Chapter 5
Contributory Fault

§ A. The Contributory Negligence Rule

HARRISON v. MONTGOMERY COUNTY BOARD OF EDUCATION
295 Md. 442, 456 A.2d 894 (1983)

MURPHY, Chief Judge

The issue in this case is whether the common law doctrine of contributory negligence should be judicially abrogated in Maryland and the doctrine of comparative negligence adopted in its place as the rule governing trial of negligence actions in this State.

I

On April 26, 1978, Michael Harrison, fourteen years old and an eighth-grade student at Gaithersburg Junior High School in Montgomery County, attended a required physical education class. Since the weather was bad, the class was held in the school gymnasium, with approximately sixty-three children participating in a "free exercise" day. The teachers allowed the students to use any of several pieces of athletic equipment in the gym. Along with several other students, Michael practiced tumbling maneuvers on a crash pad (a cushion six to eight inches thick) located at the end of a wrestling mat. On the last of several attempts to complete a running front flip, Michael apparently lost control and was severely and permanently injured when he landed on his neck and shoulders. As a result of his injuries, Michael is now a quadriplegic who requires constant supervision and attention.

Michael's mother, for herself and on Michael's behalf, filed suit in the Circuit Court for Montgomery County against the Montgomery County Board of Education and the three gym teachers present when the accident occurred. The suit, in three counts, alleged negligence on the part of all defendants in allowing Michael to engage in a dangerous activity without proper supervision; in failing to properly train Michael before permitting him to engage in the dangerous activity; and in failing to provide proper equipment to protect Michael while he engaged in the dangerous activity. Negligence on the part of the Board in failing to properly train the defendant teachers was also alleged in another count of the declaration.

At the ensuing jury trial, the defendants relied, in part, upon the doctrine of contributory negligence as a complete defense to the plaintiffs' claim. The plaintiffs, on the other hand, sought jury instructions that the doctrine of comparative negligence, and not contributory negligence, should be applied. Specifically, the plaintiffs sought three instructions: (1) a "pure" comparative negligence instruction to the effect that if Michael was negligent, and his negligence was a cause of his injury, the jury "must diminish his damages in proportion to the amount of negligence attributable to him"; (2) a "modified" form of comparative negligence that if Michael's negligence "was not as great as defendants' negligence, [he] may still recover damages but his damages must be diminished in proportion t the amount of negligence attributable to him"; and (3) another "modified" form of comparative negligence that if Michael was only slightly negligent, and the negligence of the defendants was gross in comparison, Michael could still recover "but his damages must be diminished in proportion to the amount of negligence attributable to him."

The trial judge (John F. McAuliffe) rejected the plaintiffs' proposed comparative negligence instructions. Instead, he instructed the jury, in

accordance with the established law of Maryland, that if Michael was contributorily negligent, it would be a complete bar to the plaintiffs' claim. Judge McAuliffe defined contributory negligence as "the failure of a plaintiff to act with that degree of care which a reasonably prudent person would have exercised for his own safety under the same or similar circumstances." The jury returned a verdict in favor of all defendants and the plaintiffs appealed to the Court of Special Appeals. We granted certiorari prior to decision by the intermediate appellate court to consider the significant issue of public importance raised in the case.

II

The plaintiffs argue that the doctrine of contributory negligence is outmoded, unfair, has no place in modern tort law and should be abandoned in favor of comparative negligence. They contend that application of the contributory negligence doctrine worked a substantial injustice in this case which involves permanent damage to Michael's spinal cord. They say that Michael has extensive paralysis and is totally dependent on others for all of his physical needs, his chances of improvement being all but nonexistent. They contend that the evidence of negligence on Michael's part was slight, at best. The plaintiffs suggest that in light of the substantial evidence of the defendants' negligence, it is unfair and unjust that Michael must bear the burden of this devastating injury by himself. The plaintiffs maintain that thirty-eight states, Puerto Rico, the Canal Zone, the Virgin Islands, Guam, and virtually every common law and civil law nation, including England, have abandoned contributory negligence and have adopted a rule that apportions damages on the basis of respective fault. They argue that contributory negligence is a judicially created rule in Maryland, which this Court is empowered to and should now change. They urge our understanding that the doctrine is not only harsh and unjust, but that in a legal system which rests on liability for fault, it is an anomaly that fault on the part of the plaintiff can completely relieve the defendant of all liability. In support of their position, the plaintiffs draw attention to the barrage of criticism levelled by the legal commentators against the "all or nothing" extreme required by application of the contributory negligence rule. Virtually all of these scholarly writings, plaintiffs suggest, advocate abolition of contributory negligence as being a harsh and arbitrary rule, one contrary to the basic notion of tort law that liability must be determined by fault. According to the plaintiffs, most of the commentators advocate adoption of the "pure" form of comparative negligence which apportions losses on the basis of fault, with each party bearing the portion of the loss directly attributable to his conduct. They rely, in particular, upon two articles in Volume 41 of the MARYLAND LAW REVIEW (1982): E. Digges and R. Klein, *Comparative Fault in Maryland: The Time Has Come*, at 276-299 and K. Abraham, *Adopting Comparative Negligence: Some Thoughts for the Late Reformer*, at 300-315.

Additionally, the plaintiffs rely upon cases in eight states which have judicially abrogated the doctrine of contributory negligence in favor of the rule of comparative negligence. *See Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Alvis v. Goetzman v. Wichern* [sic], Iowa, 327 N.W.2d 742 (1982); [*Alvis v.*] *Ribar*, 85 Ill. 2d 1, 52 Ill. Dec. 23, 421 N.E.2d 886 (1981); *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979); *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981); *Bradley v. Appalacian Power Co.*, 256 S.E.2d 879 (W. Va. 1979). Of these jurisdictions, seven have adopted the "pure" form of comparative negligence which permits a plaintiff to recover the portion of his damages caused by the defendant's fault, even though the plaintiff's fault might exceed that of the defendant. As reported in the Digges & Klein article, five other states have adopted this form of comparative negligence by statute,[1] as has the proposed, but not yet adopted, Uniform Comparative Fault Act promulgated in 1977 by the National Conference of Commissioners on Uniform State Laws.[2] The "modified" form of comparative negligence, adopted in twenty-seven states, permits the plaintiff to recover if his fault is relatively small in contrast with that of the

[1] The states are: Mississippi (1910); Rhode Island (1971); Washington (1973); New York (1975); Louisiana (1979).

[2] The Uniform Act is set forth in Digges & Klein, *supra*, 41 MD. L. REV. at 296-299.

defendant.[3]

In urging our adoption of the "pure" form of comparative negligence, the plaintiffs say that it is the fairest of the comparative fault systems. They suggest that we align ourselves with those states which, by judicial decision, have abandoned contributory negligence and adopted pure comparative negligence principles. They argue that circumstances have changed drastically since we originally adopted the contributory negligence doctrine in 1847; that comparative negligence is preeminently "lawyer's law," with which the Court is better qualified to deal than is the legislature; and that legislative inaction should not be viewed as tantamount to rejection of the comparative negligence doctrine. Finally, the plaintiffs urge that we not adopt the doctrine of pure comparative negligence on a purely prospective basis. They contend that no considerations of basic fairness preclude affording retroactive effect to the newly accepted doctrine, and particularly so in Michael's case, which arose in 1978.

Proper consideration of the issue in this case necessitates a brief review of the origin, adoption and development of the doctrines of contributory and comparative negligence.

(A)

Contributory Negligence

The first reported case in the development of this doctrine was *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (109).[4] In that English case, Butterfield left a public inn at dusk, mounted his horse and rode off "violently" down the street. Forrester, who was effecting some repairs to his house, had placed a pole in the roadway. Although Butterfield could have seen and avoided the obstruction, he did not and was injured. The court there noted:

> One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. *Id.* at 61, 103 Eng. Rep. at 927.

That this new doctrine was enunciated without citation to authority has been attributed to the extension into the newly developed negligence action of the older and well accepted proximate cause principle that one could not recover for damages which he caused to himself. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 195-97 (1950). American courts were receptive to the doctrine of contributory negligence, beginning with *Smith v. Smith*, 19 Mass. (2 Pick) 621 (1824). Acceptance thereafter was so swift and widespread that one court was led to proclaim that contributory negligence had been the "rule from time immemorial, and it is not likely to be changed in all time to come." *Penn. R. Co. v. Aspell*, 23 Pa. 147, 149, 62 Am. Dec. 323, 324 (1854.)

Many reasons have been advanced for the doctrine's rapid acceptance in this country. One of the strongest was a distrust of the supposedly plaintiff- minded jury in the early nineteenth century, and a corollary desire to limit the liability of newly developing industry. Application of the

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[3] Digges & Klein, in their article, 41 MD. L. REV. at 281, divide modified comparative fault systems into three general types:

1. "Slight/Gross": The plaintiff may recover that portion of his damages caused by the defendant's gross fault, unless the plaintiff's fault is not slight in contrast to the defendant's, in which case the plaintiff recovers nothing. Nebraska and South Dakota have adopted this approach by statute.

2. "Not As Great As": This form permits a plaintiff to recover only if his fault is less than that of the defendant. West Virginia, y judicial decision, has adopted this approach as by statute has Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, North Dakota, Utah and Wyoming.

3. "Not Greater Than": Under this form, if the plaintiff's fault is less than or equal to the defendant's fault, the plaintiff may recover damages reduced by the percentage of his own fault. Fifteen states have adopted this form by statute: Connecticut, Hawaii, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Vermont and Wisconsin.

[4] Although some commentators trace the doctrine of contributory negligence to earlier times, *see*, *e.g.*, 8 HOLDSWORTH, A HISTORY OF THE ENGLISH LAW, 459-61 (2d ed. 1937) (contributory negligence "a natural and logical doctrine" which found expression in 17th century opinions but was recognized much earlier), most modern courts and scholars agree with Dean Prosser in attributing the first recorded formulation of the doctrine to the *Butterfield* case. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 416 (4th ed. 1971).

doctrine permitted courts to take cases from suspected plaintiff-oriented juries, or to at least limit the jury's discretion.[5] The doctrine was compatible with several unwritten policies of the common law at the time, *i.e.*, (a) the view that courts should not assist a wrongdoer who suffered an injury as a result of his own wrongdoing, and (b) a passion for a simple issue that could be categorically answered yes or no, or at least reduced to finding a single, dominant, "proximate" cause of every injury.[6] Additional justification for the rule was found in theories of proximate causation, punishment of the negligent plaintiff, encouragement to comply with the community's standard of care, and the alleged inability of juries to measure the amount of damage attributable to the plaintiff's own negligence. *See*, *e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS at 417-18 (4th ed. 1971).

Maryland adopted the doctrine of contributory negligence in 1847 in *Irwin v. Spriggs*, 6 Gill 200. As in most other jurisdictions, the doctrine was modified in this State by adoption of the last clear chance doctrine. In *N.C.R.R. Co. v. State, Use Price*, 29 Md. 420, 436 (1868), the Court held: "The mere negligence or want of ordinary caution on the part of the deceased ... would not disentitle the plaintiff to recover ... if the defendant might, by the exercise of care on its part, have avoided the consequences of the neglect or carelessness of the deceased." Some commentators have attributed adoption of the doctrine of last clear chance to the asserted harshness of the contributory negligence rule. *See* Digges & Klein, *supra*, 41 MD. L. REV. at 276. Nothing in *N.C.R.R. Co. v. State, Use Price*, *supra*, lends any direct support to this hypothesis. Nor does another exception to the application of the contributory negligence doctrine, *i.e.*, a case involving a plaintiff under five years of age (*see Taylor v. Armiger*, 277 Md. 638, 649, 358 A.2d 883 (1975)) — indicate any general dissatisfaction with the contributory negligence doctrine. Indeed, Maryland has steadfastly adhered to the doctrine since its adoption in 1847. Thus, at the time of trial in the present case, it was the well-established law of this State that a plaintiff who fails to observe ordinary care for his own safety is contributorily negligent and is barred from all recovery, regardless of the quantum of a defendant's primary negligence. *Schweitzer v. Brewer*, 280 Md. 430, 374 A.2d 347 (1977); *Menish v. Polinger Company*, 277 Md. 553, 356 A.2d 233 (1976); *P. & C.R.R. Co. v. Andrews*, 39 Md. 329 (1874). The rule was most recently applied by the Court in *Moodie v. Santoni*, 292 Md. 582, 441 A.2d 323 (1982).

(B)

Comparative Negligence

Most commentators trace the roots of comparative negligence to Roman law. WOODS, COMPARATIVE FAULT at 17. In common law jurisdictions, the earliest application of the doctrine was in admiralty law where the rule which evolved provided for an equal division of damages among parties at fault, rather than an apportionment based on fault. WOODS, COMPARATIVE FAULT at 18-20. In England, the divided damages rule persisted in Admiralty until changed by statute in 1911 to pure comparative negligence. *Id*. at 20. American courts followed the early English equally divided damages rule until 1975, when, in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975), the Supreme Court adopted a comparative negligence rule in admiralty cases.

Outside of admiralty law, one jurisdiction experimented with comparative negligence theory in the 19th century. In *Galena & Chicago Union R.R. Co. v. Jacobs*, 20 Ill. 478 (1858), the Supreme Court of Illinois repudiated contributory negligence and adopted a form of comparative negligence in its place. It said:

> [T]he degrees of negligence must be measured and considered, and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action.[7] *Id*. at 497.

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5 *See* PROSSER, HANDBOOK, *supra*, at 418; H. WOODS, COMPARATIVE FAULT 8 (1978); Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 151-52 (1946).

6 PROSSER, HANDBOOK, *supra*, at 418; Wade, *Comparative Negligence —Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299 (1980); WOODS, COMPARATIVE FAULT, at 9.

7 Illinois followed this rule for twenty-seven years, abandoning it, however, in 1885 in *Calumet Iron & Steel*

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In *P.& C.R.R. Co. v. Andrews*, 39 Md. 329 (1874), this Court expressly declined to adopt the comparative fault doctrine. Referring to an Illinois decision, we said:

> [A]s we understand it, [the decision] was actually rested upon a principle of law established in that State, that where there has been contributing negligence, the negligence of both parties must be *compared*, and if the plaintiff is guilty of negligence, which is slight as compared with that of the defendant, he may recover. Such a principle has never been sanctioned in this State, but the exact contrary is the settled rule here, (*N.C.R.R. Co. v. Geis*, 31 Md. 366,) and the Illinois Court admit the doctrine is not supported by the weight of authority elsewhere. *Id.* at 351 (emphasis in original).

Early in the 20th century, Maryland did incorporate a form of comparative negligence legislatively in several specific areas. In "certain perilous occupations," a statute provided compensation for work-related injuries with divided damages where there was negligence by both the worker and the employer. *See* ch. 139 of the Acts of 1902. This statute was repealed when a comprehensive Workmen's Compensation Act was adopted by ch. 800 of the Acts of 1914. A "purer" form of comparative negligence was adopted by ch. 412 of the Acts of 1902 —a public local law applicable in Allegheny and Garrett Counties to injured coal and clay miners. This statute was also repealed upon adoption of a mandatory compensation plan, a forerunner of the later Workmen's Compensation Act. *See* ch. 153 of the Acts of 1910.

In 1908, Congress adopted comparative negligence in the Federal Employers Liability Act (FELA), a statute covering injuries to railroad employees, 45 U.S.C. § 51 *et seq.* A number of states enacted similar legislation. *See* Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. at 334. In 1910, Mississippi enacted the first "pure" comparative negligence statute applicable to all suits for personal injuries. MISS. CODE ANN. § 11-7-15 (1972). Wisconsin, in 1931, was the first state to adopt a "modified" comparative negligence statute, in which a plaintiff could not recover unless his negligence "was not as great as the negligence of the person against whom recovery is sought." Wis. Stat. § 895.045 (1966).[8] Of the thirty-nine states which have now adopted some form of comparative negligence, thirty-one have done so by statute while the remaining eight have done so by judicial decision

(C)

That pure comparative negligence is favored by the legal commentators and text authorities appears clear. As we earlier observed, one of the primary reasons advanced by the doctrine's advocates is that wrongdoers are required to shoulder a proportionate share of the damages caused by their own negligence. An almost boundless array of scholarly writings now exists on the subject of comparative negligence. These authorities have carefully marshalled and crystallized the reasons favoring adoption of a comparative fault system; at the same time, they have set forth the reasons advanced in justification of the continuation of the contributory negligence doctrine.[9] In this regard, one of the main

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Co. v. Martin, 115 Ill. 358, 3 N.E. 456. In that case, the court readopted the contributory negligence doctrine as a total bar to a plaintiff's recovery. As earlier indicated, Illinois again abandoned the contributory negligence doctrine in favor of pure comparative negligence in *Alvis v. Ribar*, 85 Ill. 2d 1, 52 Ill. Dec. 23, 421 N.E.2d 886 (1981).

[8] The Wisconsin statute was later amended to provide that contributory negligence did not bar recovery if the plaintiff's negligence was not "greater than" the negligence of the defendant. Wis. Stats. § 895.045 (1982-1983 Supp.).

[9] In addition to the articles by Digges & Klein and by Abraham in 41 MD. L. REV. (1982), *see* Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950); H. WOODS, COMPARATIVE FAULT (1978); Wade, *Comparative Negligence —Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299 (1980); V. SCHWARTZ, COMPARATIVE NEGLIGENCE 9 (1974); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Lowndes, *Contributory Negligence*, 22 GEO. L. J. 674 (1934); *Comments on Maki v. Frelk — Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889 (1968); Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A. J. 1005 (1957); Maloney, *From Contributory to Comparative*
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arguments against adopting comparative negligence principles is the claimed difficulty, if not impossibility, of making an accurate apportionment of fault. Comparative negligence proponents, however, point to the lack of any problem in this regard in the states which, by legislation or judicial decision, have adopted the doctrine. Another criticism of comparative negligence is that in the doctrine's application most negligence cases will ultimately be submitted to the jury (once a prima facie case of the defendant's negligence is established) and recovery will be left in the unfettered discretion of the jury. The response to this criticism is that juries already apply a "rough-cut" comparative negligence formulation, even when instructed that contributory negligence is an absolute bar to the plaintiff's recovery. But while "jury equity" may result in a de facto apportionment, the means by which this is allegedly accomplished have been condemned as destructive of the integrity of the legal system.

Proponents of comparative negligence suggest that there is great public disapproval of contributory negligence, in particular by juries. Opponents counterclaim that there simply is no hue and cry among the populace generally to abandon contributory negligence and replace it with comparative negligence. Critics of contributory negligence point to the doctrine's departure from the central principle of tort law that wrongdoers should bear the losses they cause. On the other hand, it is observed that the defendant is also barred by his negligence from collecting from the plaintiff, so that the contributory negligence rule is an equitable one, letting losses lie where they fall in cases where both parties are negligent and both are injured.

Focusing on the theoretical, it is said that the doctrine of contributory negligence inhibits many prospective plaintiffs from suing, or at least encourages settlement of claims before trial. If comparative negligence was the governing rule, the suggestion is advanced that the cases of such potential plaintiffs would reach the jury, and that the flood of litigation thus unleashed would clog the courts, causing increased settlements with corresponding increases in the cost of insurance to the public. Comparative negligence proponents assert, however, that there is no proof that such results will flow from the application of comparative fault principles — that factors other than the particular negligence doctrine adopted and applied are responsible for docket congestion and for insurance rate increases.

Also to be considered is the effect which a comparative fault system would have on other fundamental areas of negligence law. The last clear chance doctrine, assumption of the risk, joint and several liability, contribution, setoffs and counterclaims, and application of the doctrine to other fault systems, such as strict liability in tort, are several of the more obvious areas affected by the urged shift to comparative negligence. Even that change has its complications; beside the "pure" form of comparative negligence, there are several "modified" forms, so that abrogation of the contributory negligence doctrine will necessitate the substitution of an alternate doctrine. Which form to adopt presents its own questions and the choice is by no means clear. *See* Digges & Klein, *supra*, 41 MD. L. REV. at 282-84. That a change from contributory to comparative negligence involves considerably more than a simple common law adjustment is readily apparent.

III

As earlier indicated, most of the states which have adopted comparative negligence have done so by statute in derogation of the common law. Prior to the enactment of such statutes, a number of courts in these states had declined to judicially abrogate the contributory negligence doctrine and adopt comparative negligence in its place, in each instance expressly deferring on policy grounds to their respective legislatures. *See Haeg v. Sprague, Warner & Co.*, 202 Minn. 425, 281 N.W. 261 (1938); *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973); *Krise v. Gillund*, 184 N.W.2d 405 (N.D. 1971); *Baab v. Shockling*, 61 Ohio St.2d 55, 399 N.E.2d 87 (1980); *Peterson v. Culp*, 255 Or. 269, 465 P.2d 876 (1970); *Bridges v. Union Pacific Railroad Co.*, 26 Utah 2d 281, 488 P.2d 738 (1971). *See also Rader v. Fleming*, 429 P.2d 750 (Okl. 1967) (court declined to adopt comparative negligence without, however, expressly mentioning deference to the legislature as a reason). A number of courts in jurisdictions which, like Maryland, retain the contributory negligence doctrine have also declined

[9](...continued)
Negligence: A Needed Law Reform, 11 U. FLA. L. REV. 135 (1958).

to adopt the comparative negligence doctrine, holding as a matter of policy that any such change should be made by the legislature.[10] *See*, *e.g.*, *Golden v. McCurry*, 392 So. 2d 815 (Ala. 1980); *Steinman v. Strobel*, 589 S.W.2d 293 (Mo. 1979); *McGraw v. Corrin*, 303 A.2d 641 (Del. Super. Ct. 1973).

The eight state supreme courts which have adopted comparative negligence by judicial decision have perceived an imperative need for immediate change. These courts have concluded that contributory negligence is an unfair and outmoded doctrine and that comparative negligence is more equitable and more responsive to the demands of society. These courts have found that because the contributory negligence doctrine was a judicially created rule, the courts could properly replace it with a proportionate fault system. The first of these decisions, *Hoffman v. Jones*, 280 So. 2d 431, decided by the Supreme Court of Florida in 1973, expressed the view that the change to comparative negligence was necessitated by the dictates of a "great societal upheaval." *Id.* at 435. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 decided by the Supreme Court of California in 1975, was the second of these decisions to reach this result. The court concluded that no legislative barrier existed to judicial adoption of the comparative negligence doctrine. The Alaska Supreme Court in *Kaatz v. State*, 540 P.2d 1037 (1975), followed the lead of the Florida and California courts in adopting comparative negligence. Michigan was the fourth state to judicially adopt the comparative negligence doctrine. In *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511, decided in 1979, the Supreme Court of Michigan, in a detailed opinion, reasoned that comparative negligence was a fairer doctrine than contributory negligence and adopted it. The court saw no need to defer to the legislative process; it indicated that the court was better able to adopt and develop the doctrine of comparative negligence than the legislature and to afford it prospective application. In 1979, West Virginia adopted a "modified" form of comparative negligence, doing so without discussion of the propriety of judicial rather than legislative action. *See Bradley v. Appalacian Power Co.*, 256 S.E.2d 879 (W. Va. 1979). In 1981, the Supreme Court of New Mexico adopted comparative negligence; it found the arguments in favor of judicial deference to the legislature to be unpersuasive. *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981). Illinois, in 1981, became the seventh state to adopt comparative negligence by judicial decision. In *Alvis v. Ribar*, 85 Ill. 2d 1, 52 Ill. Dec. 23, 421 N.E.2d 886, the Supreme Court of Illinois, over two vigorous dissents, found that changed circumstances warranted the abandonment of contributory negligence and the adoption of comparative negligence. In declining to defer to the legislature, the court noted that contributory negligence was a judicially created doctrine, properly to be replaced by the court which created it. The court eschewed any need for judicial restraint in favor of legislative action; it noted that in those states which legislatively had adopted proportional fault systems, the statutes were general and did not address collateral issues, leaving the development of the doctrine to the courts. The court found that the failure of the Illinois legislature to enact a comparative negligence statute, even though repeatedly implored to do so, could be attributed to the legislature's belief that the judiciary was better able to adopt and develop the doctrine. In 1982, the Supreme Court of Iowa by a sharply divided court (5-4) abandoned contributory negligence in favor of pure comparative negligence, citing as justification the reasons set forth in Hoffman and its progeny. *Goetzman v. Wichern*, Iowa, 327 N.W.2d 742 (1982).

IV

Maryland cases do not reflect any general dissatisfaction with the contributory negligence doctrine. Indeed, the doctrine is a fundamental principle of Maryland negligence law, one deeply imbedded in the common law of this State, having been consistently applied by Maryland courts for 135 years. Nor have we heretofore been confronted with a claim of a pressing societal need to abandon the doctrine in favor of a comparative fault system. Until the publication in 1982 of the Digges & Klein and Abraham articles in the Maryland Law Review, scant attention appears to have been devoted by the bench and bar of this State to the relative merits of the contributory and

[10] Retaining the contributory negligence doctrine, in addition to Maryland, are Alabama, Arizona, Delaware, Indiana, Kentucky, Missouri, North Carolina, South Carolina, Tennessee, Virginia, and the District of Columbia. *See* Digges & *Klein*, *supra*, n.6.

comparative negligence doctrines.

When called upon, as here, to overrule our own decisions, consideration must be given to the doctrine of stare decisis —the policy which entails the reaffirmation of a decisional doctrine of an appellate court, even though if considered for the first time, the Court might reach a different conclusion. *Deems v. Western Maryland Ry.*, 247 Md. 95, 231 A.2d 514 (1966). Under the policy of stare decisis, ordinarily, "for reasons of certainty and stability, changes in decisional doctrine are left to the Legislature." *Id.* at 102, 231 A.2d 514. As the Court observed many years earlier in *DeMuth v. Old Town Bank*, 85 Md. 315, 320, 37 A. 266 (1897):

> [I]t is, in the end, far better that the established rules of law should be strictly applied, even though in particular instances serious loss may be thereby inflicted on some individuals, than that by subtle distinctions invented and resorted to solely to escape such consequences, long settled and firmly fixed doctrines should be shaken, questioned, confused or doubted.... It is often difficult to resist the influence which a palpable hardship is calculated to exert; but a rigid adherence to fundamental principles at all times and a stern insensibility to the results which an unvarying enforcement of those principles may occasionally entail, are the surest, if not the only, means by which stability and certainty in the administration of the law may be secured. It is for the Legislature by appropriate enactments and not for the Courts by metaphysical refinements to provide a remedy against the happening of hardships which may result from the consistent application of established legal principles. *Accord*, *Hauch v. Connor*, 295 Md. 120, 453 A.2d 1207 (1983); *Austin v. City of Baltimore*, 286 Md. 51, 405 A.2d 255 (1979); *Osterman v. Peters*, 260 Md. 313, 272 A.2d 21 (1971); *White v. King*, 244 Md. 348, 223 A.2d 763 (1966).

Notwithstanding the great importance of the doctrine of stare decisis, we have never construed it to inhibit us from changing or modifying a common law rule by judicial decision where we find, in light of changed conditions or increased knowledge, that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people. *Williams v. State*, 292 Md. 201, 438 A.2d 1301 (1981); *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981); *Condore v. Prince George's Co.*, 289 Md. 516, 425 A.2d 1011 (1981); *Kline v. Ansell*, 287 Md. 585, 414 A.2d 929 (1980). As we said in *Felder v. Butler*, 292 Md. 174, 182, 438 A.2d 494 (1981), the common law is not static; its life and heart is its dynamism —its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems. However, in considering whether a long-established common law rule —unchanged by the legislature and thus reflective of this State's public policy —is unsound in the circumstances of modern life, we have always recognized that declaration of the public policy of Maryland is normally the function of the General Assembly; that body, by Article 5 of the Maryland Declaration of Rights, is expressly empowered to revise the common law of Maryland by legislative enactment. *See Felder v. Butler*, *supra*, 292 Md. at 183, 438 A.2d 494; *Adler v. American Standard Corp.*, *supra*, 291 Md. at 45, 432 A.2d 464. The Court, therefore, has been particularly reluctant to alter a common law rule in the face of indications that to do so would be contrary to the public policy of the State. *See, e.g., Condore v. Prince George's Co.*, *supra*, 289 Md. at 532, 425 A.2d 1011.

Consistent with these principles, we have on numerous occasions declined to change well-settled legal precepts established by our decisions, in each instance expressly indicating that change was a matter for the General Assembly. *See, e.g., Felder v. Butler*, *supra* (declining to alter the common law rule pertaining to tort actions against licensed vendors of intoxicating liquors for injuries negligently caused by an intoxicated patron to an innocent third party); *Murph v. Baltimore Gas & Elec.*, 290 Md. 186, 428 A.2d 459 (1981) (declining to change common law principles governing the duty of care owed a trespasser by a property owner);[11] *Austin v. City of Baltimore*, 286

[11] For other cases reaching the same conclusion, *see*, *e.g.*, *Bramble v. Thompson*, 264 Md. 518, 287 A.2d 265 (1972); *Osterman v. Peters*, 260 Md. 313, 272 A.2d 21 (1971); *Hicks v. Hittaffer*, 256 Md. 659, 261 A.2d 769 (1970); *Herring v. Christensen*, 252 Md. 240, 249 A.2d

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Md. 51, 405 A.2d 255 (1979) (declining to judicially abrogate the doctrine of governmental immunity in tort actions); *Howard v. Bishop Byrne Home*, 249 Md. 233, 238 A.2d 863 (1968) (declining to alter the common law rule of charitable immunity from tort liability); *Matakieff v. Matakieff*, 246 Md. 23, 226 A.2d 887 (1967); *Courson v. Courson*, 208 Md. 171, 117 A.2d 850 (1959) (declining to change the common law rule of recrimination in divorce actions in favor of the doctrine of comparative rectitude); *Hensel v. Beckward*, 273 Md. 426, 330 A.2d 196 (1974); *Creaser v. Owens*, 267 Md. 238, 297 A.2d 235 (1972) (declining to change the judicially created "boulevard law" governing the duty and responsibility of a driver approaching a through highway from an unfavored road); *Stokes v. Taxi Operators Assn.*, 248 Md. 690, 237 A.2d 762 (1968) (declining to alter the common law rule governing inter-spousal immunity in tort actions); *White v. King*, 244 Md. 348, 223 A.2d 763 (1966) (declining to change the common law rule of lex loci delicti in tort actions), reaffirmed in *Hauch v. Connor*, —— Md. ——, 453 A.2d 1207 (1983); and *Cole v. State*, 212 Md. 55, 128 A.2d 437 (1957) (declining to modify the common law *M'Naughten* rule of criminal responsibility by adding a new element thereto).[12]

These cases plainly reflect our initial deference to the legislature where change is sought in a long-established and well-settled common law principle. The rationale underlying these decisions is buttressed where the legislature has declined to enact legislation to effectuate the proposed change. It is thus important in the present case to note that in the period from 1966 through 1982, the General Assembly considered a total of twenty-one bills seeking to replace the contributory negligence doctrine with a comparative fault system. None of these bills was enacted.[13] Although not conclusive, the legislature's action in rejecting the proposed change is indicative of an intention to retain the contributory negligence doctrine. *See*, *e.g.*, *Kline v. Ansell*, 287 Md. 585, 590-91, 414 A.2d 929 (1980); *Demory Brothers v. Bd. of Pub. Works*, 273 Md. 320, 326, 329 A.2d 674 (1974); *Howard v. South Balto. Gen. Hosp.*, 191 Md. 617, 619, 62

[11](…continued)
718 (1969).

[12] In other cases, involving dissimilar circumstances, we have modified common law principles without awaiting legislative action. *See*, *e.g.*, *Lewis v. State*, 285 Md. 705, 404 A.2d 1073 (1979) (eliminating procedural common law rule that an accessory may not be tried until the principal has been sentenced); *Pope v. Pope*, 284 Md. 309, 396 A.2d 1054 (1979) (declining in the absence of Maryland judicial precedent to apply ancient common law doctrine recognizing crime of misprision of felony); *McGarvey v. McGarvey*, 286 Md. 19, 405 A.2d 250 (1979) (abolishing common law rule disqualifying person convicted of infamous crime from attesting to a will); *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978) (modifying common law rule of interspousal immunity in cases involving extremely outrageous tortious conduct); *Adler v. American Standard Corp.*, *supra*, (modifying common law terminable at-will employment doctrine to conform with recognized public policy of Maryland). Moreover, we have supplemented the common law by recognizing new or novel causes of action. *See*, *e.g.*, *Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (1977) (recognizing separate tort of intentional infliction of emotional distress); *Phipps v. General Motors Corp.*, 278
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Md. 337, 363 A.2d 955 (1976) (applying strict liability in tort principles); *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962) (recognizing invasion of privacy as an independent tort). We have also abandoned common law principles where required by the constitution. *Condore v. Prince George's County*, *supra*.

[13] Ten of the proposed bills would have adopted the "pure" form of comparative negligence. *See* S.B. 111 (1966); H.B. 277 (1967); H.B. 158 (1968); H.B. 452 and S.B. 116 (1970); H.B. 556 (1974); H.B. 377 (1976); H.B. 1381 (1979); H.B. 1484 (1980); and S.B. 1007 (1982). Of these, two (H.B. 1381 and H.B. 1484) were modeled after the Uniform Comparative Fault Act. Seven bills proposed a "not as great as" form — where the plaintiff may recover if his negligence is not as great as that of the defendant: H.B. 63 (1969); H.B. 453 (1970); H.B. 546 (1971); H.B. 156 (1972); H.B. 785 (1973); H.B. 405 (1975); and H.B. 633 (1981). Four bills would have applied a "not greater than" form — where the plaintiff may recover if his negligence is not greater than that of the defendant: S.B. 106 (1976); H.B. 2004 (1977); H.B. 1386 (1979); and H.B. 98 (1980).

Of the twenty-one bills, only two emerged from committee. As reported by Digges & Klein, *supra*, at 294, n.87:

> In 1968, House Bill 158, which applied a `pure' form of comparative fault to negligence actions involving personal injury, death, or property damage, passed the House of Delegates with a 114 to 8 vote. It then was assigned to the Senate Judicial Proceedings Committee from which it never resurfaced. In 1970, a similar fate befell House Bill 453 which applied the `not as great as' formula to such negligence actions. The vote in the House was 105 to 12.

A.2d 574 (1948).

The comparative negligence doctrine is not, as we have already observed, a unitary doctrine but one which has been adopted by other states in either a pure or modified form. Those who advocate one form of the doctrine tend to be critical of the others. Whether to adopt either pure or modified comparative fault plainly involves major policy considerations. Application of pure comparative negligence principles allows a plaintiff to recover his damages regardless of fault, so long as it is less than one hundred percent, thus permitting a grossly negligent but severely injured plaintiff to recover substantial damages from a slightly negligent defendant with only minor injuries. Adoption of such a system would favor the party who incurred the most damages, regardless of the amount of that party's fault. Whether the "pure" proportional fault system is preferable to any of the several types of modified comparative negligence (*see*, *supra*, footnote 3), or to the doctrine of contributory negligence, is plainly a policy issue of major dimension. Which of these doctrines best serves the societal need is a debatable question. Not debatable is the conclusion that a change from contributory negligence to any form of comparative negligence would be one of great magnitude, with far-reaching implications in the trial of tort actions in Maryland.

All things considered, we are unable to say that the circumstances of modern life have so changed as to render contributory negligence a vestige of the past, no longer suitable to the needs of the people of Maryland. In the final analysis, whether to abandon the doctrine of contributory negligence in favor of comparative negligence involves fundamental and basic public policy considerations properly to be addressed by the legislature. We therefore conclude, as we did in *White v. King*, *supra*, where we declined to change the common law rule of lex loci delicti, that while we recognize the force of the plaintiff's argument, "in the present state of the law, we leave any change in the established doctrine to the Legislature."[14] 244 Md. at 355, 223 A.2d 763.

Judgment affirmed, with costs.

[14] Nothing in the Supreme Court's decision in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975), persuades us to reach a different result.

DAVIDSON, Judge, dissenting: [*omitted*]

Questions and Notes

1. As of 1996, only four states (Alabama, Maryland, North Carolina, and Virginia) retained the contributory negligence rule. Steven Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1 (1996). *See also* Christopher J. Robinette and Paul G. Sherland. *Contributory or Comparative: Which Is the Optimal Negligence Rule?* 24 N. ILL. U. L. REV. 41 (2003)

2. "Contributory negligence" has a specific legal meaning; it refers to the plaintiff's negligence. Some say that contributory negligence was done away with when comparative negligence was adopted. However, most commentators have retained the term contributory negligence to refer to the phenomenon of a plaintiff's negligence, even though the *treatment* of that phenomenon changed with the adoption of comparative negligence. Thus, although contributory negligence no longer bars a plaintiff's right to recover, it still is assigned a share of fault to be used in reducing (or in so-called "modified" contributory negligence states, potentially barring) a plaintiff's recovery.

LI v. YELLOW CAB COMPANY OF CALIFORNIA

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

SULLIVAN, Justice

In this case we address the grave and recurrent question whether we should judicially declare no longer applicable in California courts the doctrine of contributory negligence, which bars all recovery when the plaintiff's negligent conduct has contributed as a legal cause in any degree to the harm suffered by him, and hold that it must give way to a system of comparative negligence, which assesses liability in direct proportion to fault. As

we explain in detail *infra*, we conclude that we should. In the course of reaching our ultimate decision we conclude that: (1) The doctrine of comparative negligence is preferable to the "all-or-nothing" doctrine of contributory negligence from the point of view of logic, practical experience, and fundamental justice; (2) judicial action in this area is not precluded by the presence of section 1714 of the Civil Code, which has been said to "codify" the "all-or-nothing" rule and to render it immune from attack in the courts except on constitutional grounds; (3) given the possibility of judicial action, certain practical difficulties attendant upon the adoption of comparative negligence should not dissuade us from charting a new course — leaving the resolution of some of these problems to future judicial or legislative action; (4) the doctrine of comparative negligence should be applied in this state in its so-called "pure" form under which the assessment of liability in proportion to fault proceeds in spite of the fact that the plaintiff is equally at fault as or more at fault than the defendant; and finally (5) this new rule should be given a limited retrospective application.

The accident here in question occurred near the intersection of Alvarado Street and Third Street in Los Angeles. At this intersection Third Street runs in a generally east-west direction along the crest of a hill, and Alvarado Street, running generally north and south, rises gently to the crest from either direction. At approximately 9 p.m. on November 21, 1968, plaintiff Nga Li was proceeding northbound on Alvarado in her 1967 Oldsmobile. She was in the inside lane, and about 70 feet before she reached the Third Street intersection she stopped and then began a left turn across the three southbound lanes of Alvarado, intending to enter the driveway of a service station. At this time defendant Robert Phillips, an employee of defendant yellow Cab Company, was driving a company-owned taxicab southbound in the middle lane on Alvarado. He came over the crest of the hill, passed through the intersection, and collided with the right rear portion of plaintiff's automobile, resulting in personal injuries to plaintiff as well as considerable damage to the automobile.

The court, sitting without a jury, found as facts that defendant Phillips was traveling at approximately 30 miles per hour when he entered the intersection, that such speed was unsafe at that time and place, and that the traffic light controlling southbound traffic at the intersection was yellow when defendant in Phillips drove into the intersection. It also found, however, that plaintiff's left turn across the southbound lanes of Alvarado "was made at a time when a vehicle was approaching from the opposite direction so close as to constitute an immediate hazard." The dispositive conclusion of law was as follows: "That the driving of NGA LI was negligent, that such negligence was a proximate cause of the collision, and that she is barred from recovery by reason of such contributory negligence." Judgment for defendants was entered accordingly.

I

"Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm." (REST. 2D TORTS, § 463.) Thus the American Law Institute, in its second restatement of the law, describes the kind of conduct on the part of one seeking recovery for damage caused by negligence which renders him subject to the doctrine of contributory negligence. What the effect of such conduct will be is left to a further section, which states the doctrine in its clearest essence: "Except where the defendant has the last clear chance, the plaintiff's contributory negligence *bars* recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him." (REST. 2D TORTS, § 467.) (Italics added.)

This rule, rooted in the long-standing principle that one should not recover from another for damages brought upon oneself (*see Baltimore & P.R. Co. v. Jones* (1877) 95 U.S. 439, 442, 24 L. Ed. 506; *Buckley v. Chadwick* (1955) 45 Cal. 2d 183, 192, 288 P.2d 12, 289 P.2d 242), has been the law of this state from its beginning. (*See Innis v. The Steamer Senator* (1851) 1 Cal. 459, 460-461; *Griswold v. Sharpe* (1852) 2 Cal. 17, 23-24; *Richmond v. Sacramento Valley Railroad Company* (1861) 18 Cal. 351, 356-358; *Gay v. Winter* (1867) 34 Cal. 153, 162-163; *Needham v. S.F. & S.J.R. Co.* (1869) 37 Cal. 409, 417-423.) Although criticized almost from the outset for the harshness of its operation, it has weathered numerous attacks,

in both the legislative and the judicial arenas, seeking its amelioration or repudiation. We have undertaken a thorough reexamination of the matter, giving particular attention to the common law and statutory sources of the subject doctrine in this state. As we have indicated, this reexamination leads us to the conclusion that the "all-or-nothing" rule of contributory negligence can be and ought to be superseded by a rule which assesses liability in proportion to fault.

It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the "all-or-nothing" approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault.[1] Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task.[2] The basic objection to the doctrine —grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability —remains irresistible to reason and all intelligent notions of fairness.

Furthermore, practical experience with the application by juries of the doctrine of contributory negligence has added its weight to analyses of its inherent shortcomings: "Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff's fault. But the process is at best a haphazard and most unsatisfactory one." (Prosser, *Comparative Negligence*, *supra*, p. 4; fn. omitted.) (*See also* PROSSER, TORTS, *supra*, § 67, pp. 436-437; Comments of Malone and Wade in *Comments on Maki v. Frelk — Comparative v. Contributory Negligence: Should the Court or Legislature Decide?* (1968) 21 VAND. L. REV. 889, at pp. 934, 943; ULMAN, A JUDGE TAKES THE STAND (1933) pp. 30-34; *cf.* Comment of Kalven, 21 VAND. L. REV. 889, 901-904.) It is manifest that this state of affairs, viewed from the standpoint of the health

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[1] Dean Prosser states the kernel of critical comment in these terms: "It [the rule] places upon one party the entire burden of a loss for which two are, by hypothesis, responsible." (PROSSER, TORTS (4th ed. 1971) § 67, p. 433.) Harper and James express the same basic idea: "[T]here is no justification —in either policy or doctrine —for the rule of contributory negligence, except for the feeling that if one man is to be held liable because of his fault, then the fault of him who seeks to enforce that liability should also be considered. But this notion does not require the all-or-nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim. The logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the present rule." (2 HARPER & JAMES, THE LAW OF TORTS (1956) § 22.3, p. 1207.)

[2] Dean Prosser, in a 1953 law review article on the subject which still enjoys considerable influence, addressed himself to the commonly advanced justificatory arguments in the following terms: "There has been much speculation as to why the rule thus declared found such ready acceptance in later decisions, both in England and in the United States. The explanations given by the courts themselves never have carried much conviction. Most of the decisions have talked about `proximate cause,' saying that the plaintiff's negligence is an intervening, insulating cause between the defendant's negligence and the injury. But this cannot be supported unless a meaning is assigned to proximate cause which is found nowhere else. If two automobiles collide and injure a bystander, the negligence of one driver is not held to be a superseding cause which relieves the other of liability; and there is no visible reason for any different conclusion when the action is by one driver against the other. It has been said that the defense has a penal basis, and is intended to punish the

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plaintiff for his own misconduct; or that the court will not aid one who is himself at fault, and he must come into court with clean hands. But this is no explanation of the many cases, particularly those of the last clear chance, in which a plaintiff clearly at fault is permitted to recover. It has been said that the rule is intended to discourage accidents, by denying recovery to those who fail to use proper care for their own safety; but the assumption that the speeding motorist is, or should be, meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant. Probably the true explanation lies merely in the highly individualistic attitude of the common law of the early nineteenth century. The period of development of contributory negligence was that of the industrial revolution, and there is reason to think that the courts found in this defense, along with the concepts of duty and proximate cause, a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds." (Prosser, *Comparative Negligence* (1953) 41 CAL. L. REV. 1, 3-4; fns. omitted. For a more extensive consideration of the same subject, see 2 HARPER & JAMES, *supra*, § 22.2, pp. 1199-1207.) To be distinguished from arguments raised in justification of the "all or nothing" rule are practical considerations which have been said to counsel against the adoption of a fairer and more logical alternative. The latter considerations will be discussed in a subsequent portion of this opinion.

and vitality of the legal process, can only detract from public confidence in the ability of law and legal institutions to assign liability on a just and consistent basis. (*See* Keeton, *Creative Continuity in the Law of Torts* (1962) 75 HARV. L. REV. 463, 505; Comment of Keeton in *Comments on Maki v. Frelk*, *supra*, 21 VAND. L. REV. 889, at p. 916[3]; Note (1974) 21 UCLA L. REV. 1566, 1596-1597.)

It is in view of these theoretical and practical considerations that to this date 25 states,[4] have abrogated the "all or nothing" rule of contributory negligence and have enacted in its place general apportionment *statutes* calculated in one manner or another to assess liability in proportion to fault. In 1973 these states were joined by Florida, which effected the same result by *judicial* decision. (*Hoffman v. Jones* (Fla. 1973) 280 So. 2d 431.) We are likewise persuaded that logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery —and that it should be replaced in this state by a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.[5]

The foregoing conclusion, however, clearly takes us only part of the way. It is strenuously and ably urged by defendants and two of the amici curiae that whatever our views on the relative merits of contributory and comparative negligence, we are precluded from making those views the law of the state by judicial decision. Moreover, it is contended, even if we are not so precluded, there exist considerations of a practical nature which should dissuade us from embarking upon the course which we have indicated. We proceed to take up these two objections in order.

II

It is urged that any change in the law of contributory negligence must be made by the Legislature, not by this court. Although the doctrine of contributory negligence is of judicial origin —its genesis being traditionally attributed to the opinion of Lord Ellenborough in *Butterfield v. Forrester* (K.B. 1809) 103 Eng. Rep. 926 —the enactment of section 1714 of the Civil Code[6] in 1872 codified the doctrine as it stood at that date and, the argument continues, rendered it invulnerable to attack in the courts except on constitutional grounds. Subsequent cases of this

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3 Professor Keeton states the matter as follows in his Vanderbilt Law Review comment: "In relation to contributory negligence, as elsewhere in the law, uncertainty and lack of evenhandedness are produced by casuistic distinctions. This has happened, for example, in doctrines of last clear chance and in distinctions between what is enough to sustain a finding of primary negligence and what more is required to sustain a finding of contributory negligence. Perhaps even more significant, however, is the casuistry of tolerating blatant jury departure from evenhanded application of the legal rules of negligence and contributory negligence with the consequence that a kind of rough apportionment of damages occurs, but in unpoliced, irregular, and unreasonably discriminatory fashion. Moreover, the existence of this practice sharply reduces the true scope of the substantive change effected by openly adopting comparative negligence. [¶] Thus, stability, predictability, and evenhandedness are better served by the change to comparative negligence than by adhering in theory to a law that contributory fault bars when this rule has ceased to be the law in practice." (21 VAND. L. REV. at p. 916).

A contrary conclusion is drawn in an article by Lewis F. Powell, Jr., now an Associate Justice of the United States Supreme Court. Because a loose form of comparative negligence is already applied in practice by independent American juries, Justice Powell argues, the "all-or-nothing" rule of contributory negligence ought to be retained as a check on the jury' s tendency to favor the plaintiff. (Powell, *Contributory Negligence: A Necessary Check on the American Jury* (1957) 43 A.B.A.J. 1055.)

4 Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming. (SCHWARTZ, COMPARATIVE NEGLIGENCE (1974), Appendix A, pp. 367-369.) In the federal sphere, comparative negligence of the "pure" type (*see Infra*) has been the rule since 1908 in cases arising under the Federal Employers' Liability Act (*see* 45 U.S.C. § 53) and since 1920 in cases arising under the Jones Act (*see* 46 U.S.C. § 688) and the Death on the High Seas Act (*see* 46 U.S.C. § 766.)

5 In employing the generic term "fault" throughout this opinion we follow a usage common to the literature on the subject of comparative negligence. In all cases, however, we intend the term to import nothing more than "negligence" in the accepted legal sense.

6 Section 1714 of the Civil Code has never been amended. It provides as follows: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, *except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.* The extent of liability in such cases is defined by the Title on Compensatory Relief." (Italics added.)

court, it is pointed out, have unanimously affirmed that — barring the appearance of some constitutional infirmity —the "all-or-nothing" rule is the law of this state and shall remain so until the Legislature directs otherwise. The fundamental constitutional doctrine of separation of powers, the argument concludes, requires judicial abstention.

* * *

We have concluded that the foregoing argument, in spite of its superficial appeal, is fundamentally misguided. As we proceed to point out and elaborate below, it was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.

* * *

We think that the foregoing establishes conclusively that the intention of the Legislature in enacting section 1714 of the Civil Code was to state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance. It remains to determine whether by so doing the Legislature intended to restrict the courts from further development of these concepts according to evolving standards of duty, causation, and liability.

* * *

III

We are thus brought to the second group of arguments which have been advanced by defendants and the amici curiae supporting their position. Generally speaking, such arguments expose considerations of a practical nature which, it is urged, counsel against the adoption of a rule of comparative negligence in this state even if such adoption is possible by judicial means.

The most serious of these considerations are those attendant upon the administration of a rule of comparative negligence in cases involving multiple parties. One such problem may arise when all responsible parties are not brought before the court: it may be difficult for the jury to evaluate relative negligence in such circumstances, and to compound this difficulty such an evaluation would not be res judicata in a subsequent suit against the absent wrongdoer. Problems of contribution and indemnity among joint tortfeasors lurk in the background. (*See generally* Prosser, *Comparative Negligence*, *supra*, 41 CAL. L. REV. 1, 33-37; SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra*, §§ 16.1-16.9, pp. 247-274.)

A second and related major area of concern involves the administration of the actual process of fact-finding in a comparative negligence system. The assigning of a specific percentage factor to the amount of negligence attributable to a particular party, while in theory a matter of little difficulty, can become a matter of perplexity in the face of hard facts. The temptation for the jury to resort to a quotient verdict in such circumstances can be great. (SEE SCHWARTZ, *supra*, § 17.1, pp. 275-279.) These inherent difficulties are not, however, insurmountable. Guidelines might be provided the jury which will assist it in keeping focussed upon the true inquiry (*see*, *e.g.*, SCHWARTZ, *supra*, § 17.1, pp. 278-279), and the utilization of special verdicts[7] 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. (*See* SCHWARTZ, *supra*, § 17.4, pp. 282-291; Prosser, *Comparative Negligence*, *supra*, 41 CAL. L. REV., pp. 28-33.)

The third area of concern, the status of the doctrines of last clear chance and assumption of risk, involves less the practical problems of administering a particular form of comparative negligence than it does a definition of the theoretical outline of the specific form to be adopted. Although several states which apply comparative negligence concepts retain the last clear chance doctrine (*see* SCHWARTZ, *supra*, § 7.2, p. 134), the better reasoned position seems to

[7] It has been argued by one of the amici curiae that the mandatory use of special verdicts in negligence cases would require amendment of section 625 of the Code of Civil Procedure, which reposes the matter of special findings within the sound discretion of the trial court. (*See Cembrook v. Sterling Drug Inc.* (1964) 231 Cal. App. 2d 52, 62-65, 41 Cal. Rptr. 492.) This, however, poses no problem at this time. For the present we impose no mandatory requirement that special verdicts be used but leave the entire matter of jury supervision within the sound discretion of the trial courts.

be that when true comparative negligence is adopted, the need for last clear chance as a palliative of the hardships of the "all-or-nothing" rule disappears and its retention results only in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault. (*See* SCHWARTZ, *supra*, § 7.2, pp. 137-139; Prosser, *Comparative Negligence*, *supra*, 41 CAL. L. REV., p. 27.) As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. "To simplify greatly, it has been observed … that in one kind of situation, to wit, where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence.… 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." (*Grey v. Fibreboard Paper Products Co.* (1966) 65 Cal. 2d 240, 245-246, 53 Cal. Rptr. 545, 548, 418 P.2d 153, 156; *see also Fonseca v. County of Orange* (1972) 28 Cal. App. 3d 361, 368-369, 104 Cal. Rptr. 566; *see generally*, 4 WITKIN, SUMMARY OF CAL. LAW, *Torts*, § 723, pp. 3013-3014; 2 HARPER & JAMES, THE LAW OF TORTS, *supra*, § 21.1, pp. 1162-1168; *cf.* PROSSER, TORTS, *supra*, § 68, pp. 439-441.) We think it clear 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. (*See generally*, SCHWARTZ, *supra*, ch. 9, pp. 153-175.)

Finally there is the problem of the treatment of willful misconduct under a system of comparative negligence. In jurisdictions following the "all-or-nothing" rule, contributory negligence is no defense to an action based upon a claim of willful misconduct (*see* REST. 2D TORTS, § 503; PROSSER, TORTS, *supra*, § 65, p. 426), and this is the present rule in California. (*Williams v. Carr* (1968) 68 Cal. 2d 579, 583, 68 Cal. Rptr. 305, 440 P.2d 505.) As Dean Prosser has observed, "[this] is in reality a rule of comparative fault which is being applied, and the court is refusing to set up the lesser fault against the greater." (PROSSER, TORTS, *supra*, § 65, p. 426.) The thought is that the difference between willful and wanton misconduct and ordinary negligence is one of kind rather than degree in that the former involves conduct of an entirely different order, and under this conception it might well be urged that comparative negligence concepts should have no application when one of the parties has been guilty of willful and wanton misconduct. In has been persuasively argued, however, that the loss of deterrent effect that would occur upon application of comparative fault concepts to willful and wanton misconduct as well as ordinary negligence would be slight, and that a comprehensive system of comparative negligence should allow for the apportionment of damages in all cases involving misconduct which falls short of being intentional. (SCHWARTZ, *supra*, § 5.3, p. 108.) The law of punitive damages remains a separate consideration. (*See* SCHWARTZ, *supra*, § 5.4, pp. 109-111.)

The existence of the foregoing areas of difficulty and uncertainty (as well as others which we have not here mentioned — *see generally* SCHWARTZ, *supra*, § 21.1, pp. 335-339) has not diminished our conviction that the time for a revision of the means for dealing with contributory fault in this state is long past due and that it lies within the province of this court to initiate the needed change by our decision in this case. Two of the indicated areas *(i.e.*, multiple parties and willful misconduct) are not involved in the case before us, and we consider it neither necessary nor wise to address ourselves to specific problems of this nature which might be expected to arise.…

* * *

It remains to identify the precise form of comparative negligence which we now adopt for application in this state. Although there are many variants, only the two basic forms need be considered here. The first of these, the so-called "pure" form of comparative negligence, apportions liability in direct proportion to fault in all cases. This was the form adopted by the Supreme Court of Florida in *Hoffman v. Jones*, *supra*, and it applies by statute in Mississippi, Rhode Island, and Washington. Moreover it is the form favored by most scholars and commentators. (*See e.g.*, Prosser, *Comparative Negligence*, *supra*, 41 CAL.

L. REV. 1, 21-25; PROSSER, TORTS, *supra*, § 67, pp. 437-438; SCHWARTZ, *supra*, § 21.3, pp. 341-348; *Comments on Maki v. Frelk —Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, *supra*, 21 VAND. L. REV. 889 (Comment by Keeton at p. 906, Comment by Leflar at p. 918.) The second basic form of comparative negligence, of which there are several variants, applies apportionment based on fault *up to the point* at which the plaintiff's negligence is equal to or greater than that of the defendant — when that point is reached, plaintiff is barred from recovery. Nineteen states have adopted this form or one of its variants by statute. The principal argument advanced in its favor is moral in nature: that it is not morally right to permit one more at fault in an accident to recover from one less at fault. Other arguments assert the probability of increased insurance, administrative, and judicial costs if a "pure" rather than a "50 percent" system is adopted, but this has been seriously questioned. (*See* authorities cited in SCHWARTZ, *supra*, § 21.3, pp. 344-346; *see also Vincent v. Pabst Brewing Co.* (1970) 47 Wis. 2d 120, 138, 177 N.W.2d 513 (dissenting opinion).)

We have concluded that the "pure" form of comparative negligence is that which should be adopted in this state. In our view the "50 percent" system simply shifts the lottery aspect of the contributory negligence rule to a different ground. As Dean Prosser has noted, under such a system "[i]t is obvious that a slight difference in the proportionate fault may permit a recovery; and there has been much justified criticism of a rule under which a plaintiff who is charged with 49 percent of a total negligence recovers 51 percent of his damages, while one who is charged with 50 percent recovers nothing at all."[8] Prosser, *Comparative Negligence*, *supra*, 41 CAL. L. REV. 1, 25; fns. omitted.) In effect "such a rule distorts the very principle it recognizes, *i.e.*, that persons are responsible for their acts to the extent their fault contributes to an injurious result. The partial rule simply lowers, but does not eliminate, the bar of contributory negligence." (Juenger, *Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae, Parsonson v. Construction Equipment Company*, *supra*, 18 WAYNE L. REV. 3, 50; *see also* SCHWARTZ, *supra*, § 21.3, p. 347.)

For all of the foregoing reasons we conclude that the "all-or-nothing" rule of contributory negligence as it presently exists in this state should be and is herewith superseded by a system of "pure" comparative negligence, the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties. Therefore, in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering. The doctrine of last clear chance is abolished, and the defense of assumption of risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; both of these are to be subsumed under the general process of assessing liability in proportion to negligence. Pending future judicial or legislative developments, the trial courts of this state are to use broad discretion in seeking to assure that the principle stated is applied in the interest of justice and in furtherance of the purposes and objectives set forth in this opinion.

It remains for us to determine the extent to which the rule here announced shall have application to cases other than those which are commenced in the future.... Upon mature reflection, in view of the very substantial number of cases involving the matter here at issue which are now pending in the trial and appellate courts of this state, and with particular attention to considerations of reliance applicable to individual cases according to the stage of litigation which they have reached, we have concluded that a rule of limited retroactivity should obtain here. Accordingly we hold that the present opinion shall be applicable to all cases in which trial has not begun before the date this decision becomes final in this court, but that it shall not be applicable to any case in which trial began before that date

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[8] This problem is compounded when the injurious result is produced by the combined negligence of several parties. For example in a three-car collision a plaintiff whose negligence amounts to one-third or more recovers nothing; in a four-car collision the plaintiff is barred if his negligence is only one-quarter of the total. (*See* Juenger, *Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae, Parsonson v. Construction Equipment Company* (1972) 18 WAYNE L. REV. 3, 50-51.)

(other than the instant case) — except that if any judgment be reversed on appeal for other reasons, this opinion shall be applicable to any retrial.

* * *

The judgment is reversed.

CLARK, Justice (dissenting)

* * *

I dispute the need for judicial — instead of legislative — action in this area. The majority is clearly correct in its observation that our society has changed significantly during the 103-year existence of section 1714. But this social change has been neither recent nor traumatic, and the criticisms leveled by the majority at the present operation of contributory negligence are not new. I cannot conclude our society's evolution has now rendered the normal legislative process inadequate.

Further, the Legislature is the branch best able to effect transition from contributory to comparative or some other doctrine of negligence. Numerous and differing negligence systems have been urged over the years, yet there remains widespread disagreement among both the commentators and the states as to which one is best. . . .

* * *

By abolishing this century old doctrine today, the majority seriously erodes our constitutional function. We are again guilty of judicial chauvinism.

Questions and Notes

1. The advantages of comparative negligence are widely recognized, reflected in the overwhelming number of jurisdictions that have adopted it. A recent article suggests additional support based upon economic analysis; *see* Orr, *The Superiority of Comparative Negligence: Another Vote*, 20 J. LEGAL STUD. 119 (1991).

2. **Imputed Contributory Negligence.** Just as an employer can be held vicariously liable for the acts of his employee, even if the employer was without fault, courts at one time held plaintiffs vicariously liable for the acts of others, using the doctrine of "imputed contributory negligence." For example, when a passenger was injured in an automobile accident caused in part by the negligence of the driver, some courts would treat the driver as an agent of the passenger, and impute the driver's negligence to the passenger for purposes of applying the contributory negligence rule. Most uses of imputed contributory negligence have fallen to the wayside, either swallowed by theories of comparative fault, prohibited by statute (*e.g.*, R.C.W. 4.22.020, eliminating imputed contributory negligence for spouses and minors) or overturned by case law (*e.g.*, *Buck v. State,* 222 Mont. 423, 723 P.2d 210 (1986) (passengers may be contributorily negligent by choosing to ride with an intoxicated driver but driver's negligence could not be imputed to passengers)). The most significant area where a form of imputed contributory negligence has survived is in cases where a wrongful death action is provided for the relatives of a decedent, but the decedent's contributory fault is imputed to the claims of the surviving relatives.

3. **Seat Belt Defense.** Over half of those states with comparative negligence have made room for the so-called "seat belt defense." Prior to the adoption of comparative fault, the seat belt defense was viewed skeptically by courts, who were afraid that its use might bar otherwise legitimate plaintiffs' claims. A distinction was drawn between negligence that caused the accident itself, and negligence that merely exacerbated the damages. One issue currently pending is whether or not the recently enacted mandatory seatbelt laws will allow a negligence per se instruction. Some jurisdictions have provided to the contrary by statute. (CALIF. VEH. CODE § 27315(j): "In any civil action, a violation [of the seatbelt requirement] … shall not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation.") *See generally*, Schwartz, *The Seat Belt Defense and Mandatory Seat Belt Usage: Law, Ethics, and Economics*, 24 IDAHO L. REV. 275 (1988), calling for the defense's incorporation into comparative negligence systems, and *Note on Recent Cases*, 102 HARV. L. REV. 925 (1989) (arguing that a negligence per se finding when seat belt statutes have been violated would best encourage the use of seat belts).

4. One of the most interesting features of the *Li* case is the Court's treatment of the codification of the common law. The debate over how courts should treat statutory modifications of common law is reviewed in G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

§ B. Assumption of Risk

SMITH v. BAKER & SONS

H.L. [1891] 4 All E.L.R. 69

Lord HALSBURY

The action was an action in which the plaintiff sued his employers for injuries sustained while in the course of working in their employment. He was employed in working at a drill where two fellow workmen were engaged in striking with a hammer at the drill, which he was employed to hold in the proper position. The nature of the employment was one which involved his attention being fixed upon the drill, that it might be held in a proper position when receiving alternate strokes from the hammers wielded by his fellow workmen. The place where he was employed was in a cutting, and in his immediate proximity another set of workmen were engaged in working in the cutting, and taking stones out of it. For the purposes of this operation a steam crane was used, and occasionally, though not invariably, the stones lifted by the crane were swung over the place where the plaintiff was employed. On the occasion which gave rise to the action a stone was swung over the plaintiff, and from some cause not explained, and not attempted to be explained, the stone slipped from the crane, fell upon the plaintiff, and did him serious injury.

The first point attempted to be argued at your Lordships' Bar was that there was no evidence to go to the jury of any negligence. It is manifest upon the notes of the learned county court judge that no such point was taken at the trial, and it is, therefore, perfectly intelligible why no evidence is referred to with respect both to the crane, the manner of slinging the stone, or the mode in which the stone was fastened. Each of these things would have been material to consider if any such question had in fact been raised. I will not myself suggest, or even conjecture, what was the cause of the stone falling, or what precautions ought properly to have been taken against such a contingency. What is, or is not, negligence under such circumstances may depend upon a variety of considerations.

* * *

The objection raised, and the only objection raised, to the plaintiff's right to recover was that he had voluntarily undertaken the risk. That is the question, and the only question, which any of the courts, except the county court itself, had jurisdiction to deal with. The facts upon which that question depends are given by the plaintiff himself in his evidence. Speaking of the operation of slinging the stones over the heads of the workmen, he said himself that it was not safe, and that whenever he had sufficient warning, or saw it, he got out of the way. The ganger told the workmen employed to get out of the way of the stones which were being slung. The plaintiff said he had been long enough at the work to know that it was dangerous, and another fellow-workman in his hearing complained that it was a dangerous practice. Giving full effect to these admissions, upon which the whole case for the defendants depends, it appears to me that the utmost that they prove is that in the course of the work it did occasionally happen that stones were slung in this fashion over workmen's heads, that the plaintiff knew this, and believed it to be dangerous, and

whenever he could he got out of the way. The question of law that seems to be in debate is whether upon these facts, and on an occasion when the very form of his employment prevented him looking out for himself, he consented to undergo this particular risk, and so disentitled himself to recover when a stone was negligently slung over his head, or negligently permitted to fall on him and do him injury.

I am of opinion that the application of the maxim volenti non fit injuria is not warranted by these facts. I do not think the plaintiff did consent at all. His attention was fixed upon a drill, and while, therefore, he was unable to take precautions himself, a stone was negligently slung over his head without due precautions against its being permitted to fall.... I think that a person who relies on the maxim must show a consent to the particular thing done.

* * *

LORD BRAMWELL....

In the course of the argument, I said that the maxim volenti non fit injuria did not apply to a case of negligence; that a person never was volens that he should be injured by negligence, at least, unless he specially agreed to it; I think so still. The maxim applies where, knowing the danger or risk, the man is volens to undertake the work. What are maxims but the expression of that which good sense has made a rule.... But drop the maxim. Treat it as a question of bargain. The plaintiff here thought the pay worth the risk, and did not bargain for a compensation if hurt; in effect he undertook the work with its risks for his wages and no more. He says so. Suppose he had said "If I am to run this risk you must give me 6s. a day and not 5s.," and the master agreed, would he in reason have a claim if he got hurt? Clearly not. What difference is there if the master says, "No, I will only give the 5s."? None. I am ashamed to argue it.

Questions and Notes

1. How would you translate the maxim *volenti non fit injuria*?

2. Why was Lord Bramwell "ashamed to argue" his position?

3. In *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173 (1929), the plaintiff was injured at an amusement park in Coney Island. He was riding on an attraction called "The Flopper," which challenged the passengers to stay upright. "The tumbling bodies and the screams and laughter supplied the merriment and fun." Judge Cardozo reversed a verdict for the plaintiff, noting "The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home."

4. Consider Justice Frankfurter's description of this doctrine, often cited in cases and comments on the doctrine:

> The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas. *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 68 (1963) (FRANKFURTER, J., concurring).

5. "Assumption of Risk" actually covers a variety of different reasons for denying (or reducing) the plaintiff's recovery. Can you identify the distinct reasons in the following three cases?

BROWN v. SAN FRANCISCO BALL CLUB

222 P.2d 19 (Cal. 1950)

Fred B. WOOD, Justice

This is an appeal by plaintiff from a judgment entered upon a directed verdict for the defendant in an action against San Francisco Ball Club, Inc., for damages for personal injuries sustained while attending a professional baseball game at Seals' Stadium, San Francisco.

* * *

Appellant, a woman of 46 years, attended the

game as the guest of friends, one of whom furnished and purchased the tickets which were for seats in an unscreened portion of the stadium near the first-base line. The game was in progress when they arrived and about an hour later the accident occurred while the players were changing sides. Appellant was struck by some object and sustained serious injury. Evidence is lacking whether or not it was a baseball, or from what direction it came. However, the motion for directed verdict appears to have been made, and the issues discussed by the parties upon this appeal, upon the assumption that appellant was hit by a baseball, possibly thrown from second to first base, touching the first baseman's glove and passing thence into the stand.

Respondent owned and operated the stadium which had a seating capacity of 18,601, divided into screened and unscreened areas. Approximately 5,000 seats were behind a screen back of the home plate. The remainder were unscreened and in two sections behind the first-base and third-base lines respectively. Tickets for seats were sold at separate windows, one window for each of these three sections, each window marked for a particular section. Patrons decided where they would sit, and went to the appropriate window for their seats. It is generally true of all the games held in this stadium that a great majority of the patrons are situated in the unscreened sections, because they prefer an unobstructed view.

The attendance at this particular game was approximately 5,000. There were many vacant seats in each seating area. Most of the spectators were seated in the first-base and third-base unscreened sections, very few in the home-plate screened area.

* * *

It would seem necessarily to follow that respondent fully discharged its duty toward appellant, as concerns the risk to her of being hit by thrown or batted baseballs, when it provided screened seats for all who might reasonably be expected to request them, in fact many more screened seats than were requested. Hence, the injury suffered by her when struck by a thrown ball, while voluntarily occupying an unscreened seat, did not flow from, was not caused by, any failure of performance by respondent of any duty owed to her, and did not give rise to a cause of action in her favor against respondent for damages for such injury.

Appellant seeks to take this case out of the application of the rule upon the theory that she was ignorant of the game of baseball and the attendant risks, hence cannot be said to have knowingly assumed the risk. The point is not well taken. Although she had a limited experience with baseball, she was a mature person in possession of her faculties with nothing about her to set her apart from other spectators and require of her a lower standard of self-protection from obvious, inherent risks than that required of other spectators. She was, at the time of the accident, 46 years of age; had lived in the San Francisco area since 1926; was about to go to a school for training and to have a job as saleswoman in a real estate office;…

We conclude that the evidence herein, viewing it most favorably to the appellant, does not take her outside the application of the rule announced in the *Quin* case; that she assumed the risk of injury in respect to which she complains; that the injury was not caused by any negligence upon the part of the respondent; and that determination thereof was a proper function of the trial court upon motion for directed verdict.

In the absence of negligence upon the part of the respondent, it is unnecessary to consider the question of contributory negligence upon the part of the appellant.

The judgment is affirmed and the appeal from the order denying a new trial is dismissed.

Questions and Notes

1. The liability of baseball parks is considered in Ted J. Tierney, *Heads Up!: The Baseball Facility Liability Act*, 18 N. ILL. U. L. REV. 601 (1998); and David Horton, *Rethinking Assumption of Risk and Sports Spectators*, 51 UCLA L. REV. 339 (2003).

ALSTON v. BLYTHE

88 Wash. App. 26, 943 P.2d 692 (1997)

MORGAN, Judge.

The dispositive issue in this auto-pedestrian case is whether the trial court erred by giving an assumption-of-risk instruction. Holding that it did, we reverse and remand for new trial.

Portland Avenue is an arterial street in Tacoma. Near its intersection with East 29th Street, it has two northbound lanes, two southbound lanes, and a left-turn lane in the center.

On September 20, 1991, Alston started across Portland Avenue on foot.[74] She was walking from east to west, at or near East 29th Street. It is agreed she was not in a marked crosswalk, but the parties contest whether she was in an unmarked crosswalk.

Steven McVay was driving south on Portland Avenue in the inside (easterly) southbound lane. He was operating a tractor with a flatbed trailer. Seeing Alston as she crossed the northbound lanes, he stopped so she could continue across the southbound lanes. Alston alleges he waved her across the southbound lanes, but he denies the allegation. In any event, Alston crossed in front of his truck and stepped into the outside (westerly) southbound lane. At that moment, Michael Blythe was driving his vehicle south in that lane, and his vehicle struck and injured Alston.

* * *

Alston sued Blythe, McVay, and McVay's employer, Kaelin Trucking, alleging negligence. * * * At the close of the evidence, Alston objected to many of the trial court's instructions, but not to its instruction on contributory negligence. Ultimately, the jury decided that neither McVay nor Blythe had been negligent, and Alston filed this appeal.

Initially, we discuss whether the trial court erred in giving an assumption-of-risk instruction. Then, even though that issue is dispositive, we discuss several additional issues likely to recur on retrial.[75]

I

Alston contends the trial court erred by giving Instruction 13, which stated:

> It is a defense to an action for personal injury that the plaintiff impliedly assumed a specific risk of harm.
>
> A person impliedly assumes the risk of harm, if that person knows of a specific risk associated with a course of conduct, understands its nature, and voluntarily chooses to accept the risk by engaging in that conduct.[76]

Alston objected to this instruction on the ground that it was not supported by the evidence, and on the further ground that it could be misinterpreted to mean that assumption of risk was a complete bar to recovery. She reiterates the same objections on appeal.

Two of the elements of negligence are duty and breach.[77] Thus, a plaintiff claiming negligence must show that the defendant owed a duty of reasonable care to the plaintiff, and that the defendant failed to exercise such care.[78]

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74 Alston was accompanied by her child, but that fact is not material here.

75 *See Falk v. Keene Corp.*, 53 Wash. App. 238, 246, 767 P.2d 576, aff'd, 113 Wash.2d 645, 782 P.2d 974 (1989).

76 Clerk's Papers at 334.

77 *Tincani v. Inland Empire Zoological Soc.*, 124 Wash.2d 121, 127-28, 875 P.2d 621 (1994); *Hansen v. Friend*, 118 Wash.2d 476, 479, 824 P.2d 483 (1992); *Mathis v. Ammons*, 84 Wash. App. 411, 415-16, 928 P.2d 431 (1996), review denied, 132 Wash.2d 1008, 940 P.2d 653 (1997); *Doherty v. Municipality of Metro. Seattle*, 83 Wash. App. 464, 469, 921 P.2d 1098 (1996). Other elements, not in issue here, are causation and damages. *Mathis*, 84 Wash. App. at 416, 928 P.2d 431.

78 *See Geschwind v. Flanagan*, 121 Wash.2d 833, 854 P.2d 1061 (1993); *Schooley v. Pinch's Deli Market, Inc.*, 80 Wash. App. 862, 874, 912 P.2d 1044, review granted, 129 Wash.2d 1025, 922 P.2d 98 (1996); *Daly v. Lynch*, 24 Wash. App. 69, 76, 600 P.2d 592 (1979). As we have explained elsewhere, duty in this context involves at least three questions: What is the obligated class, what is the protected class, and what is the standard of care? Breach mirrors duty, and thus also involves three questions: Does the defendant belong to the obligated class, does the plaintiff belong to the protected class, and did the defendant violate the standard of care? Here, we have no

(continued...)

Two of the elements of contributory negligence are duty and breach.[79] Thus, a defendant claiming contributory negligence must show that the plaintiff owed a duty to exercise reasonable care for the plaintiff's own safety, and that the plaintiff failed to exercise such care.[80]

The doctrine of assumption of risk has four facets. They are (1) express assumption of risk; (2) implied primary assumption of risk; (3) implied reasonable assumption of risk; and (4) implied unreasonable assumption of risk.[81]

The third and fourth facets, implied reasonable and implied unreasonable assumption of risk, are nothing more than alternative names for contributory negligence. As the Supreme Court has said, they "involve the plaintiff's voluntary choice to encounter a risk created by the defendant's negligence," and they "retain no independent significance from contributory negligence after the adoption of comparative negligence."[82] In sum, they bear on the plaintiff's duty to exercise ordinary care for his or her own safety.

The first and second facets, express assumption of risk and implied primary assumption of risk, bear not on the plaintiff's duty to exercise ordinary care for his or her own safety, but rather on the defendant's duty to exercise ordinary care for the safety of others. Both facets raise the same question: Did the plaintiff consent, before the accident or injury, to the negation of a duty that the defendant would otherwise have owed to the plaintiff?[83] If the plaintiff did so consent, "the defendant does not have the duty, there can be no breach and hence no negligence."[84] Thus, when either facet applies, it bars any recovery based on the duty that was negated.[85]

Although the first and second facets involve the same idea--the plaintiff's consent to negate a duty the defendant would otherwise have owed to the plaintiff--they differ with respect to the way in which the plaintiff manifests consent.[86] With express assumption of risk, the plaintiff states in so many words that he or she consents to relieve the defendant of a duty the defendant would otherwise have. With implied primary assumption of risk, the plaintiff engages in other kinds of conduct, from which consent is then implied.[87] Consent is an

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[78](...continued)
need to consider duty and breach in this much detail. *See Gall v. McDonald Indus.*, 84 Wash. App. 194, 202, 205, 926 P.2d 934 (1996), review denied, 131 Wash.2d 1013, 932 P.2d 1256 (1997); *Nivens v. 7-11 Hoagy's Corner*, 83 Wash. App. 33, 41, 47, 920 P.2d 241 (1996), review granted, 131 Wash.2d 1005, 932 P.2d 645 (1997); *Schooley*, 80 Wash. App. at 866, 874, 912 P.2d 1044.

[79] *See Geschwind*, 121 Wash.2d at 838, 854 P.2d 1061; *Seattle First Nat. Bank v. Shoreline Concrete Co.*, 91 Wash.2d 230, 238, 588 P.2d 1308 (1978). Another element, not in issue here, is that the plaintiff's breach of duty be a cause of plaintiff's own damages. *Price v. Kitsap Transit*, 70 Wash. App. 748, 756, 856 P.2d 384 (1993), aff'd, 125 Wash.2d 456, 886 P.2d 556 (1994); *Alvarez v. Keyes*, 76 Wash. App. 741, 744, 887 P.2d 496 (1995). *See also Grobe v. Valley Garbage Serv. Inc.*, 87 Wash.2d 217, 231-232, 551 P.2d 748 (1976).

[80] *Geschwind*, 121 Wash.2d at 838, 854 P.2d 1061; *Alvarez*, 76 Wash. App. at 744, 887 P.2d 496.

[81] *Tincani*, 124 Wash.2d at 143, 875 P.2d 621; *Scott v. Pacific West Mt. Resort*, 119 Wash.2d 484, 496, 834 P.2d 6 (1992); *Kirk v. Washington State Univ.*, 109 Wash.2d 448, 453, 746 P.2d 285 (1987); *Shorter v. Drury*, 103 Wash.2d 645, 655, 695 P.2d 116 (1985); *Leyendecker v. Cousins*, 53 Wash. App. 769, 773, 770 P.2d 675 (1989).

[82] *Scott*, 119 Wash.2d at 497, 834 P.2d 6; *see also Leyendecker*, 53 Wash. App. at 774-75, 770 P.2d 675.

[83] *Scott*, 119 Wash.2d at 498, 834 P.2d 6; *Kirk*, 109 Wash.2d at 453-54, 746 P.2d 285; *Dorr v. Big Creek Wood Products, Inc.*, 84 Wash. App. 420, 426-27, 927 P.2d 1148 (1996).

[84] *Scott*, 119 Wash.2d at 497, 834 P.2d 6; *see also Tincani*, 124 Wash.2d at 143, 875 P.2d 621 (implied primary assumption of risk "is really a principle of no duty, or no negligence, and so denies the existence of the underlying action"); *Dorr*, 84 Wash. App. at 427, 927 P.2d 1148 (implied primary assumption of risk "is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk"); *Leyendecker*, 53 Wash. App. at 773, 770 P.2d 675.

[85] *Scott*, 119 Wash.2d at 496-98, 834 P.2d 6; *Dorr*, 84 Wash. App. at 425, 927 P.2d 1148; *Leyendecker*, 53 Wash. App. at 773, 770 P.2d 675.

[86] *Kirk*, 109 Wash.2d at 453, 746 P.2d 285; *Leyendecker*, 53 Wash. App. at 773, 770 P.2d 675.

[87] *Scott*, 119 Wash.2d at 496-97, 834 P.2d 6; *Kirk*, 109 Wash.2d at 453, 746 P.2d 285; *Dorr*, 84 Wash. App. at 427, 927 P.2d 1148 ("Those who choose to participate in sports or other amusements likely to cause harm to the participant, for example, impliedly consent in advance to excuse the defendant from any duty to protect the participant from being injured by the risks inherent in such
(continued...)

issue of fact for the jury, except when the evidence is such that reasonable minds could not differ.[88]

Because the plaintiff's consent lies at the heart of both express and implied primary assumption of risk, "[i]t is important to carefully define the scope" of that consent.[89] This is done by identifying the duties the defendant would have had in the absence of the doctrine of assumption of risk, and then segregating those duties into (a) those (if any) which the plaintiff consented to negate, and (b) those (if any) which the defendant retained.[90] Like consent itself, the scope of consent is an issue of fact for the jury, unless the evidence is such that reasonable minds could not differ.[91]

These principles mean, among other things, that a trial court may instruct on both contributory negligence and assumption of risk if the evidence produced at trial is sufficient to support two distinct findings: (a) that the plaintiff consented to relieve the defendant of one or more duties that the defendant would otherwise have owed to the plaintiff, and (b) that the plaintiff failed to exercise ordinary care for his or her own safety.[92] In most situations, however, the evidence will support only the second of these findings, and "an instruction on contributory negligence is all that is necessary or appropriate."[93]

The record in this case contains no evidence that Alston expressly or impliedly consented to relieve either McVay or Blythe of the duty of ordinary care that he owed to her as a matter of law. She merely tried to cross the street in a way that may or may not have involved contributory negligence, depending on whose testimony the jury chooses to believe. The evidence supported an instruction on contributory negligence, but not an instruction on assumption of risk, and Instruction 13 was erroneous.

The defendants argue that Instruction 13 was harmless, but we do not agree. Instruction 13 stated that the defendants had a "defense" (and, by implication, Alston could not recover) if Alston knew of a specific risk associated with crossing the street, understood that risk, and voluntarily chose to cross anyway. Given that the evidence showed nothing more than arguable contributory negligence, this contravened Washington's comparative negligence scheme, and it may well have been the reason the jury rendered a defense verdict. There is a reasonable likelihood that Instruction 13 skewed the verdict, and a new trial is required.[94]

* * *

KIRK v. WASHINGTON STATE UNIVERSITY

109 Wash. 2d 448, 746 P.2d 285 (1987)

DOLLIVER, Justice

Defendants Washington State University (WSU), its Board of Regents and the Associated Students of WSU appeal from a judgment substantially against them in a personal injury action brought by plaintiff Kathleen Kirk. The plaintiff cross-appeals certain portions of the

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[87](...continued)
activity"); cf. *Foster v. Carter*, 49 Wash. App. 340, 346, 742 P.2d 1257 (1987) (plaintiff elected to participate in BB gun war).

[88] *Dorr*, 84 Wash. App. at 431, 927 P.2d 1148.

[89] *Scott*, 119 Wash.2d at 497, 834 P.2d 6; *see also Kirk*, 109 Wash.2d at 456, 746 P.2d 285 ("plaintiff's assumption of certain known risks in a sport or recreational activity does not preclude recovery for injuries resulting from risks not known or not voluntarily encountered.")

[90] *See Scott*, 119 Wash.2d at 497, 834 P.2d 6.

[91] *See Dorr*, 84 Wash. App. at 431, 927 P.2d 1148.

[92] *Dorr*, 84 Wash. App. at 426, 927 P.2d 1148.

[93] *Dorr*, 84 Wash. App. at 426, 927 P.2d 1148. In passing, we observe that Division One has expressed skepticism concerning the propriety of some of the Washington Pattern Jury Instructions (WPI) on assumption of risk. *Dorr*, 84 Wash. App. at 430-31, 927 P.2d 1148. Sharing that skepticism, we additionally suggest that the term (continued...)

[93](...continued)
"assumption of risk" is needlessly confusing, at least when used in jury instructions. When assumption of risk is properly an issue for the jury, the jury should simply be asked to decide whether the plaintiff consented to relieve the defendant of a duty the defendant would otherwise have owed to the plaintiff.

[94] *See Hill v. GTE Directories Sales Corp.*, 71 Wash. App. 132, 144, 856 P.2d 746 (1993) (error not prejudicial "unless it is likely the outcome would have been different without it").

judgment. We affirm.

In the spring of 1978, Kathleen Kirk, a 20-year-old student at WSU, became a member of its cheerleading team, known as the WSU Yell Squad. The team received funding from both the athletic department and the Associated Students of WSU. The defendants conceded the team was a university-approved student activity. The cheerleaders performed other functions besides attending the games: they attended alumni functions, appeared at promotional functions and parades, and helped in fundraising for WSU. The team also practiced daily. The recruiters told the cheerleaders they "were in public relations."

The team had a faculty advisor, William Davis, from 1971 to 1978. Davis had actively supervised the team and emphasized safety. Sometime in the spring of 1978, Davis was transferred to a different position and replaced by another faculty member who did not attend the cheerleader practices.

In the fall of 1978, the team attempted to use the mat room, where they had practiced previously, but were told not to use that room. As a result, the team conducted its practices on the astroturf surface of Martin Stadium. Other faculty members were aware the astroturf was harder and caused more injuries than nonartificial turf. The cheerleaders were given no warning of the dangers of practicing on the astroturf.

Kirk was injured on October 18, 1978, during a cheerleading practice on the astroturf in preparation for an upcoming game. At the time she was injured the team was practicing shoulder stands. The end result of the maneuver was to have each female cheerleader standing on the shoulders of a male cheerleader. The method of reaching the stand had recently been modified in order to arrive at the completed stand more quickly. Teams in earlier years had performed the stand in the manner shown in pamphlets made available to them, the female placing one foot on the squatting male's upper leg, then one foot on his shoulder, then bringing the other foot up to his other shoulder. These pamphlets had not been made known to the 1978 team. In the modified version being used at the time of Kirk's injury, the female would stand behind the male, take his hands and "pop up", pulled up by the male, so both her feet landed on his shoulders at the same time. The male's hands would transfer immediately to the female's lower calves or ankles while she steadied herself.

Kirk's feet landed on the shoulders of the male cheerleader Mark Winger, but her body tipped backward. Winger had taken hold of her right above her ankles. Kirk stated she told him to let go, but he held her as she fell backward. She landed on the astroturf with her full weight on her left elbow, shattering all three bones in the elbow. Her left ankle was also fractured.

Shortly after Kirk's injury, WSU hired a new program supervisor with 10 years' experience in cheerleading to coach the team.

Kirk's injury to her elbow is permanent. She had surgery on the elbow due to the fractures, and one of the bones in the forearm is no longer connected to the joint. She will have continuing pain and arthritis in the area. She also became very depressed and suicidal after the injury and spent over a month in a psychiatric ward. There was some evidence Kirk had been depressed prior to the injury.

Kirk brought this action against WSU, its Board of Regents, and the Associated Students of WSU. The jury's verdict found the defendants had been negligent, and the negligence proximately caused Kirk's injuries and damages. The jury specifically found the defendants negligent for failure to provide adequate supervision, training, and coaching of the practices; failure to provide safety padding for the outdoor practices; failure to warn regarding the hardness of the astroturf surface; and failure to provide adequate literature regarding the proper and safe method of performing partner (double) stunts. The jury also found Kirk's own acts or omissions were the proximate cause of 27 percent of her injuries and reduced her damages by that amount. The total judgment for Kirk, including statutory fees and costs, was $353,791.

Both parties appeal various elements of the judgment, and this court granted direct review.

I

The defendants argue the trial court erred in refusing to adopt their proposed instructions regarding assumption of risk. They assert the assumption of risk doctrine should act as a complete bar to recovery and that the facts of this case present substantial evidence to support the proposed instructions to the jury on this issue.

The defendants' proposed instructions 12 and 13 read:

> If plaintiff assumed the risk of harm from attempting to perform a shoulder stunt she may not recover damages for an injury resulting therefrom.
>
> In order for plaintiff to have assumed such risk, she must have had actual knowledge of the particular danger and an appreciation of the risk involved and the magnitude thereof, and must thereafter have voluntarily assumed such risk.
>
> For a person to act voluntarily he must have freedom of choice. This freedom of choice must come from circumstances that provide him a reasonable opportunity, without violating any legal or moral duty, to safely refuse to expose himself to the danger in question.
>
> In determining whether the plaintiff assumed such risk, you may consider her maturity, intelligence, experience and capacity, along with all the other surrounding circumstances as shown by the evidence.

The basis of assumption of risk is the plaintiff's consent to assume the risk and look out for herself. Therefore she will not be found, in the absence of an express agreement, to assume any risk unless she had knowledge of its potential danger and the risk is generally recognized as dangerous. This means that she must not only be aware of the facts that created the danger but also must appreciate the nature, character and extent which make it unreasonable. Thus even though the plaintiff might be aware of a potential danger arising from an activity she is engaged in it may appear to her to be so slight as to be negligible. In such a case the plaintiff does not assume the risk and it is not a proper defense to the action.

Kirk in a cross appeal contests instruction 6 given by the court which allowed the jury to reduce Kirk's damages for participating in the decision to perform the stunt in question, participating in the decision to practice on the astroturf, or "[v]oluntarily participating in an activity which she knew to be dangerous and in which she knew she could be hurt by falling."

The issues raised by the parties require this court to review the status of assumption of risk in Washington. The law in effect at the time of the events leading to this action was the 1973 comparative negligence statute, R.C.W. 4.22.010, Laws of 1973, 1st Ex. Sess., ch. 138, § 1, p. 949. The statute has since been superseded by the adoption of comparative fault in 1981. Laws of 1981, ch. 27.

The position of the assumption of the risk doctrine after the adoption of comparative negligence has been the subject of extensive discussion by various courts, including ours, as well as numerous commentators. *See generally* W. KEETON, TORTS § 68 (5th ed. 1984); V. SCHWARTZ, COMPARATIVE NEGLIGENCE 153-180 (2d ed. 1986); 2 F. HARPER & F. JAMES, TORTS 1162-92 (1956 & Supp. 1968); Annot., *Effect of Adoption of Comparative Negligence Rules on Assumption of Risk*, 16 A.L.R. 4th 700 (1982); *Shorter v. Drury*, 103 Wash. 2d 645, 695 P.2d 116, *cert. denied*, 474 U.S. 827, 106 S. Ct. 86, 88 L. Ed. 2d 70 (1985); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973). The commentators have agreed the general rubric "assumption of risk" has not signified a single doctrine but rather has been applied to a cluster of different concepts. *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 68, 63 S. Ct. 444, 452, 87 L. Ed. 610, 143 A.L.R. 967 (1943) (FRANKFURTER, J., concurring); W. KEETON, at 496; F. HARPER & F. JAMES, at 1162. The commentators have identified and labeled four separate concepts to which "assumption of risk" has been applied in the past: express, implied primary, implied reasonable, and implied unreasonable. We recognized this classification scheme in *Shorter*, 103 Wash. 2d at 655, 695 P.2d 116, and will begin with this framework, as explained below, for our current discussion of these issues.

[*The court proceeded to discuss four categories of assumption of risk: express, implied primary, implied reasonable, and implied unreasonable. In this case, the court deemed the plaintiff's assumption of risk as implied reasonable, and tailored their analysis accordingly. Due to the fact that not all jurisdictions have adopted this classification system, the court's discussion of*

each category's nuances may only lead to confusion, and has therefore been deleted. For the purposes of understanding assumption of risk, the important thing is to be able to understand that the theory, as applied under a specific set of circumstances, may operate to reduce a plaintiff's damages award or act as a complete bar to recovery.]

With this basic understanding of the existing law of assumption of risk, we turn to the arguments of the parties in this case. The defendants contend they were entitled to have the jury instructed on assumption of risk as a complete bar to any recovery by the plaintiff because the injury occurred during the plaintiff's participation in an athletic activity. We disagree. The appellant misinterprets the nature of the assumption of the risk concept and our earlier opinions on the subject. Assumption of the risk may act to limit recovery but only to the extent the plaintiff's damages resulted from the specific risks known to the plaintiff and voluntarily encountered. To the extent a plaintiff's injuries resulted from other risks, created by the defendant, the defendant remains liable for that portion.

The use of assumption of risk in this manner can be seen in *Shorter v. Drury*, *supra*. The court in *Shorter* did not allow express or implied primary assumption of risk to act as a complete bar to recovery by the plaintiff where the defendant's negligence was also a cause of the damages to the plaintiff. *Shorter*, at 657, 695 P.2d 116. The court instead treated the assumption of the risk as a damage-reducing factor, attributing a portion of the causation to the plaintiff's assumption of the risk and a portion to the defendant's negligence.

In *Shorter*, a woman had in writing expressly assumed the risk of her refusal, on religious grounds, to accept any blood transfusions during a medical procedure involving the risk of bleeding even if performed without negligence by the doctor. The doctor did, however, negligently lacerate her during the procedure. She continued to refuse transfusions and bled to death. The trial court instructed the jury:

> If you find that Mr. or Mrs. Shorter assumed a risk which was a proximate cause of Mrs. Shorter's death, you must determine the degree of such conduct, expressed as a percentage, attributable to Mr. and Mrs. Shorter.... Using 100% as to the total combined conduct of the parties (negligence and assumption of the risk) which contributed to the damage to the plaintiff, you must determine what percentage of such conduct is attributable to Mr. or Mrs. Shorter. *Shorter*, at 653-54, 695 P.2d 116.

Thus, the *Shorter* court treated the plaintiff's assumption of the risk as a damage-reducing factor rather than a complete bar in cases where the defendant's negligence caused some portion of the plaintiff's damages. *See also Lyons*, 83 Wash. 2d at 96, 515 P.2d 821 ("the calculus of balancing the relative measurements of fault inevitably incorporates the degree to which the plaintiff assumed the risk").

We find support for this approach to the issue of assumption of risk in the language of Professor Schwartz:

> A rigorous application of implied assumption of risk as an absolute defense could serve to undermine seriously the general purpose of a comparative negligence statute to apportion damages on the basis of fault. This is perhaps the reason that every commentator who has addressed himself to this specific problem has agreed that plaintiff should not have his claim barred if he has impliedly assumed the risk, but rather that this conduct should be considered in apportioning damages under the statute. (Footnotes omitted.) V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.5, at 180 (2d ed. 1986).

He notes only one jurisdiction "vigorously applies" assumption of risk as an absolute defense after the adoption of comparative negligence. V. SCHWARTZ, at 180 n.78.

We also find support for our position in the opinions of numerous courts, including our own, holding a plaintiff's assumption of certain known risks in a sport or recreational activity does not preclude recovery for injuries resulting from risks not known or not voluntarily encountered. *Regan v. Seattle*, 76 Wash. 2d 501, 458 P.2d 12 (1969) (driver of "go-cart" on race course does not

assume unknown risk of spilled water on the course); *Wood v. Postelthwaite*, 6 Wash. App. 885, 496 P.2d 988 (1972), *aff'd*, 82 Wash. 2d 387, 510 P.2d 1109 (1973) (golfer does not assume unknown, unforeseen risk of being hit by golf ball due to inadequate warning but may assume other known risks inherent in the game); *Miller v. United States*, 597 F.2d 614 (7th Cir. 1979) (swimmer in public lake did not assume risk of diving off pier into too shallow water); *Segoviano v. Housing Auth.*, 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983) (participant in recreational flag football game did not voluntarily assume risk for injuries inflicted by another player in violation of the rules); *Leahy v. School Bd.*, 450 So. 2d 883 (Fla. Dist. Ct. App. 1984) (high school football player injured during a drill did not assume risks of improper supervision and inadequate safety equipment); *Rieger v. Zackoski*, 321 N.W.2d 16 (Minn. 1982) (spectator who walked onto raceway after auto race did not assume all risks of unauthorized vehicles racing around the track; defendant 32 percent negligent); *Shurley v. Hoskins*, 271 So. 2d 439 (Miss. 1973) (hunter did not assume risk of being negligently shot by companion); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90, 82 A.L.R.2d 1208 (1959) (skater did not assume risks of unusually hard and slippery ice at defendant's rink, even though known); *Rutter v. Northeastern Beaver Cy. Sch. Dist.*, 496 Pa. 590, 437 A.2d 1198 (1981) (high school football player did not voluntarily assume all risks of playing "jungle" football at coaches' request without equipment); *Meese v. Brigham Young Univ.*, 639 P.2d 720 (Utah 1981) (student beginner skier did not assume unknown risk of improperly adjusted bindings fitted by defendant; defendant 75 percent responsible for plaintiff's injuries); *Sunday v. Stratton Corp.*, 136 Vt. 293, 390 A.2d 398 (1978) (skier did not assume unknown risk of becoming entangled in brush concealed by the snow).

In the present case, the trial court did not err in rejecting proposed instructions regarding assumption of the risk as a complete bar to recovery. Although express and implied primary assumption of the risk remain valid defenses, they do not provide the total defense claimed by the defendant. Implied unreasonable assumption of the risk has never been considered a total bar to recovery in comparative negligence jurisdictions.

Kirk in her cross appeal argues the trial court erred in allowing the jury to consider assumption of the risk in any manner, even as a damage-reducing factor. Kirk argues even if she did assume certain risks that contributed to her injuries, her conduct in doing so was reasonable and should not be used to reduce her damages. This contention requires us to determine the status of implied reasonable assumption of the risk, the last remaining category. Its status had been left undecided by our earlier opinions.

One commentator has proposed implied reasonable assumption of risk should not be allowed to reduce a plaintiff's damages in any way. W. KEETON, at 497-98. There are several weaknesses in this approach, however, which lead us not to adopt it. First, Professor Keeton proposed this treatment of implied reasonable assumption of risk in part to counter the harsh effects of the absolute bar to recovery approach for express and implied primary assumption of risk. *See* W. KEETON, at 497 (proposed approach prevents implied reasonable assumption of risk from acting as "*an absolute bar*" (italics ours)). Since we have not adopted that harsh approach, we see no reason to adopt this exception to it. Second, other commentators have not favored providing special treatment for this rather elusively defined category. *See* V. SCHWARTZ, at 156-57, 180; RESTATEMENT (SECOND) OF TORTS § 496C, comment g, at 572 (1965). We favor the reasoning of Professor Schwartz allowing implied reasonable assumption of risk to be given to the jury as a factor for consideration:

> The reasoning … that *reasonable* implied assumption of risk should not serve to diminish the amount of plaintiff's recovery … is seriously flawed. When a person's conduct under the facts is truly voluntary and when he knows of the specific risk he is to encounter, this is a form of responsibility or fault that the jury should evaluate. Those who argue that the "jury cannot do this" have not met too many jurors.… When a plaintiff engages in classic assumption of risk conduct, he is *in part* responsible for his injury. V. SCHWARTZ, at 180.

We do note this form of assumption of the risk is still subject to the voluntariness element assumption of the risk; even though the plaintiff's

conduct may be reasonable it must still be shown to be voluntary in order to warrant an instruction of assumption of the risk. *See Segoviano v. Housing Auth.*, 143 Cal. App. 3d 162, 174, 191 Cal. Rptr. 578, 587 (1983) ("[u]nless the plaintiff has reasonable alternatives available to him, he cannot be said to have voluntarily assumed the risk").

The trial court below therefore did not err in allowing the jury to consider the conduct of the plaintiff, including implied reasonable assumption of risk, in reaching its findings reducing the damages.

* * *

Questions and Notes

1. For a proposal to apply assumption of risk narrowly to those cases involving abnormally dangerous activities by plaintiffs, *see* DeWolf and Hander, *Assumption of Risk and Abnormally Dangerous Activities: A Proposal*, 51 MONT. L. REV. 161 (Winter 1990).