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# Virginia Should Abolish the Archaic Tort Defense of Contributory Negligence and Adopt a Comparative Negligence Defense in its Place

Peter N. Swisher

*University of Richmond*, [pswisher@richmond.edu](mailto:pswisher@richmond.edu)

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# VIRGINIA SHOULD ABOLISH THE ARCHAIC TORT DEFENSE OF CONTRIBUTORY NEGLIGENCE AND ADOPT A COMPARATIVE NEGLIGENCE DEFENSE IN ITS PLACE

*Peter Nash Swisher* \*

## I. INTRODUCTION

Contributory negligence is conduct on the part of the plaintiff, contributing as a proximate cause to the tortious harm the plaintiff has suffered, which falls below the standard of care to which the plaintiff is required to conform for his or her own protection.<sup>1</sup> When contributory negligence is found, it constitutes a *complete defense* to the plaintiff's negligence cause of action, even though the defendant's negligence may have greatly exceeded the plaintiff's negligence.<sup>2</sup>

This rather severe legal doctrine that the plaintiff's contributory negligence would constitute a *complete defense* to the plaintiff's negligence cause of action—even though the defendant's conduct may be far more negligent than the plaintiff's conduct—was first enunciated in the 1809 English case of *Butterfield v. Forrester*.<sup>3</sup> In *Butterfield*, Lord Ellenborough, a controversial and tempestuous Tory judge in his own day, cited no supporting authority, nor gave

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\* Professor of Law, University of Richmond School of Law; J.D., 1973, University of California, Hastings College of Law; M.A., 1967, Stanford University; B.A., 1966, Amherst College.

1. *E.g.*, *Rose v. Jaques*, 268 Va. 137, 149, 597 S.E.2d 64, 71 (2004); *Lerwill v. Regent Van & Storage, Inc.*, 217 Va. 490, 493–94, 496, 229 S.E.2d 880, 882–84 (1976); *Charlottesville Music Ctr., Inc. v. McCray*, 215 Va. 31, 37, 205 S.E.2d 674, 679 (1974); RESTATEMENT (SECOND) OF TORTS § 463, at 506–07 (1965).

2. *See, e.g.*, *Burroughs v. Keffer*, 272 Va. 162, 167–68, 630 S.E.2d 297, 300–01 (2006); *Litchford v. Hancock*, 232 Va. 496, 499, 352 S.E.2d 335, 337 (1987); *Fein v. Wade*, 191 Va. 203, 209–10, 61 S.E.2d 29, 31–32 (1950).

3. (1809) 103 Eng. Rep. 926 (K.B.) 926–27; 11 East 60, 60–61.

any satisfactory explanation for this draconic legal doctrine.<sup>4</sup> As Professor Dan Dobbs has observed:

[This] rule was extreme. The plaintiff who was guilty of only slight or trivial negligence was barred completely, even if the defendant was guilty of quite serious negligence, as contemporary courts have had occasion to observe in criticizing the rule. The traditional contributory negligence rule was extreme not merely in results but in principle. No satisfactory reasoning has ever explained the rule. It departed seriously from ideals of accountability and deterrence [in tort law] because it completely relieved the defendant from liability even if he was by far the most negligent actor. A regime of accountability would, in contrast, hold the defendant liable for a proportionate share of the harm [under the doctrine of comparative negligence].<sup>5</sup>

Accordingly, forty-six states to date have abolished this archaic doctrine of contributory negligence, by judicial or legislative action, and in its place have adopted the doctrine of comparative negligence.<sup>6</sup> In contrast to contributory negligence, comparative negligence acts not as a *complete* bar to the plaintiff's recovery in tort, but only as a *partial* bar, resulting in a percentage reduction from otherwise recoverable damages awarded to the plaintiff.<sup>7</sup> Virginia and four other jurisdictions, however, still recognize the traditional tort defense of contributory negligence.<sup>8</sup>

The purpose of this essay is to argue that the time has now come for Virginia, by judicial or legislative action, to abolish its archaic common law tort defense of contributory negligence and replace it with a comparative negligence defense. Adopting a comparative negligence defense would more equitably and more fairly recognize and apportion damages according to the bedrock

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4. *See id.*

5. DAN B. DOBBS, *THE LAW OF TORTS*, § 199, at 494–95 (2000).

6. VICTOR E. SCHWARTZ WITH EVELYN F. ROWE, *COMPARATIVE NEGLIGENCE* § 1.01, at 3–4 (5th ed. 2010) (“By 1994, comparative negligence had replaced contributory negligence as a complete defense in . . . forty-six states . . .”); HENRY WOODS & BETH DEERE, *COMPARATIVE FAULT* § 1:11, at 19–25 (3d ed. 1996).

7. SCHWARTZ, *supra* note 6, § 2.01, at 31; WOODS & DEERE, *supra* note 6, § 22:2, at 502, 504.

8. Alabama, Maryland, North Carolina, Virginia, and the District of Columbia still continue to recognize the traditional tort defense of contributory negligence. VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS* 621 (12th ed. 2010); *see also* *Burroughs v. Keffer*, 272 Va. 162, 167, 630 S.E.2d 297, 300 (2006); *Faith v. Keefer*, 736 A.2d 422, 443 (Md. Ct. Spec. App. 1999); *Williams v. Delta Int'l Mach. Corp.*, 619 So. 2d 1330, 1333 (Ala. 1993).

underlying tort legal principles of accountability, deterrence, and distribution of loss.<sup>9</sup>

## II. HISTORY AND RATIONALE FOR THE LEGAL DOCTRINE OF CONTRIBUTORY NEGLIGENCE

The doctrine of contributory negligence had its origin in the English case of *Butterfield v. Forrester*.<sup>10</sup> In that case, the plaintiff was injured by a fall from his horse when, riding at a fast pace, he ran into an obstruction in the road left by the defendant.<sup>11</sup> Lord Ellenborough held that, under these particular circumstances, the plaintiff was absolutely barred from *any* recovery based on his contributory negligence, even though the defendant's negligent conduct also was a significant cause of the plaintiff's injuries.<sup>12</sup>

Contributory negligence entered American jurisprudence sixteen years later in the Massachusetts case of *Smith v. Smith*,<sup>13</sup> and in the Vermont case of *Washburn v. Tracy*.<sup>14</sup> In the space of a few decades, the doctrine of contributory negligence gained almost unanimous acceptance within the United States, "rapidly spread[ing], 'not unlike an unchecked conflagration in a wind-storm' throughout the country," thus becoming "a [well-]recognized part of American common law."<sup>15</sup> Indeed, its complete acceptance in the nineteenth century is illustrated by a Pennsylvania judge in 1854 who stated that the defense of contributory negligence was "a rule of law from time immemorial" which was "not likely to be changed in all time to come."<sup>16</sup> But like many

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9. DOBBS, *supra* note 5, § 1, at 1, § 8, at 12–13, § 9, at 13–14, § 10, at 17–18, § 11, at 19; PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 21–26 (W. Page Keeton et al. eds. 1984); *see also* RESTATEMENT (THIRD) OF TORTS § 3, at 29–31 (2000) (abolishing the doctrine of contributory negligence and replacing it with comparative negligence).

10. (1809) 103 Eng. Rep. 926 (K.B.) 927; 11 East 60, 61.

11. *Id.* at 926–27; 11 East at 60.

12. *Id.* at 927; 11 East at 61.

13. 19 Mass. (2 Pick.) 621 (1824) ("[T]his action cannot be maintained, unless the plaintiff can show that he used ordinary care; for without that, it is by no means certain that he himself was not the cause of his own injury.").

14. 2D Chip. 128 (Vt. 1824) ("[I]f it appear[s] that the injury complained of would not have happened, but for a want of ordinary care and diligence in the plaintiff, the plaintiff is not entitled to recover.").

15. STUART M. SPEISER ET AL., 3 THE AMERICAN LAW OF TORTS § 12:2, at 249–50 (2008) (citations omitted).

16. R.R. Co. v. Aspell, 23 Pa. 147, 149 (Pa. 1854).

other nineteenth century economic philosophies and common law doctrines, the doctrine of contributory negligence was *not* destined to last permanently in the vast majority of American states.<sup>17</sup>

What were the reasons and underlying justifications for adopting the defense of contributory negligence in nineteenth century America? A number of reasons for the adoption of the contributory negligence doctrine have been given over the years. "All of [these purported reasons] have been the subject of [severe] criticism," and "[n]one of them appear convincing."<sup>18</sup>

The wide acceptance of this "all or nothing" defense of contributory negligence is perhaps best explained by the fact that this legal doctrine emerged just as the Industrial Revolution was getting underway. It may well have been that as a matter of legal and social policy, the doctrine of contributory negligence was welcomed to protect infant American industries from overly sympathetic juries involved in workplace-related accidents.<sup>19</sup> As Judge D. Arthur Kelsey observes:

In theory, but hardly in practice, employees in [nineteenth] century factories were protected by their employer's duty "to provide employees with a reasonably safe place in which to work." Whatever succor this duty provided to employees, it soon surrendered to the "unholy trinity" of employer defenses: contributory negligence, assumption of risk, and the fellow servant rule. They became the "wicked sisters" of the common law because, working together, they effectively nullified any realistic possibility of holding an employer liable for the great majority of on-the-job injuries.<sup>20</sup>

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17. SCHWARTZ, *supra* note 6, § 1.02, at 6.

18. SPEISER ET AL., *supra* note 15, § 12:4, at 254.

[T]he courts often employed the rationale that the plaintiff's negligence was the proximate cause of the accident or was an intervening, insulating cause between the defendant's negligence and the injury. . . . [S]ome of the early adopting courts took the position that, similarly to the clean hands doctrine in equity, the contributory negligence doctrine was intended to punish the plaintiff for his own misconduct. Still another reason given for the defense of contributory negligence is that it is intended to discourage accidents by denying recovery to those who fail to use proper care for their own safety.

*Id.* § 12:4, at 254–55 (citations omitted).

19. William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 468–69 (1953); see also Gardner v. Geraghty, 423 N.E.2d 1321 (Ill. App. Ct. 1981); Sun Oil Co. v. Seamon, 84 N.W.2d 840, 843 (Mich. 1957).

20. D. Arthur Kelsey, *Social Compact as Law: The Workers' Compensation Act and the Wicked Sisters of the Common Law*, VBA NEWS J., Oct./Nov. 2005, at 13 (quoting Fields v.

However, since the adoption of workers' compensation statutes in all fifty states, including Virginia, in the early twentieth century, this legal and social rationale for contributory negligence as applied to workplace-related accidents ceased to have any viable justification. In 1918, the Virginia General Assembly enacted Virginia's first workers' compensation legislation, largely modeled on Indiana's workers' compensation statutes.<sup>21</sup>

Basically, under applicable Virginia workers' compensation statutes, in exchange for giving up the right to file a lawsuit against an employer for a job-related injury, the claimant employee has the advantage of not having to prove any negligence against the employer to recover workers' compensation benefits.<sup>22</sup> "Furthermore, the employer generally does *not* have available to it the defenses of contributory negligence [or] assumption of . . . risk by the claimant employee, except for a few" statutory areas involving willful negligence or intentional misconduct.<sup>23</sup>

Another nineteenth century justification of the application of a contributory negligence defense involved personal injury suits brought by railroad employees against the railroads. Various courts feared that railroads would be "perceived by many jurors to be impersonal and potentially harmful entities with deep pockets."<sup>24</sup> This nineteenth century social and legal concern has been subsequently addressed by remedial statutory law. Today, a comparative negligence defense, and *not* contributory negligence, applies in Virginia under the Federal Employers' Liability Act,<sup>25</sup>

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Virginia Ry. Co., 114 Va. 558, 561, 77 S.E. 501, 502 (1913)); see also PROSSER AND KEETON ON TORTS, *supra* note 9, § 80, at 568–72; Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 52–53 (1967).

21. See, e.g., *Richmond Cedar Works v. Harper*, 129 Va. 481, 488, 106 S.E. 516, 519 (1921) ("The Virginia [workers' compensation] act . . . has for its humane purpose the providing for all workmen coming within its provisions who are injured during the course of their employment of compensation therefor which is *certain in amount without deduction.*") (emphasis added).

22. VA. CODE ANN. § 65.2-307(A) (Repl. Vol. 2007); PETER N. SWISHER, ROBERT E. DRAIM & DAVID HUDGINS, VIRGINIA TORT AND PERSONAL INJURY LAW § 18.1, at 488 (2010).

23. SWISHER ET AL., *supra* note 22, § 18.1, at 488–89 (emphasis added); accord *Fauver v. Bell*, 192 Va. 518, 522, 65 S.E.2d 575, 577 (1951); *Feitig v. Chalkley*, 185 Va. 96, 98, 38 S.E.2d 73, 73 (1946); *Farmers' Mfg. Co. v. Warfel*, 144 Va. 98, 103–04, 131 S.E. 240, 241–42 (1926).

24. WOODS & DEERE, *supra* note 6, § 1:4, at 6; accord *Wex S. Malone, The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 155–57 (1946).

25. 45 U.S.C. § 51–60 (2006).

which governs suits brought by railroad employees against their employers.<sup>26</sup>

Therefore, lacking any modern justification or rationale, in law or social policy, the archaic nineteenth century defense of contributory negligence should now be abolished in Virginia, either by legislative or judicial action, like it has been abolished in forty-six other states, in favor of a modern comparative negligence defense in tort.<sup>27</sup>

### III. THE EMERGENCE AND ADOPTION OF COMPARATIVE NEGLIGENCE IN THE VAST MAJORITY OF AMERICAN STATES TODAY

Comparative negligence is a relatively recent legal concept, having been first enunciated by Professors A. Chambers Mole and Lyman Wilson in a scholarly 1932 law review article.<sup>28</sup> By the time Professor Ernest Turk wrote his 1950 law review article entitled *Comparative Negligence on the March*,<sup>29</sup> and Professor William Prosser wrote his 1953 law review article on *Comparative*

26. *E.g.*, *Stover v. Norfolk & W. Ry. Co.*, 249 Va. 192, 199, 455 S.E.2d 238, 242 (1995); *Norfolk & W. Ry. Co. v. Hodges*, 248 Va. 254, 260–62, 448 S.E.2d 592, 596 (1994); *Chesapeake & Ohio Ry. Co. v. Richmond*, 217 Va. 258, 261, 227 S.E.2d 707, 710 (1976); *Seaboard Coast Line R.R. Co. v. Ward*, 214 Va. 543, 545, 202 S.E.2d 877, 879 (1974). *But see Chandler v. Nat'l R.R. Passenger Corp.*, 875 F. Supp. 1172, 1179–81 (E.D. Va. 1995) (rejecting application of the Virginia railroad comparative negligence law in a truck/train collision). Although this is a federal statute, legal actions may be brought in a Virginia state court. *See generally* SWISHER ET AL., *supra* note 22, § 3.50, at 139–40.

27. There still appears to be a misguided, and unsubstantiated, opinion in some quarters that if Virginia, as a pro-business state, retains its traditional common law defense of contributory negligence, this will—in some way—influence a number of new businesses to relocate to Virginia. The truth is that other pro-business states, such as Texas, North Carolina, and Nevada, that are listed higher than Virginia in “best states to do business” have all adopted a comparative negligence regime, without any apparent harm to their pro-business competitiveness. *See, e.g.*, Gregory J. Gilligan, *State Wins High Business Ranking*, RICH. TIMES-DISPATCH, Jan. 23, 2008 at B9.

Virginia stood out in this year’s rankings [listed at number four among the best states to do business] because the state has maintained low jobless levels and has had a good pace of growth . . . “CEOs consider Virginia to be a nice place to live and hire people, evidenced by their A-rating for work-force quality and living environment.”

*Id.* Governor Bob McDonnell stated “[w]e don’t have public sector unions in Virginia, we have a right-to-work state, we have very few unions overall, and it’s one of the great selling points that I’ve got to be able to attract business [to Virginia].” Olympia Meola, *Wisconsin’s Unrest Unlikely in Virginia*, RICH. TIMES-DISPATCH, Feb. 23, 2011, at A1.

28. A. Chalmers Mole & Lyman P. Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333 (1932).

29. Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950).

*Negligence*,<sup>30</sup> only five states had recognized comparative negligence in one form or another.<sup>31</sup> By 1992, however, most states had abolished the archaic legal doctrine of contributory negligence, and had adopted the doctrine of comparative negligence in its place, by legislative or judicial action.<sup>32</sup>

Modern comparative negligence law, rather than barring *all* recovery by the plaintiff, *reduces* the plaintiff's recovery in proportion to the plaintiff's fault.<sup>33</sup> This concept largely evolved from admiralty law,<sup>34</sup> and from the Federal Employers' Liability Act, which governed lawsuits brought by railroad employees against their employers.<sup>35</sup> Today, forty-six states recognize some form of comparative negligence, either through a pure or a modified comparative negligence regime.<sup>36</sup>

Pure comparative negligence applies comparative fault to all plaintiffs in negligence cases. Under this system, no plaintiff is completely barred from recovery based on his or her contributory negligence.<sup>37</sup> Twelve states, and many federal statutes, have adopted a pure comparative negligence regime.<sup>38</sup>

Modified comparative negligence continues to utilize a traditional "complete bar" rule when the plaintiff's negligence reaches a specific break-point.<sup>39</sup> In twenty-one states, the plaintiff is completely barred from any recovery if his or her negligence *exceeds* or is *greater than* the negligence of the defendant, under a so-called "greater than 50%" approach.<sup>40</sup>

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30. Prosser, *supra* note 19.

31. SCHWARTZ, *supra* note 6, § 1.01, at 2 (Georgia, Mississippi, Nebraska, South Dakota, Wisconsin, and Arkansas adopted the comparative negligence principle in 1955, with Puerto Rico following in 1956, and Maine in 1965.).

32. *Id.* § 1.04, at 13–17, § 1.05, at 17–29.

33. *Id.* § 2.01, at 32.

34. See generally THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 12-4, at 730–31 (2d ed. 1994) (“[L]iability for such [maritime] damage is to be allocated among the parties proportionally to the comparative degree of their fault.”).

35. See *supra* notes 25–26 and accompanying text.

36. SCHWARTZ, *supra* note 6, § 1.01, at 3–4.

37. *Id.* § 2.01, at 32–33, § 3.02, at 62–64.

38. WOODS & DEERE, *supra* note 6, § 1.11, at 19–23. Alaska, California, Florida, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington follow a system of pure comparative negligence. *Id.*

39. See SCHWARTZ, *supra* note 6, § 2.01, at 33–34.

40. WOODS & DEERE, *supra* note 6, § 1.11, at 23–24. Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont,



Twelve other states apply an "alternate 'modified' system of comparative negligence," holding that the plaintiff is completely barred from any tort recovery "if his or her negligence is *equal to* or *greater than* defendant's negligence under a so-called '50% or greater approach.'"<sup>41</sup>

Adoption of this better-reasoned comparative negligence rule means that the doctrine of contributory negligence *no longer applies as a complete bar* to any tort recovery. "In effect, contributory negligence remains a partial bar to the extent that plaintiff's negligence shall proportionately reduce the amount of damages attributable to the entire injury to which a nonnegligent plaintiff would be entitled."<sup>42</sup> Accordingly, there are still elements of contributory negligence found "in *both* of the 'modified' comparative negligence systems, and as the Michigan Supreme Court observed, these 'modified' comparative negligence rules do not completely eliminate the traditional bar of contributory negligence—they only 'lower the barrier.'"<sup>43</sup>

Comparative negligence clearly is the better-reasoned solution to an archaic and obsolete nineteenth century doctrine of contributory negligence in fostering and furthering bedrock tort law principles of proportionate compensation to the plaintiff for his or her injuries, legal accountability of both parties, equitable distribution of loss, and deterrence of similar misconduct by the defendant.<sup>44</sup> As one commentator persuasively states the case for comparative negligence:

The predominant argument for abandonment of contributory negligence rests, of course, upon the undeniable inequity and injustice in casting an entire accidental loss upon a plaintiff whose negligence combined with another's negligence in causing the loss suffered, no matter how trifling plaintiff's negligence might be. Liability based on fault is the cornerstone of tort law, and a system such as contributory

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Wisconsin, and Wyoming forbid a plaintiff from recovering if his negligence is greater than half. *Id.*

41. SWISHER ET AL., *supra* note 22, § 3:49, at 138. Arizona, Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Tennessee, Utah, and West Virginia follow this approach. WOODS & DEERE, *supra* note 6, § 1.11, at 24–25.

42. SPEISER ET AL., *supra* note 15, § 13:1, at 483.

43. SWISHER ET AL., *supra* note 22, § 3:49, at 143 (quoting *Placek v. City of Sterling Heights*, 275 N.W.2d 511, 519 (Mich. 1979)).

44. See, e.g., DOBBS, *supra* note 5, § 1, at 1–2, § 10, at 17–18, § 11, at 19; PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 9, § 1, at 4, 6, § 4, at 21–26; Prosser, *supra* note 19, at 468–69; Turk, *supra* note 29, at 195–97. See generally SCHWARTZ, *supra* note 6, § 1.01, at 2–5; WOODS & DEERE, *supra* note 6, at 19–20.

ry negligence—which permits one of the contributing wrongdoers to avoid all liability—simply does not serve any principle of fault liability.<sup>45</sup>

Therefore, it is respectfully submitted that *now* is an appropriate time for the Virginia General Assembly, or the Supreme Court Virginia, or both, to re-assess the archaic and obsolete nineteenth century judge-made law of contributory negligence in light of the needs of contemporary Virginia society, and seriously “consider whether . . . adopting the doctrine of comparative negligence would be in the best interests of *all* the citizens of Virginia.”<sup>46</sup>

#### IV. SHOULD COMPARATIVE NEGLIGENCE BE ADOPTED BY THE VIRGINIA GENERAL ASSEMBLY, OR THE SUPREME COURT OF VIRGINIA?

Assuming that Virginia should abolish its obsolete nineteenth century doctrine of contributory negligence in favor of a comparative negligence regime, a final question remains: Who should make this decision to abolish contributory negligence and adopt comparative negligence—the Virginia General Assembly, or the Supreme Court of Virginia?

A number of states have adopted comparative negligence by statutory enactment through their state legislatures.<sup>47</sup> “In 1969 and 1970 [for example], Minnesota, New Hampshire, Hawaii, Vermont, and Massachusetts adopted modified comparative negligence [statutes].”<sup>48</sup> Subsequently, in 1971, Colorado, Idaho, and

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45. SPEISER ET AL., *supra* note 15, § 13:5, at 522–23. There are no serious commentators today who would argue that the archaic contributory negligence defense is superior in any way to comparative negligence in contemporary American tort law. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS, APPOINTMENT OF LIAB., *supra* note 9, § 3, at 29–30 (abolishing the doctrine of contributory negligence in favor of comparative negligence, where a plaintiff’s negligence only reduces his or her recovery, rather than totally barring plaintiff’s recovery).

46. SWISHER ET AL., *supra* note 22, § 3:49, at 139.

47. *See generally* SCHWARTZ, *supra* note 6, § 1.04, at 13–17 (discussing state legislative adoption of comparative negligence).

48. *Id.* at 16; Act of May 23, 1969, ch. 624, 1969 Minn. Laws 1069 (codified as amended MINN. STAT. ANN. § 604.01 (2005)); Act of Aug. 12, 1969, ch. 225, 1969 N.H. Laws 177 (codified as amended at N.H. REV. STAT. ANN. § 507:7-a (2006)); Act of July 14, 1969, Act 227, 2969 Haw. Sess. Laws 422 (codified as amended HAW. REV. STAT. § 663-31 (2005)); Act of Apr. 1, 1970, No. 234, 1969 Vt. Acts & Resolves 193 (Adj. Sess.) (codified as amend-

Oregon also enacted modified comparative negligence statutes, while Rhode Island enacted a pure comparative negligence statute.<sup>49</sup> In 1973, “[e]ight states—Connecticut, Nevada, New Jersey, North Dakota, Oklahoma, Texas, Utah, and Wyoming—adopted . . . modified forms of comparative negligence, and Washington [State] adopted [a] pure form [of comparative negligence].”<sup>50</sup> In the following years, “comparative negligence has been adopted by [statute] in Kansas (1974, modified form), Montana (1975, modified form), New York (1975, pure form), Pennsylvania (1976, modified form), Ohio (1980, modified form), Louisiana (1979, pure form), Iowa (1984, modified form), Indiana, (1983, modified form), Arizona (1984, pure form), and Delaware (1984, modified form).”<sup>51</sup>

In 1984, the Virginia General Assembly debated a comparative negligence bill, House Bill 107, which originally was a pure com-

ed VT. STAT. ANN. tit. 12, § 1036 (2005)); Act of Aug. 22, 1969, ch. 761, 1969 Mass. Acts 685 (codified as amended at MASS. GEN. LAWS ANN. ch. 231, § 85 (2008)).

49. Act of June 8, 1971, ch. 125, 1971 Colo. Sess. Laws 496 (codified as amended at COLO. REV. STAT. § 13-21-111 (2008)); Act of Mar. 24, 1971, ch. 186, 1971 Idaho Sess. Laws 862 (codified as amended at IDAHO CODE ANN. §§ 6-801 to 806 (2003)); Act of June 30, 1971, ch. 668, 1971 Or. Laws 1516 (codified as amended at OR. REV. STAT. § 31.600 (2006)); Act of July 16, 1971, ch. 206, 1971 R.I. Pub. Laws 786 (codified as amended at R.I. GEN. LAWS § 9-20-4 (2004)).

50. SCHWARTZ, *supra* note 6, § 1.04, at 16–17; *see also* Act of June 17, 1973, Pub. Act 73-622, 1973 Conn. Acts 1458 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. § 52-572h (2005)); Act of May 3, 1973, ch. 787, 1973 Nev. Stat. 1722 (codified as amended at NEV. REV. STAT. § 41.141 (2006)); Act of May 24, 1973, ch. 146, 1973 N.J. Laws 300 (codified as amended at N.J. STAT. ANN. §§ 2A:15-5.1 to 5-3 (2008)); North Dakota Comparative Negligence Act of Mar. 13, 1973, ch. 78, 1973 N.D. Laws 143–44 (codified as amended at N.D. CENT. CODE § 32-03.2-02 (2003)); Act of Apr. 18, 1973, ch. 30, 1973 Okla. Sess. Laws 40 (codified as amended at OKLA. STAT. ANN. tit. 23 §§ 12 to 14 (2005)); Act of Apr. 9, 1973, ch. 28, 1973 Tex. Gen. Laws 41–43 (codified as amended at TEX. REV. CIV. PRAC. & REM. CODE ANN. §§ 33.001 (2008)); Act of Mar. 8, 1973, ch. 209, 1973 Utah Laws 710 (codified as amended at UTAH CODE ANN. § 78-27-37 (2006)); Act of Feb. 8, 1973, ch. 28, 1973 Wyo. Sess. Laws 30 (codified as amended at WYO. STAT. ANN. §§ 1-1-109 to 1-1-13 (2005)); Act of Apr. 23, 1973, ch. 139, 1973 Wash. Sess. Laws 949 (codified as amended at WASH. REV. CODE ANN. § 4.22.005 (2009)).

51. SCHWARTZ, *supra* note 6, at 17 (citing Act of Mar. 15, 1974, ch. 240, 1974 Kan. Sess. Laws 828 (codified as amended at KAN. STAT. ANN. § 60-258a (2007)); Act of Mar. 17, 1975, ch. 60, 1975 Mont. Laws 126 (codified as amended at MONT. CODE ANN. § 27-1-702 (2005)); Act of May 6, 1975, ch. 69, 1975 N.Y. Law § 1411 (2005)); Act of July 9, 1976, No. 152, 1976 Pa. Laws 855 (codified as amended at PA. CONS. STAT. ANN. § 7102 (2007)); Act of Jul. 12, 1979, No. 431, 1979 La. Acts 1165, 1166 (codified as amended at LA. CIV. CODE ANN. art. 2323 (2008)); Act of Mar. 21, 1980, ch. 165, 1980 Ohio Laws 594 (codified as amended at OHIO REV. CODE ANN. § 2315.33 (2010)); Act of Jan. 1, 1985, Pub. L. No. 317-1983, 1983 Ind. Acts 1930-33 (codified as amended at IND. CODE § 34-51-2-1 (2008)); Act of May 17, 1984, ch. 1293, 1984 Iowa Acts 524–25 (codified as amended at IOWA CODE ANN. § 668.3 (2008)); Act of Apr. 24, 1984, ch. 237, 1984 Ariz. Sess. Laws 878 (codified as amended in ARIZ. REV. STAT. ANN. § 12-2505 (2008)); Act of July 17, 1984, ch. 384, 1984 Del. Laws 920 (codified as amended in DEL. CODE ANN. tit. 10, § 8132 (2006)).

parative negligence statute. This bill was defeated on the house floor by a vote of 51 to 48.<sup>52</sup> House Bill 107 was then redrafted into a modified comparative negligence statute, and subsequently passed the house by a vote of 56 to 44.<sup>53</sup> This bill was subsequently killed in a senate committee, without reaching a floor vote in the senate. It may arguably be time to reassess comparative negligence in Virginia in the General Assembly, by reintroducing former House Bill 107, and allowing a floor vote in the house *and* the senate regarding comparative negligence for the benefit of all Virginia citizens.

Alternately, the Supreme Court of Virginia *also* has the legal right and power to reassess the common law doctrine of contributory negligence.

Although a large number of states have adopted comparative negligence by statutory enactment, a number of other states also have implemented comparative negligence through judge-made law.<sup>54</sup> In each of these states that have judicially adopted comparative negligence, the courts have forthrightly addressed the propriety of judicial versus legislative adoption. In each case, the courts have found that contributory negligence is a judicially created common law doctrine which can be altered, abolished, or replaced by the court which created it, based upon the contemporary needs of modern society.<sup>55</sup>

For example, the Supreme Court of Illinois, in *Alvis v. Ribar*, held that the failure to enact six comparative negligence bills in five years indicated that the Illinois legislature was waiting for court action.<sup>56</sup> Since the Illinois legislature had failed to pass comparative negligence legislation, it was the "imperative duty of [this] court to repair that injustice and reform the law to be re-

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52. H. JOURNAL, House of Delegates of Va., Reg. Sess. 416 (1984).

53. H. JOURNAL, House of Delegates of Va., Reg. Sess. 533 (1984).

54. *Kaatz v. State*, 540 P.2d 1037, 1049 (Alaska 1975); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1229 (Cal. 1975); *Hoffman v. Jones*, 280 So.2d 431, 438 (Fla. 1973); *Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981); *Goetzman v. Wichern*, 327 N.W.2d 742, 744 (Iowa 1982); *Hilen v. Hays*, 673 S.W.2d 713, 720 (Ky. 1984); *Placek v. City of Sterling Heights*, 275 N.W.2d 511, 514 (Mich. 1979); *Gustafon v. Benda*, 661 S.W.2d 11, 16 (Mo. 1983); *Scott v. Rizzo*, 634 P.2d 1234, 1236 (N.M. 1981); *Nelson v. Concrete Supply Co.*, 399 S.E.2d 783, 784 (S.C. 1991); *McIntyre v. Balentine*, 833 S.W.2d 52, 53 (Tenn. 1992); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 885 (W.Va. 1979). See generally SCHWARTZ, *supra* note 6, § 1.05 (discussing the history of the judicial adoption of comparative negligence).

55. See generally SPEISER ET AL., *supra* note 15, § 13:5, at 516.

56. 421 N.E.2d at 895.

sponsive to the demands of society.”<sup>57</sup> Likewise, in *Gustafson v. Benda*, the Supreme Court of Missouri judicially abolished the doctrine of contributory negligence in Missouri, and judicially adopted comparative negligence, after remaining “quiescent more than five years while waiting for the legislature to act.”<sup>58</sup> And the Supreme Court of Tennessee, in *McIntyre v. Balentine*, in judicially adopting a modified form of comparative negligence, stated:

We recognize that this action could be taken by our General Assembly. However, legislative inaction has never prevented judicial abolition of obsolete common law doctrines, especially those, such as contributory negligence, conceived in the judicial womb. . . . Indeed, our abstinence would sanction “a mutual state of inaction in which the court awaits action by the legislature and the legislature awaits guidance from the court,” . . . thereby prejudicing the equitable resolution of legal conflicts.<sup>59</sup>

It is respectfully submitted that *McIntyre v. Balentine* is an excellent illustrative case for the judicial adoption of a modified form of comparative negligence that the Supreme Court of Virginia might find very persuasive, especially since the supreme court has rejected other obsolete common law precedents in the past.<sup>60</sup>

Alternately, the Supreme Court of Virginia might act in tandem with the Virginia General Assembly in rejecting contributory negligence and establishing comparative negligence in its place. For example, after the Supreme Court of Illinois judicially adopted comparative negligence in the case of *Alvis v. Ribar*,<sup>61</sup> the Illinois legislature also subsequently passed legislation regarding comparative negligence.<sup>62</sup> Likewise, after the Supreme Court of Iowa in 1981 judicially adopted comparative negligence in

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57. *Id.* at 896.

58. 661 S.W.2d at 14–15.

59. 833 S.W.2d at 56 (quoting *Alvis*, 421 N.E.2d at 896).

60. See *Weishaupt v. Commonwealth*, 227 Va. 389, 400, 315 S.E.2d 847, 852 (1984) (refusing to recognize the archaic and obsolete common law rule that a husband who forcibly rapes his wife could not be prosecuted for that crime). “Thus, by statute and case law, we are free, in essence, to adopt from English common law those principles that fit our way of life and to reject those which do not.” *Id.*

61. 421 N.E.2d at 898 (adopting a pure form of comparative negligence).

62. 735 ILL. COMP. STAT. ANN. § 5/2-1116 (West 2011) (adopting a modified form of comparative negligence).

*Goetzman v. Wichern*,<sup>63</sup> the Iowa legislature subsequently passed comparative negligence legislation in 1984.<sup>64</sup>

But whatever approach ultimately prevails—whether this legal process comes through the Virginia General Assembly, the Supreme Court of Virginia, or both—it is now time to abolish the obsolete and archaic tort defense of contributory negligence in Virginia and replace it with a comparative negligence defense, based upon important contemporary legal, social, and public policy reasons.<sup>65</sup>

The time has now come, by statute or case law, that “we are free, in essence, to adopt from [the] common law those principles that fit our way of life and to reject those which do not.”<sup>66</sup>

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63. 327 N.W.2d 742, 754 (Iowa 1982) (adopting a pure form of comparative negligence).

64. 1984 Iowa Acts 524 (codified as amended at IOWA CODE ANN. § 668.3).

65. *See supra* notes 42–45 and accompanying text. The Supreme Court of Virginia, or the General Assembly, or both, might also determine whether implied assumption of risk would continue to constitute an absolute defense, or whether it too should be merged into a comparative negligence defense. Both the Supreme Court of Montana and the Supreme Court of Florida merged assumption of risk into comparative negligence. *Kopischke v. First Cont'l Corp.*, 610 P.2d 668, 687 (Mont. 1980); *Blackburn v. Dorta*, 348 So. 2d 287, 293 (Fla. 1977).

66. *Weishaupt v. Commonwealth*, 227 Va. 389, 400, 315 S.E.2d 847, 852 (1984).

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