5.
undercut verdict-shopping), but does not penalize him unduly if for some reason he is unable or unwilling to do so.\textsuperscript{75}

The attractions of the second alternative are considerable.\textsuperscript{76} The identity of \(D_2\) may be unknown (if, for example, he is a hit-and-run driver), in which case \(P\) should suffer no more prejudice than if \(D_2\) were judgment-proof: either risk is best shared equally between \(P\) and \(D_1\). Also, it may be considered unfair to saddle the plaintiff with the burden of litigating the issue of a non-party's liability; or (as pointed out by Justice Sullivan in \textit{Li})\textsuperscript{77} to try \(D_2\) in absentia under conditions which could not possibly become binding on him as res judicata. Can \(D_2\) afterwards be impugned either by \(P\) or \(D_1\) so as to equalize their shares, just as if he had been a party defendant in the first proceedings? \(P\)'s judgment against \(D_1\) certainly did not merge his cause of action against \(D_2\), nor should his recovery of one-half of his loss from \(D_1\) operate as a complete satisfaction; hence \(D_2\) ought to be liable to \(P\) for the remaining one-sixth, the difference between the one-half \(P\) did recover and the two-thirds he would have recovered by suing \(D_1\) and \(D_2\) jointly. In addition, in a jurisdiction permitting contribution between tortfeasors in the absence of a joint judgment, \(D_1\) should be entitled to contribution from \(D_2\) for his overpayment—that is, one-sixth, the difference between one-half and one-third. Thus, the shares between \(P\), \(D_1\) and \(D_2\) would eventually have been set right.

Finally, consider the situation where \(P\) has settled with \(D_1\). States like California, which have adopted the principle of the 1955 version of the Uniform Contribution Act, require a set-off against \(D_2\)'s liability only for the amount recovered in the settlement and release \(D_1\) from any claim for contribution by \(D_2\).\textsuperscript{78} The California Contribution Act did

\textsuperscript{75} California in company with most other States adopts the first. The ensuing text is therefore addressed to that hypothesis.

In the few states which adopt the second, the consequences on \(D_1\) of considering all causal negligence would by comparison be much more tolerable.

\textsuperscript{76} It is favored by WILLIAMS, supra note 37, at \$ 110-12 and was adopted in the Republic of Ireland in the Civil Liability Act of 1961, 1961 Acts of the Oireacthes c. 41, \$ 34, at 1403.

\textsuperscript{77} 13 Cal. 3d at 823, 532 P.2d at 1239-40, 119 Cal. Rptr. at 871-72. Though the allocation of a specified share to \(D_2\) by the jury could not possibly bind \(D_2\), California law would probably impose a collateral estoppel on \(P\) with regard to (1) his total damages, and (2) his own share of responsibility, on the ground that he had a "full and fair opportunity to litigate" those issues. \textsc{Restatement (Second) of Judgments} \$ 88 (Tent. Draft No. 2, 1975). Gregory favors the solution, but in addition he would not permit \(P\) later to sue \(D_2\) lest he recover more than his due. C. GREGORY, \textsc{Legislative Loss Distribution in Negligence Action} 94-98 (1936). This fear appears unjustified.

\textsuperscript{78} The 1955 version thus preferred the promotion of settlements to the principle of equality. The 1939 version proceeded on the opposite preference for equality by requiring a pro rata, not a pro tanto credit, for \(D_2\). \textit{See also} Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968) (the "50 percent Murray credit"). The only control
not, of course, contemplate the possibility of claims by contributarily negligent plaintiffs, and therefore assumed D2's liability to be for the whole of P's loss minus whatever P had managed to collect from D1. The same principle, however, should still govern when P is guilty of contributory negligence, because to do otherwise would flout the paramount statutory purpose of encouraging settlements. If D2's responsibility were to be limited to his own share alone and were assessed merely as a fraction of the total responsibility, including D1's, he would be liable only for one-third of P's loss. This would provide no incentive for P to settle with D, and would be contrary to the statutory policy that the risk of unequal distribution should be borne by the non-settlor rather than the plaintiff. If, then, D2's liability continues to be treated as in solidum, it would presumably be necessary to ascertain both his own and D1's share and then deduct the amount P had already recovered from D1. This would conform completely with the terms of the Contribution Act, but would require adoption of the "first alternative"—comparing the shares of the plaintiff and all tortfeasors. A third possibility would be to adopt the "second alternative"—comparing only the shares of P and D2—with the result that D2 would be liable for one-half, presumably without deduction for what P recovered in his settlement from D1.

c. Last Clear Chance

The introduction of comparative negligence has brought with it not only new problems of the kind so far discussed, but has also hopefully released society from the bondage of some old ones. Most prominent among that debris is undoubtedly the last clear chance rule, which used to place so heavy a burden on the administration and credibility of the contributory negligence regime. Since that rule, though sometimes couched in the cabalistic terminology of causation, was in reality but an escape hatch from the stalemate rule, it followed that the abolition of the main rule should entail also the demise of its satellite. Despite equivocation in a few jurisdictions, largely based on particular statutory lan-


80. A clear contrast is provided by Pierringer v. Hager, 21 Wis. 2d 182, 124 N.W.2d 106 (1963), where P having released D1 expressly from D1's share of responsibility, it was held that the release freed D1 from contribution to D2 and that D2's share of responsibility had to be assessed by subtracting P's and D1's. Here the terms of the release followed the model of the earlier 1939 Uniform Contribution Act which, in contrast to the 1955 version, preferred equality over encouraging settlements and was prepared to do so at the cost of P rather than D2.
The surviving role of assumption of risk is more difficult to forecast. So long as contributory negligence spelled complete defeat for a plaintiff, there was little incentive to distinguish precisely between the two defenses. Though lip service is often paid to the axiom that the hallmark of assumption of risk is consent while that of contributory negligence is misconduct, the two are frequently allowed to run into each other. Apart from sloppiness of thought, two other interrelated factors compound this tendency. Both are the product of the increasing disenchantment with the philosophical underpinning of assumption of risk. That defense owes its origin to the sphere of master and servant and did yeoman service, in company with its notorious variant, the fellow servant rule, to exempt industry largely from paying for its overhead of work accidents prior to the advent of workmen's compensation. Not surprisingly, the defense still carries the odium of that earlier association in the limited number of consensual situations in which it still claims a surviving role, viz. against passengers of incompe-


82. 13 Cal. 3d at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872.

Florida and Alaska, the other states to introduce comparative negligence by judicial decision, also specifically abrogated the last clear chance rule. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Kaatz v. State, 540 P.2d 1037 (Alaska 1975). Wisconsin had abolished it even prior to comparative negligence. Switzer v. Detroit Inv. Co., 188 Wis. 330, 206 N.W. 407 (1925). But only the Connecticut statute, CONN. STAT. ANN. tit. 52-572h (Supp. 1975), has followed suit. Elsewhere the matter remains open. See SCHWARTZ, supra note 1, § 7.2.


84. This has its counterpart in civil law systems where assumption of risk is sometimes barely recognized as a distinct notion from contributory negligence. Those that do recognize it, like the German law, have not entirely escaped our problems of demarcation. For an excellent analysis of the problem and instructive survey of the principal legal systems, including the common law world, see Honoré, supra note 15 at 112-17.

tent drivers, spectators or participants of a dangerous sport or entrants on dangerous premises.

A second factor in the decline of the defense is its express abrogation in an increasing number of situations. Thus, in the employment context it received its coup de grace when the Federal Employers’ Liability Act,\textsuperscript{86} and many state statutes like the California Labor Code,\textsuperscript{87} finally abolished the defense in the remaining master and servant cases still governed by common law principles of tort liability. Similarly, the eclectic California court-created rule, which is linked to the puzzling invalidation by our Civil Code of all express contractual exemptions from liability for “violation of [statute] law, whether willful or negligent,”\textsuperscript{88} abrogates the defense from all actions for violation of statute.\textsuperscript{89}

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\textsuperscript{86} In 1939 Congress amended the Federal Employers Liability Act to provide that an “employee shall not be held to have assumed the risk of his employment in any case where such injury or death resulted in whole or in part from the negligence of the officers, agents, or employees of such carrier...” 45 U.S.C. § 54 (1972). This occurred after endless litigation over the dividing line between the two defenses. See Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943). The Court there held “that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment...” \textit{Id.} at 58.

\textsuperscript{87} \textit{CAL. LABOR CODE} § 2801 (West 1975) provides in part:

\begin{itemize}
  \item [(a)] The employee either expressly or impliedly assumed the risk of the hazard complained of.
  \item [(b)] The injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant.
\end{itemize}

No contract or regulation shall exempt the employer from any provisions of this section.

Yet what could better illustrate the “wilderness” of this area than the fact that some courts have, quite in reverse, limited the defense precisely to master-servant cases? \textit{E.g.}, Smith v. Blakely, 213 Kan. 91, 515 P.2d 1062 (1973).

\textsuperscript{88} “All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” \textit{CAL. CIV. CODE} § 1688 (West 1975). In construing this statute, courts have concluded that an exculpatory provision can be valid only if it does not affect the “public interest.” Tunkl v. Regents of Univ. of Calif., 60 Cal. 2d 92, 96, 383 P.2d 441, 443, 32 Cal. Rptr. 33, 35 (1963). Violation of a statute presumptively involves the public interest and is therefore not subject to exculpatory provisions.

Identical to the California provision are \textit{MONT. REV. STAT.} § 13-802 (1974); \textit{N.D. CENT. CODE} § 9-08-02 (1975); and \textit{OKLA. STAT. ANN. tit. 15, § 212 (1975).} These statutes stem verbatim from a statute drafted by David Dudley Field. \textit{See Fleming, Exculpatory Clauses, in LAW IN THE UNITED STATES OF AMERICA IN SOCIAL AND TECHNOLOGICAL REVOLUTION 105, 107-08 (J. Hazard and W. Wagner eds. 1974).}

\textsuperscript{89} Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 431, 218 P.2d 17, 31 (1950): “[A]n ordinance enacted for the public good cannot be contravened by private agreement. Public policy requires that duties imposed by statute be discharged and that those who are affected cannot suspend the operation of the law either by waiver or by express contract.” Although this rule has long been shared by English law (Wheeler v. New Merton Board Mills, Ltd. [1933] 2 K.B. 669, 675 (C.A.)), it is not generally accepted in other states. \textit{RESTATEMENT (SECOND) OF TORTS} § 496F, comment e, at 380 (1965).
These settings have provided instructive precedents for redefining the boundary between the remaining defense of contributory negligence and the discarded defense of assumption of risk. Typical is the following statement from *Fonseca v. County of Orange.*

The facts of this case fall squarely within the area of the "overlap." All of the elements of assumption of risk are present. Fonseca's undisputed testimony shows that he had actual knowledge of the danger, appreciated the nature and magnitude thereof, and voluntarily went to work on the bridge despite the danger. Such conduct, if reasonable, constitutes assumption of risk, not contributory negligence, and may not be asserted as a defense in a suit for negligence based on the violation of a safety statute or safety order. Conversely, if the conduct be deemed unreasonable, it constitutes both assumption of risk and contributory negligence and, as the latter, may be asserted.

The last sentence of this passage apparently provides the clue to the observation in the *Li* opinion that "the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence." But the *Fonseca* formula of merger—to treat all unreasonable assumptions of risk as a variant of contributory negligence, subject to apportionment—presents several difficulties as a general model for redefining the relation between the two defenses. First, the formula stems from a context (violation of statute) where assumption of risk, reasonable as well as unreasonable, express as well as implied, has been totally discarded on grounds of public policy. The same supposition, however, does not obtain elsewhere, and it would be whimsical to treat one who has unreasonably assumed the risk more favorably (by allowing him to recover in part) than one who reasonably assumed the risk (and who might still be defeated entirely).

Outside California, it is generally confined to statutes which are clearly intended to protect the plaintiff against his own inability to protect himself—for example, child labor acts and certain safety acts for the benefit of employees.


91. 13 Cal. 3d at 825, 532 P.2d at 1241, 119 Cal. Rptr. at 873. This passage is immediately preceded by a reference to, *inter alia,* the above-cited extract from *Fonseca v. County of Orange.* See text accompanying note 90 supra.

92. It will hardly come as a surprise that no such suggestion was ever made in the context of strict liability, to which assumption of risk, but not contributory negligence, offers a defense. See text accompanying notes 111-120 infra. There, assumption of risk continued to flourish, even when—as is commonly the case—the assumption was unreasonable. Sperling v. Hatch, 10 Cal. App. 3d 54, 88 Cal. Rptr. 704 (4th Dist. 1970). All the same, it is submitted that most of such instances should now more than
escape from this dilemma: one, however unpalatable, tolerates the con-
tinued vitality of the complete defense of consent to the risk, whether
reasonable or unreasonable, distinct from contributory negligence
(which alone calls for apportionment).93 The other alternative discards
assumption of risk, reasonable as well as unreasonable, as a defense not
only to claims for violation of statute but also to all claims for common
law negligence.

The latter solution has been ardently advocated by some distin-
guished commentators94 and has been adopted by several courts.95 It is
not, however, without its own problems. In the first place, there has
been no disposition to outlaw all disclaimers or other forms of express
assumption of risk. Though disclaimers are now generally viewed with
a jealous, even jaundiced, eye, a plaintiff’s expressed willingness to forgo
his rights is still generally respected unless his relation with the defend-
ant is so unequal or “affected with a public interest” that it is considered
against public policy for him to waive his legal protection, in which case
neither express nor implied assumption of risk would be upheld.96

 ever be treated rather as a variant of contributory negligence subject to apportionment.
See text accompanying notes 116-118 infra.
93. This appears to be the position in Arkansas, Georgia, Mississippi, Nebraska,
and South Dakota. For citations, see notes 1 and 4 supra. See SCHWARTZ, supra note
1, at 161-63. It is also the English view. See text accompanying notes 103-04 infra.
94. See Symposium—Assumption of Risk, 22 LA. L. REV. 1-166 (1961). In the
forefront has stood Professor Fleming James. See James, Assumption of Risk: Un-
happy Reincarnation, 78 YALE L.J. 185 (1968). Professor James did not, however,
carry the day in the A.L.I. formulation of RESTATEMENT (SECOND) OF TORTS ch. 17A
95. Several decisions rendered mostly prior to the introduction of comparative neg-
ligence purported to “abolish the defense of assumption of risk.” The leading case was
Meistrich v. Casino Arena Attractions, 31 N.J. 44, 155 A.2d 90 (1959). That case was
followed, chronologically, by Ritter v. Beals, 225 Ore. 504, 358 P.2d 1080 (1961); Sira-
gusa v. The Swedish Hospital, 69 Wash. 2d 310, 373 P.2d 767 (1962); Felger v. Ander-
son, 375 Mich. 23, 133 N.W.2d 136 (1965); Hale v. O’Neill, 492 P.2d 101 (Alaska
1971); Williamson v. Smith, 83 N.M. 336, 491 P.2d 147 (1972). Other courts have,
or seem to have, approved “merger” of unreasonable assumption of risk into contributory
negligence, mostly after introduction of comparative negligence. Frelick v. Homeo-
pathic Hospital Ass’n, 51 Del. 568, 150 A.2d 17 (1959); McConville v. State Farm Mutual
Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962); Bulatao v. Kauai Motors,
49 Hawaii 1, 496 P.2d 887 (1965); Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d
826 (1971); Roseman v. City of Esterville, 199 N.W.2d 125 (Ia. Sup. Ct. 1972); Rosas
v. Budding Food Store, — Tex. —, 518 S.W.2d 534 (1973); Lyons v. Redding Constr.

Also, the Connecticut comparative negligence statute, like FELA, flatly abolished
assumption of risk while the Oregon and Washington statutes seem to direct that unrea-
sonable assumption of risk be treated like contributory negligence. For citations to stat-
utes, see notes 1 and 4 supra; SCHWARTZ, supra note 1, ch. 9.
96. Fleming, Exculpatory Clauses, in LAW IN THE UNITED STATES OF AMERICA IN
SOCIAL AND TECHNOLOGICAL REVOLUTION 105 (J. Hazard & W. Wagner eds. 1974);
Tobriner & Grodin, The Individual and the Public Service Enterprise in the New Indus-
trial State, 55 CALIF. L. REV. 1247 (1967).
Otherwise, however, so radical a governmental intrusion into the sphere of private relations still looks somewhat out of line with contemporary values despite the much publicized contemporary trend toward paternalism and regimentation. Hence, what is proposed is not to outlaw all forms of assumption of risk, but only implied assumption of risk. From this one might well conclude that the objection is not to the principle of permitting a person to forgo his rights to legal protection but to the process of inferring such a willingness from conduct as distinct from any unequivocal expression.

Opponents of implied assumption of risk, however, advance some arguments in mitigation. Their principal concession is that consent may still reduce or extinguish the defendant's duty of care rather than constitute a defense to his breach of duty. The familiar rules for example, that a participant or spectator of a sporting event cannot complain of risks inherent in the game, that a worker cannot complain of risks inherent in his job, or that a licensee or invitee cannot complain of dangers of which he was aware, can be as well explained on the ground that the defendant was simply not negligent because he had no responsibility for those risks, as on the ground that the plaintiff had assumed them. Similarly, the so-called "fireman's rule," which negates a fireman's right to recover from one who has negligently caused the fire, may be cited as yet another example of what its proponents choose to call "primary assumption of risk," consent affecting the defendant's duty of care rather than establishing a defense to his breach of duty. Although many judicial opinions, especially those among the employment and sporting cases, are marred by an insufficient attention to the issue of the defendant's negligence, the boundaries of legitimate "primary assumption of risk" are hardly well defined. Worse, the assurance that this concept can in the future take care of cases where a plaintiff should still lose despite the demise of the defense of assumption of risk, could easily become the means for readmitting the devil through the backdoor who has just been expelled through the front. A recent English decision, at any rate, shared Prosser's own misgivings over

97. One may also find an approving nod in the same direction from the Li opinion: "Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care." 13 Cal. 3d at 820, 532 P.2d at 1240, 119 Cal. Rptr. at 872.


this stratagem. In the case in question, a family friend instructing a learner driver suffered injury when the pupil became rattled and ran into a lamppost. Clearly, his consent to run the risk, if there was such, was perfectly reasonable and could not therefore be treated as a variant of contributory negligence mandating apportionment. Moreover, the court held that not only had the instructor not assumed the risk of the pupil's negligence by voluntarily renouncing his rights against him, but he was entitled to the same standard of care as any outsider. He thus recovered in full. Perhaps an American court, enured to guest statutes, would have been less squeamish over the proposition that the driver might owe a lesser standard of care to a person inside than outside the car.

The abolitionists finally argue that there is no demonstrated need for a defense of reasonable assumption of risk ("secondary assumption of risk") on the ground that the precedents cited by traditionalists are, properly viewed, illustrations either of "no duty" ("primary assumption of risk"), just discussed, or of contributory negligence.101 This may well be a self-fulfilling prophesy since, absent a consensus on where to draw the line between the proper spheres of primary and secondary assumption of risk, one could be—and indeed is—encouraged to (re)classify all difficult cases as belonging to the first category. In at least some instances, however, such an approach would be reminiscent of Procrustes—for example, that of the driving instructor and those involving equally guilty participants in drunken "pub-crawls" or in other highly dangerous ventures.

Before resorting to this drastic and awkward solution, consideration ought to be given to the alternative of casting assumption of risk into a narrower mold, more conformable with its underlying rationale of consent and substantially restricting its ambit in accordance with contemporary values. The scope given to the defense turns, of course, primarily on how seriously one takes the requirement that the plaintiff be shown to have consented to assume the risk. The cavalier American practice in this regard is well illustrated by the above-cited passage in Fonseca to the effect that "Fonseca's undisputed testimony shows that he had actual knowledge of the danger, appreciated the nature and magnitude thereof and voluntarily went to work on the bridge despite

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the danger. Such conduct constitutes assumption of risk.102 This confuses incurring a danger with assuming it. Instead, there should be proof that, just as in the case of an express disclaimer, the plaintiff's conduct realistically indicated a willingness to renounce his right to recover for any injury resulting from the defendant's negligence. Thus, according to the prevailing English view,103 merely encountering a known hazard and so consenting to the risk of being hurt would not suffice; in order to defeat a plaintiff entirely, he must be shown to have consented to run the risk at his own expense so that he, not the negligent defendant, should bear the loss in the event of an accident. In other words, he must have assumed not only the physical but also the legal risk of injury from a negligent defendant.104 In the absence of an express disclaimer, these stringent conditions will rarely be fulfilled; they were not, as we have seen, even in the case of the driving instructor. Only in Canada have there been a few instances where, despite comparative negligence, plaintiffs were debarred completely for actively participating in drunken sprees and racing the police or each other on public highways.105 In the result, the defense is dying on the vine without the corpse posing a nasty problem of disposal.

In summary, California law confronts two choices for dealing with the future relation between assumption of risk and comparative negligence. First, the law may completely abolish the defense of implied assumption of risk or, what in practice amounts to much the same thing, the law may "merge" assumption of risk into contributory negligence. These alternatives pose a theoretical problem of reconciliation with the survival of express assumption of risk (disclaimers) and require the safety valve of "no duty" for continued recognition of certain isolated instances of reasonable assumption of risk. But since almost all cases in practice involve unreasonable assumption of risk, merger into comparative negligence would provide a less complicated way of transmitting the issue to juries and would secure the desirable result of apportioning damages. The second solution would let the defense of assumption of risk survive as an embodiment of the still vital individual freedom to forgo one's right to sue for negligence, but would redefine the conditions of the defense so that it would only be applicable on stringent proof of genuine consent to release the defendant from respon-

103. See Flemming, supra note 16, ch. 11.
104. This distinction was first formulated by Glanville Williams, Williams, supra note 37, at 308.
sibility. This approach is spared the conceptualistic imperfections of the first and avoids any dramatic break with the received tradition. In daily application, however, it will make little, if any, difference to the outcome of cases which of these preceding approaches ultimately prevails.

e. Other Applications

In addition to voluntary assumption of risk certain other, less obvious situations also require reconsideration in the wake of comparative negligence. Only a few will be mentioned here by way of illustration.

1. Invitees. First is the problem concerning rules of law that used to be conventionally formulated in terms conditioning the defendant's "duty" on absence of fault by the plaintiff. Most familiar of these is the rule limiting a land possessor's duty to those invitees and licensees alone who neither knew nor should have known of the danger on the possessor's land. Presumably this is no longer much of a problem in California, since Rowland v. Christian swept away the old classification of visitors and substituted a common duty of reasonable care. In any event, the old formulation, stemming from a time when a plaintiff would just as much have been defeated by the defense of contributory negligence, can provide no guidance now that the consequences are no longer the same.

Nor should the policy underlying comparative negligence be thwarted by assigning proximate cause as the ground for denying total recovery to a plaintiff at fault. A pertinent illustration comes from the area of dramshop liability. The California court only recently joined the majority view by holding in Veseley v. Sager that a tavern owner who had supplied an intoxicated customer with liquor in violation of a statute could become liable to a person whom the drunk injured on his drive home. In the court's view, the person injured fell within the class intended to be protected by the statutory prohibition. But surely the same has always been true of the drunk himself, so that the real reason for barring him or his survivors in the past has been his contributory negligence rather than the absence of any duty by the

108. This conclusion has been unanimously reached in Commonwealth jurisdictions. FLEMING, supra note 19, at 391-92. It has also been statutorily reinforced in Ireland Civil Liability Act of 1961, 1961 Act of Oireachtas, c. 41, § 43(2)(e).
defendant or proximate cause. Today, his fault should therefore be sanctioned only by reduction of recovery, not total denial.\textsuperscript{110}

2. \textit{Strict Liability}. More intriguing are several situations where the prospect of denying a merely inadvertent plaintiff all relief led to the exclusion of the defense of contributory negligence from certain causes of action where the defendant's negligence was regarded as by far the more heinous and one which should not lightly go without sanction. Aside from the last opportunity rule, which had a similar basis, several illustrations of this rationale spring to mind. One is the exclusion of the defense from claims based on strict liability, unless the plaintiff's misconduct takes the extreme form of knowingly and unreasonably subjecting himself to the risk.\textsuperscript{111} Admittedly, the reason for this exclusion has been rarely articulated; but to the extent that it is not based merely on a formalistic equilibrium between negligence and contributory negligence,\textsuperscript{112} it must surely be attributed to the conviction that responsibility

\textsuperscript{110} The problem arose prior to \textit{Li} in Sargent v. Goldberg, 25 Cal. App. 3d 940, 102 Cal. Rptr. 300 (2d Dist. 1972), where the wrongful death action failed \textit{inter alia} on the ground of contributory negligence, and in Cooper v. Nat'l R.R. Passenger Corp., 45 Cal. App. 3d 389, 119 Cal. Rptr. 541 (2d Dist. 1975), which muddied the waters by upholding a demurrer on alternative grounds of proximate cause (citing Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955), which had long been overruled on precisely that ground in Vessey v. Sager, 5 Cal. 3d 153, 486 P.2d 161, 95 Cal. Rptr. 623 (1971)), contributory negligence ("or, we think more precisely, . . . voluntary assumption of risk") and the doctrine of in pari delicto. The problem has not so far arisen under comparative negligence in any reported American case, but the Supreme Court of Canada allowed such a claim subject to a 50 percent reduction in the important decision of Jordan House Ltd. v. Menow and Honserger, \cite{1974S.Ct.Rep.239} 38 D.L.R.3d 105 (1973).

American case law under the stalemate rule has been divided on whether to allow claims for injury or death of the intoxicated patron. A minority of cases has permitted recovery on the ground that contributory negligence was no defense to a claim by a person whom the statute was intended to protect against his own immaturity or incompetence. See text at notes 107-114 \textit{infra}. Vance v. United States, 355 F. Supp. 756 (D. Alaska 1973); Soronen v. Old Milford Inn, Inc., 46 N.J. 582, 218 A.2d 630 (1966); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958). The New Jersey decision, based on breach of common law—not statutory—duty, applied the same principle by analogy. "The accountability may not be diluted by the fault of the patron for that would tend to nullify the very aid being offered." 46 N.J. at 590, 218 A.2d at 636. As suggested later on, under comparative negligence, when no longer confronted with the all-or-nothing dilemma, it would be appropriate to reconsider this position and instead reduce recovery on account of the victim's fault. See text at notes 114-27 \textit{infra}.

111. \textit{Restatement (Second) of Torts} § 524 (Tent. Draft No. 10, 1964); Luthringer v. Moore, 31 Cal. 2d 489, 499, 301; 190 P.2d 1, 7 (1948). The latter type of contributory negligence sometimes passes under the name of assumption of risk, but is expressly referred to in § 524(2) as "contributory negligence." Also see \textit{Restatement (Second) of Torts} § 524, comment b (Tent. Draft No. 10, 1964). It should entail apportionment under comparative negligence, regardless of the future role of assumption of risk.

112. It is elementary learning that contributory negligence means negligence by a plaintiff contributing to his injury, not contributing to the defendant's negligence. \textit{Restatement (Second) of Torts} § 463 (1965).
for creating abnormally dangerous risks should, as a matter of policy, be owed to the inattentive as well as to those who are alert. One may well conclude, now that the choice is no longer between all or nothing, that it is even better to rebuke a negligent plaintiff by somewhat reducing his damages without thereby allowing the defendant to escape all responsibility.

Precedent for the exclusion of contributory negligence as a defense to strict liability remained relatively scant as long as the occasions for strict liability were confined to the few and limited conventional areas of abnormally dangerous activities and animals. It swelled beyond comparison when the principle was extended to products liability as the result of the momentous change from negligence to strict liability in the 1960's. This transference from one scene to the other appears to have occurred almost "without saying," despite the different origin and rationale of these heads of strict liability. Most probably one inartic-
ulate factor, perhaps the most cogent, was here again the unfairness of withholding all protection from a merely inattentive consumer of a defective product (though not from one who voluntarily and unreasonably proceeds to encounter a known danger). If that hypothesis is correct, it requires thought whether this rule deserves to survive under comparative negligence, now that it has become possible to penalize the plaintiff's failure to protect himself without denying him all protection of the law. Surely, after making all due allowance for skepticism concerning the heuristic effect of rules of law on human conduct in contexts such as these, it is still strongly arguable that the chance should not be missed to put some pressure at a strategic point for the sake of accident prevention, when this would not exact an inordinate sacrifice of other interests, such as accident compensation. The Wisconsin court was the first to draw this lesson, postulating that products liability was in substance a form of negligence per se which was thus appropriately open to the (partial) defense of contributory negligence. That crutch may have been necessary in view of the Wisconsin statute's wording, which authorized comparative negligence in "claims based on negligence," but it is superfluous in California and other jurisdictions that have established the new rule either by judicial fiat or under statutes omitting that embarrassing phrase. Even those who would sacrifice functional to purely doctrinal considerations and argue that "oil and water can't mix," might be persuaded in this instance by the thought that products liability—as has often been, half apologetically, emphasized—is not absolute but is based on the social fault of marketing defective products. A matrix for apportionment is thus available.

116. The latter form of misconduct, though commonly passing under the name of assumption of risk, is really a variant of contributory negligence and should no longer defeat the plaintiff entirely under comparative negligence. See note 111 supra. Another type of misconduct, however, may still defeat a plaintiff completely—when the product is rendered dangerous only because of misuse. That negates all threshold liability because the product would simply not be defective. Campbell v. O'Donnell, [1967] Ir. R. 226; Poole v. Metal Windows, [1964] N.Z.L.R. 522; But cf. Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973) (which incautiously referred to abnormal use as a variant of contributory negligence); Noel, Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk, 25 Vand. L. Rev. 93 (1972).

Moreover, express disclaimers, a prominent variant of assumption of risk, have only limited validity in this context, especially in relation to personal injury. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); UNIFORM COMMERCIAL CODE §§ 2-216, 2-719. See notes 92, 100 supra.


118. An analogous situation concerns claims for indemnity or contribution from a strictly liable manufacturer. Although authority is divided and confused, some courts have allowed full indemnity not only to faultless retailers (e.g., Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970)) but also to negligent indemnitees (e.g., Texaco, Inc. v. McGrew Lumber Co., 117 Ill. App. 2d 351, 254 N.E.2d 584 (1969);
Several courts have since adopted this line of reasoning\textsuperscript{119} and have sanctioned a rule that has also gained the support of the commentators.\textsuperscript{120}

3. Statutory Violation. Also with overtones of strict liability is the problem of statutory violation. Whether to admit the defense of contributory negligence has proved singularly perplexing. On the one hand, the purpose of the statutory mandate is clearly most often to protect the members of the endangered class even against their own inattentiveness, since the alert rarely stand in need of the prescribed safeguard. On the other hand, courts became prisoners of their own doctrinal commitment to the notion that statutory violation was a species of negligence ("negligence per se"), from which there appeared no escape to recognizing contributory negligence as an appropriate defense. Because this conclusion tended to frustrate the statutory protective purpose, exceptions came to be recognized. The Federal Employers' Liability Act, from its inception in 1908, abolished the defense to claims based on breach of safety statutes, although at the same time it introduced comparative negligence as a partial defense to common law negligence.\textsuperscript{121} The California Labor Code has followed this model.\textsuperscript{122} Judicially created

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\item 45 U.S.C. § 53 (1972). The defense of assumption of risk was abolished in 1939.

\item \textbf{CAL. LABOR CODE § 2801 (West 1975).}
\end{itemize}
exceptions have also appeared, though only with utmost caution, confined (according to the orthodox view) to "unusual types of statutes, such as child labor acts, those prohibiting the sale of dangerous articles such as firearms to minors, . . . factory acts for the protection of workmen, or railway fencing or fire statutes which have been construed as intended to place the entire responsibility upon the defendant . . . ." But rarely, if ever, has the indulgence been extended to traffic violations and the like, with the exception of a notable recent breakthrough in New York, when "absolute liability" was imposed for a school bus violating the prohibition against moving on after discharging pupils until they had safely crossed to the other side of the highway: the estate of a 14-year-old killed by a passing car was held entitled to recover from the school district regardless of his contributory negligence. In the future, further exploration along these lines may well be spared, since under comparative negligence courts need no longer sacrifice completely the protective purpose of a safety statute by admitting contributory negligence as a defense. Indeed, even the firmly recognized exceptions developed under the cloud of the stalemate rule will now merit reconsideration.

A final illustration of the distorting effect of the common law contributory negligence bar is the judicial record of dealing with the so-called "seatbelt defense." Impressed by the stark disparity of responsibility between a defendant whose fault has alone caused the accident and a plaintiff who could at best have minimized his injuries, the all but unanimous judicial response has been to deny the defense of contributory negligence. However, under comparative negligence several

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123. Prosser, The Law of Torts 425-26 (4th ed. 1971) (emphasis added). Also consider Restatement (Second) of Torts § 483 (1965); Prosser, Contributory Negligence as Defense to Violation of Statute, 52 Minn. L. Rev. 105 (1948). In California, contributory negligence, though not assumption of risk, has long been recognized as generally constituting a defense to actions for breach of statutory duty. See Alber v. Owens, 66 Cal. 2d 790, 427 P.2d 781, 59 Cal. Rptr. 117 (1967). But the question was alluded to as not entirely beyond review in Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 770, 478 P.2d 465, 473, 91 Cal. Rptr. 745, 753 (1970).

In factory situations the leading case is Koenig v. Patrick Constr. Corp., 298 N.Y. 313, 83 N.E.2d 133 (1948), noted in 10 A.L.R.2d 848. A momentous extension recently occurred when the Michigan Supreme Court, in Frank v. General Motors Corp., 392 Mich. 91, 220 N.W.2d 641 (1974), applied the rule also to common law negligence in failing to provide equipment for a subcontractor's employees.


125. See note 123 supra. The Minnesota court refused to do so in Zerby v. Warren, 297 Minn. 134, 210 N.W.2d 58 (1972) in relation to a retailer's absolute liability for violation of a statute prohibiting the sale of "sniffing glue" to minors: "The adoption of a comparative negligence statute did not create liability where none existed before." Id. at 142, 210 N.W.2d at 63.

courts have already approved the practice of reducing the plaintiff's recovery by a small fraction in order to encourage the use of protective belts, harnesses and helmets.\textsuperscript{127}

III. Legitimacy of Judicial Reform

For students and observers of the judicial process the \textit{Li} decision will be of surpassing interest less for the merits of comparative negligence or its impact on the compensation scene than because that momentous reform was brought about by judicial rather than legislative initiative. The broad consensus among advocates of comparative negligence had always been to direct their appeals to the statehouse rather than to the courthouse, although some scholars, encouraged by the more active role of tort courts in the last 15 years, had begun to entertain the possibility and even advocate reform through the judicial process.\textsuperscript{128} Thus even Prosser, writing in 1964, did not entirely rule out a judicial coup \textit{de main},\textsuperscript{129} and Robert Keeton, 3 years earlier, had indulged his fancy by drafting a model judicial opinion for introducing comparative negligence, as a lure for courts endowed with more boldness than literary confidence.\textsuperscript{130}

Sanguine thoughts along those lines were indeed aroused, later to be cruelly dashed, by events in Illinois in 1968. In \textit{Maki v. Frelk} the

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\item (1970); Kircher, \textit{The Safety Belt Defense—Current Status}, 16 \textit{For The Defense} 45 (1975); Annot., 15 A.L.R.3d 1428 (1967); Annot., 40 A.L.R.3d 856 (1971). Judicial opinions and legal comments are often obscured by a lack of distinction between the bearing of the defense on liability for the accident and on avoidable damage.
\item A future troublespot for American courts arises from the prevailing lack of consensus over the nature of the "seatbelt defense." Some courts treat the issue, not as one of contributory negligence, but of avoidable consequences or mitigation of damages. \textit{E.g., Horn v. General Motors Corp.}, 110 Cal. Rptr. 410, 415-16 (2d Dist. 1973), \textit{rehearing granted}, 34 Cal. App. 3d 773 (2d Dist. 1973); \textit{Spier v. Barker}, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974). Although these theories are also contingent on unreasonableness, it may conceivably be argued that apportionment applies only to contributory negligence, strictly so-called. This would be putting form before substance; indeed it would be Pickwickian to put the plaintiff into a worse portion if his negligence, instead of contributing to the accident, had merely contributed to his damages. In either case, moreover, his negligence would have preceded the accident. \textit{Spier v. Barker}, 35 N.Y.2d at 449, 323 N.E.2d at 168, 363 N.Y.S.2d at 921 (1974).
\item One of the first to do so systematically was \textit{Peck, The Role of the Courts and Legislatures in the Reform of Tort Law}, 48 \textit{Minn. L. Rev.} 265, 304-07 (1963).
\item \textit{Keeton, Creative Continuity in the Law of Torts}, 75 \textit{Harv. L. Rev.} 463, 508-09 (1962).
\end{itemize}
Illinois Supreme Court first remitted the case to the court of appeals for consideration\textsuperscript{131} whether comparative negligence should not replace the all-or-nothing rule, but, after receiving an affirmative reply on the merits, the court lost its courage and, by a 5 to 2 majority, reaffirmed the old rule on the ground that change had to await legislative action.\textsuperscript{132} Thus, by Illinois' default, Florida in 1972 earned the distinction of becoming the first state to impose comparative negligence by judicial decision.\textsuperscript{133} By following this precedent the California Supreme Court lent its great prestige to that solution and probably made the \textit{Li} case another landmark for national attention and widespread following.\textsuperscript{134}

The legitimacy and suitability of judicial law reform has aroused considerable attention in recent times, spurred by the noticeably more creative role of our courts compared with their relative stagnation for several generations before. Public rhetoric tends to simplify this issue as starkly representing either a struggle between progress and reaction or one between "strict construction" and "unconstitutional usurpation of legislative functions." More thoughtful and less passionate analysis, however, by several eminent commentators without political alignment or partisan legal affiliation, has contributed greatly to a less categorical and more differentiated appraisal and understanding of this issue.\textsuperscript{135}

The courts are not in the present and similar contexts overriding a legislative mandate as they have done and indeed have the constitutional power to do when screening legislation for constitutional conformity.\textsuperscript{136}

\textsuperscript{131} Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967).

\textsuperscript{132} Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

\textsuperscript{133} Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

\textsuperscript{134} The first to follow was Alaska, Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

\textsuperscript{135} See, e.g., Peck, supra note 128, and, with particular relevance to the issue of comparative negligence, \textit{Comments on Maki v. Frelk—Comparative \textit{v.} Contributory Negligence: Should the Court or Legislature Decide?}, 21 \textit{VAND. L. REv.} 889 (1968), a symposium by James, Kalven, R. Keeton, Leflar, Malone and Wade. All but the second of this distinguished group welcomed the judicial initiative.


The constitutionality of a comparative negligence statute has only been challenged once on equal protection grounds—unsuccessfully, in Natchez & S.R.R. v. Crawford, 99 Miss. 697, 55 So. 396 (1911) upholding the first comparative negligence statute of general application in the United States. Some state constitutions make reference to contributory negligence. Thus, the Oklahoma constitution ordains that "the defense of contributory negligence shall at all times be left to the jury." Whether this provision invalidates the comparative negligence statute is debated by Gibbons, \textit{Constitutionality of Oklahoma's Comparative Negligence Statute}, 28 OKLA. L. Rev. 33 (1975) and Cooper & Olson, \textit{Constitutional Aspects of Comparative Negligence Statutes}, 28 OKLA. L. Rev. 49 (1975).
Nor does judicial lawmaking challenge the very legislative power of the legislature. This is the gist of the self-justification which has long become a cliché in these cases—that a rule, itself the creature of the courts, can also be qualified and abrogated by the courts. The legislature, after all, can have the last word by overriding, if so minded, the court's decision. This reveals the essentially provisional and subordinate role of lawmaking by the judiciary.

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. The most revealing example of a court's view of its relation to the legislature is the formula first used in Sppanel v. Mounds View School District, where the Minnesota court purposely postponed its abrogation of sovereign immunity as a defense until the end of the next session of the legislature. The latter indeed used the opportunity thus offered to it to pass on the question and enacted legislation which, inter alia, retained the immunity of school districts for another 4 years and qualified the new liability of municipalities in several ways. All the more in the absence of this sophisticated and polite technique, other legislatures have in several instances repudiated judicial abrogation of immunities, especially those of the state and its subdivisions with their obvious adverse political and fiscal implications against strongly organized interests. Something like that occurred a few years ago in California, with an interesting twist. For in response to the judicial abolition of sovereign immunity, the legislature suspended that decision for 2 years, thus gaining time to initiate a detailed study of the problem and eventually pass a complex and detailed government liability code.

137. See the symposium, Admonitory Functions of Constitutional Courts, 20 AM. J. COMP. L. 387 (1972), especially Linde, The United States Experience, id. at 415.
138. 264 Minn. 279, 118 N.W.2d 795 (1962).
139. MINN. STAT. ANN. §§ 466.01-6.12 (Supp. 1975).
142. See Van Alstyne, Governmental Tort Liability; Judicial Lawmaking in a Stat-
In considering whether the court or the legislature is the more suitable body for law reform, a factor of general relevance is that legislatures are notoriously handicapped in the area of tort law. The enormous influence of organized interests supports the status quo. Although the balance has been somewhat corrected in the very recent past by the advent on the scene of the American Trial Lawyers Association, it remains a historical fact that state legislatures have on the whole proved themselves unable to escape the bidding of the insurance industry and other legal defense organizations and consider major reform proposals in the field of torts on their merits. It is this factor which severely impugns the pretense that the legislature is a truly democratic representative of public interests in this context and which has undoubtedly emboldened the courts to pursue a more active role in order to right the balance. True, this does not preclude the legislature from having the last word, but it vitally changes the strategic balance, because it is obviously more difficult to rally a majority for overriding the court’s decision than it is to exploit the natural inertia against affirmative legislative action. For obvious reasons courts are not insensitive to the delicacy of this scenario and are therefore averse to alluding to it, let alone enlarging on it. Legal literature, however, has repeatedly filled the gap.

In the present instance, the California Supreme Court had ample reason for drawing the reluctant conclusion that the legislature in Sacramento had proved itself unable to come to terms with the reform of contributory negligence and that it had thus left the next move to the court. For in contrast to so many other states which expeditiously proceeded to legislation, the California legislature continued to be either unconcerned or still in the toils of pressure groups bent on blocking passage.

A subsidiary point often raised in the debate over the legitimacy of judicial lawmaking concerns the weight, if any, to be given to evidence of prior legislative attitudes on the question involved. At one extreme, of course, is the old saw that the legislature’s very failure to intervene spells tacit approval of the existing judicial rule; but this unrealistical-

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143. Plaintiffs, in contrast to defendants, are an unorganized group. But the American Trial Lawyers Association, representing the plaintiffs’ bar, has displayed increasing muscle not only in the courtroom but also in the corridors of the legislature.


145. 13 Cal. 3d at 810 n.1, 532 P.2d at 1230 n.1, 119 Cal. Rptr. at 862 n.1.

146. Not so long ago the California court even went to the length of arguing that the question of dramshop liability was removed from the judicial domain by the mere fact that it had become the subject of legislation in other states. Cole v. Rush, 45 Cal.
ly casts legislators into a false role, that of assiduous court watchers. Nor, for that matter, can one fairly read much into the fact that some statutes happen to assume the existence of the common law rule under attack: for obvious reasons, legislators in such instances simply did not focus attention on the merits of the rule itself.147 Somewhat more troublesome would be evidence of recent or contemporaneous legislative preoccupation with the question of reforming the common law rule. This would argue for giving the legislature more time rather than anticipating it.148 On the other hand, as already pointed out, repeated failure to enact legislation could also be interpreted as evidence of legislative inability to come to grips with the problem. This at any rate appears to have been the inference drawn by the California court, which dismissed the legislative record as inconclusive.

No less intriguing was the court's apparent nonchalance in ignoring another sign of legislative intent. For, in opting for the "pure" version of comparative negligence, the court paid no heed to the overwhelming legislative preference for the "not as great as the defendant's" formula or to the fact (if indeed it was brought to its attention) that in the only California statute sanctioning comparative negligence, it is expressly enacted that a plaintiff can recover only if his negligence was less than the defendant's.149 This legislative choice was the more significant in


147. See especially Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 218, 359 P.2d 457, 461, 11 Cal. Rptr. 89, 93 (1961). "Nor are we faced with a comprehensive legislative enactment designed to cover a field. What is before us is a series of sporadic statutes, each operating on a separate area of governmental immunity where its evil was felt most." That is very different from the situation confronting the Wisconsin court in Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970) when asked to replace the "less than the defendant's" formula of the 1931 statute with the "pure" variant. A majority of the court concluded that the former preempted judicial reform because the legislature had in 1931 considered the question in all its aspects. Two judges concurred on the ground that renewed legislative consideration was currently under way (which resulted in the 1971 substitution of the "no greater than" formula).

The same view as that of the majority in Vincent also prevailed in Bissen v. Fujii, 51 Hawaii 636, 466 P.2d 429 (1970), where the legislature had prospectively enacted the "50 percent" rule and the court declined to adopt retroactively ("pure") comparative negligence and thus "outdo" the legislature. In this respect the "odd-man-out" is Moyses v. Spartan Asphalt Pav. Co., 383 Mich. 314, 174 N.W.2d 797 (1970), where the court sanctioned "equitable" contribution among joint and several tortfeasors in the face of a statute limited to joint tortfeasors only. The legislature got the message and in 1974 amended its act. Mich. Comp. Law Ann. § 600.2925a (Supp. 1976).

148. This was the view, for example, by two judges of the Wisconsin court in Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 131, 177 N.W.2d 513, 517 (1970).

149. All bills in the preceding 3 years had embodied the Wisconsin formula. See note 24 supra. Cf. also Maki v. Freik, 85 Ill. App. 2d 439, 451, 229 N.E.2d 284, 290 (1967), adopting the Wisconsin rule because of its satisfactory record in that state.

150. Cal. Labor Code § 2801 (West 1971), which is limited to the situation of common law claims by an employee against his employer.
clearly disowning the "pure" version of its model in the FELA.\textsuperscript{151}

The focus of this discussion may now turn from the preceding general considerations concerning judicial lawmaking to others more specifically bearing on the reform of contributory negligence, including those especially relevant to California.

To start with, there is no denying the centrality and entrenchment of the common law all-or-nothing rule in our legal system. As Bohlen, father of the first Restatement of Torts once put it, "[T]his conception is part of the very atmosphere of English legal thought."\textsuperscript{152} We are dealing here not with a rule of marginal application, such as that for emotional disturbance\textsuperscript{153} or loss of consortium,\textsuperscript{154} but one that combines longevity with ubiquity. Thus, no useful analogy can be drawn to the judicial origin of comparative negligence in France or Soviet Russia where, in the former, the eventual decision put to rest half a century's judicial vacillation,\textsuperscript{155} and where, in the latter, the decision came soon after the promulgation of the first Soviet Civil Code and was remarkable only because that Code gave no specific direction in the matter.\textsuperscript{156}

That this aspect was once regarded as prohibitive by the California court itself is demonstrated by its reaffirmation, not so many years ago, that the decedent’s contributory negligence barred the wrongful death claim of survivors. The court so held on the ground that the rule, even if difficult to square with the relevant statute (Code of Civil Procedure section 377),\textsuperscript{157} was of such long standing that it had the acquiescence of the legislature and should not be touched by the court.\textsuperscript{158} On the present occasion, however, this reasoning no longer carried the day. Instead, the \textit{Li} court invoked the Civil Code itself as a mandate for changing the law. Its reasoning was a veritable tour-de-force. For after finally conceding that the only relevant Code section, section 1714, announced the basic rule of negligence\textsuperscript{159} with the complete de-

\begin{itemize}
\item \textsuperscript{151} 45 U.S.C. §§ 51-60 (1972).
\item \textsuperscript{153} Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
\item \textsuperscript{155} See Turk, \textit{Comparative Negligence on the March}, 28 Chi.-Kent L. Rev. 189, 239-40 (1950).
\item \textsuperscript{156} The decision of a Soviet (the RSFSR) Supreme Court Pleun of June 28, 1926, introducing the principle of "mixed liability," is translated by Rudden, \textit{Courts and Codes in England, France and Soviet Russia}, 48 Tul. L. Rev. 1010, 1023-24 (1974).
\item \textsuperscript{157} Cal. Code Civ. Pro. § 377 (West 1965).
\item \textsuperscript{158} Buckley v. Chadwick, 45 Cal. 2d 183, 288 P.2d 12 (1955), repudiating the thesis developed by Nourse, \textit{Is Contributory Negligence of Deceased a Defense to a Wrongful Death Action?} 42 Calif. L. Rev. 310 (1954).
\item \textsuperscript{159} Cal. Civ. Code § 1714 (West 1965) has played a crucial role as an aid in expanding tort liability. See, e.g., Brown v. Merlo, 8 Cal. 3d 855, 865, 506 P.2d 212,
\end{itemize}
fense of contributory negligence, the court discerned nonetheless a pervasive legislative intent that the codification of 1872 not impede further development of these cardinal concepts. From the specific Code instruction to construe provisions codifying existing statutes and common law as continuations thereof, the court deduced authority for an ongoing judicial evolution of these provisions beyond the confines of the statutory language itself. Thus, in one fell swoop, it demolished both the argument that comparative negligence was preempted by existing statute law and that, in any event, the all-or-nothing rule was too interwoven in the very fabric of our law to be set aside without express legislative sanction.

Other accredited criteria would seem to support the Li decision less equivocally. In appraising the better suitability of court or legislature as lawmaker in this particular instance, the following three criteria deserve special attention.

First is the question which of these two bodies is better equipped to understand the nature and implications of the problem and to make an informed choice from available alternatives. It is fashionable to suppose that the investigatory opportunities of the legislature establish its superior credentials in this respect. Undoubtedly, this is true with respect to many complex issues, especially those entailing multiple ripple effects and serious fiscal implications. These are, of course, more likely to occur in the field of public law, but occasionally even a tort problem may be thought to fall into this category: arguably, for instance, sovereign immunity, over which legislatures have generally claimed to speak the last, if not the only word. But on 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 refuguration (as in developing "last clear chance," disqualifying it progressively from claims based on grosser forms of negligence (willful or wanton, reckless), on certain types of statutory violation, and on strict liability for defective products).

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160. An argument seeking to interpret the words "except in so far as the [plaintiff] has... brought the injury on himself" (CAL. CIV. CODE § 1714 (West 1966) (emphasis added)) as actually contemplating the solution of comparative negligence was convincingly rejected on semantic grounds as well as on the basis of the Code Commissioners' Note following section 1714 in the 1872 Code. 13 Cal. 3d at 817, 532 P.2d at 1235, 119 Cal. Rptr. at 867.


163. In a sense this is a version of the bootstrap argument to the effect that exist-
Moreover, such quantitative data as exist on the impact of comparative negligence on insurance rates and on the processing of claims by settlement or resort to court\textsuperscript{164} are at least as well available to judges as to legislators. Beyond that, the record of the last 5 years in Sacramento dispels any pretense that the legislature could or would establish its own data base. Nor should one lightly indulge the fancy that because many legislators have enjoyed legal training, they are therefore as sensitive to the need for reform or as well equipped to pass an independent judgment on this issue as are the courts. In a nutshell, this is preeminently lawyer's law.

The next test is administrative. A strong argument against judicial intervention exists where the reform cannot be accomplished in one stroke but must instead await resolution of numerous details and collateral issues in its wake. Legislation would in such a setting be capable of disposing of most or all of these at once, issuing a complete and comprehensive set of new regulations like Athena emerging full-blown from the forehead of Zeus. By this token, governmental immunity once again seems to be less well qualified for judicial lawmaking (\textit{vide} the very complex and differentiated Government Liability Code\textsuperscript{165} in California which eventually replaced the curt fiat of the Court in \textit{Muskopf v. Corning Hospital Dist.})\textsuperscript{166} compared with, say, the abolition of family immunities,\textsuperscript{167} the imposition of liability for prenatal injuries,\textsuperscript{168} or even contribution among tortfeasors.\textsuperscript{169} Not that reform statutes invariably exploit this advantage—the New York statute abolishing sovereign immunity is a notorious example of legislative abandonment of all the details, including some important policy questions (e.g. discretionary activities), to be worked out by the courts through the protracted process of random litigation.\textsuperscript{170}
The introduction of comparative negligence would seem to fall half-way between these extremes. That it would raise a number of possible collateral changes was the subject of the first part of this article, but these changes are neither sufficiently numerous nor complex to affect the balance critically. Two other considerations further mitigate their impact. First, almost 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.\textsuperscript{171} Second, courts can—and the \textit{Li} court did\textsuperscript{172}—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.

Last of all is the argument that legislative reform can give affected parties time to prepare themselves for the change of law, for example by procuring liability insurance and by adjusting cost calculations. Thus, statutes abrogating charitable and other immunities have commonly postponed their commencement for that purpose.\textsuperscript{173} But courts also have long broken with the Blackstonian fiction that judicial decisions must necessarily be retroactive in operation because they merely declare what the common law should always have been discovered to be. Accordingly, decisions reversing a prior trend on which large-scale reliance may have been placed are nowadays frequently "sunburst,"\textsuperscript{174} given prospective operation only.\textsuperscript{175} Regarding comparative negligence, the \textit{Li} court opted for limited retroactivity. In the absence of any reliance by defendants on the old rule,\textsuperscript{176} and because it was unlikely that there would be any substantial fiscal impact of the change on insurers,\textsuperscript{177} the court found no need to limit the new rule to causes of

\begin{footnotes}
\item[171] SCHWARTZ, \textit{supra} note 1, at ch. 1.
\item[172] 13 Cal. 3d at 823-29, 532 P.2d at 1239-44, 119 Cal. Rptr. at 871-76.
\item[173] See note 139 and accompanying text \textit{supra}.
\item[174] The term derives from Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932), holding that prospective overruling was not opposed to constitutional requirements.
\item[176] "It almost goes without saying that the existence or lack of such an affirmative defense has no effect on the everyday 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": Godfrey v. State, 84 Wash. 2d 959, 964, 530 P.2d 630, 632 (1975).
\item[177] Contrast situations fraught with substantial fiscal implications, like the reversal of charitable or governmental immunity, which prompted the choice of prospective overruling expressly in City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962). \textit{See also}
\end{footnotes}
action arising thereafter; though, for the sake of sparing the judicial system from dislocation, the rule was to apply only to trials not yet begun before the decision became final. But, heralding a major change, the court did depart from its own, much criticized, practice and awarded the benefit of the new rule to the successful appellants themselves in token of their meritorious initiative.

**Conclusion**

The preceding discussion cannot pretend to have yielded any clear-cut answer concerning the propriety of introducing comparative negligence by judicial rather than legislative fiat. From the viewpoint of substantive competence—who is better equipped to make the choice—the courts emerge as at least equally, if not better, qualified in the light of the most relevant criteria: their familiarity and understanding of the problem and their capacity to establish a new regime with least administrative and social dislocation.

More controversial perhaps is the general relationship between judicial and legislative lawmaking. On the one hand, it is far too late in

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178. For the same reason, many decisions abrogating family immunity here also have been given retrospective effect. *E.g.*, Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962). But other courts have made a routine of prospective overruling regardless of these considerations. *E.g.*, Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

179. This was in substantial accord with the disposition of the Florida court in Hoffman v. Jones, 280 So. 2d 431, 440 (Fla. 1973), but contrary to Maki v. Frelk, 85 Ill. App. 2d 439, 453, 229 N.E.2d 284, 291 (1967), *rev'd on other grounds*, 40 Ill. 2d 193, 293 N.E.2d 445 (1968). Most comparative negligence statutes are either expressly worded or judicially construed to operate prospectively only, *i.e.*, to cover only causes of action arising after the statute comes into force. Thus far only two decisions have broken with that tradition and applied comparative negligence to all cases tried thereafter, regardless of when the cause of action arose. Peterson v. City of Minneapolis, 285 Minn. 282, 173 N.W.2d 353 (1969), and Godfrey v. State, 84 Wash. 2d 959, 530 P.2d 630 (1975) (rejecting both policy and constitutional arguments to the contrary). *See also Schwartz, supra* note 1, ch. 8; Annot., 37 A.L.R.3d 1438 (1971).

the day to decry all judicial law reform as a categorical violation of the constitutional balance of powers, especially in California where the court has consistently over the last 20 years assumed the task of modernizing the common law of torts. Significantly, it has rarely aroused any sign of legislative disapproval with its decisions, let alone with its role as decisionmaker. Observers of the American legislative scene could indeed find much support for the thesis that modern legislatures at the state level and even at the federal level not only acquiesce in but frequently actively promote judicial policymaking, often in order themselves to escape the brunt of political responsibility. Moreover, inasmuch as they retain the power to undo the court's decisions, judicial initiative can hardly be viewed as a challenge to their ultimate authority. In any event, the Supreme Court of California has over the years gained such stature in public esteem as an arbiter of public issues that it was understandably not daunted either by the fact that the legislature in Sacramento had repeatedly failed to reach a decision on the question or that courts in most other states had hitherto declined to assume the same responsibility.

The Li decision did not introduce a radical reorientation; rather, it created an adjustment within the basic framework of the existing system, less radical in spirit and perhaps even in effect than, for example, the strict liability for defective products imposed in 1963 in the Greenman case. Far from being a threat to the integrity of the legal process, it was well within the parameter of stability and predictability postulated by Keeton as essential to a "system of law" and as aiding that continuity which is widely regarded as within the special responsibility of the judicial branch.


# TABLE OF CONTENTS

I. Civil Procedure
   A. Written Specification of Reasons for New Trial Orders 286
   B. Judicial Review of Grand Jury Reports 297

II. Community Property
   Community Property Status of Military Benefits 305

III. Constitutional Law
   A. Ballot Position Advantages 329
   B. Privacy: The New Constitutional Language and the Old Right 347
   C. Ex Parte Temporary Restraining Orders and the First Amendment 369

IV. Contracts
   Termination of Temporary Insurance Coverage under Insurance Binders 386

V. Criminal Law
   A. Justification of the Use of Deadly Force in the Protection of Property 396
   B. Modifying the Indeterminate Sentence: The Changing Emphasis in Criminal Punishment 405
   C. Collateral Estoppel in Felony-Homicide Cases 417

VI. Criminal Procedure
   A. Seizure and Search: The California Constitution as an Independent Ground 442
   B. Rights of Mentally Disordered Sex Offenders 453
   C. Protection of Bank Records Against Unreasonable Search and Seizure 470
   D. Judicial Power to Dismiss Criminal Charges 495
   E. No Judicially Created Notice-of-Alibi Procedure 509
   F. Use of Probation Revocation Hearing Testimony in Subsequent Criminal Trials 516

VII. Environmental Law
   Application of the California Environmental Quality Act to Municipal Annexations of Land 532

VIII. Evidence
   New Limitations on the Privilege Against Self-incrimination 554

IX. Property
   The Demise of the Due-on-Sale Clause 573

X. Torts
   A. New Class of Plaintiffs in False Imprisonment Actions 602
   B. Liability for the Negligence of Others: Herein of the Defects of the Foreseeability Test 617

XI. Cases in Brief 634

XII. A Statistical Analysis of the Workload of the California Supreme Court 663

284
<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ault v. International Harvester Company</td>
<td>634</td>
</tr>
<tr>
<td>Beaudreau v. Superior Court</td>
<td>635</td>
</tr>
<tr>
<td>Board of Regents v. Davis</td>
<td>636</td>
</tr>
<tr>
<td>Bozung v. Local Agency Formation Commission</td>
<td>532</td>
</tr>
<tr>
<td>Builders Association of Santa Clara-Santa Cruz Counties v. Superior Court</td>
<td>637</td>
</tr>
<tr>
<td>Bunnell v. Superior Court</td>
<td>639</td>
</tr>
<tr>
<td>Burrows v. Superior Court</td>
<td>470</td>
</tr>
<tr>
<td>City and County of San Francisco v. Cooper</td>
<td>640</td>
</tr>
<tr>
<td>Gee v. Brown</td>
<td>642</td>
</tr>
<tr>
<td>Gould v. Grubb</td>
<td>329</td>
</tr>
<tr>
<td>Green v. Layton</td>
<td>643</td>
</tr>
<tr>
<td>In re Marriage of Fithian</td>
<td>305</td>
</tr>
<tr>
<td>In re Marriage of Jones</td>
<td>305</td>
</tr>
<tr>
<td>In re Marriage of Loehr</td>
<td>305</td>
</tr>
<tr>
<td>In re Marriage of Milhan</td>
<td>305</td>
</tr>
<tr>
<td>In re Rodriguez</td>
<td>405</td>
</tr>
<tr>
<td>La Manna v. Stewart</td>
<td>286</td>
</tr>
<tr>
<td>Morse v. Municipal Court</td>
<td>644</td>
</tr>
<tr>
<td>People v. Bonneville</td>
<td>453</td>
</tr>
<tr>
<td>People v. Brisendine</td>
<td>442</td>
</tr>
<tr>
<td>People v. Burnick</td>
<td>453</td>
</tr>
<tr>
<td>People v. Ceballos</td>
<td>396</td>
</tr>
<tr>
<td>People v. Coleman</td>
<td>516</td>
</tr>
<tr>
<td>People v. Cook</td>
<td>646</td>
</tr>
<tr>
<td>People v. Feagley</td>
<td>453</td>
</tr>
<tr>
<td>People v. Hill</td>
<td>648</td>
</tr>
<tr>
<td>People v. Hitch</td>
<td>649</td>
</tr>
<tr>
<td>People v. Municipal Court (Ahnemann)</td>
<td>649</td>
</tr>
<tr>
<td>People v. Orin</td>
<td>495</td>
</tr>
<tr>
<td>People v. Rincon-Pineda</td>
<td>651</td>
</tr>
<tr>
<td>People v. Superior Court (Kaufman)</td>
<td>554</td>
</tr>
<tr>
<td>People v. Superior Court (1973 Grand Jury)</td>
<td>297</td>
</tr>
<tr>
<td>People v. Taylor</td>
<td>417</td>
</tr>
<tr>
<td>People v. Upshaw</td>
<td>654</td>
</tr>
<tr>
<td>People v. Wingo</td>
<td>405</td>
</tr>
<tr>
<td>Reynolds v. Superior Court</td>
<td>509</td>
</tr>
<tr>
<td>Sarracino v. Superior Court</td>
<td>655</td>
</tr>
<tr>
<td>Sea-Land Service, Inc. v. County of Alameda</td>
<td>657</td>
</tr>
<tr>
<td>Smith v. Westland Life Insurance Company</td>
<td>386</td>
</tr>
<tr>
<td>Sullivan v. County of Los Angeles</td>
<td>602</td>
</tr>
<tr>
<td>Tucker v. Lassen Savings &amp; Loan Association</td>
<td>573</td>
</tr>
<tr>
<td>Turner v. Board of Trustees</td>
<td>659</td>
</tr>
<tr>
<td>United Farm Workers v. Superior Court</td>
<td>369</td>
</tr>
<tr>
<td>Weirum v. RKO General, Inc.</td>
<td>617</td>
</tr>
<tr>
<td>Western Oil and Gas Association v. Orange County Air Pollution Control District</td>
<td>661</td>
</tr>
<tr>
<td>White v. Davis</td>
<td>347</td>
</tr>
</tbody>
</table>