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Pure Comparative Negligence in Illinois

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PURE COMPARATIVE NEGLIGENCE IN ILLINOIS

Alvis v. Ribar
85 Ill. 2d 1, 421 N.E.2d 886 (1981)

Under the contributory negligence system followed in Illinois for almost one hundred years before *Alvis v. Ribar*,[1] damages were not apportioned according to the fault of the parties but were assessed in an all or nothing fashion. If the defendant was found to have caused the plaintiff's injuries, he bore the total burden of all assessed damages. But if the plaintiff was adjudged to have contributed, even slightly, to the cause of his injury, the defendant was completely relieved from all liability, and the plaintiff collected nothing.[2]

Over the last twenty years, a majority of the legislatures and courts in this country have found the contributory negligence system to be illogical, unfair and unresponsive to the needs of an industrial, urban society.[3] When *Alvis v. Ribar* was decided by the Illinois Supreme Court, Illinois long had been ready for change from its system of contributory negligence.

With *Alvis v. Ribar*, Illinois became the thirty-seventh state to abandon the harsh contributory negligence defense.[4] Under the "pure"

1. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).
2. *Id.* at 16-18, 421 N.E.2d at 892-93. *See* text accompanying notes 17-33 *infra*.
3. *See* text accompanying notes 34-86 *infra*.
4. The following states have adopted a form of comparative negligence by judicial decision: Kaatz v. State, 540 P.2d 1037 (Alaska 1975) (pure); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (pure); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (pure); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979) (pure); Claymore v. City of Albuquerque, Nos. 4804, 4805 (N.M. App. Dec. 8, 1980) (pure); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979) (modified).

In the following states, comparative negligence was adopted by statute: ARK. STAT. ANN. §§ 27-1763 to 27-1765 (1979) (modified); COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1980) (modified); CONN. GEN. STAT. ANN. § 52-572n (West Supp. 1981) (modified); GA. CODE ANN. § 105-603 (1968) (unique); HAWAII REV. STAT. § 663-31 (1976) (modified); IDAHO CODE §§ 6-801, 6-802 (1979) (modified); KAN. STAT. ANN. § 60-258a (1976) (modified); LA. CIV. CODE ANN. art. 2323 (West Supp. 1981) (pure); ME. REV. STAT. ANN. tit. 14, § 156 (1980) (modified); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1981) (modified); MINN. STAT. ANN. § 604.01 (West Supp. 1981) (modified); MISS. CODE ANN. § 11-7-15 (1972) (pure); MONT. REV. CODES ANN. § 58-607.1 (Supp. 1977) (modified); NEB. REV. STAT. § 25-1151 (1979) (slight/gross); NEV. REV. STAT. § 41.141 (1979) (modified); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1979) (modified); N.J. STAT. ANN. §§ 2A:15-5.1 to 2A:15-5.3 (West Supp. 1981-82) (modified); N.Y. CIV. PRAC. LAW §§ 1411-1413 (McKinney 1976) (pure); N.D. CENT. CODE § 9-10-07 (1975) (modified); OKLA. STAT. ANN. tit. 23, §§ 13, 14 (West Supp. 1981-1982) (modified); OR. REV. STAT. §§ 18.470, 18.475, 18.480, 18.490 (1979) (modified); 42 PA. CONS. STAT. ANN. § 7102 (Purdon Supp. 1981) (modified); R.I. GEN. LAWS § 9-20-4 (Supp. 1981) (pure); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979) (slight/gross); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1982) (modified); UTAH CODE ANN. §§ 78-27-37, 78-27-38, 78-27-41 (1977) (modified); VT. STAT. ANN. tit. 12, § 1036

form of comparative negligence adopted by the Illinois Supreme Court, a negligent plaintiff will be permitted to recover that portion of his damages not attributable to his own fault, and, conversely, a defendant will be liable for only that portion of the damages that he directly caused.[5]

This comment will analyze the *Alvis v. Ribar* opinion in the following manner: first, the history of comparative negligence will be set forth briefly, and the different types that have evolved will be examined; next, the facts of the case and the reasoning of the court will then be discussed; and, finally, the opinion will be analyzed.

The analysis first will suggest that certain problems of implementation could have been minimized by the Illinois Supreme Court. Next, it will be pointed out that while the majority's argument for judicial rather than legislative enactment of comparative negligence was clearly the more practical position, it now might be advisable for the legislature to enact a comprehensive code addressing the multitude of complicated corollary issues that must be resolved as a result of the *Alvis* decision. One of those issues is the question of whether comparative fault principles should be extended to strict products liability cases. Discussion of this question illustrates the intricacy of the issues left unresolved by *Alvis*, and it will be concluded that application of comparative negligence to strict products liability runs counter to the policy underlying that cause of action.

DEVELOPMENT OF COMPARATIVE NEGLIGENCE

Contributory Negligence

Modern resurgence of interest[6] in the very old doctrine of comparative negligence[7] has been characterized as a reaction against the harsh common law defense of contributory negligence that became popular

(Supp. 1981) (modified); WASH. REV. CODE ANN. § 4.22.010 (Supp. 1981) (pure); WIS. STAT. ANN. § 895.045 (West Supp. 1981-1982) (modified); WYO. STAT. § 1-1-109 (1977) (modified).

5. 85 Ill. 2d at 27, 421 N.E.2d at 898. *See* text accompanying notes 80-86 *infra*.

6. Renewed interest is very recent. Prior to 1969, comparative negligence was the law only in seven states. V. SCHWARTZ, COMPARATIVE NEGLIGENCE 4 n.43 (1974) [hereinafter cited as SCHWARTZ].

7. Some commentators have traced the origins of comparative negligence to admiralty law of the 1700's. When two or more ships were at fault, damages were distributed according to the "conscience" of experts. R. MARSDEN, THE LAW OF COLLISIONS AT SEA 105-06 (10th ed. K. McGuffie 1953); Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 339-41 (1932). *But cf.* Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 218 (1950) (comparative negligence originated in the laws of the medieval era) [hereinafter cited as Turk].

in the United States in the late 1800's.[8] Thus, to understand comparative negligence, one must look first to contributory negligence.

Formalization of the doctrine of contributory negligence commonly is thought to have originated in England in 1809 with the famous case of *Butterfield v. Forrester*.[9] In *Butterfield*, the defendant, while repairing his house, obstructed a road with a pole. The plaintiff left a public inn at dusk. Although the pole was partially visible in the twilight, the plaintiff, galloping at high speed, did not see it and was thrown from his horse and injured. The court did not allow the plaintiff to recover damages, finding that if he had not been riding his horse so fast, he would have seen the obstruction and would have avoided his own injury.[10]

The *Butterfield* court placed a burden upon the plaintiff to "use common and ordinary caution to be in the right" before he could successfully recover from a negligent defendant.[11] The rule of *Butterfield v. Forrester* quickly became an effective means of preventing a negligent plaintiff from pursuing a cause of action, and by the mid-1800's contributory negligence had become an accepted defense against negligence both in England[12] and in the United States.[13]

Commentators agree that the reasons for the rapid acceptance of the contributory negligence doctrine were sociological, political and economic.[14] In an agrarian economy, when uncomplicated disputes between neighbors formed the bulk of the tort litigation, jurors were able to deal with the cases comfortably and fairly. During the middle

8. *See* text accompanying notes 14-23 *infra*.

9. 103 Eng. Rep. 926 (K.B. 1809). The *Butterfield* court probably was not aware of the import of its decision with this opinion. The English courts traditionally examined all negligence cases in terms of proximate cause, and one commentator has suggested that the court intended in this case to say only that the defendant was not the proximate cause of the plaintiff's injuries. Turk, *supra* note 7, at 197.

10. 103 Eng. Rep. at 927.

11. The full text of Lord Ellenborough's famous quotation reads: "A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use common and ordinary caution to be in the right." *Id.*

12. In Caswell v. Worth, 119 Eng. Rep. 697, 699-700 (K.B. 1856), one judge stated, "In *Butterfield v. Forrester* . . . and several subsequent cases it has been held that the want of ordinary care in avoiding an injury disentitles the party injured from suing."

13. In 1824, seventeen years after the opinion was issued in England, *Butterfield* was first cited in the United States in a Massachusetts case, Smith v. Smith, 19 Mass. 621, 623 (1824). *See also* Washburn v. Tracy, 2 D. Chip. 128, 15 Am. Dec. 661 (Vt. 1824); Noyes v. Town of Morristown, 1 Vt. 353 (1828).

After these early cases, the contributory negligence defense spread so rapidly and became so uniformly accepted throughout all the states that in 1854 a mistaken Pennsylvania judge called the contributory negligence defense "a rule of law from time immemorial." Pennsylvania R.R. Co. v. Aspell, 23 Pa. 147, 149 (1854).

14. Turk, *supra* note 7, at 198-99. *See also* Malone, *The Formative Era of Contributory Negligence*, 41 ILL. LAW. REV. 151 (1946) [hereinafter cited as Malone].

1800's, however, both the United States and England experienced vigorous industrialization and economic growth. As defendants became large, unfamiliar corporations, the average juror became pro-plaintiff, regarding these new defendants as rich intruders. Liberal awards in suits brought by workers and citizens against the new enterprises would have further endangered the already precarious existence of the industries, hampering their ability to expand.[15] Thus, contributory negligence developed as a welcome means of protecting and encouraging large industry.[16]

In Illinois, the evolution of contributory negligence reflected the trend in the rest of the country. Relying on *Butterfield*, the Illinois Supreme Court in *Aurora Branch Railroad v. Grimes*[17] ruled that a party seeking to recover damages for a loss caused by negligence must show that his own negligence did not concur with that of the other party to produce the injury.[18] Illinois' brand of contributory negligence was particularly difficult for the plaintiff, as the *Grimes* court placed the burden upon him to establish not only the defendant's negligence but also his own lack of negligence.[19] Over the years, while the courts fol-

15. One has only to notice the large number of cases in the mid-1800's in which the plaintiff was an injured child or farmer and the defendant a railroad to become fully aware of the conflict that occurred between industry and citizenry during this time of transition. *See generally* Beers v. Housatonuc R.R., 19 Conn. 566 (1849) (no recovery for cattle killed by negligent railroad because plaintiff negligently allowed cattle to roam); Illinois Cent. R.R. v. Hall, 72 Ill. 222 (1874) (plaintiff struck by train while walking through town). *See also* the extensive list of railroad cases in Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 368-69, 3 N.E. 456, 460-61 (1885).

16. It has been suggested that the contributory negligence defense allowed the court to control or to eliminate the jury. In effect, contributory negligence was an ingenious device which gave the court almost complete freedom to accept or to reject jury participation at its pleasure, thus meeting the economic demands of the times. Malone, *supra* note 14, at 155; Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 3-4 (1953) [hereinafter cited as Prosser I]. For a discussion of the economic reasons underlying contributory negligence, see Hoffman v. Jones, 280 So. 2d 431, 436-37 (Fla. 1973); Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), *rev'd*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

17. 13 Ill. 585 (1852). The *Grimes* court also cited cases from Connecticut and Maine in support of establishing contributory negligence in Illinois: Beers v. Housatonuc R.R., 19 Conn. 566 (1849); Kennard v. Burton, 12 Shep. 39 (Me. 1846).

18. The court carefully delineated the proper standard of care required of a plaintiff who sought to prove that he was not contributorily negligent. It concluded that where both parties "are in the right," the plaintiff need only show that the injury was produced by the defendant's negligence and that the plaintiff exercised ordinary care. 13 Ill. at 588. Where the plaintiff was "not in the exercise of a legal right," he was required to use more than ordinary care to avoid an injury, although it was noted that even where he could establish that high degree of care, some courts would bar recovery on the grounds of contributory negligence. *Id.* at 590-91.

19. In Illinois, the law prior to *Alvis* required the plaintiff to plead his own lack of negligence. *See* ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL no. 10.03 (2d ed. 1971), which reads: "It was the duty of the plaintiff, before and at the time of the occurrence, to use ordinary care for [his own safety] [and] [the safety of his property]. That means it was the duty of the plaintiff to be free from contributory negligence."

lowed and expanded upon this contributory negligence system,[20] well-accepted means of circumventing the full strength of the doctrine developed concurrently.

One common exception allowed the contributorily negligent plaintiff to recover when the defendant's acts were willful, wanton, or so gross as to amount to recklessness.[21] The courts reasoned that wanton negligence bordered on an intentional act and that the incidental negligence of the plaintiff should not bar recovery. Another exception to contributory negligence, the doctrine of last clear chance, developed only to a very limited extent in Illinois. Courts found it confusing and difficult to apply.[22] When last clear chance is allowed by the courts, the plaintiff is permitted to defend against his contributory negligence by proving that the defendant had the last clear chance to avoid the accident.[23]

Early Comparative Negligence

In the middle 1800's, there was a brief departure from the contributory negligence rule of *Grimes*. In *Galena & Chicago Union Railroad v. Jacobs*,[24] the Illinois court ruled that the "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."[25]

Over the next thirty years, Illinois cases reflect an evolution of this rule in the courts. First, recovery was allowed, as in *Jacobs*, only when the negligence of the plaintiff was slight and that of the defendant gross. Ultimately, however, recovery was permitted where the plaintiff's negligence, although slight, contributed to the injury.[26] The com-

20. Cases after *Grimes* further developed contributory negligence in Illinois. In Chicago & Miss. R.R. v. Patchin, 16 Ill. 197 (1854), the court tried to lessen the harshness of contributory negligence by making the defendant's duty of care higher: railroads were "under the strictest duty of care, and liable for even slight neglect." *Id.* at 203.

21. Toledo, W. & W. Ry. v. McGinnis, 71 Ill. 346 (1874).

22. Specht v. Chicago City Ry., 233 Ill. App. 384 (1924). *But see* Moore v. Moss, 14 Ill. 106, 109 (1852) (in a case dealing with the damages caused by one river steamboat to another, the court invoked last clear chance).

23. The doctrine was first noted in Davies v. Mann, 152 Eng. Rep. 588 (Ex. 1842).

24. 20 Ill. 478 (1858). *Jacobs* involved the death of a very young immigrant child who wandered onto the railroad tracks despite close supervision. One wonders if comparative negligence did not develop partly as a response of the court to this particularly tragic set of facts.

25. 20 Ill. at 497. In adopting comparative negligence in Illinois, the court relied for support upon two English cases, Raisin v. Mitchell, 173 Eng. Rep. 979 (C.P. 1839), and Lynch v. Nurdin, 113 Eng. Rep. 1041 (Q.B. 1841). Writing for the court, Justice Breese noted, however, that "although these cases do not distinctly avow this doctrine [comparative negligence], there is a vein of it very perceptible, running through . . . them." 20 Ill. at 497.

26. Indianapolis & St. L.R.R. v. Evans, 88 Ill. 63, 65 (1878); Illinois Cent. R.R. v. Hammer,

parison between the degrees of negligence became an important analytical factor, and the contributorily negligent plaintiff could collect damages so long as the defendant's negligence clearly and largely exceeded the plaintiff's.[27]

Thus, the worst aspect of the contributory negligence system, the requirement of total absence of fault by the plaintiff, was quietly rejected. Although it did not fully conform to current concepts of comparative negligence, Illinois followed a form of comparative negligence during the following three decades.[28]

In the late 1800's, however, the Illinois Supreme Court began to set the stage for the demise of this form of comparative negligence. The decisions of this era uniformly minimized the role of comparative negligence,[29] thereby opening the door for the return of older views. In *City of Lanark v. Dougherty*,[30] the court abolished comparative negligence, although the opinion conveys the impression that no change had been made in existing law.

The courts did not discuss underlying reasons for this change, and subsequent commentators and courts have speculated about the abandonment of comparative negligence. It has been suggested that a variety of factors may have contributed to its demise. First, society may have become aware once again of a continuing economic necessity to subsidize industry by protecting it from frequent, costly tort judgments.[31] Second, confusion and uncertainty may have stemmed from the use of both negligence systems.[32] Finally, it has been noted that Illinois' comparative negligence scheme was not well regarded by other

72 Ill. 347 (1874). *See also* Wabash R.R. v. Henks, 91 Ill. 406 (1879); Quinn v. Donovan, 85 Ill. 194 (1877); Schmidt v. Chicago & N.W. Ry., 83 Ill. 405 (1876).

27. Illinois Cent. R.R. v. Hammer, 72 Ill. 347 (1874). *See also* Wabash R.R. v. Henks, 91 Ill. 406 (1879); Chicago, Milw. & St. P. Ry. v. Mason, 27 Ill. App. 459 (1888).

28. Damages were not apportioned, and the end result in every case was to leave the entire loss to one party, even though both were at fault. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 484-85 (1953) [hereinafter cited as Prosser II].

29. Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N.E. 456 (1885) (pointing out that comparative and contributory negligence had existed compatibly in Illinois).

30. 153 Ill. 163, 38 N.E. 892 (1894). The plaintiff recovered for injuries caused by a hole in the defendant's sidewalk. On appeal, the defendant argued that the jury instructions ignored the rule of comparative negligence. The court, however, stated, "The doctrine of comparative negligence is no longer the law of this court." *Id.* at 164, 38 N.E. at 893. The jury only had to find that the plaintiff exercised ordinary care and that the defendant was guilty of negligence which produced the plaintiff's injuries. *Id.* The case did not involve any issues of contributory negligence, and provides rather tenuous authority for overruling a line of cases spanning more than thirty years.

31. *See* Prosser II, *supra* note 28, at 485; Turk, *supra* note 7, at 208.

32. Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 50 (1944); Phillips, *Maki vs. Frelk: The Rise and Fall of Comparative Negligence in Illinois*, 57 ILL. B.J. 10 (1968).

jurisdictions.[33] The combination of these pressures was sufficient to cause the Illinois courts, once again, to revert to exclusive reliance on contributory negligence.

THE MODERN TREND

Despite Illinois' early retreat from comparative negligence, the doctrine slowly increased in popularity in federal statutes,[34] in United States Supreme Court holdings,[35] and, to a limited extent, in the statutes of other states.[36] In each of these areas, comparative negligence evolved as a more equitable means of awarding damages than strict adherence to contributory negligence. Nevertheless, significant state action to abolish contributory negligence was relatively slow until very recently.[37]

Until the late 1960's, most states hesitated to apply comparative negligence except in special situations involving injured workmen or defendant railroads.[38] In 1950, sixteen states considered, but failed to pass, comparative negligence legislation.[39] The reasons for the many rejections of the doctrine have been unclear, and state legislative history is rather sparse. Commentators have suggested that the causes of defeat had little to do with the merits of the system. Rather, major corporate defendants and insurance companies consistently lobbied to defeat proposed legislation because of concern that comparative negli-

33. *See, e.g.*, Elliot, *Degrees of Negligence*, 6 So. CAL. L. REV. 91, 136 (1933).

34. *See* Federal Employers' Liability Act of 1908 § 3, 45 U.S.C. § 53 (1976). This act, still the law today, was followed by other federal comparative negligence legislation. *E.g.*, Death on the High Seas Act § 6, 46 U.S.C. § 766 (1976); Jones Act § 33, 46 U.S.C. § 688 (1976).

35. In Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 408-09 (1953), the Supreme Court noted that the "harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice." In United States v. Reliable Transfer Co., 421 U.S. 397 (1975), the Court replaced the admiralty rule of divided damages with a rule providing for the allocation of liability for damages in proportion to the relative fault of each party.

36. Mississippi enacted a comparative negligence statute in 1910. MISS. CODE ANN. § 11-7-15 (1972). *See* Shell & Bufkin, *Comparative Negligence in Mississippi*, 27 MISS. L.J. 105 (1956). Wisconsin adopted comparative negligence by statute in 1931. WIS. STAT. ANN. § 895.045 (West Supp. 1981-1982).

37. SCHWARTZ, *supra* note 6, at 12-16. Comparative negligence was characterized by a significant amount of early interest, but early legislative efforts were unsuccessful. The New York Assembly defeated comparative negligence bills in 1930 and 1947. Note, 22 N.Y.U. L.Q. REV. 458 (1947). Legislation proposed in Michigan did not make it out of committee. Neef, *Comparative Negligence*, 27 MICH. ST. B.J. no. 5, at 34 (May 1978). Comparative negligence legislation also failed during this period in Pennsylvania, Oregon and Washington. HENRY, WHY NOT COMPARATIVE NEGLIGENCE IN WASHINGTON? 1 (Am. Trial Law. A. Monograph 1970).

38. SCHWARTZ, *supra* note 6, at 14.

39. *Id.*

gence in any form would be too expensive.[40]

In the late 1960's, however, interest was renewed when no-fault insurance plans were unveiled. Opponents of no-fault insurance sought to compromise through support of the comparative negligence systems they had blocked so vigorously a few years earlier.[41] By 1981, thirty-one states had changed to comparative negligence systems through legislation, and six others, including Illinois, had done so through court decisions.[42]

The Pure v. Modified Controversy

The act of abolishing contributory negligence does not put something in its place, and one of a variety of comparative negligence formulae must be selected by the jurisdiction.[43] Whether a pure or modified system is preferable has been one of the most controversial issues associated with state adoption of comparative negligence.[44] Brief examination of the major types of comparative negligence provides a context for understanding the choice of pure comparative negligence by the Illinois Supreme Court.

Pure comparative negligence is one of the simplest[45] comparative negligence rules. Under this system, the contributorily negligent plaintiff's damages are reduced in proportion to the amount of negligence attributable to him.[46] No amount of the plaintiff's negligence under one hundred percent bars recovery,[47] so it is possible for a plaintiff who is ninety-nine percent negligent to collect one percent of his damages from the defendant. If a defendant in a pure comparative negligence jurisdiction successfully counterclaims, the plaintiff and defendant

40. Fleming, *The Supreme Court of California 1974-1975, Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 239-40 (1976) [hereinafter cited as Fleming].

41. *Id.*

42. *See* note 4 *supra* for a list of those states that have adopted comparative negligence judicially and those that have done so legislatively.

43. *See* Comment, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889, 899 (1968) [hereinafter cited as *Comments on Maki*].

44. Events in Wisconsin provide a good example of disagreement within a state regarding the form of comparative negligence. In one case, three justices expressed willingness to abandon the modified system and to adopt a system of pure comparative negligence if the legislature did not act with reasonable speed. Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 130-41, 177 N.W.2d 513, 517-33 (1970) (concurring and dissenting opinions). *See* Prosser I, *supra* note 16, at 9-25, where the various forms of comparative negligence are set forth in detail.

45. The simplest form is the equal division of damages between the parties, a method that developed in admiralty courts. Although it has been described as "crude," it arguably is better than denial of all recovery. Prosser I, *supra* note 16, at 9-10.

46. Alvis v. Ribar, 85 Ill. 2d 1, 25, 421 N.E.2d 886, 897 (1981).

47. SCHWARTZ, *supra* note 6, at 46-48.

share the burden of the damage total according to the percentage of negligence attributable to each.[48]

An argument frequently advanced against adoption of a pure comparative negligence system is that it is contrary to the nature and purpose of the legal system to allow a plaintiff who has contributed substantially to his injury to recover damages for any portion of his loss.[49] It is asserted that when a plaintiff's fault equals or exceeds the defendant's, he should not be permitted to recover any part of his damages.[50] Therefore, many states have chosen to adopt one of a number of modified forms of comparative negligence,[51] allowing only partial apportionment of fault. In a modified system, the percentage of a plaintiff's negligence in relationship to the damage total is not always the basis for apportionment. Depending upon the system, apportionment of damages occurs only when specific factual circumstances are present. In a number of states, for example, the plaintiff is barred from recovery when his negligence is greater than the defendant's[52] or when his negligence is more than slight.[53] In some situations, damages may be divided equally rather than in proportion to the fault of each party.[54]

Although a majority of states has enacted modified systems,[55] Prosser characterized this form of comparative negligence as a political compromise, adopted by courts or legislatures unable to obtain support

48. 85 Ill. 2d at 25-26, 421 N.E.2d at 897. Counterclaims raise no insurmountable difficulties under comparative negligence but do present problems regarding jury instructions and setoffs. For example, if Plaintiff A is awarded a $10,000 judgment and Defendant B is awarded $5,000 for his counterclaim, the question arises as to whether these judgments should be set off against each other, leaving A with a judgment against B of $5,000, and B with no recovery. This, in turn, raises questions regarding the role of insurance. Kionka, *Comparative Negligence Comes to Illinois*, 70 ILL. B.J. 16, 23-24 (1981) [hereinafter cited as Kionka].

49. 85 Ill. 2d at 29-31, 421 N.E.2d at 899-900 (Underwood, J., dissenting). Justice Underwood depicted comparative negligence as a "radical break from the common law's tort-fault methodology." He could not accept the "major premise that a [contributorily negligent party] should recover his damages regardless of his fault." *Id.*

50. *Id.*

51. SCHWARTZ, *supra* note 6, at 32-33.

52. This rule is followed in Connecticut, Nevada, New Hampshire, New Jersey, Texas, Vermont and Wisconsin. For discussion of each system, *see* SCHWARTZ, *supra* note 6, at 33.

53. This system, which prevails in Nebraska, is known as the slight-gross system. *Id.* at 32-33. *See* Prosser I, *supra* note 16, at 17-21. The most serious problem connected with this system has been the great number of appeals in which the court is asked to decide whether the conduct of the plaintiff is more than slight negligence. *Id.* at 19.

54. This system provides for equal division of damages even if the plaintiff is 10% at fault and the defendant is 90% at fault. The only remaining application of this system for apportionment of damages between plaintiff and defendant is in admiralty cases. *See, e.g.*, Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 284 (1952) (division between defendant and third-party defendant).

55. *See* note 4 *supra*.

for the more desirable pure form of comparative negligence. He states that modified systems "are remarkable neither for soundness in principle nor success in operation."[56] Another author observed that modified programs of comparative negligence are usually more complicated and difficult to administer than pure comparative negligence.[57]

Early in the recent wave of change, the Florida Supreme Court adopted the pure form of comparative negligence,[58] and was followed by the courts in California,[59] Alaska[60] and Michigan.[61] The reasoning of these four courts was relied upon in *Alvis*, and, therefore, a brief examination of the decisions is important background for an understanding of the choices made by the Illinois court.

When abolishing contributory negligence, each of the courts indicated that it strove to reach what it considered the most equitable result in tort law—the equation of liability with fault.[62] Therefore, these jurisdictions ruled that liability should be assessed in proportion to fault even if the plaintiff's negligence equals or exceeds the defendant's.[63] In the view of the California Supreme Court, a modified system "distorts the very principle it recognizes"—that persons should bear the cost of their injuries in relation to their fault. Therefore, any rule which lowers but does not eliminate the contributory negligence bar was rejected.[64] The Alaska[65] and Michigan[66] courts agreed with this

56. Prosser I, *supra* note 16, at 16-17.

57. SCHWARTZ, *supra* note 6, at 45. Commentators have suggested that many states have selected a comparative system because of fear of granting a sympathetic jury the power to grant generous awards to very negligent plaintiffs. *See, e.g.*, Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005 (1957).

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

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

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

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

62. Citing *Placek* and *Li*, the Illinois Supreme Court noted, "The 'pure' form of comparative negligence is the only system which truly apportions damages according to the relative fault of the parties and, thus, achieves total justice." 85 Ill. 2d at 27, 421 N.E.2d at 8. *See* text accompanying notes 80-86 *infra*.

63. Hoffman v. Jones, 280 So. 2d at 438-39; Li v. Yellow Cab Co., 13 Cal. 3d at 827-29, 532 P.2d at 1241-44, 119 Cal. Rptr. at 874-76.

64. 13 Cal. 3d at 828, 532 P.2d at 1242, 119 Cal. Rptr. at 875. The court considered significant the experience of Wisconsin where the use of a modified system has caused much litigation on the narrow issue of whether the plaintiff's negligence is equal to the defendant's. *Id.* at 828, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

65. The Alaska Supreme Court stated in *Kaatz*: "We are convinced that the pure system is the one which is the simplest to administer and which is best calculated to bring about substantial justice in negligence cases." 540 P.2d at 1049.

66. The Michigan Supreme Court in *Placek* stated: "What the hybrid rule does in fact is not eliminate contributory negligence, but merely lower the barrier. . . . What comparative negligence does is hold a person fully responsible for his or her acts and to the full extent to which they cause injury. That is justice." 405 Mich. at 661, 275 N.W.2d at 519 (quoting Kirby v. Larson, 400 Mich. 585, 644, 256 N.W.2d 400, 428-29 (1977)).

reasoning and also chose pure comparative negligence.

Judicial or Legislative Change

In addition to differences of opinion over the correct *form* of comparative negligence, thinking regarding the *method* of implementation also has been sharply divided.[67] The *Maki v. Frelk*[68] cases in Illinois embody the controversy.

In 1967, in *Maki v. Frelk*,[69] the Illinois Appellate Court for the Second District attempted to abolish contributory negligence.[70] The appellate court in *Maki* found the doctrine of contributory negligence "unsound and unjust under present conditions" and adopted a modified system of comparative negligence.[71] Since the existing contributory negligence doctrine was judicially created, the appellate court reasoned, it had "not only the right but the duty to abolish the defense."[72]

The Illinois Supreme Court reversed, stating that "such far-reaching change, if desirable, should be made by the legislature rather than by the court."[73] Although contributory negligence had evolved through common law decisions, the court asserted, it was such an integral part of modern law that it should be changed only by legislative action. The court said that the General Assembly "is the department of government to which the constitution has entrusted the power of changing the laws."[74]

Justice Ward vigorously dissented. He argued that because Illinois' position on contributory negligence had been created by the

67. *See* SCHWARTZ, *supra* note 6, at 352-65; *Comments on Maki, supra* note 43; Note, 17 BUFFALO L. REV. 573 (1968).

68. 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), *rev'd*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

69. *Id.* *Maki* involved a cause of action for wrongful death, and, as in *Alvis*, the issue raised by the case arose from the pleadings. The plaintiff did not allege due care of the decedent but instead alleged that if there was any negligence on the part of the plaintiff or the plaintiff's decedent, it was less than the negligence of the defendant when compared. The circuit court dismissed the plaintiff's disputed count for failure to state a cause of action, but the appellate court for the second district reversed the circuit court. In a five-to-two decision, the Illinois Supreme Court reversed the intermediate court, expressing the view that the change to comparative negligence should be made by the legislature. 40 Ill. 2d at 197, 239 N.E.2d at 448.

70. The appellate court decision was favorably regarded by commentators, and in a Vanderbilt University Symposium, five out of the six participants favored the idea of judicial change. *Comments on Maki, supra* note 43.

71. 85 Ill. App. 2d at 452, 229 N.E.2d at 291.

72. *Id.* Commentators have observed that the suggestion that legal change is exclusively a legislative function runs against Anglo-American legal tradition. *See, e.g.*, Green, *The Thrust of Tort Law Part II: Judicial Law Making*, 64 W. VA. L. REV. 115 (1962); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

73. 40 Ill. 2d at 196, 239 N.E.2d at 447.

74. *Id.*

courts and not by the legislature, legislative inaction reflected the legislature's belief that the courts should make the change.[75] At the time of *Maki v. Frelk*, however, all states applying comparative negligence had, in fact, adopted it by statute.[76]

In support of the *Maki* court's position, it has been asserted that legislative inaction or legislative rejection of comparative negligence statutes indicates that the legislature, representing the public, has chosen to retain the existing system.[77] Further, opponents of judicial adoption of comparative negligence have pointed out that the implementation process is complex and involves the resolution of multiple ancillary issues. As one commentator observed, most courts "have seen the abyss" and have determined that the change should be enacted legislatively.[78] This, it appears, was the case in Illinois, where the courts, though openly sympathetic to the plaintiff's plight under contributory negligence,[79] waited for thirteen years after *Maki* for the legislature to make the change.

Florida became the first state to adopt comparative negligence judicially with *Hoffman v. Jones*[80] in 1973. *Hoffman* began a wave of judicial action, and subsequently the courts of Alaska, California, Michigan, West Virginia, New Mexico and Illinois followed.[81] Each of these courts considered the traditional arguments against judicial change of an established body of common law, and each determined that it was within its powers to abandon contributory negligence in favor of comparative negligence. The Florida court observed that "[l]egislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule."[82]

75. 40 Ill. 2d at 202, 239 N.E.2d at 450 (Ward, J., dissenting).

76. Florida was the first state to adopt comparative negligence by decision. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). *See* SCHWARTZ, *supra* note 6, at 24-25.

77. *See, e.g.*, Alvis v. Ribar, 85 Ill. 2d at 33, 421 N.E.2d at 901 (Underwood, J., dissenting).

78. SCHWARTZ, *supra* note 6, at 355.

79. Justice Campbell, writing the appellate court opinion in *Alvis*, said that "while this court may find itself in sympathy with the plaintiffs' contention, it is not for this court to attempt to reverse the many cases of the Illinois Supreme Court in this area." Franzese v. Katz, 78 Ill. App. 3d 1117, 1119, 398 N.E.2d 124, 125 (1979), *rev'd sub nom.* Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

80. 280 So. 2d 431 (Fla. 1973). One commentator considered *Hoffman* a courageous and historic step in the history of judicial lawmaking. SCHWARTZ, *supra* note 6, at 24-25. The Florida court determined that a state statute declaring the general English common and statutory law in effect as of 1776 in Florida did not control the issue of contributory negligence, because contributory negligence did not exist prior to 1776. 280 So. 2d at 434-35.

81. *See* note 4 *supra*.

82. 280 So. 2d at 436 (quoting Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971)). Florida also set the example for courts following *Hoffman* by addressing issues such as last clear chance, special

In *Li v. Yellow Cab Company*, the California Supreme Court similarly determined that it was within its judicial powers to adopt comparative negligence, though the California legislature had codified contributory negligence.[83] Reasoning that the legislature had not intended to insulate statutory matters from further judicial development, the court concluded that the statute merely reflected existing common law principles which it could alter.[84] The court stated that full development of the comparative negligence system would occur through resolution of collateral issues presented in future cases.[85] The subsequent opinions of the Alaska and Michigan Supreme Courts reflect an analysis similar[86] to that of California and Florida. Nevertheless, during the period after *Maki v. Frelk*, when many jurisdictions were struggling with these issues and were adopting change, Illinois continued to deny damages to all contributorily negligent plaintiffs.

ALVIS V. RIBAR

Facts of the Case

In *Alvis v. Ribar*,[87] a vehicle operated by defendant Ribar skidded out of control and collided with a metal barrel which anchored an official intersection stop sign. The sign had been placed temporarily at the intersection during some construction work being done by the defendant contractor. Plaintiff Alvis, a passenger in defendant Ribar's car, was injured as a result of the collision. He filed a multi-count personal injury complaint, seeking damages from Ribar, the contractor and the

verdicts, and retroactivity, which were beyond the scope of the *Hoffman* facts. In this regard, the court engaged in a quasi-legislative function which has been followed by the subsequent courts. SCHWARTZ, *supra* note 6, at 26-27.

83. 13 Cal. 3d at 823, 532 P.2d at 1239, 119 Cal. Rptr. at 871.

84. The court stated that in enacting § 714 of the Civil Code, 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." 13 Cal. 3d at 814, 532 P.2d at 1233, 119 Cal. Rptr. at 865.

85. *Id.* at 826-27, 532 P.2d at 1242, 119 Cal. Rptr. at 874.

86. With Kaatz v. State, 540 P.2d 1037 (Alaska 1975), Alaska became the third state to introduce comparative negligence judicially. The court addressed the legislative-judicial question only in passing, concluding that the Florida and California courts had demonstrated the permissibility of such a course. In Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979), the Michigan Supreme Court became the fourth state court to adopt comparative negligence judicially. The Michigan court pointed out that both the court and the legislature possessed the power to change the common law. *Id.* at 656, 275 N.W.2d at 519. The court concluded that the legislature did not have superior knowledge regarding the issues and would not adopt a comprehensive statute. *Id.* at 658-59, 275 N.W.2d at 518-19.

87. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

county.[88]

Krohn v. Abbott Laboratories, Inc.[89] was consolidated with *Alvis* for appeal. In *Krohn*, a tractor trailer was traveling west when it collided with the eastbound vehicle driven by Krohn. The collision occurred in the eastbound lane, and Krohn was fatally injured. Plaintiff Karin Krohn brought a wrongful death action against both Abbott Laboratories, the owner of the tractor, and driver Robert Sweetwood, Abbott's employee.[90]

In *Alvis* and *Krohn*, the complaints included counts based on the doctrine of comparative negligence, and in each case, that count was dismissed by the trial court in response to motions by the defendants.[91] The appellate court affirmed the dismissals, stating, "It is not for this court to attempt to reverse the many cases and opinions of the Illinois Supreme Court."[92] The Illinois Supreme Court reversed, however, abolishing the doctrine of contributory negligence in Illinois and adopting in its place the doctrine of comparative negligence in its pure form.[93]

Reasoning of the Court

In arriving at its decision, the *Alvis* court was confronted with three major issues: first, whether a change should be made from the existing contributory negligence doctrine to a system of comparative negligence;[94] second, whether the court or the General Assembly should introduce such a change;[95] and third, whether a pure or modified form of comparative negligence should be chosen.[96]

In evaluating whether the existing contributory negligence doctrine should be abandoned, the court concluded that contributory neg-

88. *See* Franzese v. Katz, 78 Ill. App. 3d 1117, 398 N.E.2d 124 (1979), *rev'd sub nom.* Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

89. Unreported decision, consolidated with *Alvis v. Ribar* on appeal.

90. 85 Ill. 2d at 4-5, 421 N.E.2d at 887. The appellate court did not indicate the nature of either plaintiff's alleged contributory negligence.

91. *Id.* at 4, 421 N.E.2d at 887. In the trial court, the plaintiffs' briefs directly asked the court to apply comparative negligence. It was argued that the Illinois General Assembly had repeatedly failed to pass such a statute and probably would continue to refuse to act. The plaintiffs noted that almost twelve years had elapsed since *Maki v. Frelk*, and it was urged that the time had come for a change. 78 Ill. App. 3d at 1118-19, 398 N.E.2d at 125.

92. *Id.* at 1119, 398 N.E.2d at 125. Justice Campbell, writing for the appellate court, reasoned that *Maki* was still controlling, despite the fact that the court found itself in sympathy with the plaintiffs' contentions. The court determined that it could not substitute itself for the legislature or the supreme court and adopt the doctrine of comparative negligence. *Id.*

93. 85 Ill. 2d at 27-28, 421 N.E.2d at 898.

94. *Id.* at 5-21, 421 N.E.2d at 887-95.

95. *Id.* at 21-24, 421 N.E.2d at 895-97.

96. *Id.* at 25-28, 421 N.E.2d at 897-98.

ligence, devised to encourage the growth of industry in an earlier era, was not responsive to the needs of today's society.[97] The court pointed out that no less than thirty-six other states, the United States Supreme Court, and many foreign countries have abandoned contributory negligence in favor of comparative negligence.[98] The majority concluded that the question was no longer whether it should follow the lead of other jurisdictions and eliminate contributory negligence, but rather when and how it should do so.[99]

The court then examined the range of criticisms leveled at comparative negligence by the defendants and concluded that none of them presented any compelling reason for maintaining the contributory negligence system. First, the court reasoned that a jury would be capable of apportioning fault under a comparative negligence system. It was being done in thirty-six other states and could be accomplished in Illinois.[100] Second, the court observed that the experience of other jurisdictions indicated that the administrative difficulties created by a change would not be insurmountable. For example, the application of comparative negligence systems elsewhere was not thought to have created increased claims, decreased settlements, increases in insurance costs, or overcrowded court dockets.[101] Finally, the court concluded that even if the administrative problems of comparative negligence were severe, a harsh and archaic rule that no longer served a purpose could not remain the law of the state.[102]

After determining that a system of comparative negligence should be adopted, the court further reasoned that it was within its powers to

97. To substantiate this conclusion, the court presented a careful history of contributory negligence in the United States and in Illinois. *Id.* at 5-12, 421 N.E.2d at 887-92.

98. *Id.* at 15, 421 N.E.2d at 892. The court stated that Canada, the Canal Zone, Switzerland, Spain, Portugal, Austria, Germany, France, the Phillipines, Japan, Russia, New Zealand, Australia, Poland and Turkey had all abandoned contributory negligence in favor of comparative negligence. *Id.* Almost every common law jurisdiction outside the United States had discarded contributory negligence. *See* Wade, *A Uniform Comparative Fault Act—What Should It Provide?*, 10 U. MICH. J.L. REF. 220, 221 (1977) [hereinafter cited as Wade].

99. 85 Ill. 2d at 15, 421 N.E.2d at 892 (quoting Placek v. City of Sterling Heights, 405 Mich. 638, 653, 275 N.W.2d 511, 515 (1979)).

100. *Id.* at 17, 421 N.E.2d at 893. The court further reasoned that small imperfections in percentage allocations of fault are far superior to the all-or-nothing results of contributory negligence. *Id.* at 18, 421 N.E.2d at 893. The court also responded to the charge that comparative negligence rewards carelessness. Contrary to the defendants' assertion, the court believed that comparative negligence deters negligent actions, as each party is liable for his damages in direct proportion to his degree of carelessness. *Id.* at 18, 421 N.E.2d at 893-94. *See also* Li v. Yellow Cab Co., 13 Cal. 3d at 827 n.21, 532 P.2d at 1242 n.21, 119 Cal. Rptr. at 874 n.21; Prosser I, *supra* note 16, at 9-12.

101. 85 Ill. 2d at 18-19, 421 N.E.2d at 894.

102. *Id.* at 19, 421 N.E.2d at 894.

bring about such a change.[103] Valuing progress more than stability and describing Illinois as out of step with the majority of states, the court declared that it was not compelled to follow *Maki v. Frelk*.[104] Rather, it determined that contributory negligence was a judicially created doctrine which could be altered or replaced by the court that created it.[105] The supreme court concluded that the Illinois General Assembly and courts were at an impasse, so that, in the interests of serving the public, it must act.[106] While the court recognized that many collateral issues would arise as a result of the adoption of a new system, it reasoned that these subsequent problems could be resolved on a case-by-case basis.[107]

Dissenting, Justice Ryan questioned whether the court, representing no constituency, possessed the power to institute the change to comparative negligence.[108] Justice Ryan argued that the need for legal stability dictated adhering to *Maki*, and he was "offended" by the idea that a majority of a seven-member court could enact a change that the 236-member legislature had refused to make on six different occasions.[109] Justice Underwood, also dissenting, acknowledged the court's authority to change the contributory negligence rule, but suggested that years of uncertainty would be avoided if the change to comparative negligence were accomplished through sweeping legislative action, which could address all corollary issues.[110]

The court resolved the third major issue it faced by choosing a pure form of comparative negligence.[111] The majority declared that true justice is achieved only when each party bears a burden of damages in direct proportion to his fault. Citing *Li v. Yellow Cab Com-*

103. *Id.* at 21-25, 421 N.E.2d at 895-97. The court based its assumption of power on past court actions in other states, on supreme court precedent, and on the duty of the court to develop the law in accord with the demands of society. *See also* note 106 *infra*.

104. The court stated that it could no longer ignore contributorily negligent plaintiffs who are forced to bear the entire burden of their injuries because of some negligence on their part, and that it would no longer condone a policy that allowed defendants to escape liability for their own negligence "on the pretext that another party's negligence has contributed to such injuries." 85 Ill. 2d at 24-25, 421 N.E.2d at 896-97.

105. *Id.* at 21, 421 N.E.2d at 895.

106. *Id.* at 23-24, 421 N.E.2d at 896. Keeton suggests that a legal system must provide for growth by occasional instances of more abrupt change. Decisional creativity may be a more potent instrument of reform than statutory creativity. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 472-86 (1962). Also notable is the fact that the Illinois Supreme Court overruled long-standing precedent regarding contribution among joint tortfeasors in Skinner v. Reed-Prentice Div. Pkg. Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1978).

107. 85 Ill. 2d at 28, 421 N.E.2d at 898. *See* text accompanying notes 117-79 *infra*.

108. 85 Ill. 2d at 35-42, 421 N.E.2d at 901-04 (Ryan, J., dissenting).

109. *Id.* at 36-37, 421 N.E.2d at 902.

110. *Id.* at 29, 421 N.E.2d at 898-99 (Underwood, J., dissenting). *See* text accompanying notes 129-43 *infra*.

111. 85 Ill. 2d at 27, 421 N.E.2d at 898.

pany,[112] the court argued that the modified system of comparative negligence "simply shift[ed] the lottery aspect of the contributory negligence rule to a different ground."[113] Although a portion of the unfairness would be eliminated, a large number of new appeals would be created to determine whether the plaintiff's portion of negligence is sufficient to bar his recovery.

Neither dissenting justice was in favor of pure comparative negligence. Justice Underwood objected to the system on moral grounds,[114] arguing that justice was not furthered by allowing a plaintiff who might be more negligent than the defendant to collect damages.[115] Justice Ryan suggested that pure comparative negligence was merely a fiction for enactment of a no-fault system and predicted that under a pure system, the jury would not limit the plaintiff's damages according to his own degree of fault.[116] Justice Ryan proposed that the legislature review the entire tort field and either adopt a no-fault system or retain the fault concept and enact a modified no-fault program of comparative negligence.

ANALYSIS

Prior to *Alvis v. Ribar*, Illinois was out of step with current enlightened legal thought and practice in the area of comparative negligence. It was both necessary and appropriate for the court to act. But *Alvis* was only the first step in the adoption of comparative negligence, because the development of a comparative negligence system must be an evolutionary process. Now that the abrupt change has been made, a new set of issues must be addressed.

112. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). The Illinois court contrasted the operation of Wisconsin's modified system of comparative negligence with a pure system such as that adopted in California. For further discussion of the severe problems created by a modified system, see generally Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970); Prosser II, *supra* note 28, at 493-94.

113. 85 Ill. 2d at 27, 421 N.E.2d at 898.

114. *Id.* at 30-31, 421 N.E.2d at 900. (Underwood, J., dissenting). This moral argument has been rebutted by commentators. *See, e.g.*, SCHWARTZ, *supra* note 6, at 25, where it is suggested that it is better to require a negligent plaintiff to pay the cost of his own carelessness than it is to punish him by denying any recovery both to him and to the defendant whom he injured.

115. 85 Ill. 2d at 30-31, 421 N.E.2d at 900, (Underwood, J., dissenting). Justice Underwood's objection to pure comparative negligence was also based on the fact that almost two-thirds of the states adopting a comparative negligence plan have chosen a modified system, on his opinion that a pure system would cause increased litigation, and on his view that such policy decisions should be left to the legislature. *Id.*

116. *Id.* at 41, 421 N.E.2d at 904. (Ryan, J., dissenting). Justice Ryan stated no authority for this contention. Further, in the event of such blatant disregard of instructions by the jury, trial judges and reviewing courts have methods of protecting the defendant. Turk, *supra* note 7, at 342-43.

As a result of *Alvis*, many procedural and substantive questions await future resolution. One of the larger, more important issues to be addressed is whether comparative negligence principles should be applied in strict products liability cases. Other important questions include how joint and several liability will be affected by a combined application of the Illinois contribution statute and comparative negligence; whether the plaintiff's negligence should be compared to that of all defendants, or only to that of those defendants before the court; and whether the amount received by a plaintiff who settles with a defendant prior to judgment should be used as a measure of the proportionate liability of that defendant. Each of these issues requires a detailed evaluation.

This analysis will focus first on some of the more immediate problems presented by *Alvis*. It will be suggested that certain problems of implementation could have been minimized by the court. Second, it will be proposed that even though the majority's argument for judicial rather than legislative change was the correct, more practical position, the legislature should now fully evaluate the implications of comparative negligence and enact a comprehensive code addressing the multitude of corollary issues that remain unresolved. Finally, to illustrate the theoretical and practical complexity of these corollary issues, application of comparative principles to strict products liability will be considered, and it will be concluded that as a matter of policy, the two doctrines should remain separate.

Implementation

Under a system of comparative negligence, the apportionment of fault between plaintiff and defendant is done by the jury. Little is known of the process by which the jury apportions damages in comparative negligence cases,[117] and courts are reluctant to become involved in reassessing the percentage of negligence determined by the jury.[118] Cases have been reported in which the negligence of the plaintiff was clear as a matter of law, but the sum awarded to the plaintiff was so nearly equal to that asked for that it was apparent to the court that the

117. Prosser noted that there must be many cases in which apportionment is incorrectly made, but the court is powerless to interfere because it does not know or cannot prove what has happened. Because of this, it is difficult to investigate the exact frequency with which this occurs. Prosser I, *supra* note 16, at 15-16.

118. For example, the Wisconsin Supreme Court rigidly adheres to the rule that the jury's apportionment will be sustained if there is any credible evidence to support its findings. *See, e.g.*, Neider v. Spoehr, 41 Wis. 2d 610, 165 N.W.2d 171 (1969); Bruno v. Biesecker, 40 Wis. 2d 305, 162 N.W.2d 135 (1968).

jury did not make the apportionment.[119] In order for a comparative negligence system to work, the courts must begin to collect information regarding the reasoning process of the jury in this area.[120]

Although the Illinois Supreme Court acknowledged the difficulties inherent in jury apportionment of fault,[121] it merely suggested that special verdicts and special interrogatories could be of assistance in assuring that the jury has done its job correctly.[122] The court could have followed the lead of other jurisdictions by requiring special jury verdicts or interrogatories in all comparative negligence trials. In four other states, the comparative negligence statutes require a special verdict whenever the plaintiff's negligence is an issue.[123] The result of special verdicts or interrogatories is that the jury no longer operates in secrecy, and the court is provided with a realistic method of making sure that the comparative negligence system is functioning correctly. If the jury has disregarded the instructions, misunderstood them, or even made a simple error in arithmetic, the error can be corrected. With a special verdict, the court is told whether the jury has found the plaintiff negligent, whether it has divided the damages, and, if so, in what proportion.[124] The jury must give detailed consideration to the issues and cannot arrive at an emotional, undocumented opinion. If the process or the result is wrong, a remittitur[125] may prevent a complete new trial.

The *Alvis* court also stated that concern over various administrative problems that might result from change to a comparative negligence system were exaggerated.[126] To dispute claims that increased

119. *E.g.*, Ideal Cement Co. v. Killingsworth, 198 So. 2d 248 (Miss. 1967) (because the size of the verdict indicated that the jury did not comply with instructions to reduce it in proportion to the contributory negligence, the court ordered remittitur on the apportionment question).

120. Prosser has suggested that one reason many states opted for modified comparative negligence was judicial and legislative distrust of the "unreliable and irresponsible jury." Prosser I, *supra* note 16, at 28.

121. 85 Ill. 2d at 17-18, 421 N.E.2d at 893.

122. *Id.* at 28, 421 N.E.2d at 898. Special verdicts require answers by the jury to specific questions such as the following: whether the jury believed the defendant and/or plaintiff to be negligent; what percentage of the total negligence was attributable to each party; and what the amount of damages is that the plaintiff has sustained. The jury is not asked to return a general verdict for one party. With the information given, the court can make the apportionment itself. The procedure causes the jury to separate the question of the amount of damages the plaintiff suffered from the question of the percentage of his fault. SCHWARTZ, *supra* note 6, at 288-89; Prosser I, *supra* note 16, at 28-29.

123. COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1980); HAWAII REV. STAT. § 663-31 (1976); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1981); N.J. STAT. ANN. § 2A:15-5.2 (Supp. 1981-1982).

124. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.15 (2d ed. 1977).

125. Remittitur and additur are procedural devices whereby a court may avoid a new trial even though the jury has returned a verdict which is improper as to damages. Remittitur is used for too high an award, additur for an unusually low award. SCHWARTZ, *supra* note 6, at 305-06.

126. 85 Ill. 2d at 19, 421 N.E.2d at 894.

litigation, decreased settlements and overcrowded dockets would follow, the court cited a two-part Arkansas study conducted in 1958 and 1969.[127]

The first part of the study was based upon the responses of ninety-eight subjects, the second upon the responses of eighty-seven subjects. Twenty-three judges contributed to the pool of respondents. One small test conducted twelve years ago in Arkansas should not satisfy the Illinois judiciary or legal profession that the effect of comparative negligence will not be problematic.[128] It appears that not enough is known to predict what the full impact will be, and, as with damage apportionment, more research in this area is needed.

Judicial Adoption of Comparative Negligence

Arguing that the change should be left to the General Assembly, Justice Underwood asserted that the Illinois legislature has expressed approval of the contributory negligence rule by incorporating it into numerous statutes.[129] The majority, however, noted that the legislature had not focused on the merits of contributory negligence but had simply written statutes that conformed to then-existing law.[130] Further research reveals the strength of the majority's assertion.

Each of the statutes cited by the dissent[131] as evidence of the legislature's bias toward contributory negligence was part of the Government and Governmental Employees' Tort Immunity Act.[132] The purpose of this act had nothing to do with acceptance of contributory negligence, but rather was to grant tort immunity statutorily to certain local governmental entities.[133] The statutes deal with the tort immunity

127. Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959); Note, *Comparative Negligence—A Survey of the Arkansas Experience*, 22 ARK. L. REV. 692 (1969). These studies were conducted to evaluate the impact of the change from contributory to comparative negligence. The follow-up survey reported more cases settled under comparative negligence, a higher portion of verdicts obtained by the plaintiff, and larger verdicts under comparative negligence. 22 ARK. L. REV. at 713.

128. Only one other study regarding the effects of comparative negligence was cited by the *Alvis* court or by other authors. *See* Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1960), in which it was reported that the effect of comparative negligence on insurance rates was found to be minimal. *Id.* at 726-28.

129. 85 Ill. 2d at 33-34, 421 N.E.2d at 901. (Underwood, J., dissenting).

130. *Id.* at 23, 421 N.E.2d at 896.

131. ILL. REV. STAT. ch. 24, ¶ 1-4-4 (1979) (injuries caused by firemen); *id.* ch. 24, ¶¶ 1-4-5, 1-4-6 (injuries caused by policemen); *id.* ch. 34, ¶ 301.1 (injuries caused by sheriff or deputy); *id.* ch. 121, ¶¶ 381-387 (liability of county highway superintendents).

132. 1965 Ill. Laws 2982 (August 13, 1965).

133. In Molitor v. Kaneland Community Unit District, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), the supreme court held school districts liable for torts committed by their employees in the course of school operations. Immediately after this case, the Illinois General Assembly passed bills granting

of firemen, policemen and various local officials and do not support the proposition that Illinois' statutes reflect a preference for contributory negligence.

In a further argument for deferral to the legislature, Justice Underwood suggested that the many issues left unsettled by the *Alvis* opinion indicated that the change to comparative negligence should have occurred through legislative enactment of a comprehensive statute.[134] While theoretically a valid suggestion,[135] the reality is that no other legislature, when enacting comparative negligence, has established a statutory scheme that deals with each of the remaining issues. It is clear from the examples cited[136] that the pure comparative negligence statutes of other states provide only skeletons, leaving all interpretation and implementation to the courts. Despite the dissent's preference, a statute is not intrinsically superior to a court decision, and in fact is of less value when the statute is a cursory statement and the court opinion is detailed and explicit.

Citing the California Supreme Court in *Li v. Yellow Cab Com-*

immunity to certain local governmental units which previously had functioned entirely immune from tort liability. In 1965, the legislature passed a comprehensive bill dealing with the subject. *See* 1965 Ill. Laws 2982 (August 13, 1965). The purpose of the Act was to regulate tort actions against local governments, and in doing so, the legislature codified the common law of torts at the time. *See* Kionka & Norton, *Tort Liability of Local Governments and Their Employees in Illinois*, 58 ILL. B.J. 620 (1970). *See also* Comment, *Illinois Tort Claims Act: A New Approach to Municipal Tort Liability in Illinois*, 61 NW. U.L. REV. 265 (1966).

134. 85 Ill. 2d at 29, 421 N.E.2d at 899 (Underwood, J., dissenting).

135. Because the courts have never agreed upon any theory for limiting the powers of common law courts, judicial or legislative change has always raised difficult questions, and often resolution of the problem turns on practicalities rather than on a right or wrong position. The Michigan Supreme Court noted that if the courts and judiciary defer to each other for a long enough period, rules become frozen, and resistance to change may be asserted because a particular precedent has been followed for so long—a rather circular argument. Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400 (1977). *See also* Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 472 (1962).

136. WASH. REV. CODE ANN. § 4.22.010 (Supp. 1981):

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages caused by negligence resulting in death or in injury to person or property, but any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering.

R.I. GEN. LAWS § 9-20-4 (Supp. 1981):

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may not have been in the exercise of due care shall not bar a recovery, but damages shall be diminished by the finder of fact in proportion to the amount of negligence attributable to the person injured, or the owner of the property or the person having control over the property.

Mississippi's statute, MISS. CODE ANN. § 11-7-15 (1972), and Louisiana's statute, LA. CIV. CODE ANN. art. 2323 (West Supp. 1981), are essentially the same as the Washington and Rhode Island statutes. The New York statute differs only in that it eliminates the use of the assumption of risk defense. N.Y. CIV. PRAC. LAW §§ 1411-1433 (1976).

pany,[137] the Illinois Supreme Court correctly noted that full development of a comparative negligence system can occur through resolution of collateral issues raised in future cases.[138] Subsequent to *Li*, the California courts have ruled on joint and several liability of joint tortfeasors,[139] have resolved issues regarding assumption of risk,[140] and, importantly, have held that principles of comparative negligence apply to actions based on strict liability.[141]

Questioning the propriety of such judicial activism, Justice Ryan doubted if the courts even possessed the constitutional authority to adopt the change to comparative negligence. He argued that the court had "not been favored with an omnipotence not possessed by this state's coequal branches of government."[142] As the majority observed, however, a rule which is court-made can also be modified or overruled by the same court.[143] What must be added to that response is that the court's decision did not deprive the legislature of its freedom to affirm, to expand upon, or to abrogate the actions of the judiciary.

The court in an *Alvis*-type situation should be seen as a catalyst rather than as a usurper of the legislature's powers.[144] When commenting upon the same issue in California, one writer observed that the "creative judicial role" should be seen "not as a confrontation but as an assistance to the legislature in the continuous task of defining and redefining the norms of society." He further noted that the notorious inertia of the legislature "can often be overcome only as a result of a stimulus from the courts."[145]

137. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

138. 85 Ill. 2d at 28, 421 N.E.2d at 898.

139. In American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), the California court held that comparative negligence should be used as the basis for apportioning liability among multiple negligent tortfeasors pursuant to a comparative indemnification doctrine. In Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978), the California Supreme Court held that comparative fault principles should be utilized as the basis of apportionment among two tortfeasors when the liability of one rests upon the strict products liability doctrine and the liability of the other is derived from negligence theory.

140. In Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976), the court held that the assumption of risk defense was still of limited applicability.

141. In Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), the California Supreme Court held that principles of comparative negligence apply to actions founded on strict products liability. *See* text accompanying notes 161-66 *infra*.

142. 85 Ill. 2d at 38, 421 N.E.2d at 903 (Ryan, J., dissenting).

143. *Id.* at 21-24, 421 N.E.2d at 895-96.

144. *See* Fleming, *supra* note 40, at 275.

145. *Id.* Echoing this philosophy, the majority in *Alvis* wrote:

> There are, however, times when there exists a mutual state of inaction in which the court awaits action by the legislature and the legislature awaits guidance from the court. Such a stalemate is a manifest injustice to the public. . . . [I]t is the imperative duty of the court to repair that injustice and reform the law.

85 Ill. 2d at 23-24, 421 N.E.2d at 896.

The Illinois General Assembly again is confronted with a choice. It can elect to do nothing, and the pattern of California and Florida will be followed, with each ancillary issue resolved when the appropriate case reaches the supreme court. One author, recently commenting on *Alvis*, suggested that a long-term process of resolving these issues may help to "mold the law into its optimal form."[146] According to this point of view, a period during which tort law is in an unsettled state is an integral aspect of the evolution of a new doctrine.

Viewing this evolutionary process in a less favorable light, it can be assumed that a period of confusion among the trial courts, litigants and members of the legal profession may prevail for some time. As Justice Underwood observed, unless the legislature acts, it will in all probability be years before the corollary questions are answered by the judiciary.[147]

As an alternative to judicial action, the legislature could now carefully study and evaluate the remaining questions[148] and enact a comprehensive comparative negligence statute.[149] While it was both expedient and desirable for the Illinois Supreme Court to end the legislative-judicial impasse, the General Assembly could now choose to take the next necessary and important steps in the development of tort law in Illinois.

An Unresolved Issue: Comparative Fault Principles and Strict Products Liability

When assessing the implications of *Alvis*, one of the first questions that must be asked is whether comparative fault principles should be applied to the area of strict products liability. The potential impact of comparative negligence principles on strict liability cases demonstrates the complex implications of the *Alvis* holding, as well as the scope of analysis necessary to resolve the unsettled issues.

The *Alvis* opinion holds that, "in those instances where applicable,

146. Kionka, *supra* note 48, at 27.

147. 85 Ill. 2d at 29, 421 N.E.2d at 899.

148. Examples of some issues to be resolved in Illinois are: whether joint and several liability will continue to be applied under a combined application of the contribution statute and comparative negligence; whether *Alvis* will have any effects on the negligence of minors; whether the plaintiff's negligence should be compared to all defendants or only to those before the court; whether, when a defendant settles with the plaintiff prior to judgment, the amount received by the plaintiff should be used as a measure of the proportionate liability of that defendant; whether comparative fault principles should be applied to a strict products liability cause of action.

149. In California, the legislature enacted a comprehensive government liability code two years after the court abolished sovereign immunity. *See* Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963).

[contributory negligence] is replaced by the doctrine of comparative negligence."[150] To apply comparative negligence to the assessment of fault of each party in a strict liability case would defeat the policy underlying that cause of action. A brief examination of the development of strict liability supports such a conclusion.

The strict products liability claim evolved as a means to provide legal protection to the purchaser of a defective product.[151] In *Suvada v. White Motor Company*,[152] a cause of action based on strict liability in tort was first allowed in Illinois.[153] The court ruled that a seller of a defective product was strictly liable for personal or property damage to the user or consumer, even if the seller had exercised all possible care in preparation and sale of his product. In order to prevail, the plaintiff was required to prove that his injury resulted from a defect in the product, that the defect was an unreasonably dangerous one and existed at the time the product left the manufacturer's control, and that the product reached the plaintiff in the condition in which it was sold.[154]

150. 85 Ill. 2d at 25, 421 N.E.2d at 897.

151. Prior to strict products liability, the consumer relied upon a cause of action for negligence or for breach of warranty to recover for injuries from a defective product. As manufacturing and marketing of products became more complex, these two causes of action became less effective. *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). In a warranty action, defenses such as lack of privity, lack of notice of breach, and disclaimers impeded recovery. Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In a suit based upon negligence, the plaintiff had difficulty proving the manufacturer's negligence since he usually was not familiar with the manufacturing process. Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

152. 32 Ill. 2d 612, 210 N.E.2d 182 (1965). In *Suvada*, the plaintiffs purchased a used tractor unit from defendant White Motor Company. The brake system was manufactured by defendant Bendix-Westinghouse and installed by White. The brake system failed, and the plaintiff filed an action against both White and Bendix. Bendix defended against the warranty action by claiming that the plaintiff was not in privity with Bendix and that its warranty on the brake unit ran only to White. *Id.* at 613-15, 210 N.E.2d at 183-84. Noting the many exceptions that had eroded the privity requirement, the court held that "lack of privity of contract is not a defense in a tort action against the manufacturer." *Id.* at 617, 210 N.E.2d at 185. Further, liability in tort for a defective product was extended to the seller, the contractor, the supplier, the parts assembler and the manufacturer of component parts. *Id.* at 617-18, 210 N.E.2d at 185-86.

153. Two years before *Suvada*, the California Supreme Court held a manufacturer who placed a defective product on the market strictly liable although both privity and notice of breach were lacking. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). For an historical sketch of the development of the strict products liability cause of action, see PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 641-44 (4th ed. 1971) [hereinafter cited as PROSSER, TORTS].

154. The new principle of strict products liability expressed in *Suvada* was derived from the Second Restatement, which provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

In *Williams v. Brown Manufacturing Company*,[155] several years after *Suvada*, the Illinois Supreme Court held that a plaintiff's contributory negligence would not bar his recovery in a strict products liability action. However, if the plaintiff used the product for an unforeseeable purpose or knowingly and voluntarily assumed the risk posed by the defective product, any recovery would be barred.[156]

Clearly articulated policy considerations supported the adoption of this new cause of action. In *Suvada*[157] and *Williams*,[158] the court explained that public interest in human health and life justified imposing the total economic burden of the plaintiff's injury on the one creating the risk and reaping the profit from sale of the product. The *Suvada* court noted that public policy motivated an earlier imposition of liability on sellers and manufacturers of food, and it asserted that the same reasons were equally compelling for imposing strict liability on the manufacturer of a defective product.[159] Courts in other jurisdictions also have forcefully stated that the strict products liability cause of action was created to offer protection to consumers in a technologically complex and economically complicated society, in which the costs of injury from defective products should be borne by the manufacturers who choose to make them available to the consumer.[160]

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

155. 45 Ill. 2d 418, 261 N.E.2d 305 (1970). The *Williams* holding relied upon RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965), which reads, in pertinent part:

> Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. . . . If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

156. The court explained that it had not intended *Suvada* to be interpreted as requiring the plaintiff to plead and prove inspection of a product for potential defects. This differed from the traditional Illinois requirement that the plaintiff plead his own lack of contributory negligence. 45 Ill. 2d at 425-26, 261 N.E.2d at 309-10. *See* note 19 *supra*.

157. 32 Ill. 2d at 618-19, 210 N.E.2d at 186.

158. 45 Ill. 2d at 426, 261 N.E.2d at 310.

159. The stated policies underlying the imposition of strict liability in food cases were: (1) public interest in human life and health demands maximum protection of the consumer; (2) the manufacturer solicits and invites the use of his product and represents to the public that it is safe; (3) the losses should be borne by those who create the risk and reap the profit. 32 Ill. 2d at 619, 210 N.E.2d at 186. *See also* Noel, *Strict Liability of Manufacturers*, 50 A.B.A.J. 446 (1964).

160. The California Supreme Court noted in *Greenman* that strict liability was judicially created because of the economic and social need to protect consumers in an increasingly complex, mechanized society. The court sought to avoid placing the cost of injury from a defective product upon "injured persons who were powerless to protect themselves." 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

After consideration of these same policy matters, the California Supreme Court recently held in *Daly v. General Motors Corporation*[161] that conduct of the plaintiff which contributes to his injury should be regarded as contributory negligence,[162] decreasing any recovery of damages accordingly.[163] A variety of practical arguments has been advanced by courts[164] and commentators[165] in support of this position. First, it is reasoned that courts traditionally did not apply the contributory negligence defense to strict liability because it operated until recently as an absolute bar to the plaintiff's recovery. In light of the comparative negligence doctrine, it is suggested that the courts can proceed more equitably and apportion damages between the plaintiff and defendant.[166] Earlier concern that a negligent plaintiff might be denied

161. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). The majority in *Daly* labeled its application of the contributory negligence defense to strict liability actions "comparative fault," in which the trier of fact compares the damage caused by the plaintiff's negligence with the defendant's strict liability. Two justices strongly dissented. 20 Cal. 3d at 750, 575 P.2d at 1177, 144 Cal. Rptr. at 395 (Jefferson, J., dissenting); *id.* at 757, 575 P.2d at 1181, 144 Cal. Rptr. at 399 (Mosk, J., dissenting). *See also* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 47 (Alaska 1976) (Burke, J., dissenting). Justice Burke argued that the plaintiff's contributory negligence should be considered in strict liability actions only where the plaintiff knowingly and voluntarily assumed the risk. *Id.*

162. A subject of much discussion has been the theoretical basis on which the plaintiff's negligence and the defendant's strict liability can be compared. *Compare* Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337 (1977) [hereinafter cited as Levine], *with* Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974) [hereinafter cited as Schwartz]. Levine argues that those applying comparative fault to strict liability are comparing a fault doctrine, negligence, to a no-fault doctrine, strict liability. Levine, *supra*, at 351-56. Schwartz, in contrast, asserts that it is within the power of the court to decide what defenses are appropriate in strict liability cases. He concludes that there is no reason why comparative negligence should not be selected in an appropriate situation. Schwartz, *supra*, at 196. Another scholar has suggested that the concept of negligence can encompass both the plaintiff's failure to act reasonably under the circumstances and a concept such as strict liability. Both plaintiff and defendant are negligent, though the courts and legislatures have imposed a different standard of liability on the manufacturer. Therefore, it is theoretically possible to compare the defendant's legal fault with the plaintiff's failure to exercise due care. Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 376-81 (1978).

163. Prosser has observed that "[i]t is perhaps unfortunate that contributory negligence is called negligence at all." He explained that negligence is understood as behavior that creates an unreasonable risk of harm to another. Contributory negligence, however, involves no duty to another and is conduct which creates an unreasonable risk to the actor himself. Prosser suggests that contributory negligence should better be characterized as "comparative fault." PROSSER, TORTS, *supra* note 153, at 418. Following this reasoning, the *Daly* court concluded that it is not theoretically contradictory to consider both plaintiff's and defendant's fault in a strict liability action. 20 Cal. 3d at 725, 575 P.2d at 1168, 144 Cal. Rptr. at 386.

164. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

165. *See, e.g.*, Noel, *Defective Products; Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93, 117-19 (1972). *But see* Levine, *supra* note 162, at 346-51; Wade, *supra* note 98.

166. Schwartz, *supra* note 162, at 177-78. The author explains that much needless litigation to

all recovery is no longer valid, since the defendant and plaintiff can bear the cost together. Second, it is urged that the policy of compensating defenseless victims of manufacturing defects is not undermined when a plaintiff's recovery is reduced only to the extent that his own lack of reasonable care contributed to his injury. Such a result, it is said, is a reasonable extension of comparative negligence principles.[167] Third, it is argued that the manufacturer's incentive to produce safe products will not be reduced by an equitable division of the costs. Because the manufacturer's liability will be lessened only a fraction, strong economic motivation to decrease the burden of potential damages will remain.[168]

A final argument in favor of the synthesis of comparative negligence and strict products liability is, at first, especially convincing. In *Skinner v. Reed-Prentice*,[169] the Illinois Supreme Court allowed a strictly liable defendant-manufacturer to seek contribution from a negligent defendant-employer. Subsequently, Illinois enacted a contribution statute which allows for apportionment of the plaintiff's judgment among the defendants according to the fault of each, regardless of the theory of liability.[170] Therefore, it might be assumed that the extension

determine whether the plaintiff's negligence is of a type that constitutes a complete bar to recovery can be avoided by use of comparative fault in strict liability.

167. Daly v. General Motors Corp., 20 Cal. 3d at 737, 575 P.2d at 1168-69, 144 Cal. Rptr. at 387; Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d at 46. Schwartz argues that the community should not be required to absorb a loss due, in part, to plaintiff's fault. Schwartz, *supra* note 162, at 177-79.

168. 20 Cal. 3d at 737-38, 575 P.2d at 1169, 144 Cal. Rptr. at 387. The *Daly* court stated that although the manufacturer's expense will be lessened, continuing liability for a defective product cannot be avoided. *Id.* The Alaska Supreme Court in *Butaud* summarily addressed this issue by stating, "The manufacturer is still accountable for all the harm from a defective product except that part caused by the consumer's own conduct." 555 P.2d at 46.

169. Skinner v. Reed-Prentice Div. Pkg. Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1978). *Skinner* departed from the prior Illinois common law rule which prohibited contribution among jointly and severally liable defendants by holding that a joint tortfeasor may seek contribution from other tortfeasors based upon the relative degree of fault of each for the plaintiff's harm. *See* Comment, *Comparative Contribution: The Legislative Enactment of the* Skinner *Doctrine*, 14 J. MAR. L. REV. 173 (1980) [hereinafter cited as *Comparative Contribution*].

170. Illinois Contribution Among Joint Tortfeasors Act, ILL. REV. STAT. ch. 70, ¶¶ 301-305 (1979). The statute provides in pertinent part:

302. Right of contribution

§ 2. Right of Contribution. (a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is liable to make contribution beyond his own pro rata share of the common liability.

(c) When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the

of these principles to an apportionment of damages between the *plaintiff* and the defendant is logical and may have been anticipated by the *Alvis* court.

Despite the many arguments to the contrary, the application of comparative fault principles to the strict products liability cause of action compromises the policy goals of strict liability.[171] An original goal of the strict products liability cause of action was to require the economically motivated manufacturer to design and to market his products so that a foreseeable defect or misuse would be eliminated.[172] How a consumer interacts with a product is directly related to the defendant's design and marketing of it.[173] When a manufacturer actively

injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.

(d) The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to any other tortfeasor.

(e) A tortfeasor who settles with a claimant pursuant to paragraph (c) is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement.

(f) Anyone who, by payment, has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full his obligation to the tortfeasor, is subrogated to the tortfeasor's right of contribution. This provision does not affect any right of contribution nor any right of subrogation arising from any other relationship.

. . . .

304. Rights of plaintiff unaffected

§ 4. Rights of Plaintiff Unaffected. A plaintiff's right to recover the full amount of his judgment from any one or more defendants subject to liability in tort for the same injury to person or property, or for wrongful death, is not affected by the provisions of this Act.

The rule in *Alvis* applies to all cases in which trial commenced on or after June 8, 1981. 85 Ill. 2d at 28, 421 N.E.2d at 898. The statute applies to "causes of action arising on or after March 1, 1978." ILL. REV. STAT. ch. 70, ¶ 301 (1979). Thus, in cases in which the cause of action arose before March 1, 1978, and trial commences after June 8, 1981, the plaintiff will be permitted to benefit from the application of comparative fault, but the defendant will not be able to seek contribution from other joint tortfeasors.

171. This issue was recognized but not discussed in a recent commentary on the *Alvis* opinion. The author noted that "[t]he court will still have to decide whether reducing plaintiff's damages in an action based on strict products liability will too greatly undermine the policy basis of such liability." Kionka, *supra* note 48, at 19.

172. *Compare* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), *with* Daly v. General Motors Corp. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *and* Bachner v. Pearson, 479 P.2d 319 (Alaska 1970), *with* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976). In the earlier cases, the courts unequivocally stated that the strict products liability cause was created to provide maximum protection for the powerless consumer by forcing the manufacturer to bear the financial burden for injuries caused by the marketing of products with defects. In the subsequent cases allowing contributory negligence as a defense, the courts ignored or seriously compromised regarding the policy issues. The Alaska Supreme Court did not even address the subject in *Butaud*. 555 P.2d at 47 (Burke, J., dissenting).

173. *See* Twerski, *From Defect to Cause to Comparative Fault—Rethinking Products Liability Concepts*, 60 MARQ. L. REV. 297, 343 (1977) [hereinafter cited as Twerski]. Twerski observes that in resolving products liability cases, the legal profession has utilized its past experience with negligence. There has been "no clear recognition that the litigation problems created by this new class

chooses to take the economic risk of marketing a defective or dangerous product, and that same defect causes the plaintiff's harm, the plaintiff, not consciously aware of the potential for injury, should not have his judgment reduced.[174]

Application of this analysis to automobile manufacturers and users is illustrative. Car manufacturers can reasonably foresee that drivers will both negligently misuse or assume the risk of their cars by failing to utilize safety equipment, by driving too fast, or by driving when intoxicated. It is also reasonably foreseeable that cars will be involved in crashes.[175] Although a driver may make an informed, voluntary choice to drive when intoxicated or without a shoulder harness, rarely is he aware of the secondary injuries he might incur from hidden safety defects in his car.[176] The automobile manufacturer, clearly in a better position than the consumer to anticipate the risk and the effect of a particular defect, has a duty to protect the consumer. If the manufacturer markets a car with a safety defect not readily apparent to the purchaser, and that defect ultimately causes the plaintiff's injury, the plaintiff's incidental negligence should not diminish his award.[177]

Furthermore, the fact that a strictly liable auto manufacturer may seek contribution from other defendants does not justify allocation of fault between a strictly liable *defendant* and a negligent *plaintiff*. When the liability of two defendants is compared, the plaintiff-protection aspect of the strict liability cause of action is not significantly jeopardized. Although the plaintiff may recover from two or more sources, his own incidental negligence does not cause the reduction of his damages. However, the manufacturer's impetus to produce defect-free products

of cases require a new set of perspectives" which directly address the problems of interaction between the user and the product. *Id.* at 349.

174. *See* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Tort*, in PERSPECTIVES ON TORT LAW 179, 182-93 (R. Rabin ed. 1976). The ability of the manufacturer to assess the costs and benefits of the product's use should not be disregarded and should be central to the imposition of any liability. *Id.* at 185.

175. For discussion of the "second crash" problem, see PROSSER, TORTS, *supra* note 153, at 646; Twerski, *supra* note 173, at 341-45. Prosser comments that the greater number of decisions have denied any duty to protect against the consequence of collisions "on the rather specious ground that collision is not the intended use of the car but is an abnormal use which relieves the maker of responsibility." PROSSER, TORTS, *supra* note 153, at 646. Prosser observes, however, that injuries caused by some part of the auto after collision are foreseeable and arise out of the car's intended use. *Id.*

176. Larson v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) (plaintiff impaled on steering shaft); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 381 (1978) (plaintiff's exterior door latch was depressed on impact, the door flew open, and plaintiff was hurled from the car); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969) (knob on gear shift lever cracked; plaintiff impaled).

177. *See* Twerski, *supra* note 173, at 341-45.

may be diminished by the knowledge that another defendant may also have to pay for a part of the judgment.[178] Although a collective duty of manufacturers, assemblers, marketers and employers is still present, that obligation to make certain that a product is defect-free should not be decreased further by an extension of the reasoning underlying the contribution statute to the strict products liability cause of action.

One author noted that the problem with comparative negligence is that "it is the great compromiser. It permits a court the luxury of evading fundamental policy questions, and once it is introduced it has a life of its own which blinds courts to policy questions which they might otherwise be required to face."[179] If the Illinois courts or legislature should determine that a clarification or change of policy is in order, then the application of comparative fault to the strict products liability cause of action would become defensible. So long as the court adheres to the *Suvada-Williams* goals of consumer protection, comparative negligence should not be extended to strict products liability.

CONCLUSION

The Illinois Supreme Court took an important and enlightened step in abolishing the contributory negligence defense. The doctrine was illogical, inequitable and unresponsive to the needs of today's society. The *Alvis v. Ribar* decision demonstrated the positive ability of the courts to overcome a mutual state of legislative and judicial inaction and to bring about vital reform. In asserting its power to implement this change, the court acted in accord with its own precedent in other areas of the law and with the recent precedent of other states.

The many corollary issues that must be addressed as a result of the *Alvis* opinion can be resolved through legislative or judicial action. By ruling on issues as they are raised in subsequent cases, the Illinois Supreme Court will be able to create a program of comparative negligence far more detailed and explicit than that which most states have enacted statutorily. As an alternative to this evolutionary process, the Illinois General Assembly could engage in detailed study of each of the unsettled issues and enact a comprehensive comparative negligence code. Application of comparative fault principles to the strict products liability cause of action illustrates the complexity of the issues created by *Alvis*. Comparative negligence should not be extended to the strict

178. *See Comparative Contribution, supra* note 169, at 191.
179. Twerski, *supra* note 173, at 346.

liability cause of action unless the courts first address important policy issues.

Despite the many remaining uncertainties in Illinois tort law, the court adopted a most practical and equitable system and achieved its objective of bringing about a just and socially desirable distribution of loss that is in keeping with the needs of today's society.*

CAROL ISACKSON

* As this paper went to press, three bills proposing modification or abolition of *Alvis* were in committees of the Illinois legislature. House Bills 2137 and 2096, both proposing modified systems of comparative negligence, were referred to the Rules Committee on March 23, 1982. House Bill 1894, which proposed reinstating contributory negligence, was referred to the Judiciary Committee on April 12, 1982.