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Guido Calabresi

Jeffrey O. Cooper

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Articles

NEW DIRECTIONS IN TORT LAW

1995 Monsanto Lecture
Valparaiso University School of Law

GUIDO CALABRESI*
AND
JEFFREY O. COOPER**

There are four different levels to recent developments in the law of torts: what's happening in practice, what's happening in Congress, what's happening with the Restatements at the American Law Institute, and, more fundamentally, what are the practical and theoretical effects of an important change in the basic approach that has been gaining form in torts over the last thirty years. After a preliminary nod to the first three, we will focus on this last one, which involves the emergence of splitting rules and the ways in which the trend toward splitting has manifested itself in various tort doctrines.

* Circuit Judge, United States Court of Appeals, Second Circuit; Sterling Professor of Law, Emeritus, Yale Law School.

** Associate Research Scholar, Yale Law School; former law clerk to Judge Calabresi; Assistant Professor, Indiana University School of Law, Indianapolis, Fall 1996. This article is based on the 1995 Monsanto Lecture, which Judge Calabresi delivered at Valparaiso University School of Law on November 16, 1995. That lecture, in turn, drew on the collaborative efforts of the two authors.

I.

First, a few words about what we see as the less interesting recent developments in practice, in Congress, and at the American Law Institute. These developments have been the subject of much commentary over the past few years. But, they are, as we hope to show, relatively unimportant.

A. *Practice*

If one believes the press and the scholarly literature, the dominant trend in practice today is a retreat among courts and juries from earlier, very strongly pro-plaintiff positions to positions more favorable to business and to other classes of defendants.¹ There is, indeed, some evidence that this is happening, but it is hard to verify, harder to quantify, and harder still to explain.² In the end, moreover, there is not much to say about it. If it is happening, it is the result of other changes in the law and in society. It may be very interesting, for a lawyer practicing today before a judge or a jury, to know that the current trend seems to be more favorable to defendants than it has been in the recent past. But that trend will not help the lawyer very much in any individual case, let alone suggest to the lawyer how best to argue the case. More importantly, it will not necessarily say anything about what may happen a few years from now. Since there is not much that can usefully be said about this trend, we will spend no more time on it.

B. *Congress*

What is happening in Congress is more dramatic. Tort reform was, after all, part of the Contract With America,³ and for awhile last spring we were bombarded with advertisements suggesting that unless reforms were passed the world would end, and other advertisements stating that if reforms did pass, it

1. See generally Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992) (describing pro-defendant trends in products liability lawsuits); see also John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1003 (1995) (suggesting that trends in both doctrine and practice favor defendants). The mainstream press has also commented upon anecdotal evidence and regional studies supporting the existence of a pro-defendant trend. See, e.g., George Flynn, *Jury Awards Becoming "More Sensible" Locally; Trend Shows Plaintiffs Getting Less*, HOUSTON CHRON., July 9, 1995, at A29; Richard Perez-Pena, *Study Finds Sharp Drop Last Year in Awards for Medical Malpractice Cases*, N.Y. TIMES, Jan. 27, 1995, at B7; Bill Rankin, *Tort Reform: The Price of Justice*, ATLANTA J. & CONST., May 21, 1995, at 1D; Richard Waters, *Where Passions and Court Awards Run High—The Tide Is Turning in Favour of Corporate Defendants in US Product Liability Cases*, FIN. TIMES, May 24, 1995, at 27.

2. See Waters, *supra* note 1, at 27.

3. See *In Their Own Words: The Republican Promises*, N.Y. TIMES, Nov. 11, 1994, at A26.

would be worse than the end of the world. But in a way, what is happening in Congress, though it involves the most heat, is the least interesting of all the changes, for, so far, it is mainly a great deal of sound and fury.⁴ Even if something passes—which is by no means certain⁵—we suspect that it will be seen primarily as a missed opportunity for real change, as a foregone chance to do something that would renovate the entire torts system. That possibility has not been taken seriously in this country, as it was in New Zealand, where the common law action for accidental injury was eliminated. In its place, New Zealand adopted Owen Woodhouse's plan and created a central fund—supported by payments based, to some degree, on the riskiness of the assessed activities—from which compensation claims are paid to all those injured in accidents. It was a radical reform conceived by a very conservative person.⁶

Some reforms may eventually go through Congress and be signed by the President. One possibility is caps on awards of punitive damages.⁷ But punitive damages are really a trivial part of tort law, for they are awarded in a

4. According to press reports, Senators Bob Dole and Mitch McConnell will shortly introduce a bill that would replace third-party liability with a first-party insurance system, under which individuals would obtain coverage that would compensate them for lost wages and, for an additional premium, pain-and-suffering damages in the event that they were injured in an accident. See Peter Passell, *A Dole Bill to Revise Tort Law May Lure Some Centrist Democrats*, N.Y. TIMES, May 2, 1996, at D2. The shift from third-party to first-party liability would, unlike the proposals that have been circulating in Congress for the last year, represent a fundamental—andperhaps desirable—shift in this country's tort law system. The idea behind the Dole-McConnell plan is not new. See generally, e.g., Guido Calabresi, *The New York Plan: A Free Choice Modification*, 71 COLUM. L. REV. 267 (1971) (describing and suggesting modifications to a proposed New York first-party insurance system). And, in light of the failure, so far, of more modest proposals to be enacted into law, the passage of the Dole-McConnell plan seems dubious at best.

5. The House of Representatives passed the Common Sense Legal Standards Reform Act on March 10, 1995, by a vote of 265-161. See H.R. 956, 104th Cong., 1st Sess. (1995); 141 CONG. REC. H3015-27 (1995). The Senate passed an amended bill on May 10, 1995. See 141 CONG. REC. S 6407. The two chambers, however, were unable to resolve their differences until March 1996, when both approved the retitled Common Sense Product Liability Legal Reform Act. See 142 CONG. REC. S. 2590-91, 142 CONG. REC. H 3204 (1996). President Clinton vetoed the bill on May 2, 1996. See Neil A. Lewis, *President Vetoes Limits on Liabilities*, N.Y. TIMES, May 3, 1996, at A1. Citations in this article to particular sections of H.R. 956 are to the version that the House of Representatives passed in March 1995.

6. New Zealand's Accident Compensation Act of 1972, which went into effect in 1974, abolished the common law tort action for personal injuries arising out of accidents and put in its place a no-fault scheme, similar to a workers' compensation plan, which allowed injured parties to obtain compensation from a fund administered by the state. See Accident Compensation Act of 1972, 1 N.Z. Stat. 521, as amended by Accident Compensation Act of 1982, 3 N.Z. 1552. The plan was based on the report of a 1967 commission led by Owen Woodhouse. See ROYAL COMM'N OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (1967).

7. H.R. 956 would cap most punitive damages awards in products liability cases at either twice the amount of economic and non-economic loss suffered by the plaintiff, or \$250,000, whichever is greater. H.R. 956, *supra* note 5, § 107(b).

very small percentage of cases.⁸ More importantly, the reform proposals made to date do not seem to be based on a careful rethinking of the rationale for punitive damages. They seem, instead, to be no more than a reflexive response to a dimly seen and poorly understood problem. As a result, even if some limits were placed on some kinds of punitive damages, the impact of the change would be uncertain.

There may, perhaps, be some restrictions placed on contingent fees, such as would come about by placing caps on non-economic damages.⁹ It would be interesting if limits on contingent fees were adopted, because that would seem to run counter to the trend in other countries. England, for instance, which has long opposed them, has just adopted a form of contingent fees.¹⁰ The Chief Justices of Australia and the Netherlands have said that these countries, too, are considering such fees in one form or another.¹¹

The contingent fees to be made available in these countries are, or would be, quite different from the contingent fees that we have in the United States, however. In this country, the contingent fee system is calculated as a percentage of the recovery. Contrary to what some may think,¹² this system does not encourage lawyers to take frivolous cases. A lawyer retained on a contingent-fee basis will not take a case that he or she thinks cannot be won, because if the lawyer is correct about the merits of the case, he or she will not be paid. On the other hand, a lawyer who is on a standard retainer may be perfectly happy to take a terrible case, because he or she will be paid regardless of the result. Hence, the notion that contingent fees systematically encourage people to take meritless cases is bizarre beyond recognition.

What does a contingent fee do, then? In the American system, a contingent fee will cause a lawyer to take a case, even though it has a small probability of success, if the return following a successful result would be enormous. A

8. A study of cases from state courts in the nation's 75 largest counties from July 1, 1991, to June 30, 1992, for example, found that punitive damages were awarded in only four percent of tort cases in which plaintiffs won jury verdicts. See BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT NO. NCJ 154346, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 8 (1995).

9. H.R. § 956, *supra* note 5, § 203(a).

10. Courts and Legal Servs. Act, 1990, § 58 (Eng.); Conditional Fee Agreements Regs., S.I. 1995, Nos. 1674-45.

11. Rt. Hon. Sir Anthony Mason, Chief Justice of the Court of Australia (retired) & Hon. Sjoerd Royer, President of the Netherlands Supreme Court, Remarks at the Canadian Institute for Advanced Legal Studies Cambridge Lectures (July 11, 1995), followed by private conversations with Judge Calabresi.

12. See, e.g., Allison F. Aranson, Note, *The United States Percentage Contingent Fee System: Ridicule and Reform from an International Perspective*, 27 TEX. INT'L L.J. 755 (1992) (arguing that the American contingent fee system encourages frivolous litigation).

lawyer may be willing to take a case with a one in a thousand chance of winning if the potential return runs into the millions. So many strange things can happen during the course of litigation that a one in a thousand chance may seem a reasonable risk to take if the payoff is high enough should the case be won. On the other hand, our system does not encourage a lawyer to take a case that has a pretty good chance of success but only a small recovery on victory.

England's new contingent fee system is very different. In the English system, a lawyer who signs a contingent fee arrangement and then wins a case gets double the fee that he or she would normally obtain under a standard arrangement.¹³ But if the case is lost, the lawyer gets nothing.¹⁴ That kind of arrangement does not encourage lawyers to take a case with a one in a thousand chance of a multimillion dollar return, because 999 times out of a thousand, they will lose and get no fee whatsoever, while in the one case they win, they will get only double the normal fee they would get for that amount of work.

None of the so-called reforms in Congress that would affect contingent fees focuses on these issues. What we hear from Congress, instead, is talk about putting a cap on some part of non-economic damages, or other suggestions of that sort.¹⁵ That kind of change does not address the real question, and so the reform, even if it came about, would likely be temporary and trivial.

The problem with legislative reform of tort law in the end is a deeper one. The kind of reform that occurs in our legislatures with respect to tort law is usually the result of a funny kind of alliance between two types of repeat players: the plaintiffs' lawyers, on one side, and the categories that give rise to defendants in tort law—the injurer categories—on the other.¹⁶ They both have certain interests, which are quite different from the interests of the person who is injured and from a general societal interest in reducing the costs of administering tort law. Potential defendants primarily seek to reduce their exposure to lawsuits and damages. The defendants would also benefit from a reduction in administrative costs, but their lawyers, who often are also their lobbyists, would not. The plaintiffs' lawyers, on the other hand, are interested in something that will give rise to large amounts of damages every once in a

13. Courts and Legal Servs. Act, 1990, § 58(2) (Eng.); Contingent Fee Agreements Regs., S.I. 1995, No. 1674, § 3.

14. *Id.*

15. *See supra* note 4.

16. The advantages that repeat players enjoy in the American legal system were first described by Marc Galanter in the mid-1970's. *See* Marc Galanter, *Afterword: Explaining Litigation*, 9 *LAW & SOC'Y REV.* 347 (1975); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974).

while. They will accept reforms that keep that element in the system, whether the changes hurt the plaintiffs a lot or a little. They do not care at all about reducing the costs of administering the system, since often their fees constitute those very costs. We do not mean that they are being dishonest. They have convinced themselves, as we all do, that what is good for them is also good for the plaintiffs and the country.

What is usually missing from reform proposals in legislatures, however, is the significant presence of people who are looking specifically to the interests of those who are injured and to the administrative costs of granting such people recovery. Injured people are not repeat players. At any given time, a certain number of people have been injured and want recovery. They care passionately about tort law at that moment. But once their claims are resolved—once they have won or lost—they lose interest very quickly. The rest of us do not think of ourselves as sufficiently likely to be injured to push for reform one way or the other. We are not interested in reform until we are hurt. As a result, legislative discussions of tort reform often turn out to reflect only the interests of whichever group of repeat players happens to have more influence with those who won the last election or are running in the next one. No surprise, then, that they rarely reflect the deeper issues at stake.

C. *American Law Institute*

The prospects for comprehensive legislative reform thus seem to be limited. More interesting, perhaps, are the recent activities of the American Law Institute, which is about to issue the Third Restatement of Torts (Products Liability). The Restatement, as we know, can have a great deal of influence. Based on the drafts that have been released, the new Restatement seems to represent a marked departure from the earlier Restatements and adopts positions that are very much more pro-defendant. For example, the current draft abandons the consumer expectation test as a basis for determining when a product design defect exists.¹⁷ This test, on which a number of courts have relied,¹⁸ derives from the present Restatement.¹⁹

In its place, the Restaters favor what they call a “risk/utility standard.”²⁰

17. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (Tentative Draft No. 2 1995).

18. See, e.g., *Hill v. International Harvester Co.*, 798 F.2d 256 (7th Cir. 1986) (Illinois law); *Casrell v. Altec Indus., Inc.*, 335 So. 2d 128 (Ala. 1976); *Lamar v. McKee Indus., Inc.*, 721 P.2d 611 (Alaska 1986); *Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W.2d 392 (Mo. 1987).

19. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1977).

20. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. c (Tentative Draft No. 2 1995).

The idea of a risk/utility standard is not new; courts have been using versions of a risk/utility standard in design defect cases for years, although it frequently is not used exclusively. Typically, the risk/utility standard asks whether, knowing what we know now, the product's benefits are worth the harms that it causes.²¹ Notice, that test is very different from the traditional Learned Hand test of fault, which asked a similar question—is the gravity of harm greater than the cost of avoidance—but did so from the perspective of what the actor knew or ought to have known at the time he or she acted.²² The traditional risk/utility test is instead something that has been called the “ex-post Learned Hand” test.²³ It asks, knowing what we do now, would a reasonable person put out a product of this sort? Since it imposes liability on the basis of what is known now, rather than on the basis of what the producer knew or should have known at the time the product was designed, the traditional risk/utility test is a non-fault test.

Fault or non-fault, the test has several problems. For one, it is profoundly case-by-case, and therefore is very expensive to administer. It will always require an individualized inquiry to determine whether a particular product is worth its risks. Second, the test, like the Learned Hand test, asks society, or better, an agent of the state, to say what actions or better, an agent of the state, to say what actions or products are worth it, and which are not.²⁴ It bases liability on the answer given to that question. That strikes us as a mistake. We think the better approach is to try to decide what categories of people—buyers or sellers, users or producers—are in a better position to decide whether, and to what degree, avoidance is worth it, and place the cost of non-avoidance on those categories.²⁵ Indirectly, but pretty clearly, that is what the consumer expectations test tries to do.²⁶

If the proposed Restatement had adopted the traditional risk/utility test, we would have thought the choice unfortunate but not especially novel. The current draft goes much further, however. Although it calls its proposed test a risk/utility test, its standard is very different from the test that the courts have been applying. First, unlike either the consumer contemplation test or the traditional risk/utility test, the Restatement's test would impose liability only for

21. See generally W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 99, at 699 (5th ed. 1984) [hereinafter PROSSER & KEETON].

22. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

23. See Guido Calabresi & Alvin K. Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585, 590 (1985).

24. *Id.*

25. See Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972).

26. See Calabresi & Klevorick, *supra* note 23, at 593 n.23.

harms that were reasonably foreseeable.²⁷ The Restatement thus, in effect, abandons strict liability for design defects.²⁸ Second, the Restatement requires, as a precondition of recovery, that the plaintiff prove the existence of a reasonable alternative design,²⁹ and as such would impose a significant burden on plaintiffs in light of the parties' relative expertise and access to information.³⁰

This last requirement, more importantly, represents a substantial shift away from theories of product liability that emphasize consumer protection and toward a rule of *caveat emptor*, requiring the consumer to take the product as it is and bear all the risks of its use.³¹ What else can it mean to say that where the product's risks are shown to outweigh its utility, and this fact was foreseeable to the producer, but there is no reasonable alternative design, there is no liability? Manufacturers have long pushed for liability-limiting rules like this one, especially in the nineteenth century, but the closest they had come to it, even in that century, was the now-abandoned rule that employees assume the risks inherent in the conditions of their employment, including the risk that other employees will be negligent. The proposed Restatement rule does not quite shift all risks to the consumer, but, particularly in light of the difficulty that many plaintiffs will have in proving the existence of a reasonable design alternative, it represents a dramatic shift in that direction.

One of us has been engaged in the argument over proper standards for products liability actions for a long time, and the Restatement comes out totally opposite from the way that co-author would like. Is that important? It may be on a personal level. But frankly, it is not terribly important to the law of torts. It is unclear whether the change would even have any effect, because the Restatement's influence depends on whether courts pay attention to it, which in turn depends on whether the Restatement actually reflects what is happening in

27. RESTATEMENT (THIRD) OF TORTS § 2(b) & cmt. a (Tentative Draft No. 2 1995).

28. *Id.* § 2 cmt. a.

29. *Id.* § 2(b).

30. John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEMPHIS L. REV. 493, 517 (1996); Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407, 1423 (1994).

31. See generally Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, at 669-77 (discussing the Restatement's potential to create categories of liability-proof products for which no reasonable alternative designs exist).

the courts. And it is doubtful that this particular Restatement has much support in the courts.³²

Of course, the Restatement can become a self-fulfilling prophecy. There is a story, perhaps apocryphal, about the *Palsgraf* case³³ and the First Restatement of Torts. Supposedly, at about the time *Palsgraf* was to be decided, Judge Cardozo, who participated in the American Law Institute, traveled from Albany to New York for a meeting on the Restatement. At the meeting, there was a big argument on the issue of *Palsgraf*, the issue of whether negligence, to be actionable, had to be in relation to the plaintiff, or whether instead careless behavior in the abstract—"negligence in the air," as it were—would suffice.³⁴ At a certain point, Cardozo is said to have said,

Well, I don't know whether what I am about to say is quite proper [he was a very soft-spoken gentleman] but the Restatement, after all, should reflect the law as it is, as well as what we think it ought to be, and we have a case before us now that raises exactly this question. While I can't tell you for certain how it's going to come out, I think you ought to know that my best judgment is that the New York Court of Appeals is going to hold that negligence is relational, and that it has to be with respect to somebody

This, supposedly, was enough to swing the Restaters because, after all, New York is an important state, and if that was going to be the law of New York, the Restatement should reflect it.

Cardozo then returned to Albany, where he went into conference on the *Palsgraf* case. It was a very tightly divided court, with Judge Andrews arguing that as long as a defendant acted carelessly, and injury resulted, a claim for negligence existed regardless of whether the injured plaintiff belonged to a foreseeable category of victims of the defendant's careless act.³⁵ Then, in a quiet moment in the conference, Cardozo said, "Well, I don't know how much we should be affected by the Restatement, and of course they could change their minds, but I should tell you that I think that the Restaters are going to define negligence as relational." So, four to three, *Palsgraf* came out the way it did, and the Restatement became a self-fulfilled prophecy.

32. See generally Vargo, *supra* note 30, at 559-950 (providing a comprehensive state-by-state survey of design-defect products liability standards); Shapo, *supra* note 31, at 666-68, 671 (1995) (questioning whether the proposed Restatement Section 2(b) reflects existing caselaw); Vandall, *supra* note 30, at 1408-1421 (discussing courts' analysis of reasonable alternative designs).

33. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

34. *Id.* at 99.

35. *Id.* at 102-03 (Andrews, J., dissenting).

That may happen with the Restatement here, too, because the taking of a position in the Restatement is bound to have some influence. Nevertheless, the possibility of this kind of shift in rules for strict liability, while not insignificant, is not the dominant, or most interesting, trend in tort law today.

II.

What we think is important in tort law today is the reaction to a deep change in thinking about torts and compensation that has taken place in the last thirty or so years. This change we believe, is as important for tort law as was the coming of insurance seventy years ago. Like that earlier change, it is slowly making its way through the whole of tort law and redirecting the development of different doctrines, one after another. And like that earlier change, it is making itself felt at times in jury decisions, at times in court decisions, and at times in legislative actions. It also appears occasionally in Restatement comments and not infrequently in scholarly discussions.

In the last thirty years, after much pressure from theoretical scholars and others,³⁶ our tort system has moved away from the dominance of all-or-nothing recovery rules—from situations in which you either won or lost—toward rules that allow and favor splitting in any number of ways. We sometimes call it contribution, we sometimes call it bananas—what we call it is unimportant. Fleming James, in his torts classes at Yale, used to say, “You can call it Thucydides or you can call it mustard plaster, but it’s all proximate cause just the same.” What we have here is the same kind of thing. Whatever we call it, what we have seen is the emergence of a strong tendency to split the burden of accident costs.

This movement has made itself felt in many parts of tort law and has raised a number of complex theoretical questions that we will only have time to touch on here. We will concentrate on two examples of the ways in which splitting rules have entered the law, and on the consequences of this splitting. One is the working of so-called comparative negligence into the system, and the other the beginning of acceptance of the concept of statistical causation. The two are not unrelated.

36. A partial, but by no means exhaustive, list of influential early articles advocating the replacement of the all-or-nothing rules of contributory negligence with the splitting rules of comparative negligence would include Charles O. Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1 (1936); Fleming James, Jr., *Comparative Negligence*, 62 YALE L.J. 691 (1953); Wex S. Malone, *Comparative Negligence—Louisiana’s Forgotten Heritage*, 6 LA. L. REV. 125 (1945); A. Chalmers Mole & Lyman P. Wilson, *A Study of Comparative Negligence*, 17 CORNELL L. Q. 333, 604 (1932); William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); and Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 304 (1950).

We begin by noting that the move from all-or-nothing to splitting, to contribution, is neither pro-plaintiff nor pro-defendant. This fact makes it much more interesting than some of the other things that are happening, or may be happening, because those others tend to respond to the political forces that are dominant at the moment, and as a result are likely to change with the political tides. The move toward splitting rules is something whose significance is much harder to comprehend in ideological terms.

Comparative negligence itself is a good example. Before comparative negligence was adopted, defense groups were very much against it. Plaintiffs' groups, on the other hand, were in favor of it. They thought that it would allow plaintiffs to get to a jury more often, and that a jury would usually decide for the plaintiff. The fascinating thing is that insofar as we have statistics,³⁷ they seem to suggest that the coming of comparative negligence has not really changed the total that plaintiffs have been awarded. Recoveries in individual cases undoubtedly have been altered, but the total amount of recovery has stayed about the same.³⁸ And, incidentally, since contingent fees are usually a percentage of the award, the "take" of plaintiffs' lawyers has probably been unaltered by the move to comparative negligence.

In a contributory negligence regime, there are cases in which either the judge (as a matter of law) or the jury (as a matter of fact) concludes that there is contributory negligence, and as a result the plaintiff gets nothing. In cases presenting the same facts under a comparative negligence scheme, the plaintiff will not recover the full amount of his or her damages, but will still get something. Such cases, of course, increase the total amount of plaintiff recovery. But there also are cases under contributory negligence in which a jury, forced to decide between giving a plaintiff all or nothing, overlooks the existence of some plaintiff negligence and gives the plaintiff a sizeable recovery (perhaps slightly reduced, but essentially full) because it cannot see giving the

37. The statistics we have in this area are never any good. One of the problems seems to be that a number of variables tend to be at work over time; as a result, isolating the effect of the change from contributory to comparative negligence is difficult. See Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 237 (1990).

38. See, e.g., *id.* at 239-45 (describing studies finding no significant change in the overall amount of awards); McConnell, *Damages About the Same Under Comparative Negligence*, CHICAGO DAILY L. BULL., Mar. 18, 1986, at 2 (finding no significant change in Illinois jury awards in the two years following the adoption of comparative negligence). But see Stuart Low & Janet Kiholm Smith, *Decisions to Retain Attorneys and File Lawsuits: An Examination of the Comparative Negligence Rule in Accident Law*, 24 J. LEGAL STUD. 535, 557 (1995) (concluding that comparative negligence produces higher award amounts than contributory negligence).

plaintiff nothing at all.³⁹ Under comparative negligence in cases of this type, plaintiffs most likely will receive less than they previously did.

Thus, under comparative negligence, some plaintiffs who previously got nothing secured something. Others receive less than they previously did. Strangely enough, the opposing trends seem to have balanced out, so that the total amount received as damages for accidents seems to have remained about the same. The best indication that this is so is that the transition to so-called comparative negligence has had remarkably little effect on insurance rates.⁴⁰

A. Comparative Negligence

1. What Do We Compare?

We earlier spoke of the change as being to “so-called” comparative negligence. We did this because what is being compared under comparative negligence is not simply how faulty one side is as against the other. Whatever the language of the statute or the judicial decision that established comparative negligence, in practice what is compared is not just negligence, not merely fault, but a more complex and hybrid concept which we call “responsibility.” That is, we do not just compare the degree of deviation from the reasonable-person standard of behavior; we also consider how important in a “causal” sense one party’s fault is relative to the other.⁴¹ In doing this, we essentially consider how good a safety pressure point one party is compared with the other. That is, we take into account the relative effectiveness of safety incentives placed on either party. In this way, a number of non-fault factors (that formerly entered into the all-or-nothing decision, if at all, only by way of causation analysis) have become a central part of the comparative responsibility inquiry. As a result, so-called comparative negligence is certainly comparative, but what we compare involves both fault and non-fault grounds for allocating losses.

How can we compare fault with non-fault? In the abstract, it sounds extraordinary. But in a funny kind of way, we are used to doing exactly the

39. See, e.g., Mutter, *supra* note 37, at 231 (describing this outcome as a *de facto* comparative negligence effect); John J. Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 OR. L. REV. 38, 41 (1969) (describing the tendency of juries under the contributory negligence system to reach compromise verdicts in cases in which the defendant’s negligence was greater than the plaintiff’s).

40. See Cornelius J. Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689, 707-22 (1960). More recent studies generally have been inconclusive. See generally Mutter, *supra* note 37, at 236-44 (surveying studies of the impact of the shift from contributory negligence to comparative negligence); VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 2-4, at 52-53 (3d ed. 1994) (citing an inconclusive North Carolina study).

41. See 4 FOWLER V. HARPER ET AL., *LAW OF TORTS* § 22.16, at 397-98 (2d ed. 1986).

same thing under all-or-nothing rules, except of course that ultimately one side or the other prevails absolutely. The most dramatic example of that comparison occurs in the concept of proximate cause. When we say there is no proximate cause, we are saying that we would rather put the loss—all of it—on a plaintiff who is innocent (by definition, since not contributorily negligent, under the old system) than on a defendant who is by definition negligent (since otherwise we would not reach the issue of causation at all). Even though one side is faulty and the other one is not, we put the whole loss on the non-faulty side, in part at least because “distance” makes the faulty side’s wrongful behavior less important to accident avoidance than the safety choices available to the innocent other party.⁴²

To take a rather scurrilous example, let us suppose that, as a youth, the dean of Valparaiso Law School had a child out of wedlock. That is, at best, a negligent thing to do. Let us suppose that children born out of wedlock have many more automobile accidents than children who are born into a home steeped in family values.⁴³ Let us finally suppose that the dean’s child, having reached the age of seventeen and obtained a driver’s license, plows into the provost of the university.

Now, we doubtlessly can say that, by having had a child out of wedlock, the dean acted wrongfully. We can also say that the dean’s wrongful act was a but-for cause of the accident. We might even say that one of the reasons we do not want people to have children out of wedlock is that we want to reduce the incidence of subsequent automobile accidents. Thus, all the traditional prerequisites for causation are met. And yet, we would probably never impose liability on the dean for the accident, because it seems absurd to put such a loss on the dean as a way of deterring this kind of accident in the future. Whatever the innocent plaintiff could do to avoid that accident or diminish the damages from it—wear armor-plated underwear, or not walk down the street, or anything of that sort—makes the innocent plaintiff a better pressure point than the negligent dean. Once we reach that conclusion—in an all-or-nothing regime—all the loss lies on the plaintiff. In effect, we compare fault and non-fault avoidance and find that on these facts non-fault is more important, and this conclusion—which we call “no proximate cause”—determines who is to be the loss bearer.

42. See Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalvern, Jr.*, 43 U. CHI. L. REV. 69, 88-89 (1975).

43. Judges, of course, cannot discuss politics, and given the current environment we hesitate to describe this kind of upbringing more precisely. Whatever family values are, let us suppose that those favored youths who grow up under their influence have fewer accidents.

Sometimes, instead, though the "distance" is great, we find that proximate cause exists.⁴⁴ Then the whole loss is put on the negligent party, despite the fact that the other party, though faultless, could also have helped avoid the harm.⁴⁵ The comparison between fault and non-fault comes out the other way. Again, that is the way all-or-nothing rules work.

Under comparative negligence, on the other hand, we are in a position to ask how important the capacity of each side to avoid the accident was. We can do it taking into account both failed capacity to opt for safety that arose out of faulty behavior, and failed capacity to opt for safety that we do not choose to call "wrong" or "undesirable," but which nevertheless had a part in the occurrence of the accident. With this in mind, we will now look at the effect comparative negligence has had on various doctrines in the law of torts.

B. *The Effect of Comparative Negligence on Traditional Doctrines*

1. Last Clear Chance

The doctrine of last clear chance, which ameliorated the harshness of the all-or-nothing contributory negligence rule, typically disappears under comparative negligence.⁴⁶ Under last clear chance, a plaintiff, even though

44. A rather startling example of this comes from Louisiana. In *Lynch v. Fisher*, 34 So. 2d 513 (La. Ct. App. 1947), a truck driver parked his truck on the right side of a narrow highway, leaving it extending far out into the path of traffic and failing to set out flares or any other kind of warning. Predictably, a car, which was travelling at excessive speed, hit the truck. The plaintiff, driving in another car, stopped at the accident scene to assist. *Id.* The plaintiff helped the driver of the badly damaged car from the vehicle and then attempted to assist the driver's wife, who was seriously (and fatally, as it turned out) injured. *Id.* In the process of trying to help the wife, the plaintiff removed a floor mat from the car, revealing a pistol. *Id.* The plaintiff handed the pistol to the car's driver, the husband, who did not appear to be seriously hurt, but who was in fact temporarily deranged as a result of the accident. *Id.* The husband then shot the plaintiff in the ankle. *Id.* Despite the rather involved (not to say implausible) series of events that transpired between the parking of the truck and the shooting of the plaintiff, the court permitted the plaintiff's negligence action against the owner of the truck to proceed. *Id.* at 517-19.

45. It is a commonplace that how far proximate cause runs itself depends on the degree of wrongfulness of the party whose proximity is being tested, and that, in practice, proximate cause runs much further when the defendant is wanton and willful. If this is in fact the case, it demonstrates, quite dramatically, that a fault/no-fault comparison occurs under all-or-nothing rules, and that it is a genuine comparison even though it results in one or the other side bearing the whole loss.

46. *See, e.g.*, *Kaatz v. State*, 540 P.2d 1037, 1050 (Alaska 1975); *Nga Li v. Yellow Cab Co.*, 532 P.2d 1226, 1242 (Cal. 1975); *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973); *Alvis v. Ribar*, 421 N.E.2d 886, 888 (Ill. 1981); *Cushman v. Perkins*, 245 A.2d 846, 850-51 (Me. 1968); *Petrove v. Grand Trunk W. R.R. Co.*, 464 N.W.2d 711, 712 (Mich. 1991); *Gustafson v. Benda*, 661 S.W.2d 11, 12 (Mo. 1983); *Davies v. Butler*, 602 P.2d 605, 613 (Nev. 1979); *McIntyre v. Balentine*, 833 S.W.2d 52, 57 (Tenn. 1992); *French v. Grigsby*, 571 S.W.2d 867, 867 (Tex. 1978); *Dixon v. Stewart*, 658 P.2d 591, 598 (Utah 1982); *Danculovich v. Brown*, 593 P.2d 187, 194

contributorily negligent, can recover fully if the defendant had the last chance in time to avoid the accident by acting reasonably, and did not do so.⁴⁷ With the adoption of comparative negligence, the great majority of jurisdictions to address the question have concluded that last clear chance, as an all-or-nothing rule, must be abandoned. Why? What is it about comparative negligence that has rendered last clear chance superfluous? The answer is that under comparative negligence we are in a position to evaluate all of the pressure points and to allocate damages accordingly. We can examine whose negligence was last in time, whose behavior entailed the greatest risk, and so on. If the defendant's negligence was last in time, but entailed only a slight increase in the risk of the accident, while the plaintiff's behavior was far more dangerous, it makes no sense in a comparative system to allow the plaintiff to recover fully, just because the defendant had the last chance to act.

It is interesting that last clear chance has disappeared even in those jurisdictions that have a Wisconsin-type system of comparative negligence—that is, one in which, if the plaintiff is more responsible than the defendant, the loss lies entirely on the plaintiff.⁴⁸ We might think that in these jurisdictions there would still be a place for last clear chance. Here, once again, the plaintiff might, in theory, have to bear the whole loss even though the defendant's negligence was last in time. But the question of how to weigh the plaintiff's responsibility where the defendant has the last clear chance in all probability now becomes a jury question. In other words, no matter how terribly the plaintiff acted, the issue of whether the plaintiff's responsibility outweighs the defendant's is probably always a jury question if the defendant had the last clear chance.⁴⁹ From the perspective of the negligent plaintiff, this resolution provides considerable solace, since the plaintiff is at least able to present his or her case to the jury and will not be thrown out on summary judgment. The chances that the jury will not find such a plaintiff more responsible than the

(Wyo. 1979); CONN. GEN. STAT. § 52-572h(b) (1995); OR. REV. STAT. § 18.475(1) (1995). *But see* Connor v. Mangum, 207 S.E.2d 604, 607 (Ga. Ct. App. 1974) (retaining last clear chance despite comparative negligence); Whitaker v. Burlington N., Inc., 352 N.W.2d 589, 591 (Neb. 1984) (same); Vlach v. Wyman, 104 N.W.2d 817, 817-18 (S.D. 1960) (same).

47. See 4 HARPER, ET AL., *supra* note 41, § 22.12, at 359.

48. The judicial-legislative dialogue that led Wisconsin to revise this rule from one that barred from recovery plaintiffs who were at least as responsible as defendants to one that allowed them to recover unless they were more responsible than defendants is described in GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 36-37 (1982).

49. See Eichelberg v. National R.R. Passenger Corp., 57 F.3d 1179, 1188 (2d Cir. 1995); *cf.* Fleming James, Jr., *Connecticut's Comparative Negligence Statute: An Analysis of Some Problems*, 6 CONN. L. REV. 207, 213 (1974) (stating that the negligence of a defendant who fails to take advantage of a last clear chance to avoid an accident is usually as great as or greater than any plaintiff's negligence). *But cf.* Mitchell v. Ross, 470 N.E.2d 245, 248 (Ohio Ct. App. 1984) (granting summary judgment for the defendant in a case in which last clear chance might have applied before the adoption of comparative negligence).

causally closer defendant, and hence will award some damages, are quite strong. Nevertheless, this potential partial recovery result is still a far cry from the result that would have obtained under the doctrine of last clear chance. For there, under an all-or-nothing rule, the presumably faultier plaintiff would have recovered fully.⁵⁰

2. Fault and Non-Fault: Products Liability

Comparative splitting rules come up in a somewhat different and interesting way in the area of products liability, which has long been a non-fault area in the law of torts.⁵¹ Before the adoption of comparative negligence, the dominant rule was that contributory negligence was no defense to products liability.⁵² Now, with comparative negligence, there has been an increasing tendency to allow comparison where there would normally be defendant products liability, but where the plaintiff was negligent.⁵³

50. A recent Second Circuit case showed the workings of this problem in their finest convolutions. See *Eichelberg v. National R.R. Passenger Corp.*, 57 F.3d 1179 (2d Cir. 1995). *Eichelberg* was a railroad case in Connecticut, a state that adhered to what can be called the "clearer last chance" variant of the last clear chance doctrine. The clearer last chance variant addressed the situation in which the plaintiff had the last clear chance to avoid the accident by the use of due care, but did not do so, and the defendant, with enough time remaining to avoid the accident, either realized or ought to have realized that the plaintiff would not act, even subsequently, to avoid the harm. In Connecticut, as in other jurisdictions that followed the clearer last chance rule (before the coming of comparative negligence), the defendant bore the liability in such situations. See *id.* at 1188-89; *Childs v. Blesso*, 260 A.2d 582, 583 (Conn. 1969). In these jurisdictions, the introduction of comparative negligence leads to all sorts of wonderful complications, which the *Eichelberg* opinion began to address. See *Eichelberg*, 57 F.3d at 1187-90.

51. In the nineteenth century, no-fault rules were very different from those in place today in the area of products liability. The courts refused to impose liability in products liability cases, regardless of how faulty the defendant's behavior had been, unless there was privity between the plaintiff and the defendant. The resulting rule, then, could be described as a very strongly pro-defendant no-fault rule. See Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 936-37 (1981) (citing *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842)).

52. See PROSSER & KEETON, *supra* note 21, § 102, at 711-12. A few jurisdictions took the position that contributory negligence was a full defense to products liability. These jurisdictions held that as between an innocent injurer and a victim, the loss fell on the injurer, where it remained unless the victim was shown to be at fault. This test was really just the reverse of the traditional Learned Hand fault test, under which an innocent victim bears the loss unless the injurer is shown to be at fault. In these jurisdictions, therefore, products liability was not properly described as a "no-fault" area, but rather as a fault area with the opposite starting point from classic fault-based tort law. See, e.g., *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 92 (Fla. 1976); *Busch v. Busch Constr. Co.*, 262 N.W.2d 377 (Minn. 1977).

53. See, e.g., *Elliot v. Sears, Roebuck & Co.*, 642 A.2d 709 (Conn. 1994); *West*, 336 So. 2d at 80; *Coney v. J.L.G. Indus.*, 454 N.E.2d 197 (Ill. 1983); *Forsythe v. Coats Co.*, 639 P.2d 43 (Kan. 1982); *Bell v. Jet Wheel Blast*, 462 So. 2d 166 (La. 1985); *Austin v. Raybestos-Manhattan, Inc.*, 471 A.2d 280 (Me. 1984); *Brisbois v. Fibreboard Corp.*, 418 N.W.2d 650 (Mich. 1988); *Jack Frost, Inc. v. Engineered Bldg. Components Co.*, 304 N.W.2d 346 (Minn. 1981); *Sandford v.*

What are we then comparing? We are comparing whatever it was that led us, on a non-fault basis, to say that the injurer was the party on whom we wanted to put the accident costs, with the fact that the plaintiff acted wrongfully and therefore perhaps should bear some of the loss, which is to say that he or she should bear some of the pressure to opt for safety. What we are doing, once again, is comparing fault and non-fault. The plaintiff's fault becomes a basis for modifying, to some extent, the notion that the injurer was the best pressure point. And, also once again, this becomes possible because all-or-nothing rules were abandoned in favor of splitting rules.

3. Fault and Non-Fault: Assumption of Risk

The same process works in reverse with assumption of risk. Assumption of risk covers a number of different situations, including some in which the plaintiff acted perfectly reasonably.⁵⁴ If the plaintiff assumed the risk, the whole loss was on the plaintiff, even though the defendant did something that as to other people would be wrongful or negligent. This was because the plaintiff, though not at fault, had greater knowledge of the risk and was in a better position to limit or avoid the harm, and therefore the incentive—that is, the loss if it occurred—was best put on him or her. Assumption of risk of this sort is the exact converse of products liability and of ultra-hazardous activity liability, in which the plaintiff's negligence was not considered and the whole loss was placed on the more knowledgeable defendant. In assumption of risk situations, we put the loss on the plaintiff, even if he or she was innocent,

Chevrolet Div., 642 P.2d 624 (Or. 1982); *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 693 (Tenn. 1995); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); *Dippel v. Sciano*, 155 N.W.2d 55 (Wis. 1967).

54. Any discussion of assumption of risk is necessarily complicated by the range of different kinds of plaintiff conduct to which the courts have applied the label. At one extreme is express assumption at risk, under which the plaintiff's explicit promise to relieve the defendant of liability for certain risks precludes the plaintiff's recovery for those risks. At the other extreme, courts have sometimes used "implied assumption of risk" and "contributory negligence" interchangeably to describe situations in which the plaintiff was aware of a risk created by the defendant's negligent conduct and acted unreasonably in confronting that risk. In between these two are situations that might be called "reasonable implied assumption of risk." See SCHWARTZ, *supra* note 40, § 9-1(d), at 189. In these cases, there is no express agreement between the plaintiff and the defendant, and the plaintiff's behavior may be entirely reasonable. Nevertheless, the plaintiff is barred from recovery. See RESTATEMENT (SECOND) OF TORTS § 496C cmt. g (1965). Courts typically explain this result by concluding either that under the circumstances of the case the defendant did not owe a duty to the plaintiff, or that the plaintiff's decision to confront the risk, however reasonable, meant that the plaintiff could not be heard to complain about any injury that resulted. See, e.g., *Ford v. Govin*, 266 Cal. Rptr. 870, 877 (Ct. App. 1990) (explaining the policy bases for reasonable implied assumption of risk). These cases present the most interesting problems under comparative negligence, because, unlike express assumption of risk, they do not involve contractual indemnity, and, unlike "unreasonable" assumption of risk, they do not concern situations in which traditional, negligence-based notions of fault govern the plaintiff's actions.

because he or she was a better chooser, a better decisionmaker, despite the fact that the defendant did something that could properly be called careless, or negligent, or scurrilous, or mean.

In virtually every jurisdiction that adopted comparative negligence, implied assumption of risk has been nominally abolished.⁵⁵ The doctrine has not disappeared entirely, however. Instead, although the phrase "assumption of risk" has largely been abandoned, the concepts that underlay the doctrine have been incorporated into the comparative negligence inquiry. In situations that

55. The comparative negligence statutes of a number of states either merged implied assumption of risk (in whole or in part) with comparative negligence or explicitly abolished the defense. See ALASKA STAT. § 09.17.900 (1994); ARK. CODE ANN. § 16-64-122(c) (1994); COLO. REV. STAT. § 13-21-111.7 (1989); CONN. GEN. STAT. § 52-572h(l) (1991); IND. CODE § 34-4-33-2(a) (1) (1995 Supp.); IOWA CODE § 668-1 (1987); MASS GEN. L. ch. 231, § 85 (1985); MINN STAT. § 604.01 (1988 & 1996 Supp.); N.Y. CIV. PRAC. L. & R. § 1411 (1976); N.D. CENT. CODE § 32-03.2-02 (1995 Supp.); OHIO REV. CODE ANN. § 2315.19(A) (1) - (2) (1994); OKLA. STAT. tit. 23, § 12 (1987); OR. REV. STAT. § 18.475 (1988); UTAH CODE ANN. § 78-27-37 (2) (1991); WASH. REV. CODE § 4.22.015 (1988). In those instances in which the statute included assumption of risk in the comparative negligence inquiry, courts concluded that implied assumption of risk was abolished as a separate defense. See *Springrose v. Willmore*, 24-25, 192 N.W.2d 826, 827 (Minn. 1971); *Wentz v. Deseth*, 221 N.W.2d 101, 104-05 (N.D. 1974); *Anderson v. Ciccardi*, 451 N.E.2d 780, 783 (Ohio 1983); *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975); *Lyons v. Redding Constr. Cent.* 515 P.2d 821, 826 (Wash. 1973). Other states feature broadly worded comparative negligence statutes, and courts typically have interpreted the statutes as abolishing implied assumption of risk or merging it with comparative negligence. See *Wilson v. Gordon*, 354 A.2d 398, 401-02 (Me. 1976); *Kopischke v. First Continental Corp.*, 610 P.2d 668, 687 (Mont. 1980); *Sunday v. Stratton Corp.*, 390 A.2d 398, 404 (Vt. 1978); *King v. Kayak Mfg. Corp.*, 387 S.E.2d 511, 517 (W. Va. 1989); *Polsky v. Levine*, 243 N.W.2d 503, 505 (Wis. 1976); *Brittain v. Booth*, 601 P.2d 532, 534 (Wyo. 1979). Courts in jurisdictions that judicially adopted comparative negligence have similarly merged aspects of assumption of risk into comparative negligence. See *Nga Li v. Yellow Cab Co.*, 532 P.2d 1226, 1241 (Cal. 1975); *Blackburn v. Dorta*, 348 So. 2d 287, 291-92 (Fla. 1977). In only a handful of jurisdictions with comparative negligence schemes does implied assumption of risk remain a viable defense. See *McPherson v. Sunset Speedway, Inc.*, 594 F.2d 711, 714 N.4 (8th Cir. 1979) (applying Nebraska law); *Singleton v. Wiley*, 372 So. 2d 272, 274 (Miss. 1979); *Fritchley v. Love-Courson Drilling Co.*, 129 N.W.2d 515, 518 (Neb. 1964); *Kennedy v. Providence Hockey Club, Inc.*, 376 A.2d 329, 332-33 (R.I. 1977). For a general discussion of assumption of risk and the transition to comparative negligence, see SCHWARTZ, *supra* note 40, § 9-3 through § 9-4, at 195-217.

Courts typically have concluded that an express agreement by the plaintiff to assume a particular known risk continues to bar recovery. See, e.g., *Salinas v. Vierstra*, 695 P.2d 369, 375 (Idaho 1985) (stating that this kind of claim should be treated under contract, not tort, and that the phrase "assumption of risk" should not be used); *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1134 (La. 1988) (stating that express assumption of risk remains viable under comparative negligence); *Wilson*, 354 A.2d at 401 (Maine) (stating that express assumption of risk is consistent with comparative negligence); *Anderson*, 451 N.E.2d at 783 (Ohio) (stating that comparative negligence does not affect express assumption of risk); *Farley*, 529 S.W.2d at 758 (Texas) (stating that express assumption of risk is unaffected by comparative negligence); *Shorter v. Drury*, 695 P.2d 116, 122 (Wash. 1985) (holding that express assumption of risk is unaffected by Washington's comparative negligence statute).

formerly would have fallen under the heading of reasonable implied assumption of risk,⁵⁶ a few courts have decided that the “no-duty” aspects of the doctrine continue to operate as a complete bar to recovery.⁵⁷ Most, however, have abandoned the absolute judgment that the loss ought to lie on innocent plaintiffs rather than on negligent defendants, and have concluded instead that liability should be apportioned according to the relative responsibility of the parties in bringing about the injury, taking into account those factors that would previously have gone to the issue of assumption risk.⁵⁸ Once again, as with the adoption of comparative negligence as a partial defense to products liability, the law compares fault and non-fault and ends up splitting the loss, because the incentives are best put to some extent on each of the parties, both the negligent and the non-negligent ones.

The integration of non-fault notions into the splitting analysis under comparative negligence could ultimately lead us to compare non-fault with non-fault—comparative non-negligence, if you will. That is, there may be situations in which neither side was negligent, but each side could have done something to avoid the loss and did not. In these situations, too, we might want to split the loss. But we are, in fact, nowhere near ready to do that yet, across the board. And so where neither side is at fault, we still remain subject to all-or-nothing rules. In the absence of defendant fault, innocent plaintiffs bear the whole loss in most areas, while in so-called non-fault liability areas, defendants bear the entire loss where neither party is at fault.

Yet, splitting is not too far away in at least some situations where neither side is at fault. Thus, we may well get comparative non-fault liability in cases where we have a traditional ground for defendant non-negligent liability—for example, products liability or ultrahazardous activity liability—and we also have what would formerly have been called plaintiff’s assumption of the risk. In such a situation, placing some of the loss on each party seems anything but far-fetched. Indeed, the law of the state of New York—adopting comparative

56. See *supra* note 54.

57. See *Blackburn*, 348 So. 2d at 291 (Fla.); *Anderson*, 451 N.E.2d at 783 (Ohio). A number of states did not recognize implied reasonable assumption of risk as a defense prior to the adoption of comparative negligence and hence have not incorporated its concepts into the comparative negligence. See, e.g., *Springrose*, 192 N.W.2d at 827 (Minn.) (stating that Minnesota recognized implied assumption of risk only where the plaintiff’s behavior was unreasonable).

58. See, e.g., *Arbegast v. Board of Educ.*, 480 N.E.2d 365, 370-72 (N.Y. 1985) (stating that the comparison under comparative negligence includes “cases where the conduct of one or more of the parties will be found to be not negligent, but will nonetheless be a factor in determining the amount of damages”) (internal quotation omitted); *Blair v. Mt. Hood Meadows Dev. Corp.*, 630 P.2d 827, 830-31 (Or. 1981) (stating that under Oregon’s comparative negligence statute, implied assumption of risk—whether reasonable or unreasonable—is not a complete defense, “even when recharacterized as an ‘absence’ of or limitation upon duty”).

negligence and abolishing assumption of risk as an absolute defense to liability—in its very terms provides for comparative non-negligence, although no one seems to have realized it yet.⁵⁹

4. Science Fiction

Will comparative non-fault go beyond these limited areas? Perhaps, and in that respect we note that the New York statute contains no clear limits when it countenances such a comparison. Thus, it is not impossible that comparative non-fault may spread even to areas in which the defendant traditionally would not have been held liable without negligence. We doubt that there will be, at least in the foreseeable future, a general acceptance of splitting of losses between innocent plaintiffs and defendants. But what may happen is an expansion of non-negligent grounds for defendant liability, an expansion, that is, of ultrahazardous or products liability into new areas. This expansion would itself be justified on the ground that the result will not be full defendant liability, but rather, a splitting among the parties, because in these “new” strict liability areas there would also exist good reasons for putting some of the loss on the plaintiff.

This is the kind of science fiction thinking into which the logic of splitting gets us. While we are contemplating a science fiction world, we might as well consider all kinds of fascinating questions about how traditional tort law doctrines could evolve if splitting truly became the norm. Will the doctrine of proximate cause be adjusted?

There are cases in which the defendant’s negligence is very distant in time, and in which we therefore say that there is no proximate cause and that the whole loss lies on the plaintiff. Will we be willing to say, in such cases, that because the defendant’s negligence did play some role in bringing about the injury (albeit a distant one), some of the loss should now be put on the defendant? After all, in our earlier example, the dean of Valparaiso Law School was wrongful in having that illegitimate child, and it did have some effect in bringing about the accident with the provost. It may be that we would deem it appropriate for the dean to bear some of the consequences of his actions, while still leaving more of the loss on the provost.

59. New York’s comparative negligence statute reads:

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

N.Y. CIV. PRAC. L. & R. § 1411 (McKinney 1976). The New York Court of Appeals has interpreted the phrase “culpable conduct,” as used in the statute, to include implied assumption of risk, whether reasonable or unreasonable. See *Arbegas*, 480 N.E.2d 365, 369-70.

Conversely, today, we frequently find that proximate cause exists, and we therefore place full liability on a negligent defendant. We do this, sometimes, even though the link between the defendant's wrong and the harm that occurred is very small. In such situations, if we believe that the innocent plaintiff is not inert and could have opted for safety, would splitting become appropriate?

While we are being fanciful, what of the current rule that gives no recovery for fanciful damages?⁶⁰ Would splitting be better than the current approach that gives all, or nothing, depending on which side of the rather porous line of fancifulness a particular fact situation falls? More important, because more common, is the area of "emotional damages." The old rule, which gave full recovery for emotional damages if there was impact, and none if there was not, is in hasty retreat.⁶¹ But what seems to be taking its place is a diversity of rules, which vary from jurisdiction to jurisdiction, on the basis of which it still happens that either *all* or *no* emotional damages are recoverable. Indeed, most of the new rules seem about as brittle as the old impact doctrine. Would rules that in appropriate circumstances countenance the splitting of emotional damages—that is, the award of a limited amount of purely emotional damages—be better? It is not impossible.

5. Joint and Several Liability

There is one splitting rule that deserves particular comment. One powerful aspect of today's so-called tort reform movement comes from not understanding the effect that moving from all-or-nothing rules to splitting rules has had on joint and several liability. The notion of joint and several liability is as old as tort law. It has always been the case that if one defendant is ten percent negligent, and another defendant is ninety percent negligent, and together they combine to injure Marshall, they are both liable to him. Marshall can recover a hundred percent of his damages from either one. How they might choose to apportion the damages between themselves later is of no interest to Marshall.

As I said, that rule is deeply, deeply seated in tort law. Yet today it is one of the chief targets of the so-called reforms. It is treated as some recent

60. "Fanciful" damages are the ideosyncratic damages that are suffered when there is harm to an item on which the owner places a special value above and beyond its market value. If Marshall suffers the loss of his watch, to which he attaches no particular significance, his damages are the market value of the destroyed watch. If Taney suffers the loss of the watch given to him by his dear, late Aunt Amnesia, he suffers grievously, and yet he is not entitled to recover for the sentimental value that he attached to the watch and for the emotional trauma that its loss causes him. Like Marshall, Taney only gets its market value. See GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES AND THE LAW* 69-76 (1985).

61. See generally *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996) (describing problems with and the judicial retreat from the impact rule).

aberration, foisted on defendants by "liberal" courts.⁶² Why? There are some reasons, but they are scarcely ever articulated. Moreover, the proposed legislative changes to joint and several liability do not make terribly much sense. This is because the drafters do not seem to understand what has happened that has made this traditional rule, which seemed both reasonable and acceptable, now muddy and problematic. It all comes about as a result of the advent of splitting rules.

Before comparative negligence, what was the situation? One defendant was ninety percent negligent, the other defendant was ten percent negligent, and the plaintiff was, by definition, not negligent—if the plaintiff was negligent, the contributory negligence rule would bar recovery. Under those circumstances, the fact that, in an action brought solely against the ten percent negligent defendant, that defendant would bear one hundred percent of the loss seemed perfectly fair. As between that defendant and the plaintiff, who was completely innocent, the loss was quite correctly put on the wrongdoing defendant. Remember that if one defendant was sixty percent negligent, the other defendant was ten percent negligent, and the plaintiff was thirty percent contributorily negligent, then the plaintiff recovered nothing from either defendant. Remember also that the same result would occur if there was a ninety percent negligent defendant and a ten percent negligent defendant, but the plaintiff was found to have assumed the risk. In other words, if there were any reason for attributing some of the loss to the plaintiff, under all-or-nothing rules, there was no recovery at all by that plaintiff. In such a world, holding a ten percent negligent defendant fully liable, jointly and severally, was hardly unfair or controversial.

Comparative negligence introduced important new wrinkles into these situations. Suppose now that one defendant is sixty percent responsible—not negligent, but responsible, because that is what we compare under comparative negligence—and another defendant is ten percent responsible, while the plaintiff is thirty percent responsible. Suppose also that the sixty percent responsible defendant is judgment-proof and cannot pay. Is it appropriate to put seventy percent of the loss on the ten percent responsible defendant and thirty percent of the loss on the thirty percent responsible plaintiff?

Fairness now depends on what the jury intended to do when it assessed responsibility. Did the jury mean, in allocating responsibility, that the plaintiff was three times as responsible as the ten percent responsible defendant? If so, requiring the ten percent responsible defendant to bear seventy percent of the loss seems both unfair and contrary to what the jury found. Or did the jury

62. See, e.g., William Mullen, *In U.S., Court Is Now the First Resort*, CHI. TRIB., July 21, 1991, at C1.

mean, instead, that the defendants as a whole were to be held seventy percent responsible—that the ten percent/sixty percent division between the defendants was no more than an equitable split as to them, a split that did not concern their individual responsibility to the plaintiff at all? Did the jury intend, in other words, that the plaintiff, in fact, deserved to recover seventy percent of his or her damages, regardless of who would ultimately pay? If this is the case, then the old rule, perhaps slightly modified, might be as fair as the previous hypothetical made it seem unfair.

The states have taken varying approaches to this problem.⁶³ Considerable uncertainty remains, however, because the courts do not seem to have understood the full consequences of the shift from an all-or-nothing rule to a splitting rule. Until they, and we, understand these consequences, efforts at reform are bound to be haphazard and nonsensical.⁶⁴

C. *Statistical Causation*

The evolution of splitting rules under comparative negligence is both consistent and concurrent with what is happening with statistical causation, which began, in the United States, with *Sindell v. Abbott Laboratories*.⁶⁵ In *Sindell*, multiple defendants had produced a drug that had undoubtedly injured the plaintiffs after their mothers had ingested it during pregnancy many years previously. But the plaintiffs were unable to show which defendant, more probably than not, had supplied the dosage that their mothers had taken. Rather than bar the plaintiffs from recovery, the court looked to the market share held by each defendant, and treated that share as the percentage of the plaintiffs'

63. Compare, e.g., *Kelly v. Long Island Lighting Co.*, 286 N.E.2d 241, 243 (N.Y. 1972) (holding that joint and several liability survives under comparative negligence); *Coney v. J.L.G. Indus.*, 454 N.E.2d 197, 205-06 (Ill. 1983); *American Motorcycle Ass'n v. Superior Ct.*, 578 P.2d 899, 905-06 (Cal. 1978) with *Brown v. Keill*, 580 P.2d 867, 873-74 (Kan. 1978) (finding joint and several liability abrogated by comparative negligence); *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1978); *Howard v. Spafford*, 321 A.2d 74 (Vt. 1974). See also SCHWARTZ, *supra* note 40, § 3-5(c)(2)-(5), at 86-88 (describing varying state approaches).

64. The products liability reform bill passed by the House of Representatives, for example, would permit joint and several liability to continue for economic damages, but would allocate liability for non-economic losses according to each defendant's percentage of responsibility. See H.R. 956, *supra* note 5, § 110. See also S. 672, 104th Cong., 1st Sess. § 201(c) (1995) (proposing the same rule for all cases involving personal injury or wrongful death). Thus, in the case of a sixty percent responsible defendant, a ten percent responsible defendant, and a thirty percent responsible plaintiff, if the sixty percent responsible defendant is bankrupt or otherwise unavailable, the plaintiff can recover from the ten percent responsible defendant all of his or her economic losses, but only ten percent of his or her damages for pain and suffering, emotional distress, and the like. This is reform of a sort, but it is hardly thoughtful reform. It seems to be based on a perception that something is wrong, but without any understanding of what that something is.

65. 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

damages for which each defendant was responsible.⁶⁶ In other words, a defendant with a forty percent market share would pay forty percent of the plaintiffs' damages, a defendant with a twenty percent share would pay twenty percent of the damages, a defendant with a fifteen percent share would pay fifteen percent, and so on. The *Sindell* approach, then, is essentially a splitting rule applied to the question of but-for cause. An increasing number of courts have been following *Sindell's* lead.⁶⁷

The *Sindell* approach to statistical causation is very interesting. And we have views about why the approach is used in some situations and not applied in others. But that is something that we do not have time to discuss here. We would like, however, to consider briefly the consequences of the approach where it clearly applies. Suppose one defendant is responsible for forty percent of the risk, and another defendant responsible for thirty-five percent of the risk. The remaining twenty-five percent is attributable (a) to the plaintiff, or (b) to a defendant who is judgment-proof, or (c) to an endemic, underlying risk, so that twenty-five percent of the injuries to plaintiffs would have occurred even had the defendants not produced their product.

Who bears this remaining twenty-five percent? Do we put it on the defendants, because together they are responsible for more than fifty percent of the risk, as the old all-or-nothing rule might well have done? Do we say that this kind of risk lies on the plaintiff? Or do we say that it should be borne by society in general? Does it make a difference if the remaining twenty-five percent is partly linked to plaintiff behavior? Assume, for example, that plaintiffs who smoke have a greater chance of suffering the harm. Does it matter whether plaintiffs' behavior, though linked to the risk, is or is not behavior that we would call faulty?

The courts have tended to say that when statistical causation is used there is *several* liability but no *joint* liability.⁶⁸ Each party is responsible only for its own percentage share, and the remainder, if any, lies on the plaintiff. There are, in fact, lots of arguments that can be made about this conclusion, including issues of what allocation would reduce administrative costs most. But if we assume that *several* liability is the rule, how should we treat the situation in which one defendant is forty percent responsible, and the rest of the risk is

66. *Sindell*, 607 P.2d at 937.

67. See, e.g., *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 284-85 (Fla. 1990); *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 729 (Haw. 1991); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 1078 (N.Y.), cert. denied, 493 U.S. 944 (1989); *Martin v. Abbott Labs.*, 689 P.2d 368, 382-83 (Wash. 1984); *Collins v. Eli Lilly & Co.*, 342 N.W.2d 37, 52-53 (Wis. 1984).

68. See, e.g., *Brown v. Superior Ct.*, 751 P.2d 470, 487 (Cal. 1988); *Conley*, 570 So. 2d at 284-85; *Hymowitz*, 539 N.E.2d at 1078; *George v. Parke-Davis*, 733 P.2d 507, 513 (Wash. 1987).

attributable to an endemic, underlying risk? Why not hold the forty-percent responsible defendant liable for forty percent of the damages? Why should fifty percent be a line when the choice is no longer between total recovery and no recovery?

When fifty percent was the line, and causation required direct proof, if a defendant was "more probably than not" the cause of the plaintiff's injury, the defendant would bear one hundred percent of the loss. The all-or-nothing rule worked that way. Conversely, it barred any recovery by the plaintiff whenever the defendant could not be shown more probably than not to have been the cause of the injury. But if the defendant is liable for only sixty percent of the loss when statistics show that this is the extent of his or her responsibility—that is, when they have shown that the defendant was more probably than not responsible for the harm that occurred—then why should not the defendant be liable for forty percent of the loss, when *that* is the full extent of his or her responsibility?⁶⁹ Once again, because of splitting, some of the most fundamental notions of tort law are being called, or may well be called, into question.

III.

Given the advent of splitting rules, it would not take much of a doctrinal leap for splitting to spread into some of these new areas. This does not, however, tell us how much we *want* to extend splitting rules into new areas, and for what reasons. To answer these questions, we must consider the fundamental aims of tort law. Splitting allows incentives to be placed, in part, both on parties that can avoid harm by avoiding wrongful behavior, and on parties that can avoid harm by making structural changes. This keeps us from having to choose between putting the loss entirely on one party, when we think that party ought to have avoided the harm through careful behavior, or putting the loss entirely on the other party in order to give that category incentives to decide whether such a loss (and others like it) are worth expending resources to avoid. Although splitting rules give us more options, we do not necessarily know whether they create a better package of incentives than existed before.

These same options allow us more leeway in deciding what set of rules yields optimal loss spreading, wealth distribution, taste shaping, and reduction of administrative costs for any given amount of deterrence. We have not here discussed these things. We have only adverted to how the adoption of splitting rules may affect deterrence—that is, the reduction of the sum of accident costs

69. The answer cannot be administrative cost—*i.e.*, that it is cheaper to put all the costs on the party who bears the largest part of the risk, because if it were, then one hundred percent of the damages would be borne by the defendant who was sixty percent responsible.

and of accident avoidance costs.⁷⁰ To decide whether splitting makes sense in those situations in which it has occurred, and in those situations in which it might occur with only a limited expansion of doctrinal rules, we would need a lot more analysis and hard data than we are capable of providing at this point.

Would the sum of accident costs and of accident avoidance costs be reduced if proximate cause was no longer treated as an all-or-nothing issue? Would reduction occur if emotional damages were not treated as fully available when there is impact or some other such factor, and totally unavailable in the absence of such a factor? Indeed, would the sum of accident costs and avoidance costs be reduced if fault and non-fault grounds for liability were both used to effectuate a splitting of the burden? Would they be reduced if the burden was split between two parties, neither of whom was at fault? And would splitting in any of these cases improve the spreading of losses, the distribution of wealth, and the shaping of tastes? Would it reduce or increase administrative costs?

With the advent of splitting rules, we have a new toy to play with. This paper has noted the ways in which we are already playing with this toy, and has suggested some other paths that our play might lead us to explore. But, at the moment, we can do no more than raise the question of whether this kind of playing will improve or hinder the law of torts.

70. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 26-27 (1970).