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Comment

Judicial Adoption of Comparative Negligence—The Supreme Court of California Takes A Historic Stand

VICTOR E. SCHWARTZ*

Many arguments, some quite sophisticated, have been advanced for and against the proposition that comparative negligence can and should be implemented by the judiciary in the absence of legislative action. The high degree of academic interest that the issue has provoked is probably based upon the fact that neither courts, practicing lawyers, nor law professors have "any agreed upon theory on the limits of the powers of common law courts."[1]

Arguments against the adoption of comparative negligence by the judiciary, except for a rather lonely Florida decision,[2] have met with almost uniform success in the courts.[3] Thus, the decision of the Supreme Court of California in *Li v. Yellow Cab Company of California*,[4] adopting a pure comparative negligence system in place of the contributory negligence defense, is a decision of major significance.

The dramatic impact of the *Li* case is suggested by the fact that contributory negligence was the law of California from its very beginning as a state.[5] It is probable that the *Li* decision will have a substantial impact on the law of other states as well as on the law of California.

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This article is derived, in part, from Chapter 21 of Professor Schwartz's treatise on COMPARATIVE NEGLIGENCE, published by The Allen Smith Company in 1974. Professor Schwartz's treatise was referred to on sixteen separate occasions by the Supreme Court of California in the case of *Li v. Yellow Cab Company of California*, the principal decision discussed in this article.

[1] Symposium, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889, 897 (1968) [hereinafter cited as *Comments on Maki v. Frelk*]. *See also* Schwartz, *Comparative Negligence: Oiling the System*, 11 TRIAL 58 (1975).

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

[3] *See, e.g.*, McGraw v. Corrin, —— Del. ——, 303 A.2d 641 (1973); Loui v. Oakley, 50 Hawaii 260, 438 P.2d 393 (1968); Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968); Haeg v. Sprague, Warner & Co., 202 Minn. 425, 281 N.W. 261 (1938); Krise v. Gillund, 184 N.W.2d 405 (N. Dak. 1971); Syroid v. Albuquerque Gravel Prod. Co., 86 N.M. 235, 522 P.2d 570 (1974); Peterson v. Culp, 255 Ore. 269, 465 P.2d 876 (1970).

[4] 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (*en banc*).

[5] *See* Innis v. The Steamer Senator, 1 Cal. 459, 460–61 (1851).

The extensive and well reasoned opinion of Justice Sullivan may be expected to provide a basis for similar decisions. This article will discuss the arguments for and against judicial adoption of comparative negligence, and then focus on the nature and scope of the *Li* decision.

The Case Against Judicial Adoption of Comparative Negligence

The most telling argument against judicial implementation of comparative negligence is that the matter is better left to the legislature. Although contributory negligence had a common law origin, it is argued, it has been with us so long and is so deeply engrained in the law that it has become a fundamental part of our jurisprudence and only the legislature can tamper with it. This argument is bolstered by the contention that legislative inaction, especially outright failure to pass comparative negligence statutes, evinces a legislative intention to retain contributory negligence.

This long history lends particular relevance to the principle of stare decisis. Liability insurance companies may have taken into account the fact that, in theory, their negligent insureds will not be liable when they injure persons whose own negligence contributed to the happening of an accident.

In recent years the judiciary in many states has weeded a number of anachronistic doctrines out of the law of torts in spite of marginal reliance on these rules by liability insurance companies. Nevertheless, it has been suggested by courts that the change from contributory to comparative negligence involves different considerations because it is so pervasive—it potentially affects *every* negligence case.[6]

A most important distinction between judicial adoption of comparative negligence and a number of the other major judge-made changes of the past two decades is the very difficult problem of formulating an alternative rule.[7] What form of comparative negligence is to be chosen? Is it to be pure comparative negligence[8] as in Florida, Mississippi, New York, Rhode Island, and Washington? Or is it to be modified comparative negligence,[9] the approach taken by the overwhelming number of states with legislation on the subject? If it is to be modified comparative negligence, which type of modified comparative negligence should be

[6] *See* Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

[7] *See* Krise v. Gillund, 184 N.W.2d 405 (N. Dak. 1971) (explicitly relying on difficulty in selecting an alternative system in declining to make the change).

[8] *See* text accompanying note 45 *infra*.

[9] *See* text accompanying note 46 *infra*.

selected?[10] Some jurisdictions bar the plaintiff from any recovery if he is equally as negligent as defendant. Others require abrogation of plaintiff's claim only when he is *more* negligent than defendant.

The choice before the courts involves more than selecting case law from another jurisdiction. Comparative negligence is usually statutory.[11] Moreover, courts must do more than reason from a statute.[12] They must adopt an entire statutory system, an act that goes beyond the traditional bounds of case-law decision.[13]

In addition, the decisions which courts must face involve more than making a selection from the numerous forms of comparative negligence. Once a system is selected, the court will be faced with many difficult questions in future decisions. For example, should the change be retroactive? Should the doctrines of last clear chance or assumption of risk be retained? How are cases involving multiple parties to be handled? To date, the overwhelming majority of courts have avoided this abyss and have left the task of reform to the legislature.

THE CASE FOR JUDICIAL ADOPTION OF COMPARATIVE NEGLIGENCE

Arguments in favor of judicial implementation of a comparative negligence system begin with the fundamental fact that the contributory negligence defense was created by the courts. It is argued, therefore, that it can be judicially exercised or modified. Statements similar to that of the Minnesota Supreme Court that "the rule of contributory negligence, through no fault of ours, remains in our law"[14] are simply in contravention of documented legal history.

The contributory negligence defense began with *Butterfield v. Forrester*[15] and was implemented in this country by judicial decision.[16] Although the common-law doctrine of stare decisis places a high value

[10] Another form of modified comparative negligence simply divides damages between plaintiff and defendant. The rule sacrifices justice in individual cases in order to obtain procedural convenience. It was applied for many years in admiralty cases involving collisions, but was recently relegated to the area of "historic interest" when it was rejected by the Supreme Court of the United States in favor of pure comparative negligence. See United States v. Reliable Transfer Co., 95 S. Ct. 1708 (1975).

[11] Once a legislature has spoken, courts are reluctant to change to another form. *See* Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970).

[12] *See* Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936).

[13] *See Comments on Maki v. Frelk* at 899.

[14] Haeg v. Sprague, Warner & Co., 202 Minn. 425, 429, 281 N.W. 261, 263 (1938).

[15] 103 Eng. Rep. 926 (1809).

[16] *See* Juenger, *Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae*, 18 WAYNE L. REV. 3, 9 (1972), *citing* Smith v. Smith, 19 Mass. 662, 2 Pick. 621 (1825).

on judicial precedent, courts traditionally have adopted rational alternatives when the reasons for a judge-made rule fail.

It is almost universally agreed,[17] even by courts that have declined to implement comparative negligence,[18] that the contributory negligence defense is outmoded. There is no longer a need to give special protection to infant industries from suits based on their negligent acts. In light of the fact that most defendants are insured, the contributory negligence defense produces a very poor allocation of costs in negligence cases. In fact, the unjust results worked by the contributory negligence defense have provided one of the most significant arguments on behalf of those in favor of a no-fault system for apportioning the costs of automobile[19] and other accidents.[20]

Nevertheless, a majority of the members of the Supreme Court of Illinois have suggested that stare decisis should cause the court to follow precedent "unless it can be shown that serious detriment is thereby likely to arise prejudicial to public interest."[21] The members of the court were not convinced that the contributory negligence defense is in fact seriously prejudicial to public interest.

By way of contrast, Justice Black, speaking for the Supreme Court of the United States in *Pope and Talbot, Inc. v. Hawn*,[22] stated 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.[23]

Judge Hallows of Wisconsin has said that "perhaps the doctrine of contributory negligence has done more to deny justice to the injured person than any other one legal concept."[24] This is why advocates of no-fault systems place such reliance on the doctrine in arguing for abolition of the entire fault system.

The injustice of the contributory negligence defense can manifest itself in spite of modifications (such as the last clear chance doctrine)

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[17] *See* F. HARPER & F. JAMES, THE LAW OF TORTS 1193–1209 (1956); W. SCHWARTZ & L. WOLFSTONE, COMPARATIVE NEGLIGENCE (A.T.L. Monograph Series, 1970); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953). Even the defense bar does not oppose comparative negligence. *See* RESPONSIBLE REFORM, AN UPDATE (D.R.I. Monograph No. 3, 1972) (expressing a preference for the Wisconsin system).

[18] *See, e.g.*, Haeg v. Sprague, Warner & Co., 202 Minn. 425, 429–30, 281 N.W. 261, 263 (1938).

[19] *See* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM—A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 1 (1965).

[20] *See* J. O'CONNELL, ENDING INSULT TO INJURY 15–16 (1975).

[21] Maki v. Frelk, 40 Ill. 2d at 193, 239 N.E.2d at 447.

[22] 346 U.S. 406 (1953).

[23] *Id.* at 408–09.

[24] Hallows, *Comparative Negligence*, 19 FED. INS. COUNSEL Q. 71, 72 (1969).

that have been utilized to soften its harshness. Thus, in cases where plaintiff sought to have the court change from contributory to comparative negligence, there apparently was no common law "safety device" by which to allow a seriously injured, negligent plaintiff any recovery.[25]

Some opponents of comparative negligence have suggested that the doctrine is an unnecessary frill because juries almost always modify the contributory negligence defense and apply a de facto comparative negligence system.[26] This assertion is an overstatement. Serious studies of the American jury indicate that it frequently respects the judge's charge and applies the contributory negligence defense to preclude recovery.[27] More importantly, we must ask whether we want a system of justice that depends on a jury ignoring the law.

Despite these considerations, many judges apparently still believe that they must await legislative action. Legal analysis indicates that this hesitation is not well founded. Until the legislature does enact a statute endorsing contributory negligence, the area is open for judicial decision.

As Professor Robert Keeton has suggested, state courts of last resort have not failed in the past two decades to rid tort law of outmoded and unjust common-law rules.[28] A number of such changes are less complex and pervasive than the shift from contributory to comparative negligence. Nevertheless, several recent decisions do represent fundamental changes. For example, the Supreme Court of California in *Rowland v. Christian*[29] rejected the common-law categories of trespasser, licensee, and invitee as the ultimate vehicles for formulating the duty of a landholder to persons who come on his property. This decision, as would be the case in a change from contributory to comparative negligence, creates a problem of fashioning an alternative rule. Nevertheless, it has gained growing acceptance by courts.[30]

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[25] *See* Loui v. Oakley, 50 Hawaii 260, 438 P.2d 393 (1968); Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968); Haeg v. Sprague, Warner & Co., 202 Minn. 425, 281 N.W. 261 (1938); Krise v. Gillund, 184 N.W.2d 405 (N. Dak. 1971).

[26] *See* Alibrandi v. Helmsley, 63 Misc. 2d 997, 998, 314 N.Y.S.2d 95, 97 (N.Y. City Civ. Ct. 1970): "As every trial lawyer knows, the jury would likely have ignored its instructions on contributory negligence and applied a standard of comparative negligence" (judge, acting as the trier of fact, felt compelled to apply the contributory negligence defense); J. ULMAN, A JUDGE TAKES THE STAND 30–34 (1933).

[27] *See Comments on Maki v. Frelk* at 902–03. *See also* Alibrandi v. Helmsley, 63 Misc. 2d 997, 314 N.Y.S.2d 95 (N.Y. City Civ. Ct. 1970), where a judge acting as trier of fact felt compelled to apply the defense.

[28] *See* Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962) (collecting more than 90 overruling decisions on more than 30 separate rules of tort law).

[29] 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

[30] *See, e.g.*, Pickard v. City and County of Honolulu, 51 Hawaii 134, 452 P.2d 445

Similarly, many courts have abolished intrafamily immunities,[31] even though this creates special problems in defining the tort obligations of family members toward one another.[32] In fact, almost every rejection of a deep-seated common-law rule forces a court to fashion an alternative approach.[33]

It is true that a court adopting comparative negligence may be using a statute, rather than a case, as the underlying basis for its new rule. However, there is nothing inherently wrong with this approach, and it has been used without creating a serious crisis in the area of contribution among joint tortfeasors.[34]

A persuasive precedent suggesting that statutes can serve as a source of law is the decision of the United States Supreme Court in *Moragne v. States Marine Lines, Inc.*[35] There, the late Mr. Justice Harlan, a man who was particularly sensitive to judicial encroachment on the legislature's domain, held for a unanimous Court that the judiciary could create an action for wrongful death under federal maritime law. In order to do this, the federal courts had to look to legislation to fashion a remedy. This did not trouble Justice Harlan. He said:

> It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles—many of them deriving from earlier legislative exertions.[36]

The variety of wrongful death alternatives is certainly as great as those in comparative negligence.[37] Nevertheless, the Court was not troubled by problems such as who should be the beneficiaries, or how damages should be formulated, or how a statute of limitations should be founded. The Court said it would not be "without persuasive [statutory] analogy for guidance."[38] The same approach could be taken by a court in dealing with the topic of comparative negligence.

(1969), and cases cited in Annot., 32 A.L.R.3d 508 (1970). *But see, e.g.*, Werth & Ashley Realty Co., 199 N.W.2d 899 (N. Dak. 1972).

[31] *See* RESTATEMENT (SECOND) OF TORTS § 895 G & H (Tent. Draft No. 18, 1972).

[32] *See* Cole v. Sears Roebuck & Co., 47 Wis. 2d 629, 177 N.W.2d 866 (1970); Lemmen v. Servais, 39 Wis. 2d 75, 158 N.W.2d 341 (1968).

[33] This same problem occurred when the doctrine of last clear chance was used to soften the blow of the contributory negligence defense. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 66 (4th ed. 1971).

[34] *See, e.g.*, Moyses v. Sparton Asphalt Paving Co., 383 Mich. 314, 334, 174 N.W.2d 797, 806 (1970).

[35] 398 U.S. 375 (1970).

[36] *Id.* at 392.

[37] *See generally* S. SPEISER, RECOVERY FOR WRONGFUL DEATH (1966).

[38] 398 U.S. at 408.

Besides the California and Florida decisions introducing comparative negligence, there is a strong precedent for judicial implementation of such a system. For over a hundred years the courts of Georgia have fashioned their own operational comparative negligence system.[39] Although those courts did originally rely on two statutes (one dealing exclusively with railroads) to fashion their decisions,[40] the late Dean Prosser properly called the original cases a "remarkable tour de force of construction."[41]

Finally, it should be noted that the federal courts have, through case-law decisions, fashioned a comparative negligence system in the area of admiralty law. These courts have been able to implement the rules by judicial decision, and are unlikely ever to retreat from the "fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires."[42]

It is true that once a comparative negligence system is adopted many new and challenging legal problems may arise. The appearance of these problems does not suggest, however, that implementation of comparative negligence must await legislative action. In the overwhelming majority of cases in which the legislature has implemented comparative negligence, it has not chosen to resolve these problems.[43] The courts still must resolve these matters on the basis of common law decision. Since this is the case, the courts should not hesitate to adopt a comparative negligence system that they believe to be just.

LI V. YELLOW CAB COMPANY

In *Li v. Yellow Cab Company*,[44] the Supreme Court of California was persuaded by the arguments that favor a court's adoption of comparative negligence. In fact, the court had to overcome an obstacle which would not confront courts in other states[45]—Section 1714 of the Civil Code of California had been construed over many years as providing

[39] *See* Seagraves v. Abco Mfg. Co., 118 Ga. App. 414, 164 S.E.2d 242 (1968); Flanders v. Meath, 27 Ga. 358, 361–62 (1859); Macon & W.R. R. v. Winn, 26 Ga. 250, 254 (1858); Hilkey, *Comparative Negligence in Georgia*, 8 GA. B.J. 51 (1945).

[40] *See* cases cited in note 39 *supra*. Currently, the statutes are GA. CODE ANN. §§ 94–703 & 105–603 (Spec. Supp. 1971).

[41] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 67 (4th ed. 1971).

[42] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1958). *See also* note 10 *supra*.

[43] *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE, Appendix B, 369–86 (1974) [hereinafter cited as COMPARATIVE NEGLIGENCE].

[44] 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[45] See 13 Cal. 3d at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864. Louisiana is the only other state that might encounter such a problem, but in that state the Civil Code could be utilized to support comparative negligence. *See* Malone, *Comparative Negligence, Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945).

for the contributory negligence defense.[46] This fact gave a degree of legislative imprimatur to the old common law rule. The court overcame this obstacle through an extensive study of the history of Civil Code Section 1714 and concluded that the legislature had *not* intended to freeze the rule of contributory negligence into the law. Certainly the black letter of the provision does not suggest that contributory negligence must be retained. In fact, the provision could be read to sponsor comparative negligence![47]

Once the court adopted the thesis that it had the power to convert to comparative negligence, it then resolved a number of the practical problems that a judicial adoption of this system might bring about. The net result was to provide more "answers" to comparative negligence problems than many legislatures have in the past.[48] The court made careful use of resource material on comparative negligence in designing an introductory plan of the doctrine for California.

The court did not attempt to resolve every potential comparative negligence problem; rather, it dealt with a few of the most important ones, leaving the rest to the common law decision process. By doing so, the court struck a practical balance between the need for guidance and the traditional common law restraint against deciding issues in the abstract.

Selection of a "Pure" Comparative Negligence System

The *Li* court, faced with the selection of a form of comparative negligence, chose a "pure" system. Under a "pure" comparative negligence system, a contributorily negligent plaintiff's damages are reduced by the trier of fact in proportion to the amount of fault attributable to him.[49] The court indicated that it preferred this system over the so-called "modified" forms because the latter simply shift "the lottery aspect of the contributory negligence rule to a different ground."[50] In other words, the court accepted the underlying basis of comparative negligence—that damages should be apportioned in accordance with fault. If one

[46] Section 1714 provides as follows:

> Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, *except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.* The extent of liability in such cases is defined by the Title on Compensatory Relief.

CAL. CIV. CODE § 1714 (West 1973) (emphasis added).

[47] *See* Bodwell, *It's Been Comparative Negligence for Seventy-Nine Years*, 27 L.A. BAR BULL. 247, 273 (1952). This argument was also made, but was not accepted by the court.

[48] *See* note 43 *supra.*

[49] *See* COMPARATIVE NEGLIGENCE § 3.2.

[50] 13 Cal. 3d at 827, 532 P.2d at 1242, 119 Cal. Rptr. at 874.

accepts that premise, there is no reason why plaintiff's claim should be barred the moment he is "50 percent" or more at fault.[51]

Administration of the System

The court also provided some guidance with respect to the administration of a comparative negligence system. In this regard, the court suggested that special verdicts or special interrogatories could be employed by the trial court, and that this procedure would help to assure judges that the jury was applying the system correctly. An attorney for either party might draft special interrogatories that would ascertain the percentage of fault attributable to each party and how much damage each party suffered.[52]

Interaction with Other Tort Doctrines

The *Li* court gave firm guidance with respect to some of the most important problems of interaction between comparative negligence and other tort doctrines. In this connection, the court specifically indicated that the need for last clear chance no longer existed in California, adopting the view that the retention of last clear chance would only result "in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault."[53] In this respect, the adoption of pure comparative negligence will assist defendant as he will no longer have to pay total damages when he has the last clear chance, but may have them reduced by the amount plaintiff was at fault.

The court also dealt with another legal problem that has perplexed many comparative negligence jurisdictions—what is the relationship between the defense of assumption of risk and comparative negligence? Respecting this, the court concluded:

> [T]he adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is *no more than a variant of contributory negligence.*[54]

Thus, where plaintiff has *unreasonably* assumed a risk (*e.g.*, voluntarily entered an automobile with a driver known to be intoxicated), his conduct will not totally bar his claim; rather, his fault will be taken

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[51] *See* COMPARATIVE NEGLIGENCE § 21.3.

[52] *See id.* at § 17.4.

[53] 13 Cal. 3d at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872, *citing* COMPARATIVE NEGLIGENCE § 7.2; Prosser, *Comparative Negligence,* 41 CAL. L. REV. 1, 27 (1953).

[54] 13 Cal. 3d at 825, 532 P.2d at 1241, 119 Cal. Rptr. at 873 (emphasis added).

into account and utilized to reduce the amount of his recovery. In that situation, "the form of assumption of risk involved is no more than a variant of contributory negligence." On the other hand, when plaintiff has *reasonably* assumed a risk (*e.g.*, sat in the area of a baseball stadium that has no protective screening), his conduct will not be considered as "fault" under a comparative negligence system. Instead, the court will decide whether the defendant breached a "duty" to plaintiff. In that connection, a court will determine whether defendant discharged his duty by providing some protective screening and warning of the risks involved.[55]

Retroactivity

In light of the massive changes that might be wrought by the opinion, the court clearly and sharply confined its retroactive effect. The decision was applied to plaintiff Li "so as to provide incentive in future cases for parties who may have occasion to raise 'issues involving renovation of unsound or outmoded legal doctrines.' "[56] The new rule will also govern retrial of any cases currently on appeal if they are reversed for reasons unconnected with the contributory comparative negligence defense issue. In general, the new rule will apply in trials that begin on or after the date that the court's decision becomes final.

Comparative Negligence Issues in the Future

There were a number of other legal issues relating to comparative negligence which the court mentioned but did not resolve in its opinion. These will be left for case by case development. The court did cite sources with regard to these problems that may be of assistance to attorneys in determining what the court will do in the future. These matters include how comparative negligence will affect wilful and wanton defendants,[57] punitive damages,[58] and multiple parties.[59]

There are other important comparative negligence issues that were neither mentioned nor resolved by the court. A few examples include the interaction of comparative negligence with strict liability,[60] actions

[55] *See* COMPARATIVE NEGLIGENCE §§ 9.3–.5.

[56] 13 Cal. 3d at 830, 532 P.2d at 1244, 119 Cal. Rptr. at 876.

[57] 13 Cal. 3d at 825–26, 532 P.2d at 1241, 119 Cal. Rptr. at 873, *citing* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65 (4th ed. 1971) (suggesting no apportionment when defendant is reckless) and COMPARATIVE NEGLIGENCE § 5.4, suggesting that damages be apportioned in all cases involving misconduct which falls short of being intentional.

[58] 13 Cal. 3d at 826, 532 P.2d at 1241, 119 Cal. Rptr. at 873.

[59] 13 Cal. 3d at 823, 532 P.2d at 1240, 119 Cal. Rptr. at 782, *citing* Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 33–37 (1953); COMPARATIVE NEGLIGENCE §§ 16.1–.9.

[60] COMPARATIVE NEGLIGENCE §§ 12.1–.7.

based on nuisance,[61] and violations of criminal safety statutes.[62] Although the absence of guidance on these issues will create uncertainty in the law, a point to remember is that most legislatures have not dealt with any of these problems, and it took this author over three years of research to deal with all of them.

CONCLUSION

It seems unlikely that any modern legislature would overturn a decision of a court that changed from contributory to comparative negligence. There has been no sign of this in Florida and it seems extraordinarily unlikely in California. Moreover, no state with a statutory comparative negligence system has ever reverted to the contributory negligence defense.

In sum, the *Li* decision demonstrates that the supreme court of a state can provide an important assist toward making the litigation system of adjusting the costs of accidents work. The courts need not rely on the legislature to rid the law of an archaic common law doctrine. Trial lawyers should be encouraged to bring the *Li* ray of California sunshine to the attention of courts in other states.[63]

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[61] *Id.* at §§ 11.1–.4.

[62] *Id.* at §§ 6.1–.3.

[63] This has already occurred in Alaska. See the recent decision in Kaatz v. Alaska, 540 P.2d 1037 (Alaska 1975).