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Erratum

Page 12, third paragraph, next to the last line: "benefactors" should be -beneficiaries-; Page 38, second full paragraph, second line: "It" should be-The comparative negligence doctrine-; Footnote 396: "well-read" should be -often cited-; Footnote 418: The footnote should read only "Id." The remainder of the footnote is correctly shown in footnote 430.

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ARTICLES

CONTRIBUTORY NEGLIGENCE, COMPARATIVE NEGLIGENCE, AND *STARE DECISIS* IN NORTH CAROLINA

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Any opinions expressed in this article should be attributed to only the author, and not to any other person or entity.

INTRODUCTION

North Carolina is one of only four states that continues to adhere to the contributory negligence doctrine. The contributory negligence doctrine provides that a plaintiff who is injured by a defendant whose negligence is a proximate cause of the plaintiff's injuries is generally barred from recovery against the defendant when the plaintiff's negligence is also a proximate cause of the plaintiff's injuries. Recovery is barred even if the plaintiff's fault

is very small and the defendant's fault is very large. It is an all-or-nothing proposition roundly criticized for its harshness and unfairness.

The doctrine of comparative negligence—or comparative fault—was adopted by the forty-six states to repudiate the contributory negligence doctrine. The comparative negligence doctrine provides that a plaintiff may recover against a defendant whose negligence is a proximate cause of the plaintiff's injuries even if the plaintiff's negligence is also a proximate cause of the plaintiff's injuries; the plaintiff's damages are reduced by the proportionate amount of fault that is attributable to the plaintiff.[1] Thus, under the comparative negligence doctrine, both the plaintiff and the defendant bear the amount of loss attributable to them, instead of one party or the other bearing the entire loss as under the contributory negligence doctrine.

After examining the contributory and comparative negligence doctrines, efforts in the North Carolina General Assembly to pass comparative fault bills, and the North Carolina Supreme Court's *stare decisis* jurisprudence, this article concludes that it is time for North Carolina to reject the contributory negligence doctrine and adopt the comparative negligence doctrine in its stead. There are two paths by which North Carolina can progress from a contributory negligence state to a comparative negligence state: legislative and judicial. The legislative path has been well-explored in North Carolina, particularly during the 1980s. Many comparative negligence bills have been introduced in the North Carolina General Assembly. Some of these bills died in committee; others passed in one house only to see defeat in the other. None passed both houses to become law.

As contributory negligence is a common-law rule—and not a statutory rule—in North Carolina, the North Carolina Supreme Court has the ability to repudiate the contributory negligence doctrine for the comparative negligence doctrine. The *stare decisis* jurisprudence of the North Carolina Supreme Court indicates that the court should not adhere to the outmoded contributory negligence doctrine when asked to reject it for the comparative negligence doctrine. Over the past twenty-five years, the courts of twelve states that had not yet legislatively adopted the comparative negligence doctrine have taken such action.

1. The variations of the comparative negligence doctrine are discussed *infra* part III.A.

Recognizing that the contributory negligence doctrine is a common-law doctrine, the majority of this article discusses the doctrine as it relates to the judicial path. Most of the arguments in favor of adopting the comparative negligence doctrine discussed in this article in regard to the judicial path apply with equal force to the legislative path. The legislative path, however, is complicated by lobbyists, day-to-day political trends and trade-offs, and many other influences. Such non-static factors do not lend themselves to thorough examination in a law review article. Members of the North Carolina General Assembly will hopefully find this article useful nonetheless.

There are several excellent law review articles examining the rejection of the contributory negligence doctrine for the comparative negligence doctrine.[2] This article does not seek to repeat their work. Instead, this article examines the issue in light of North Carolina's experience and history with the contributory and comparative negligence doctrines.

Part I of this article examines the contributory negligence doctrine and its history in the United States and North Carolina. Part II describes some of the criticism levelled at the contributory negligence doctrine. Part III examines the comparative negligence doctrine, including a description of the types of comparative negligence systems, a history of the doctrine, and a look at the history of comparative negligence bills in the North Carolina General Assembly, concentrating on the several comparative negligence bills introduced in the 1980s and one of the principal arguments made against the bills. Part IV discusses North Carolina's *stare decisis* jurisprudence and judicial deference to the legislative branch in relation to the common law of North Carolina and the contributory negligence doctrine.

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2. Some of the most informative articles include Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199 (1990); John G. Fleming, *Comparative Negligence at Last—By Judicial Choice*, 64 CAL. L. REV. 239 (1976); Friedrich K. Juenger, *Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae,* Parsonson v. Construction Equipment Company, 18 WAYNE L. REV. 3 (1972); *Comments on* Maki v. Frelk—*Comparative v. Contributory Negligence: Should the Court or Legislature Decide*, 21 VAND. L. REV. 889 (1968) (written by six prominent tort-law commentators) [hereinafter Commentator's Name, *Comments*]; William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 467 (1953); Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950); and Leon Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36 (1944).

I. CONTRIBUTORY NEGLIGENCE: STANDARDS, RATIONALE AND LIMITATIONS

Contributory negligence is a defense asserted in a negligence action.[3] The *Restatement (Second) of Torts* defines contributory negligence as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm."[4]

In a contributory negligence jurisdiction such as North Carolina, a contributorily negligent plaintiff generally may not succeed in an action against a defendant whose negligence is also a proximate cause of the plaintiff's injuries, even if the plaintiff's fault is comparatively small and the defendant's fault is comparatively large.[5] This part discusses the history of the contributory negligence doctrine, concentrating on its development in North Carolina.

A. *Development of the Contributory Negligence Doctrine and Associated Standards in North Carolina*

The first recognized contributory negligence case is an 1809 English case, *Butterfield v. Forrester*.[6] In *Butterfield*, the plaintiff departed an inn at dusk on horseback and travelled very quickly down a public road.[7] He did not get far, however. The defendant, making repairs on his house, had obstructed the road with a pole.[8] The plaintiff rode too fast to see and avoid the obstruction, and sustained injuries in the ensuing collision.[9]

The plaintiff sought redress in court, but was denied recovery. The presiding Lord Ellenborough explained: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of

3. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS (5th ed. 1984 & Supp. 1988).

4. RESTATEMENT (SECOND) OF TORTS § 463 (1965).

5. *See generally* CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS § 19 (1991).

6. 103 Eng. Rep. 926 (1809).

7. *Id.* at 926-27.

8. *Id.* at 926.

9. *Id.* at 926-27.

ordinary care to avoid it on the part of the plaintiff."[10] This statement is commonly recognized as the origination of the contributory negligence doctrine.[11]

The first American case recognizing contributory negligence is an 1824 Massachusetts case, *Smith v. Smith*.[12] Other American courts, citing *Butterfield*, quickly accepted the doctrine.[13]

The North Carolina Supreme Court first recognized the contributory negligence doctrine in *dictum* in 1849. In *Herring v. Wilmington & Raleigh Railroad*,[14] the defendant's train hit two of the plaintiff's slaves, who may have been asleep, killing one and badly wounding the other.[15] The plaintiff brought an action against the defendant and lost at trial.[16] On appeal, the supreme court stated that the defendant's engineer reasonably assumed that the slaves would move, and concluded that the defendant was not negligent.[17] Thus, the court found it unnecessary to reach the issue "as to the damage done, when there was negligence on both sides."[18] The court stated in *dictum*, however, that "[w]e concur in the opinion that, [when there is negligence on both sides], neither party can recover, unless one be guilty of . . . gross neglect."[19] The court reasoned that "if both are in equal fault, if one can recover, so can the other, and thus there would be mutual faults and mutual recoveries, which would contradict the saying, 'that law is the perfection of reason.' "[20]

The North Carolina Supreme Court first applied the contributory negligence doctrine in an 1869 case, *Morrison v. Cornelius*.[21] In *Morrison*, the defendants maintained a saltpetre[22] manufacturing business on property near land where the plaintiff raised cat-

10. *Id.* at 927.

11. *See, e.g.,* Prosser, *supra* note 2, at 467. Some commentators, however, reason that the doctrine developed much earlier. *See, e.g.,* Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 151 (1946).

12. 19 Mass. 621 (1824) (citing *Butterfield*, 103 Eng. Rep. at 926).

13. HENRY WOODS, COMPARATIVE FAULT § 1.3 (2d ed. 1987 & Supp. 1995).

14. 32 N.C. 402 (1849).

15. *Id.* at 402.

16. *Id.*

17. *Id.* at 408-09.

18. *Id.* at 409.

19. *Id.*

20. *Id.*

21. 63 N.C. 346 (1869).

22. Saltpetre, or saltpeter, is potassium nitrate or sodium nitrate. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1601 (2d ed. 1979).

tle.[23] During the Civil War, the defendants ceased their business and moved their equipment into storage.[24] The defendants, however, left several large containers which contained poisonous liquid on their property.[25] Approximately three months after the defendants ceased operation, seven of the plaintiff's cattle were found dead near the containers.[26]

The plaintiff sought the value of his cattle in court.[27] The jury found for the plaintiff and the defendants appealed. Reversing, the North Carolina Supreme Court stated a "general rule" which is cited as the first recognition of the contributory negligence doctrine in North Carolina:[28]

> In all cases where a person, in the lawful use of his own property, causes injury to another, the party injured, before he can recover damages at law, must show that he has exercised proper care, and is free from blame in regard to the matter. If it appears that the party injured has, by any act of omission or commission on his part, contributed to the injury complained of, it is generally *damnum absque injuria*.[29]

Damnum absque injuria means "[a] loss or injury which does not give rise to an action for damages against the person causing it."[30]

The supreme court's statement of the contributory negligence doctrine has not materially varied from the original *Morrison* statement. Later North Carolina courts summarized the contributory negligence doctrine as:

> Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating

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23. *Morrison*, 63 N.C. at 347.

24. *Id.*

25. *Id.* at 347-48.

26. *Id.*

27. *Id.* at 346-47.

28. *Id.* at 348. Recent cases citing *Morrison* as such include *Bowden v. Bell*, 116 N.C. App. 64, 67, 446 S.E.2d 816, 819 (1994); *Bosley v. Alexander*, 114 N.C. App. 470, 471, 442 S.E.2d 82, 83 (1994); and *Corns v. Hall*, 112 N.C. App. 232, 237, 435 S.E.2d 88, 90 (1993).

As *Herring*'s discussion of contributory negligence is *dictum*, *see supra* notes 14-20 and accompanying text, *Morrison* is the appropriately cited precedent for the contributory negligence doctrine in North Carolina.

29. *Morrison*, 63 N.C. at 348-49. The court noted that there are some exceptions to this general rule "founded upon particular circumstances," but did not elaborate. *Id.* at 349 (citing Lynch v. Nurdin, 1 Ad. & E. (N.S.) 422 (1841); Birge v. Gardner, 19 Conn. 507 (1849)).

30. BLACK'S LAW DICTIONARY 393 (6th ed. 1991).

with the actionable negligence of defendant, contributes to the injury complained of, he is guilty of contributory negligence.[31]

Over time, the supreme court developed rules and standards for applying the contributory negligence doctrine. The court explained that there is no material difference between "negligence" and "contributory negligence."[32] Contributory negligence, the court observed, is merely a term used to describe the negligence of the plaintiff.[33]

In *Lambeth v. North Carolina Railroad*,[34] decided three years after *Morrison*, the supreme court expounded on the definition of the "proper care" that a plaintiff must exercise to avoid being barred from recovery under the contributory negligence doctrine.[35] The *Lambeth* court stated that the appropriate inquiry is whether the plaintiff exercised "ordinary care under the circumstances."[36] Ordinary care, the court explained, is the "degree of care which may have been reasonably expected from a sensible person in the situation of the" plaintiff.[37] Later courts described a "sensible person" as an "ordinarily prudent person."[38] Later courts explained also that such care does not require persons to anticipate the negligence of others.[39]

From the first appearance of the contributory negligence doctrine in North Carolina, North Carolina courts ruled that a plaintiff can be barred by the contributory negligence doctrine only if the plaintiff's negligence was a proximate cause of the plaintiff's

31. Clark v. Roberts, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965).

32. *See* Liske v. Walton, 198 N.C. 741, 742, 153 S.E. 318, 319 (1930); Moore v. Chicago Bridge & Iron Works, 183 N.C. 438, 439-40, 111 S.E. 776, 777 (1922).

33. *See* Adams v. Board of Educ., 248 N.C. 506, 511, 103 S.E.2d 854, 857 (1958) ("an act or omission on the part of the plaintiff amounting to a want of ordinary care concurring and cooperating with some negligent act or omission on the part of the defendant as makes the act or omission of the plaintiff a proximate cause or occasion of the injury complained of").

34. 66 N.C. 494 (1872).

35. Recall that *Morrison* provided that the plaintiff must have exercised "proper care." *See supra* footnote 29 and accompanying text.

36. *Lambeth*, 66 N.C. at 499.

37. *Id.*; *see also* Asbury v. Charlotte Elec. R.R., Light & Power Co., 125 N.C. 568, 575-76, 34 S.E. 654, 657 (1899).

38. *See, e.g.,* Smith v. Fiber Controls Corp., 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (citation omitted); Adams v. Beaty Serv. Co., 237 N.C. 136, 141, 74 S.E.2d 332, 336 (1953).

39. *See, e.g.,* Reeves v. Staley, 220 N.C. 573, 583, 18 S.E.2d 239, 246 (1942) (citations omitted); Murray v. Atlantic Coast Line R.R., 218 N.C. 392, 401, 11 S.E.2d 326, 332-33 (1940) (citations omitted).

injuries.[40] Proximate cause in this situation "means [that] the plaintiff's conduct must have been a factual cause of the injuries, and that the risk of the harm to the plaintiff must have been reasonably foreseeable."[41]

B. *The North Carolina Supreme Court's Rationale for the Contributory Negligence Doctrine*

The *Morrison* court cited no authority and offered no rationale for the court's pronouncement of the contributory negligence rule. Later North Carolina Supreme Court opinions sought to offer some justification for the rule.

An 1876 case, *Manly v. Wilmington & Weldon Railroad*,[42] provides the most substantive explanation of the rule's rationale given by the supreme court. Nevertheless, the explanation provided therein is scant. The *Manly* court explained that when the plaintiff's injury arises from both the plaintiff's and the defendant's non-malicious negligence, "the negligence of both being the immediate and proximate cause of the injury, a recovery is denied upon the ground that the injured party must be taken to have brought the injury upon himself."[43] The supreme court further expounded on this rationale in *Bessent v. Southern Railway*.[44] The *Bessent* court stated that "the law adjudges any injuries [a

40. *See, e.g.,* Bigelow v. Johnson, 303 N.C. 126, 131, 277 S.E.2d 347, 351 (1981) (citations omitted); Farmer v. Wilmington & Weldon R.R., 88 N.C. 564, 570 (1883); Manly v. Wilmington & Weldon R.R., 74 N.C. 655, 658 (1876).

This requirement yielded an early rule: If the plaintiff's negligence is only a remote cause of a plaintiff's injuries, contributory negligence is not a bar to a plaintiff's recovery. *See* Doggett v. Richmond & Danville R.R., 78 N.C. 305, 307 (1878). A remote cause is generally some act or omission of the plaintiff's which does not occur at the same time as the plaintiff's injuries. *See, e.g., Manly*, 74 N.C. at 660. Remote contributory negligence can have another role in negligence law. *See, e.g.,* Mutter, *supra* note 2, at 214-27 (describing remote contributory negligence in Tennessee).

41. DAYE & MORRIS, *supra* note 5, § 19.21.31.

42. 74 N.C. 655 (1876).

43. *Id.* at 659; *accord* Exum v. Atlantic Coast Line R.R., 154 N.C. 408, 411, 70 S.E. 845, 846 (1911); Royster v. Southern Ry., 147 N.C. 347, 350-51, 61 S.E. 179, 180 (1908); Pharr v. Southern Ry., 133 N.C. 610, 615, 45 S.E. 1021, 1022-23 (1903); Pleasants v. Raleigh & Augusta Air-Line R.R., 95 N.C. 195, 201-02 (1886); Parker v. Wilmington & Weldon R.R., 86 N.C. 221, 225 (1882) ("the party injured is taken to have brought the injury on himself"); *see also* Harrison v. North Carolina R.R., 194 N.C. 656, 660, 140 S.E. 598, 601 (1927) ("the law is not able to protect those who have eyes and will not see" (citations omitted)).

44. 132 N.C. 934 (1903).

contributorily negligent plaintiff] may have received to be the result of his own carelessness."[45]

The supreme court founded its embracement of the contributory negligence doctrine also on the court's assumption that no method exists to allocate damages between the parties. The *Manly* court explained that, in its view, no rule exists to determine how to apportion damages when both parties are at fault.[46] In 1887, the court reiterated this view in *Walker v. Reidsville*, stating that "[n]o rule can be devised to determine how much of the damage is attributable to the one party and how much to the other."[47]

The supreme court based its adoption of the contributory negligence doctrine also upon the court's recognition that the overwhelming majority of American jurisdictions—all—followed the doctrine. The *Morrison* court cited the contributory negligence doctrine as a "general rule" after examining "with care some of the leading American and English authorities."[48] This statement, combined with the absence of stated rationale for the doctrine's adoption and the then-wide acceptance of the doctrine in other jurisdictions, indicates that the court did not base the doctrine on any unique attributes of North Carolina or North Carolinians, but simply followed the mainstream thought on the issue.

Later supreme court opinions rested the court's explanation of the contributory negligence doctrine on "proximate cause." Although earlier opinions intimated this rationale,[49] a 1911 opinion, *Harvell v. Weldon Lumber Co.*,[50] summarized the thought: "[W]hen the plaintiff and the defendant are negligent, and the negligence of both concur and continue to the time of the injury,

45. *Id.* at 940 (citations omitted).

46. *Manly*, 74 N.C. at 659-60 ("For the parties being mutually in fault, there can be no apportionment of damages, no rule existing to settle in such cases, what one shall pay more than another.").

47. 96 N.C. 382, 384 (1887). The supreme court's analysis in *Herring v. Wilmington & Raleigh Railroad Co.*, 32 N.C. 402 (1849), also indicates that the *Morrison* court was unaware of the comparative negligence doctrine or any similar doctrine. For a description of *Herring*, see *supra* notes 14 - 20 and accompanying text.

48. *Morrison*, 63 N.C. at 348. The *Herring* court, in setting forth its *dictum* regarding the contributory negligence doctrine, likewise cited no authority for its statement. *See Herring*, 32 N.C. at 408-09.

49. *See, e.g.,* Chambers v. Western North Carolina R.R., 91 N.C. 471, 475 (1884); Farmer v. Washington & Weldon R.R., 88 N.C. 564, 570 (1883).

50. 154 N.C. 254, 70 S.E. 389 (1911).

the negligence of the defendant is not in the legal sense proximate."[51] Other opinions explained that a contributorily negligent plaintiff's negligence is "*the* proximate cause" of his injuries.[52]

Several commentators attribute the United States' quick acceptance of the contributory negligence doctrine on courts' alleged desire to aid the industrial revolution, particularly railroads.[53] Railroad cases shaped nineteenth-century negligence law in North Carolina and the United States.[54] Many courts reasoned as the North Carolina Supreme Court did in *Forbes v. Atlantic & North Carolina Railroad*: "Railroads are lawful and useful and while they must use care not to injure the citizen, the citizen must use care also. And he cannot complain if harm come[s] to him by his own negligence."[55]

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51. *Id.* at 262, 70 S.E. at 392; *see also* Elder v. Plaza Ry., 194 N.C. 617, 619, 140 S.E. 298, 299 (1927) ("the real, efficient, and proximate cause"); Lea v. Southern Pub. Util. Co., 176 N.C. 511, 514, 97 S.E. 492, 493 (1918) ("when the plaintiff and defendant are negligent, and the negligence of both concur and continue to the time of the injury, the negligence of the defendant is in a legal sense not the proximate cause of the injury"); Exum v. Atlantic Coast Line R.R., 154 N.C. 408, 413, 70 S.E. 845, 847 (1911). The court sometimes termed the plaintiff's contributory negligence as the "efficient" proximate cause, apparently to account for the difficulty with "the proximate cause" rationale. *See, e.g., Elder*, 194 N.C. at 619, 140 S.E. at 299.

52. *See, e.g.,* Smith v. Norfolk & S. R.R., 145 N.C. 98, 103, 58 S.E. 799, 801 (1907) (citations omitted); Brewster v. Elizabeth City, 137 N.C. 392, 394, 49 S.E. 885, 886-87 (1905). These "the proximate cause" pronouncements conflict with the *Manly* court's earlier statement that "the negligence of *both* [parties is] the immediate and *proximate cause* of the injury." *Manly*, 74 N.C. at 659.

Nineteenth and early-twentieth century courts of other states also based their rationale for the contributory negligence doctrine on "proximate cause." *See* Prosser, *supra* note 2, at 468 (citations omitted). This characterization of "proximate cause" reasons that the plaintiff's contributory negligence is an intervening, and thus insulating, cause between the defendant's negligence and the plaintiff's injury. *See id.* at 468 & n. 16 (citing Gilman v. Central Vermont R.R., 107 A. 122 (Ver. 1919); Ware v. Saufley, 237 S.W. 1060 (Ky. Ct. App. 1922); Exum v. Atlantic Coast Line R.R., 154 N.C. 408, 70 S.E. 845 (1911); Chesapeake & Ohio R.R. v. Wills, 68 S.E. 395 (Va. 1910)).

The North Carolina Supreme Court later rejected this "the proximate cause" rationale. *See infra* notes 391 - 392 and accompanying text.

53. *See, e.g.,* Prosser, *supra* note 2, at 468-69; Malone, *supra* note 11, at 164-69.

54. *See* WOODS, *supra* note 13, § 1:5.

55. 76 N.C. 454, 457 (1876); *see also* Murphy v. Wilmington & Weldon R.R., 70 N.C. 437, 437-39 (1874) (castigating a plaintiff who parked his wagon too close to the tracks and brought suit when a train destroyed it).

These commentators explain that the contributory negligence doctrine helped the courts to control sympathetic juries and thus control corporate liability in furtherance of the industrial revolution. One commentator reasons that the doctrine demonstrates the philosophy of the times which encouraged dangerous undertakings and permitted human sacrifice for the sake of industrialization.[56]

Nearly all of the published nineteenth-century negligence cases decided by the North Carolina Supreme Court that discuss the contributory negligence doctrine involve a railroad. Indeed, railroads succeeded in the great majority of nineteenth-century negligence cases in which they were a defendant before the supreme court. One North Carolina commentator reasoned that "[c]onsidering the favorable political and judicial climate for railroads [in North Carolina], it is not surprising that the new legal rules largely worked in the favor of railroad interests."[57] In addition, the commentator observed that "[t]he language and reasoning of the railroad decisions also evinced the court's predisposition to railroad interests."[58]

A close reading of the North Carolina Supreme Court's nineteenth-century opinions discussing the contributory negligence doctrine, however, does not reveal any particular sort of pro-railroad bias. Moreover, the language and reasoning of the court's nineteenth-century railroad decisions mirror the language and reasoning of other states' high courts nineteenth-century railroad decisions. Absent convincing concrete evidence, it seems that theorizing that a particular court adopted a particular legal doctrine because of the court's unspoken desire to assist the industrial revolution is pure speculation. Given the largely uniform application of the contributory negligence doctrine throughout the United States—and the lack of dissents—, it is much more likely that the railroads and other industrial entities were simply the benefactors of the reasoned legal theories of the day.

In summary, the North Carolina Supreme Court based the adoption of the contributory negligence doctrine on four rationales: (1) The injured party "brought the injury upon himself"; (2) No rule existed to allow for the apportionment of damages; (3) All

56. JOHN G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 5-6 (1968).

57. James L. Hunt, Note, *Private Law and Public Policy: Negligence Law and Political Change in Nineteenth-Century North Carolina*, 66 N.C. L. REV. 421, 429 (1988).

58. *Id.*

other American jurisdictions followed the doctrine; and (4) The plaintiff's negligence was "the proximate cause" of the injury, while the defendant's negligence was not "the proximate cause." These rationales are examined further in part IV of this article.

C. *Limitations on the Contributory Negligence Doctrine in North Carolina*

From the first appearance of the contributory negligence doctrine, courts "have displayed an uneasy consciousness that something is wrong."[59] Although American courts quickly adopted the doctrine without lengthy analysis, nearly all American courts and legislatures immediately began limiting the general contributory negligence rule with modifications that lessened the rule's impact on plaintiffs. Both the North Carolina Supreme Court and the North Carolina General Assembly joined in this effort. This section describes the several limitations placed on the contributory negligence rule in North Carolina.

1. *Last Clear Chance*

The most significant limitation on the contributory negligence rule is the last clear chance doctrine. An 1842 English case, *Davies v. Mann*,[60] is cited as the first articulation of the doctrine.[61] In *Davies*, the defendant negligently rode his horses and wagon into a donkey which the plaintiff had left in the road.[62] The court allowed the plaintiff to recover the donkey's value even though the plaintiff was negligent. Lord Abinger held that because "the defendant might by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there."[63]

In an 1881 case, *Gunter v. Wicker*,[64] the North Carolina Supreme Court adopted the last clear chance doctrine. In *Gunter*, the defendants employed the plaintiff to run a saw mill.[65] When the plaintiff entered the machinery to oil without adjusting the engine to secure his safety, one of the defendants turned on the

59. Prosser, *supra* note 2, at 470.
60. 152 Eng. Rep. 588 (1842).
61. *See, e.g.*, Prosser, *supra* note 2, at 471.
62. *Davies*, 152 Eng. Rep. at 588.
63. *Id.* at 589.
64. 85 N.C. 310 (1881).
65. *Id.* at 310.

machinery without warning.[66] The plaintiff received injuries and sought damages in court.[67] The jury found for the plaintiff and the defendants appealed.[68] Citing *Davies*, the supreme court stated that " '[n]otwithstanding the previous negligence of the plaintiff, if at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant an action will lie for damages.' "[69]

The supreme court reasoned that, regardless of the plaintiff's negligence, the defendant's "care and attention would have prevented the accident, and to their absence it must be attributed."[70] Moreover, the court observed, "[t]he plaintiff's exposure of his person was not a cause, but a condition which rendered the injury possible and actual, as the result of the absence of the caution which was imposed upon the defendant in consequence."[71]

The supreme court's statement of the last clear chance doctrine has not materially varied from this original formulation. In North Carolina,

> in order to submit the issue of last clear chance to the jury, the evidence must tend to show the following elements: (1) that plaintiff, by his own negligence, placed himself in a position of peril (or a position of peril to which he was inadvertent); (2) that defendant saw, or by the exercise of reasonable care should have seen, and understood the perilous position of plaintiff; (3) that he should have so seen or discovered plaintiff's perilous condition in time to have avoided injuring him; (4) that notwithstanding such notice defendant failed or refused to use every reasonable means at his command to avoid the impending injury; and (5) that as a result of such failure or refusal plaintiff was in fact injured.[72]

The North Carolina Supreme Court, like courts of other jurisdictions, found some analytic difficulty with the last clear chance doctrine.[73] In *Baker v. Wilmington & Weldon Railroad*,[74] the doc-

66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 312 (quoting *Davies*, 152 Eng. Rep. at 589).
70. *Id.*
71. *Id.* at 313.
72. Wray v. Hughes, 44 N.C. App. 678, 681-82, 262 S.E.2d 307, 309-10 (1980) (citing Cockrell v. Cromartie Transp. Co., 295 N.C. 444, 245 S.E.2d 497 (1978); Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977); Exum v. Boyles 272 N.C. 567, 158 S.E.2d 845 (1968); Bell v. Wallace, 32 N.C. App. 370, 232 S.E.2d 305, *disc. rev. denied*, 292 N.C. 466, 233 S.E.2d 921 (1977)).
73. *See generally* Leon Green, *Contributory Negligence and Proximate Cause*, 6 N.C. L. REV. 3, 21-30 (1927).

trine is referred to as "intervening negligence."[75] In *Neal v. Carolina Central Railroad*,[76] the court equated the doctrine with the issue of proximate cause.[77] In 1928, the court, in *Redmon v. Southern Railway*,[78] noted the contradiction in the court's previous rationale for the last clear chance doctrine, but found it unnecessary to resolve the issue.[79] The supreme court later explained that in North Carolina "last clear chance is 'but an application of the doctrine of proximate cause.' "[80]

Some commentators explain that the last clear chance doctrine serves as a transition between the contributory negligence and comparative negligence doctrines.[81] It is generally recognized, however, that the doctrine is simply the result of courts' acknowledgment of the harshness of the contributory negligence doctrine.[82]

2. *Willful and Wanton Defendant*

Another early limitation on the contributory negligence doctrine provides that a plaintiff's contributory negligence will not bar a plaintiff's recovery if the defendant's conduct was willful and wanton.[83] The North Carolina Supreme Court noted this lim-

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74. 118 N.C. 1015, 24 S.E. 415 (1895).

75. *Id.* at 1021, 24 S.E. at 417; *see also* Pickett v. Wilmington & Weldon R.R., 117 N.C. 616, 631, 23 S.E. 264, 266-67 (1895).

76. 126 N.C. 634, 36 S.E. 117 (1900).

77. *Id.* at 639, 36 S.E. at 118 ("The doctrine of proximate cause—the last clear chance—is firmly established."); *see also* Norman v. Charlotte Elec. Ry., 167 N.C. 533, 544-45, 83 S.E. 835, 838 (1914); Edge v. Atlantic Coast Line Ry., 153 N.C. 212, 214-18, 69 S.E. 74, 75-76 (1910).

78. 195 N.C. 764, 143 S.E. 829 (1928).

79. *Id.* at 769, 143 S.E. at 831-32. The *Redmon* opinion contains a summary of principles associated with the last clear chance doctrine at the time. *Id.* at 769-71, 143 S.E. at 832.

80. Vernon v. Crist, 291 N.C. 646, 654, 231 S.E.2d 591, 596 (1977) (quoting Exum v. Boyles, 272 N.C. 567, 578, 158 S.E.2d 845, 854 (1968)).

81. *See, e.g.*, Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938).

82. *See* Prosser, *supra* note 2, at 472.

83. *See generally* DAYE & MORRIS, *supra* note 5, § 19.21.32. Professors Daye and Morris note that

> [t]he terms "wanton" and "reckless" appear to be used synonymously in this context. Willful and wanton conduct "rests on the assumption that [the defendant] knew the probable consequences [of his act or failure to act], but was recklessly, wantonly or intentionally indifferent to the results." It describes conduct in which the defendant proceeds in reckless or conscious disregard of a high risk to the safety of others.

itation in *dictum* in *Herring v. Wilmington & Raleigh Railroad*.[84] In an 1899 case, *Brendle v. Spencer*,[85] the supreme court stated that "[i]t is well settled that contributory negligence, even if admitted by the plaintiff, is no defense to willful or wanton injury."[86] This limitation is applied in the same manner today.[87] Later courts held that if the plaintiff's conduct is also willful and wanton, the plaintiff's contributory negligence will bar the plaintiff from recovery.[88]

3. Burden of Proof

The North Carolina Supreme Court's early statement of the contributory negligence doctrine in *Morrison* indicated that the plaintiff's burden did not end at proving the defendant's negligence. In *dictum*, the *Morrison* court stated that it is the plaintiff's burden to show the absence of the plaintiff's negligence.[89] In an 1883 divided decision, *Owens v. Richmond & Danville Railroad*,[90] the supreme court, in a rather contradictory opinion, seemed to rule that the plaintiff's burden does, in fact, include this showing.

In *Owens*, the trial court charged the jury that it is the defendant's burden to show, by a preponderance of the evidence, that the plaintiff was contributorily negligent.[91] The majority noted that the courts of England and other states were split on the question of whether the plaintiff has the burden of proving his exercise of ordinary care or whether the defendant has the burden

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Id. § 19.21.32, at 278 (footnotes omitted).

84. 32 N.C. 402, 409 (1849) ("when there was negligence on both sides," "neither party can recover, unless one be guilty of wanton injury or gross neglect"). For a description of *Herring*, see *supra* notes 14 - 20 and accompanying text.

85. 125 N.C. 474, 34 S.E. 634 (1899).

86. *Id.* at 478, 34 S.E. at 635. Although the *Brendle* court stated that this limitation is "well settled," *Brendle* appears to be the first North Carolina Supreme Court case in which the limitation is applied.

87. *See, e.g.,* Pearce v. Barham, 271 N.C. 285, 289-90, 156 S.E.2d 290, 294 (1967); Fry v. Southern Pub. Util. Co., 183 N.C. 281, 293, 111 S.E. 354, 361 (1922).

88. *See, e.g.,* Harrington v. Collins, 298 N.C. 535, 538, 259 S.E.2d 275, 278 (1979) (citing Pearce v. Barham, 271 N.C. 285, 156 S.E.2d 290 (1967)).

89. *See* Morrison v. Cornelius, 63 N.C. 346, 348-49 (1869) ("the party injured, before he can recover damages at law, must show that he has exercised proper care, and is free from blame").

90. 88 N.C. 502 (1883).

91. *Id.* at 504.

of proving the plaintiff's lack thereof.[92] The majority stated that "we do not undertake to reconcile the divergent decisions in reference to the burden of proof."[93] The majority found it "clear," however, that if the plaintiff's evidence does not reveal "whether the plaintiff exhibited the necessary watchfulness and care to avoid the consequent harm or injury, it will be assumed there was not such want of it on his part."[94] The majority reasoned that if the plaintiff's contributory negligence could be inferred from the plaintiff's evidence or the defendant's evidence, the "duty" of showing the plaintiff's contributory negligence "in self-exculpation devolves upon the defendant."[95] The majority further explained that "it must be left to the jury to determine whether, upon the facts proved, the plaintiff has a legal cause of action against the defendant," especially considering that other doctrines may effect the outcome.[96]

The majority held, however, that it was error for the trial judge to have instructed the jury regarding the defendant's burden.[97] The majority explained that it is improper to "burden the defence" by requiring the defendant to demonstrate the plaintiff's negligence.[98] The majority stated that "[t]he inquiry should have been free from that embarrassment."[99] The majority described this ruling as "just and fair."[100] Thus, the majority ruled that nothing should be said about this "embarrassment" to the jury.

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92. *Id.* at 504-05. The *Owens* majority surveyed these decisions. *Id.* at 505-07.

93. *Id.* at 507.

94. *Id.*

95. *Id.* ("[I]f the plaintiff in any legal sense were the cause or the concurring cause of his own injury, the duty of so showing in self-exculpation devolves upon the defendant. The inference of this co-operating agency may be drawn from the plaintiff's proof of the defendant's neglect or misconduct, as well as by substantive and independent testimony produced by the defendant."). The *Owens* court quoted *Cleveland & Pittsburgh Rail Road v. Rowan*, 66 Penn. 393 (1870): "It is true, if negligence appear by the plaintiff's own testimony, the defendant might rest on it as securely as if proved by himself. As the love of life and the instinct of preservation are the highest motive for care in any reasoning being, they will stand for proof until the contrary appears." *Id.* at 399, *quoted in Owens*, 88 N.C. at 507.

96. *Owens*, 88 N.C. at 507-08. The *Owens* court cited last clear chance as an example. *Id.* at 508.

97. *Id.* at 512.

98. *Id.*

99. *Id.*

100. *Id.*

Justice Thomas Ruffin, dissenting, stated that the rule pronounced by the majority "strikes me, not only as being illogical and contrary to the rules of good pleading, in that, it requires the plaintiff to aver and prove negative matters, but as losing sight of that reasonable presumption, which the common law always makes, that every person does his duty until the contrary is shown."[101] Justice Ruffin further reasoned that the majority's rule is "in opposition to the very law of our nature, and makes no allowance for that instinct which prompts men, when in hazardous situations, to use care in avoiding injury and preserving their lives."[102]

Four years after *Owens*, the General Assembly statutorily placed the burden of pleading and proving contributory negligence on the defendant.[103] Contributory negligence remains an affirmative defense with such pleading and proof burdens today in North Carolina.[104]

4. *Contributory Negligence as a Matter of Law*

An important "*de facto*" limitation on the contributory negligence doctrine is the North Carolina courts' appropriate reluctance to take the contributory negligence issue from the jury.[105] A North Carolina court's finding that the plaintiff is contributorily negligent as a matter of law is now infrequent. This is, however, only a relatively recent development.

Early cases display the North Carolina Supreme Court's willingness to approve the taking of the contributory negligence issue from the jury. In *Walker v. Town of Reidsville*,[106] one of the few

101. *Id.* at 517 (Ruffin, J., dissenting).

102. *Id.*

103. *See* Act of Jan. 26, 1887, ch. 33, § 1, 1887 N.C. Sess. Laws 81, 81; *see also* Cox v. Norfolk & C.R. Co., 123 N.C. 604, 613, 31 S.E. 848, 850 (1898) (applying the statute); Jordan v. City of Asheville, 112 N.C. 743, 745, 16 S.E. 760, 760-61 (1893) (same).

104. *See* N.C. GEN. STAT. § 1-139 (1983); *see also* Woodson v. Rowland, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991); Clary v. Alexander County Bd. of Educ., 286 N.C. 525, 532, 212 S.E.2d 160, 165 (1975).

105. *See generally* DAYE & MORRIS, *supra* note 5, § 19.21.34.

106. 96 N.C. 382, 2 S.E. 74 (1887). *Chambers v. Western North Carolina Railroad*, 91 N.C. 471, 474 (1884), appears to be the first reported negligence case where the contributory negligence issue was taken from the jury. *See also* Lambeth v. North Carolina R.R., 66 N.C. 494, 498 (1872) (trial judge instructed the jury "that any alightment from the cars when moving was contributory negligence, and in law disabled the plaintiff to recover," but the supreme court found this instruction erroneous).

early non-railroad negligence cases, the defendant had dug a large pit in a busy street.[107] The defendant placed barriers in some places around the pit, but did not place one on the side facing a walkway between a market-house and the town hall.[108] The plaintiff approached from the unbarricaded side, fell into the pit and sustained bodily injury.[109] The plaintiff brought suit asserting that the defendant negligently failed to properly barricade the pit.[110] The evidence showed that the plaintiff had seen men working in the pit for ten days prior, but was thinking about a trip he was to make when he fell.[111] At trial, the judge intimated his opinion that the plaintiff could not recover and entered a nonsuit.[112] Affirming, the supreme court reasoned that "there can be no reasonable question that the plaintiff negligently contributed" to his injury.[113] The court explained: "A reasonably prudent and careful man would not forget the presence of such danger in his immediate neighborhood."[114] The court did not comment on the jury's role in this regard.

In *Exum v. Atlantic Coast Line Railroad*,[115] the defendant's train hit and killed the plaintiff's intestate while he walked on the defendant's tracks.[116] The plaintiff offered evidence of the defendant's engineer's negligence at trial.[117] The trial judge, however, granted the defendant's motion for nonsuit.[118]

On appeal, the supreme court quoted *Neal v. Carolina Central Railroad*:[119]

> If plaintiff's intestate was walking up defendant's road, in open day-light, on a straight piece of road, where he could have seen defendant's train 150 yards, and was run over and injured, [the intestate] was guilty of negligence; and although the defendant may have been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, or

107. *Walker*, 96 N.C. at 383, 2 S.E. at 74.
108. *Id.* at 383-84, 2 S.E. at 74-75.
109. *Id.*
110. *Id.* at 383, 2 S.E. at 74.
111. *Id.* at 383-84, 2 S.E. at 75.
112. *Id.* at 383, 2 S.E. at 74.
113. *Id.* at 385, 2 S.E. at 75.
114. *Id.*
115. 154 N.C. 408, 70 S.E. 845 (1911).
116. *Id.* at 409-411, 70 S.E. at 845.
117. *Id.* at 409-411, 412, 70 S.E. at 845-46.
118. *Id.* at 409, 70 S.E. at 845.
119. 126 N.C. 634, 36 S.E. 117 (1900).

> in not ringing its bell as required by said ordinance, and in not keeping a lookout by its engineer, as it ought to have done, yet the injury would have been attributed to the negligence of plaintiff's intestate.[120]

The *Exum* court reasoned that, based on the rules announced in *Neal* and similar cases, the plaintiff was contributorily negligent as a matter of law and affirmed the trial court.[121] *Exum* is particularly notable because of Chief Justice Walter Clark's vigorous dissent. Chief Justice Clark characterized the majority's opinion as holding "that the defendant, as a matter of law, had a right to kill the deceased and that by a nonsuit a jury can be deprived of any right to determine whose negligence was the proximate cause of the death."[122] Chief Justice Clark pointedly explained that "[t]he bare fact that the intestate was walking on the track did not, as a matter of law, give the defendant the right to kill him."[123] He concluded that the issue "should have been left to the jury."[124]

Despite Chief Justice Clark's forceful dissent in *Exum*, the North Carolina Supreme Court continued to exhibit its willingness to find a plaintiff contributorily negligent as a matter of law and thus take the issue from the jury. Moreover, this willingness *increased* during the 1940s and early-1950s. The supreme court began to find contributory negligence as a matter of law in a greater number of fact situations.[125] Cases were differentiated

120. *Id.* at 638, 36 S.E. at 118, *quoted in Exum*, 154 N.C. at 411, 70 S.E. at 846.

121. *Exum*, 154 N.C. at 412-13, 70 S.E. at 845-47.

122. *Id.* at 421, 70 S.E. at 850 (Clark, C.J., dissenting).

123. *Id.* at 414, 70 S.E. at 847 (Clark, C.J., dissenting).

124. *Id.* (Clark, C.J., dissenting).

125. *See, e.g.*, Garmon v. Thomas, 241 N.C. 412, 85 S.E.2d 589 (1955); Badders v. Lassiter, 240 N.C. 413, 82 S.E.2d 357 (1954); Sheldon v. Childers, 240 N.C. 449, 82 S.E.2d 396 (1954); Singletary v. Nixon, 239 N.C. 634, 80 S.E.2d 676 (1954); Lyerly v. Griffin, 237 N.C. 686, 75 S.E.2d 730 (1953); Morrisette v. A.G. Boone Co., 235 N.C. 162, 69 S.E.2d 239 (1952); Morris v. Jenrette Transp. Co., 235 N.C. 568, 70 S.E.2d 845 (1952); Herndon v. North Carolina R.R., 234 N.C. 9, 65 S.E.2d 320 (1951); Moore v. Boone, 231 N.C. 494, 575 S.E.2d 783 (1950); Cox v. Lee, 230 N.C. 155, 52 S.E.2d 355 (1949); Tyson v. Ford, 228 N.C. 778, 47 S.E.2d 251 (1948); Atkins v. White Transp. Co., 224 N.C. 688, 32 S.E.2d 209 (1944); Austin v. Overton, 222 N.C. 89, 21 S.E.2d 887 (1942); Montgomery v. Blades, 222 N.C. 463, 23 S.E.2d 844 (1943); Godwin v. Atlantic Coast Line R.R., 220 N.C. 281, 17 S.E.2d 137 (1941); Hampton v. Hawkins, 219 N.C. 205, 13 S.E.2d 227 (1941); Beck v. Hooks, 218 N.C. 105, 10 S.E.2d 608 (1940); Mason v. Atlantic Coast Line R.R., 208 N.C. 842, 181 S.E. 625 (1935) (without describing the facts); Tart v. Southern Ry., 202 N.C. 52, 161 S.E. 720 (1932); Harrison v. North Carolina R.R., 194 N.C. 656, 140 S.E. 598 (1927); Wright v. Southern Ry.,

based on small details.[126] One North Carolina commentator observed that "the phrase 'contributory negligence as a matter of law' is readily applied to justify opposite results in cases with similar facts."[127]

This willingness was also displayed in the negligence *per se* cases.[128] In 1907, the supreme court held that the violation of a safety statute is negligence or contributory negligence *per se*.[129] In response to this rule and common-law rules declaring actions negligent *per se*, the North Carolina General Assembly enacted many statutes declaring that certain actions prohibited by statute are not to be considered negligence *per se* or contributory negligence as a matter of law. These include statutes declaring that a party's failure to wear a seat belt may not be introduced in an action for damages,[130] a party's failure to have an rearview mirror on the parties' motorcycle shall not be considered contributory negligence *per se*,[131] a party's failure to wear a helmet while riding a motorcycle shall not be considered contributory negligence *per se*,[132] and many other similar statutes.[133]

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155 N.C. 325, 71 S.E. 306 (1911). Several of these cases found contributory negligence as a matter of law over forceful dissents.

126. *Compare, e.g., Garmon v. Thomas*, 241 N.C. 412, 85 S.E.2d 589 (1955) *with Goodson v. Williams*, 237 N.C. 291, 74 S.E.2d 762 (1953), *and Tyson*, 228 N.C. at 778, 47 S.E.2d at 251 *with Williams v. Express Lines*, 198 N.C. 193, 151 S.E. 197 (1930). *See* Gerald C. Parker, Note, *Torts—Contributory Negligence as a Matter of Law—A Threat to Stare Decisis*, 34 N.C. L. REV. 137, 138 & n.5 (1955).

127. *See* Parker, *supra* note 126, at 138; *see also* David M. Clinard, Note, *Torts—Last Clear Chance—Contributory Negligence as a Matter of Law*, 33 N.C. L. REV. 138, 142 (1954) ("contributory negligence as a matter of law . . . explains nothing and succeeds only in creating an aura of mystery about the entire decision").

128. "Negligence *per se*" is often used in describing the violation of a safety statute. Negligence *per se* is used here to also describe fact situations in which the court will automatically find negligence, or contributory negligence, as a matter of law.

129. *See* Leathers v. Blackwell Durham Tobacco Co., 144 N.C. 330, 344-52, 57 S.E. 11, 16-17 (1907); *see also* Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 11-12, 220 S.E.2d 536, 539-40 (1975); Stone v. Texas Co., 180 N.C. 546, 551-54, 105 S.E. 425, 427-30 (1920).

130. N.C. GEN. STAT. § 20-135.2A (1989).

131. N.C. GEN. STAT. § 20-126(c) (1989).

132. N.C. GEN. STAT. § 20-140.4(b) (1989).

133. *See* N.C. GEN. STAT. §§ 20-137.1, 20-141, 20-158, 20-158.1, 20-175.3, 25-3-406, 62-242, 90-95.5, 113-291.8, 143-291, 143-299.1 (1989).

A particularly contentious example of this phenomenon is the outrunning-headlights cases. In a 1927 case, *Weston v. Southern Railway*,[134] the supreme court ruled that a plaintiff motorist is negligent as a matter of law when the motorist travels at speeds at which the motorist cannot stop within the length of the motorist's headlight radius.[135] The physics of a strict following of this rule resulted in a quite harsh situation: a person hitting something with their car at night was negligent as a matter of law in nearly all circumstances. The supreme court followed this rule through the early-1950s.[136] In 1953, the General Assembly overruled this rule by statute.[137]

Beginning in the mid-1950s—and continuing through today—the supreme court backed away from its previously aggressive and expansive view of contributory negligence as a matter of law. For example, in direct contrast to *Walker v. Town of Reidsville*,[138] the supreme court held in the 1955 case of *Dennis v. City of Albermarle*[139] that a plaintiff is not contributorily negligent as a matter of law just because the plaintiff temporarily forgot or was inattentive to a known danger.[140] A 1968 case, *Miller v. Miller*,[141] demonstrated how far the supreme court had come in this regard. In *Miller*, the supreme court held that the failure to use an available seatbelt does not constitute contributory negligence *per se*.[142]

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134. 194 N.C. 210, 139 S.E. 237 (1927).

135. *Id.* at 213-16, 139 S.E. at 238-39.

136. Chaffin v. Brame, 233 N.C. 377, 381-82, 64 S.E.2d 276, 279 (1951); Cox v. Lee, 230 N.C. 155, 158, 52 S.E.2d 355, 356-57 (1949); Tyson v. Ford, 228 N.C. 778, 780, 47 S.E.2d 251, 253 (1948); *see also* Lemuel Gibbons, Note, *Negligence—Contributory Negligence—Outrunning Headlights as*, 27 N.C. L. REV. 153 (1948).

137. N.C. GEN. STAT. § 20-141(n) (1989). Section 20-141(n) provides that "the failure of a motorist to stop his vehicle within the radius of its headlights or the range of his vision shall not be held negligence per se or contributory negligence per se." *Id.*; *see Speed Restrictions*, 31 N.C. L. REV. 415 (1953).

138. 96 N.C. 382, 2 S.E. 74 (1887). For a description of *Walker*, see *supra* notes 106 - 114 and accompanying text.

139. 242 N.C. 263, 87 S.E.2d 561 (1955).

140. *Id.* at 268-69, 87 S.E.2d at 565-66 (citing CORPUS JURIS SECUNDUM and cases from other states, but not citing *Walker*).

141. 273 N.C. 228, 160 S.E.2d 65 (1968).

142. *Id.* at 237, 160 S.E.2d at 72-74. The North Carolina General Assembly later provided that a parties' failure to wear a seat belt may not be introduced in a suit for damages in a safety statute requiring the use of seat belts. *See* N.C. GEN. STAT. § 20-135.2A (1989).

In a 1987 case, *Taylor v. Walker*,[143] the supreme court summarized its modern view:

> Only in exceptional cases is it proper to enter a directed verdict or a judgment notwithstanding the verdict against a plaintiff in a negligence case. Issues arising in negligence cases are ordinarily not susceptible of summary adjudication because application of the prudent man test, or any other applicable standard of care, is generally for the jury. Greater judicial caution is therefore called for in actions alleging negligence as a basis for plaintiff's recovery or, in the alternative, asserting contributory negligence as a bar to that recovery.[144]

5. *Plaintiff's Status*

Both the North Carolina Supreme Court and the North Carolina General Assembly limited the contributory negligence doctrine by making the doctrine inapplicable to particular plaintiffs. In 1908, the United States Congress enacted a statute adopting the pure comparative negligence doctrine[145] for negligence suits brought against interstate railroads for injuries sustained by their employees.[146] In 1913, the General Assembly, like many state legislatures, followed Congress's lead by adopting a statute rejecting the contributory negligence doctrine and adopting the compara-

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143. 320 N.C. 729, 360 S.E.2d 796 (1987).

144. *Id.* at 734, 360 S.E.2d at 799 (citing King v. Allred, 309 N.C. 113, 305 S.E.2d 554 (1983); Williams v. Carolina Power & Light Co., 296 N.C. 400, 250 S.E.2d 255 (1979); Moore v. Fieldcrest Mills, Inc., 296 N.C. 467, 251 S.E.2d 419 (1979); Millikan v. Guilford Mills, Inc., 70 N.C. App. 705, 320 S.E.2d 909 (1984), *disc. rev. denied*, 312 N.C. 798, 325 S.E.2d 631 (1985); Gladstein v. South Square Assoc., 39 N.C. App. 171, 249 S.E.2d 827 (1978), *disc. rev. denied*, 296 N.C. 636, 254 S.E.2d 178 (1979)); *see also* Lamm v. Bissette Realty, Inc., 327 N.C. 412, 418, 395 S.E.2d 112, 116 (1990); Daughtry v. Turnage, 295 N.C. 543, 547, 246 S.E.2d 788, 789-91 (1978); Clark v. Bodycombe, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976).

Several earlier supreme court opinions make similar statements regarding contributory negligence *per se*. *See, e.g.,* Phillips v. Nessmith, 226 N.C. 173, 174, 37 S.E.2d 178, 179 (1946); Mulford v. Cotton States Hotel Co., 213 N.C. 603, 604, 197 S.E. 169, 170 (1938); Battle v. Cleaver, 179 N.C. 112, 114, 101 S.E. 555, 556 (1919). A study of the negligence cases from the mid-twentieth century reveals, however, that the statement gave way in application. *See* notes 105 - 137 and accompanying text.

145. For a description of the different types of comparative negligence, see *infra* part III.A.

146. 45 U.S.C. §§ 51-60 (1988); *see generally* WOODS, *supra* note 13, § 1:11.

tive negligence doctrine for suits against intrastate railroads by their employees.[147]

The supreme court limited the use of the contributory negligence doctrine when children's actions are at issue. The court held that children under the age of seven are, as a matter of law, incapable of contributory negligence.[148] Children between the ages of seven and fourteen are rebuttably presumed incapable of contributory negligence.[149] Children over the age of fourteen are presumed capable of contributory negligence.[150] This capability may be rebutted, however, by proving that the child lacked the discretion, knowledge, and experience of an ordinary child of the same age.[151]

Another limitation stated by the supreme court, albeit rarely used, is known as the "rescue doctrine."[152] The rescue doctrine provides that a contributorily-negligent plaintiff who risks his or her life or serious injury in attempting a rescue is not barred from

147. Laws 1913, c.6, § 2, *codified at* N.C. GEN. STAT. § 62-242(c) (1989). Section 242(c) provides:

> In all actions . . . brought against any common carrier by railroad to recover damages for personal injury to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

N.C. GEN. STAT. § 62-242(c) (1989); *see generally* Turk, *supra* note 2, at 334.

148. *See* Hoots v. Beeson, 272 N.C. 644, 647, 159 S.E.2d 16, 19 (1968); Walston v. Greene, 247 N.C. 693, 695, 102 S.E.2d 124, 125 (1958).

149. *See* Weeks v. Barnard, 265 N.C. 339, 340, 143 S.E.2d 809, 810 (1965); Adams v. State Bd. of Educ., 248 N.C. 506, 511, 103 S.E.2d 854, 857 (1958); Caudle v. Seaboard Air Line Ry., 202 N.C. 404, 407, 163 S.E. 122, 124 (1932).

150. Welch v. Jenkins, 271 N.C. 138, 142, 155 S.E.2d 763, 766-67 (1967) (citations omitted); Baker v. Seaboard Air Line Ry., 150 N.C. 562, 564-68, 64 S.E. 506, 507-08 (1909). The supreme court has long held that a child's age and maturity are factors in determining the standard of care required of the child. *See* Manly v. Wilmington & Weldon R.R., 74 N.C. 655, 660 (1876) ("The caution required is according to the maturity and capacity of the child." (citation omitted)); *see also* Weeks v. Barnard, 265 N.C. 339, 340, 143 S.E.2d 809, 810 (1965); *Adams*, 248 N.C. at 511, 103 S.E.2d at 857. Both subjective and objective considerations are involved in determining such standard of care. *See generally* DAYE & MORRIS, *supra* note 5, § 16.40.5.

151. *See Welch*, 271 N.C. at 142, 155 S.E.2d at 766 (citing *Adams*, 248 N.C. at 512, 103 S.E.2d at 858); *Caudle*, 202 N.C. at 407, 163 S.E. at 124 (citations omitted)).

152. *See* Caldwell v. Deese, 288 N.C. 375, 380, 218 S.E.2d 379, 382 (1975); Partin v. Carolina Power & Light Co., 40 N.C. App. 630, 634, 253 S.E.2d 605, 609-10, *disc. rev. denied*, 297 N.C. 611, 257 S.E.2d 219 (1979).

recovery against a negligent defendant.[153] This doctrine does not apply if the attempt is recklessly or rashly made, or if the plaintiff caused the peril.[154]

Thus it is evident that the strict idea of the contributory negligence doctrine barring all contributorily negligent plaintiffs from recovery has considerably eroded in North Carolina over the years. It is also important to note that the development of the rules associated with the contributory negligence doctrine was a combined effort between the North Carolina Supreme Court and the North Carolina General Assembly.

II. CRITICISM OF THE CONTRIBUTORY NEGLIGENCE DOCTRINE

The contributory negligence doctrine is widely and thoroughly criticized. It is difficult—impossible may be the appropriate term—to find a defender of the contributory negligence doctrine in modern case law or legal scholarship. This part discusses some of the criticism.

A. An Unjust Doctrine

The primary criticism of the contributory negligence doctrine is nearly universal: The contributory negligence doctrine is inherently unfair. The doctrine makes *one* party bear the entire loss even though the loss is caused by the fault of *two or more* parties.[155] Normally, the one party bearing the entire loss is the "injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free."[156] Renowned tort commentator William L. Prosser has noted: "No one ever has succeeded in justifying that as a policy, and no one ever will."[157]

Courts abandoning contributory negligence for comparative negligence unanimously echo this criticism.[158] Their descriptions

153. Alford v. Washington, 238 N.C. 694, 701, 78 S.E.2d 915, 920 (1953).

154. *See Caldwell*, 288 N.C. at 380, 218 S.E.2d at 382; *Alford*, 238 N.C. at 701, 78 S.E.2d at 920.

155. *See* KEETON ET AL., *supra* note 3, § 67, at 468-69; Prosser, *supra* note 2, at 468-69.

156. Prosser, *supra* note 2, at 469.

157. *Id.*

158. *See* McIntyre v. Balentine, 833 S.W.2d 52, 56 (Tenn. 1992); Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991) (referring "bench and bar" to Langley v. Boyter, 325 S.E.2d 550 (S.C. Ct. App. 1984)); Hilen v. Hays, 673 S.W.2d 713, 718 (Ky. 1984); Gustafson v. Benda, 661 S.W.2d 11, 15 (Mo. 1983); Goetzman v. Wichern, 327 N.W.2d 742, 753 (Iowa 1982); Alvis v. Ribar, 421 N.E.2d 886, 896 (Ill. 1981); Scott v. Rizzo, 634 P.2d 1234, 1237 (N.M. 1981);

of contributory negligence include: "unfair";[159] "inherent injustice";[160] "substantial injustice since it was first invoked";[161] "obvious injustice";[162] "inequitable in its operation";[163] and "the rule . . . is a harsh one."[164]

Among the courts recently abandoning the contributory negligence doctrine for the comparative negligence doctrine are the supreme courts of two of North Carolina's neighboring states, South Carolina and Tennessee. In an unanimous opinion, the South Carolina Supreme Court rejected the contributory negligence doctrine for the comparative negligence doctrine in 1991.[165] The South Carolina Supreme Court referred "bench and bar" to an opinion written by the chief judge of the South Carolina Court of Appeals in *Langley v. Boyter*.[166]

The *Langley* court explained:

> The continued existence of the doctrine of contributory negligence . . . cannot be justified on any logical basis. It is contrary to the basic premise of our fault system to allow a defendant, who is at fault in causing an accident, to escape bearing any of its cost, while requiring a plaintiff, who is no more than equally at fault or even less at fault, to bear all of its costs.[167]

The *Langley* court further explained that "the doctrine of contributory negligence is an idea whose time is gone."[168]

Similarly, in an unanimous opinion, the Tennessee Supreme Court rejected the contributory negligence doctrine for the comparative negligence doctrine in 1992.[169] The Tennessee Supreme Court concluded that

> it is time to abandon the outmoded and unjust common law doctrine of contributory negligence and adopt in its place a system of

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Bradley v. Appalachian Power Co., 256 S.E.2d 879, 883 (W. Va. 1979); Placek v. City of Sterling Heights, 275 N.W.2d 511, 514 (Mich. 1979); Kaatz v. State, 540 P.2d 1037, 1048 (Alaska 1975); Li v. Yellow Cab Co., 532 P.2d 1226, 1230 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973).

159. Goetzman v. Wichern, 327 N.W.2d 742, 753 (Iowa 1982).
160. Kaatz v. State, 540 P.2d 1037, 1048 (Alaska 1975).
161. Placek v. City of Sterling Heights, 275 N.W.2d 511, 514 (Mich. 1979).
162. Bradley v. Appalachian Power Co., 256 S.E.2d 879, 883 (W. Va. 1979).
163. Li v. Yellow Cab Co., 532 P.2d 1226, 1230 (Cal. 1975).
164. *Hoffman*, 280 So. 2d at 437.
165. Nelson v. Concrete Supply Co., 399 S.E.2d 783 (S.C. 1991).
166. 325 S.E.2d 550 (S.C. App. 1984).
167. *Id.* at 562.
168. *Id.*
169. McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).

> comparative fault. Justice simply will not permit our continued adherence to a rule that, in the face of a judicial determination that others bear responsibility, nevertheless completely denies injured litigants recompense for their damages.[170]

The supreme courts of Alaska, California, Florida, Illinois, Iowa, Kentucky, Michigan, Missouri, New Mexico, and West Virginia expressed similar sentiments in adopting the comparative negligence doctrine in place of the contributory negligence doctrine.[171]

In an admiralty case, the United States Supreme Court expressed its dim view of the contributory negligence doctrine:

> 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. Exercising its traditional discretion, admiralty had eveloped and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires.[172]

In addition, the Supreme Court described contributory negligence as a "discredited doctrine."[173]

Prominent legal commentators agree that contributory negligence is harsh and unjust. Commentators such as William L. Prosser,[174] John G. Fleming,[175] Leon Green,[176] Fowler V. Harper and Fleming James, Jr.,[177] Robert E. Keeton,[178] and Roscoe Pound[179] all conclude that the contributory negligence doctrine is unfair and inequitable. These commentators describe the contributory negligence doctrine as "the cruelest and most indefensible

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170. *Id.* at 56.

171. *See* Hilen v. Hays, 673 S.W.2d 713, 718 (Ky. 1984); Gustafson v. Benda, 661 S.W.2d 11, 15 (Mo. 1983); Alvis v. Ribar, 421 N.E.2d 886, 896 (Ill. 1981); Scott v. Rizzo, 634 P.2d 1234, 1237 (N.M. 1981); and cases cited *supra* note 158.

172. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 408-09 (1953) (footnote omitted).

173. *Id.* at 409.

174. Prosser, *supra* note 2.

175. JOHN G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 134-36 (2d ed. 1985).

176. Leon Green, *The Individual's Protection Under Negligence Law: Risk Sharing*, 47 NW. U.L. REV. 751 (1953).

177. 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 1193-1209 (1956).

178. Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

179. Roscoe Pound, *Comparative Negligence*, 13 NACCA L.J. 195 (1954).

doctrine of the common law";[180] "obvious injustice";[181] "deplorable";[182] "out of keeping with the prevailing and easily discernible sense of justice of laymen as well as lawyers";[183] "fundamentally and radically unjust and ought to be given up";[184] a "harsh régime";[185] and a "Draconian rule sired by a medieval concept of cause out of a heartless laissez-faire."[186]

The law faculty of the University of North Carolina at Chapel Hill was among the first to criticize the contributory negligence doctrine in a scholarly journal. In 1932, the law faculty authored a law review article urging the North Carolina General Assembly to pass a statute adopting the comparative negligence doctrine.[187] The law faculty explained that the "harsh result" of contributory negligence "has been unpopular, as out of line with modern ideas of justice."[188] The law faculty noted that North Carolina courts have adopted several limitations on the contributory negligence doctrine "to alleviate the situation" and "to afford relief against the strict application of the" doctrine.[189]

The law faculty clearly articulated their position on the merits of the comparative negligence doctrine over the contributory negligence doctrine:

> It cannot be doubted that comparative negligence more closely approximates ideal justice than does the harsh common law rule of contributory negligence. The latter, if it was originally intended as a deterrent, has long outlived its usefulness, since it allows a complete defense to one who in most cases is mainly responsible for the injury. Conceding the possibility of the contrary, the defendant in any event should be answerable for his portion of the fault. There seem to be no reasonable grounds for allowing the plaintiff's conduct to exonerate completely a concededly negligent

180. Green, *supra* note 176, at 757.

181. Prosser, *supra* note 2, at 469.

182. Keeton, *supra* note 178, at 506.

183. *Id.* at 507.

184. Pound, *supra* note 179, at 197.

185. FLEMING, *supra* note 175, at 135.

186. 2 HARPER & JAMES, *supra* note 177, at 1207 (footnote omitted).

187. *Proposals for Legislation in North Carolina*, 11 N.C. L. REV. 51, 52-59 (1932) [hereinafter *Proposals*]. For a description of the life of a comparative negligence bill introduced in the North Carolina General Assembly in 1933, see *infra* notes 256-257 and accompanying text.

188. *Proposals, supra* note 187, *at* 53.

189. *Id.* at 53-54. For a discussion of these limitations, see *supra* part I.C.

defendant. Comparative negligence apportions the fault equitably.[190]

The law faculty rejected the contention that a comparative negligence system would be difficult to administer.[191] They noted that other states found no difficulty and that North Carolina courts had applied the comparative negligence doctrine under the Federal Employers' Liability Act for, at that time, nearly twenty years.[192] The law faculty concluded that "there is a real need in North Carolina for a general application of comparative negligence."[193]

Two 1994 North Carolina Court of Appeals opinions reflect the growing discomfort with the contributory negligence doctrine in North Carolina. In *Bosley v. Alexander*,[194] the court of appeals stated that "there are serious questions regarding the validity of the doctrine of contributory negligence."[195] The *Bosley* court quoted the United States Supreme Court's description of contributory negligence: "a 'discredited doctrine.' "[196] The *Bosley* court noted also that either the North Carolina Supreme Court or General Assembly could replace the contributory negligence system with a comparative negligence system.[197]

In *Bowden v. Bell*,[198] the court of appeals stated that contributory negligence "ha[s] been sharply criticized."[199] The *Bowden* court noted that the North Carolina Legislative Research Commission recommended the abolishment of contributory negligence for comparative negligence in 1981.[200] Like the *Bosley* court, the *Bowden* court voiced the supreme court's and General Assembly's ability to alter the common-law in this area.[201]

Courts and legal scholars are not the only sources of contributory-negligence-doctrine criticism. Many of North Carolina's newspapers are severely critical of the contributory negligence doctrine as well. The *Raleigh News & Observer* calls the doctrine

190. *Proposals, supra* note 187, at 57 (footnote omitted).
191. *Id.* at 57-58.
192. *Id.* at 58.
193. *Id.* at 59.
194. 114 N.C. App. 470, 442 S.E.2d 82 (1994).
195. *Id.* at 471, 442 S.E.2d at 83 (citations omitted).
196. *Id.* (*quoting* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953)).
197. *Id.*
198. 116 N.C. App. 64, 446 S.E.2d 816 (1994).
199. *Id.* at 66, 446 S.E.2d at 818-19.
200. *Id.* at 66-67, 446 S.E.2d at 819 (citation omitted).
201. *Id.* at 67, 446 S.E.2d at 819 (citations omitted).

"unfair," "antiquated," and "harsh."[202] The *Winston-Salem Journal* describes the contributory negligence as "simply unfair" and explains that justice requires the rejection of contributory negligence.[203] The *Chapel Hill Herald* explains that the debate over comparative negligence is "about allowing a judge to be fair to both parties."[204] The *Durham Herald-Sun* states it well: The contributory negligence doctrine is "one of the few negatives that go with living in the Old North State."[205]

B. Citizen-Jurors and the Contributory Negligence Doctrine

The contributory negligence doctrine receives vehement criticism for its effect on the public's perception of the ability of the court system to impart justice to individuals.[206] This comes from the recognition that juries, in order to avoid the harshness of the contributory negligence doctrine, sometimes practice "substantial justice"—or "rough justice"—and find the defendant liable even though contributory negligence is present and no other doctrines lead to this conclusion, and reduce the damages in proportion to plaintiff's fault, without any guidance from the court.[207] One

202. *See Fairer Fault System Overdue*, RALEIGH NEWS & OBSERVER, May 8, 1991, at A16; *A Fair Shake Denied — Again*, RALEIGH NEWS & OBSERVER, May 17, 1991, at A12 ("North Carolina's hard-working, ordinary citizens—its paycheck people—deserve equitable treatment too."); *Defeat Pried From Victory*, RALEIGH NEWS & OBSERVER, June 12, 1987, at A14; *Fairness Before Costs*, RALEIGH NEWS & OBSERVER, Mar. 14, 1983, at A4; *Fair Shake for Victims*, RALEIGH NEWS & OBSERVER, Mar. 5, 1983, at A4 ("[w]hen a law is as unfair as [the contributory negligence doctrine], it ought to be changed").

203. *Time to Root for Justice*, WINSTON-SALEM J., May 2, 1991, at 16; *see also Bill on Rights of Accident Victims Defeated in House*, WINSTON-SALEM J., May 16, 1991, at 19.

204. *Negligence Law Outdated*, CHAPEL HILL HERALD, April 28, 1994, at 4.

205. *'Contributory Negligence' 125 Years Out of Date*, DURHAM HERALD-SUN, April 25, 1994, at A8; *see also Negligence Law Ripe for Change*, DURHAM HERALD-SUN, April 24, 1994, at 16 ("the argument isn't about siding with either insurance executives or personal injury lawyers (a terrifying thought), it's about allowing a judge to be fair to both parties").

206. *See, e.g.*, Li v. Yellow Cab Co., 532 P.2d 1226, 1231 (Cal. 1975); Frank E. Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 151-52 (1958).

207. *See Li*, 532 P.2d at 1231 (citing Keeton, *supra* note 178, at 505; Prosser, *supra* note 2 (this is what "[e]very trial lawyer is well aware" of); *Comments*, *supra* note 2 (comments of Professors Keeton, Malone, and Wade)); VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 21.1 (2d ed. 1986); Wex S. Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 62-66 (1945); Herbert R. Baer, *The Relative Roles of Legal Rules and Non-Legal Factors*

judge observed that "as a practical matter . . . juries have long been applying the doctrine of comparative negligence in reaching their verdicts."[208]

Jurors doing "substantial justice" are left with the feeling that they took the just course, but may remain uncomfortably aware that they did not strictly follow the judge's instructions long after they leave the courthouse. Avoiding a judge's instructions is certainly nothing to be proud of, and is a cause for serious concern. One commentator explains that "there is something basically wrong with a rule of law that is so contrary to the settled convictions of the lay community that laymen will almost always refuse to enforce it, even when solemnly told to do so by a judge whose instructions they have sworn to follow."[209] Importantly, this delivery of "substantial" justice is much too random and fleeting to deserve North Carolina's reliance.[210]

More often, juries strictly follow the judge's instructions in this regard,[211] but may walk away from the county courthouse with the injustice of the contributory negligence doctrine forever

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in Accident Litigation, 31 N.C. L. REV. 46 (1952); John Drescher, Jr., *House Endorses Bill to Expand Accident Compensation*, RALEIGH NEWS & OBSERVER, July 2, 1985, at C4 (proponents of a comparative fault bill in the North Carolina General Assembly stated that "juries sometimes d[o] not pay attention to what the judge told them about . . . contributory negligence and award[ ] damages to people who contributed to an accident").

208. Walter L. Tooze, *Contributory Versus Comparative Negligence—A Judge Expresses His Views*, 12 NACCA L.J. 211, 212 (1953). Justice Lewis F. Powell, Jr., before his appointment to the United States Supreme Court, noted that "the average jury will usually award some damages regardless of contributory negligence." Lewis F. Powell, Jr., *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005, 1006 (1957).

This phenomena has raised other difficulties as well. *See* Noel Fidel, *Preeminently a Political Institution: The Right of Arizona Juries to Nullify the Law of Contributory Negligence*, 23 ARIZ. ST. L.J. 1 (1991).

209. Maloney, *supra* note 206, at 151-52.

210. North Carolina Representative H. Martin Lancaster (D-Wayne), in supporting a bill providing for the comparative negligence doctrine in North Carolina, noted that this phenomenon "creates inequities from case to case." *See* Drescher, *supra* note 207, at C4. Representative Lancaster explained that "[a]ll this bill does is say every plaintiff is going to be fed out of the same spoon. This is pure fairness and equity." *Id.*

211. *See* Kalven, *Comment*, *supra* note 2, at 902; Elizabeth Leland, *Accident Lawsuit Renews Call for Comparative Fault System*, RALEIGH NEWS & OBSERVER, Feb. 15, 1983, at C1 (describing North Carolina case where jury wanted to award widow damages, but followed the contributory negligence doctrine).

imbedded in their minds. Both "substantial justice" juries and strict juries may feel rather uncomfortable with their experience with the contributory negligence doctrine.

Feelings such as these promote a distrust in citizen-jurors regarding the judicial system's ability to provide them, their families and neighbors fair resolution of their future problems. Any distrust or lost confidence in our judicial system is unhealthy.

C. *Limitations Criticized*

The many limitations on the contributory negligence doctrine developed by the courts to reduce the harshness of contributory negligence are cumbersome and complicated in application, and often confuse the jury.[212] Last clear chance, shifting burdens for minor plaintiffs, willful and wanton defendants, and the rescue doctrine, added to the interpretation of proximate cause and other terminology, are understandably difficult for a jury to digest.

Last clear chance, a doctrine long-applied in North Carolina,[213] is often ridiculed. One group of well-known commentators laments the "variety of irreconcilable rules [associated with the 'last clear chance' doctrine] . . . and the lack of any rational fundamental theory to support them."[214] North Carolina courts have also noted the difficulties with the last clear chance doctrine.[215]

Moreover, the last clear chance doctrine results in an all-or-nothing risk for a negligent defendant. A defendant who had the last clear chance is liable for 100% of a contributorily negligent plaintiff's damages even if the plaintiff's negligence accounts for 99% of the negligence. It is not "easy to defend a rule which absolves the plaintiff entirely of his own negligence, and places the whole loss upon the defendant, whose fault may be the lesser of the two."[216]

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212. *See* Green, *supra* note 73, at 32 ("The rules of law pertaining to negligence conduct . . . have been made complex, difficult of understanding and application by a useless resort to the mysticism of words.").

213. *See* Bowden v. Bell, 116 N.C. App. 64, 67, 446 S.E.2d 816, 819 (1994) (citing Gunter v. Wicker, 85 N.C. 310 (1881)); *supra*, part I.C.1.; *see generally* DAYE & MORRIS, *supra* note 5, § 19.21.35.

214. KEETON ET AL., *supra* note 3, at 468.

215. *See supra* notes 73 - 82 and accompanying text.

216. KEETON ET AL., *supra* note 3, at 468.

III. THE COMPARATIVE NEGLIGENCE DOCTRINE

The virtues of the comparative negligence doctrine over the contributory negligence doctrine are well-documented in the sources cited in parts I and II of this article and are thus not repeated in detail here. The comparative negligence doctrine's highest quality is that it is premised on the principle that parties at fault should be responsible for the cost of the injuries sustained as a result of their fault.[217] It is an effective solution to the problems associated with the contributory negligence doctrine. The comparative negligence doctrine offers a fair method of apportionment—each party is responsible for the damages attributable to that party's proportionate negligence. The doctrine avoids allowing a highly negligent defendant to escape all responsibility for the injuries caused by the defendant's negligence when the plaintiff is also negligent. Importantly, the comparative negligence doctrine allows citizen-jurors to impart justice with pride and confidence in the civil justice system. The doctrine also reduces the confusion associated with the variety of contributory-negligence limitations.

This part begins by describing the types of comparative negligence systems. Next, it surveys the history of the doctrine and its modern pervasiveness. Finally, this part examines the legislative history of the comparative negligence bills introduced in the North Carolina General Assembly, and one of the principle arguments against their adoption, the "insurance-costs" argument.

A. *Types of Comparative Negligence Systems*

Comparative negligence systems compare the fault attributable to the plaintiff to the fault attributable to the defendant and provide for the division of damages.[218] Thus, the comparative negligence doctrine is often, and more accurately, called "comparative fault." There are two general types of comparative negligence systems, "pure" and "modified."

The pure comparative negligence system provides that a plaintiff may recover the portion of the plaintiff's damages caused by the defendant's fault.[219] The plaintiff's contributory negligence does not completely bar the plaintiff's recovery, but instead reduces the plaintiff's damages in proportion to the plaintiff's

217. *See* WOODS, *supra* note 13, § 1:1.
218. *See* SCHWARTZ, *supra* note 207, § 2.1, at 29.
219. *See id.* § 3.2, at 48.

fault.[220] Under the pure system, the plaintiff is not barred from recovery even if the plaintiff's negligence is greater than that of the defendant's.[221] The pure comparative negligence system is recognized as "undoubtably the fairest and most equitable system."[222] Twelve states follow the pure comparative negligence doctrine.[223] Several federal statutes adopt this system.[224] The Uniform Comparative Fault Act provides for this system.[225] The United States Supreme Court adopted pure comparative negligence for admiralty suits.[226] Many foreign countries apply pure comparative negligence.[227]

Modified comparative negligence systems likewise provide that a plaintiff may recover the portion of the plaintiff's damages caused by the defendant's fault.[228] Under modified systems, however, if the plaintiff's fault exceeds a certain proportion, the plaintiff's contributory negligence bars the plaintiff's recovery. There are three types of modified comparative negligence systems: "not greater than," "not as great as," and "slight/gross."

The "less than or equal to" system—or the "fifty percent" system—provides that a contributorily negligent plaintiff can recover damages if the plaintiff's fault is less than or equal to the defendant's fault; the plaintiff's damages are reduced by the percentage

220. *Id.*

221. *Id.*

222. WOODS, *supra* note 13, § 1:11, at 27; *see also* Juenger, *supra* note 2, at 49-50; Prosser, *supra* note 2, at 494, 508; John Wade, *A Uniform Comparative Fault Act-What Should it Provide?*, 10 U. MICH. J. L. REF. 220, 225 (1977); Keeton, *Comments*, *supra* note 2, at 911.

223. *See* WOODS, *supra* note 13, § 1:11, at 27-28. Alaska, California, Florida, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington are pure comparative negligence jurisdictions. *Id.*

224. *See* SCHWARTZ, *supra* note 207, § 3.2, at 49-50 (citing FELA, the Merchant Marine Act, the Jones Act, and the Federal Death on the High Seas Act).

225. UNIFORM COMPARATIVE FAULT ACT § 1 (1977).

226. United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975) (unanimous opinion).

227. *See* SCHWARTZ, *supra* note 207, § 3.2, at 50.

228. It is generally recognized that modified systems are the result of political compromise. *See* SCHWARTZ, *supra* note 207, § 3.1, at 47; Prosser, *supra* note 2, at 494.

of the fault attributable to the plaintiff.[229] Twenty-one states follow the "not greater than" system.[230]

The "less than" system—or the "forty-nine percent" system—provides that a contributorily negligent plaintiff can recover damages if the plaintiff's fault is less than the defendant's fault; the plaintiff's damages are reduced by the percentage of the fault attributable to the plaintiff.[231] Eleven states follow the "less than" system.[232] The "less than" system presents some practical difficulties.[233] Based on their experience, nine states that originally adopted the "less than" system have since switched to the "less than or equal to" system.[234]

The "slight/gross" system provides that a contributorily negligent plaintiff can recover damages caused by the defendant's gross fault if the plaintiff's fault is slight in comparison to the defendant's fault; otherwise, the plaintiff cannot recover damages against the defendant.[235] Only two states, Nebraska[236] and South Dakota,[237] adopted the "slight/gross" system. The "slight/gross" system has many peculiar problems and is difficult to apply.[238]

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229. *See* SCHWARTZ, *supra* note 207, § 2.1, at 31-32, § 3.5, at 67-76; KEETON ET AL., *supra* note 3, § 67, at 473.

230. WOODS, *supra* note 13, § 1:11, at 28-29. Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, and Wyoming follow the "less than or equal to" system. *Id.* Nine of these states formally followed the "less than" system. *Id.*

231. *See* SCHWARTZ, *supra* note 207, § 2.1, at 31-32, § 3.5, at 67-76; KEETON ET AL., *supra* note 3, § 67, at 473.

232. WOODS, *supra* note 13, § 1:11, at 29-30. Arizona, Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, North Dakota, Tennessee, Utah, and West Virginia follow the "less than" system. *Id.*

233. *See infra* note 436.

234. WOODS, *supra* note 13, § 1:11, at 28-29.

235. SCHWARTZ, *supra* note 207, § 2.1, at 30-31; KEETON ET AL., *supra* note 3, § 67, at 474.

236. *See* WOODS, *supra* note 13, at 674. Nebraska altered its statute in 1964 to provide for the comparison of the plaintiff's slight negligence and the defendant's ordinary negligence. *Id.*

237. *See* WOODS, *supra* note 13, at 739. Like Nebraska, South Dakota amended its statute to provide for comparison between the plaintiff's slight negligence and the defendant's ordinary negligence. *Id.*

238. *See* SCHWARTZ, *supra* note 207, § 2.1, at 30-31, § 3.4, at 59-66.

B. *History of the Comparative Negligence Doctrine*

Roots of the comparative negligence doctrine can be traced back fifteen centuries to Roman law.[239] The development of modern comparative negligence laws is traced to eighteenth-century English admiralty law. Eighteenth-century English admiralty courts divided the damages equally when both parties were negligent.[240] The United States Supreme Court adopted this admiralty rule in 1855.[241] English courts followed this rule until 1911, when England adopted a statute that provided for the division of damages "in proportion to the degree in which each vessel was at fault."[242]

The Federal Employers' Liability Act (FELA), adopted by the United States Congress in 1908, enacted a comparative negligence system for all negligence actions brought in state or federal courts against railroads by their employees for injuries sustained while engaged in interstate commerce.[243] FELA was a reactive measure implemented to combat common-law doctrines such as the contributory negligence doctrine which had led to many injustices in suits brought by injured railroad employees.[244] Many states, including North Carolina, followed Congress's lead by enacting comparative negligence statutes covering railroad employees engaged in intrastate commerce.[245]

In 1910, Mississippi became the first state to adopt the comparative negligence doctrine generally when the Mississippi legis-

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239. *See* WOODS, *supra* note 13, § 1:9 ("The great Digest of Justinian, completed in 533 A.D., which ambitiously undertook to digest all juristic Roman law to that date, provided that a party should assume damages in proportion to his fault and that where damages cannot be apportioned they should be divided equally."); *cf.* Turk, *supra* note 2, at 218-25 (origin of comparative negligence doctrine is the medieval sea codes).

240. Prosser, *supra* note 2, at 475. Early-seventeenth-century English admiralty law divided the damages evenly even where only one party's ship could be faulted. *See id.* at 475 & n.45 (citations omitted).

241. *See* The Schooner Catharine, 58 U.S. (17 How.) 170 (1854).

242. *See* Prosser, *supra* note 2, at 476 (citation omitted).

243. 35 Stat. 66, ch. 149, § 3 (1908), *codified at* 45 U.S.C. § 53 (1988). Congress also enacted the comparative negligence doctrine in the Jones Act, 38 Stat. L. 1185, ch. 153, § 20 (1915), *codified at* 46 U.S.C. app. § 688 (1988), and the Death on the High Seas Act, 41 Stat. 537, ch. 111, § 6 (1920), *codified at* 46 U.S.C. app. § 766 (1988).

244. WOODS, *supra* note 13, § 1:11, at 24.

245. *See* Prosser, *supra* note 2, at 478-79. For a description of North Carolina's legislation in this area, see *supra* note 147 and accompanying text.

lature enacted a pure comparative negligence statute.[246] Between 1910 and 1968, six other states rejected the contributory negligence doctrine for some form of the comparative negligence doctrine.[247]

Beginning in 1969, the United States witnessed state after state reject the contributory negligence doctrine for the comparative negligence doctrine.[248] Some of these states rejected the contributory negligence doctrine for the comparative negligence doctrine by statute. Others did so by a decision of the state's supreme court.

Four states adopted comparative negligence in 1969, joined by one state in 1970, and four more states in 1971.[249] The "stampede" had begun.[250] Eleven states adopted comparative negligence in 1973, followed by one state in 1974, four states in 1975, one state in 1976, and three states in 1979.[251] By the end of 1985, nine more states had made the switch,[252] bringing the number of

246. *See generally* WOODS, *supra* note 13, at 24 (citing MISS. CODE ANN. § 11-7-15 (1972)). The Georgia Supreme Court devised a comparative negligence system for Georgia by broadly construing an 1860 railroad accident statute that provided for comparative negligence. *See* KEETON ET AL., *supra* note 3, § 67, at 471; WOODS, *supra* note 13, § 1:11, at 24.

247. These states are: Georgia (1913), Nebraska (1913), Wisconsin (1931), South Dakota (1941), Arkansas (1955), and Maine (1965). Judge Woods describes the negligence-law history of each state in the Appendix of his treatise. *See* WOODS, *supra* note 13, at 499-788. The development of the comparative negligence doctrine in Georgia is rather interesting, *see id.* at 558-60, but a full discussion of the topic is beyond the scope of this article. Georgia is given a date of 1913 because that is the year of the second of two Georgia Supreme Court opinions cited as adopting the comparative negligence standard generally in Georgia. *See id.* at 559 (citing Elk Cotton Mills v. Grant, 140 Ga. 727, 79 S.E. 836 (1913)).

248. *See* SCHWARTZ, *supra* note 207, § 1.1. at 1-3.

249. Hawaii, Massachusetts, Minnesota, and New Hampshire rejected contributory negligence for comparative negligence in 1969. *Id.* § 1.1, at 2. Vermont followed in 1970. *Id.* Colorado, Idaho, Oregon, and Rhode Island followed in 1971. *Id.*

250. *Id.* § 1.1, at 3.

251. Connecticut, Florida, Nevada, New Jersey, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming rejected contributory negligence for comparative negligence in 1973. *Id.* at 2-3. They were followed by Kansas in 1974, Alaska, California, Montana, and New York in 1975, Pennsylvania in 1976, and Louisiana, Michigan, and West Virginia in 1979 (Louisiana's switch became effective in 1980). *Id.* at 2-3.

252. Ohio rejected contributory negligence for comparative negligence in 1980, followed by Illinois and New Mexico in 1981, Iowa in 1982, Indiana and Missouri

states rejecting the contributory negligence doctrine for the comparative negligence doctrine to forty-four.

In 1986, the contributory negligence roster included only six states: Alabama, Maryland, North Carolina, South Carolina, Tennessee, and Virginia. The South Carolina Supreme Court rejected contributory negligence for comparative negligence in 1991.[253] The Tennessee Supreme Court followed suit in 1992.[254]

Today, the contributory negligence doctrine has been rejected by forty-six states. It is codified in federal negligence statutes, followed by the United States Supreme Court in admiralty suits, and prevails in nearly all of the major civilized countries. North Carolina, however, still follows the contributory negligence doctrine.

C. *The Comparative Negligence Doctrine in the North Carolina General Assembly*

There have been several attempts to progress North Carolina to a comparative fault system in the North Carolina General Assembly. The North Carolina Senate and the North Carolina House of Representatives each considered comparative fault bills. Some bills passed one house, only to face defeat in the other. Some bills died in committee. None passed both houses to become law.[255] This section describes the legislative history of comparative negligence bills in the General Assembly, concentrating on the 1980s and one of the principal arguments presented to the General Assembly in opposition to the bills during that time.

1. A Legislative History

The first comparative negligence bill in the North Carolina General Assembly was introduced in the North Carolina House of Representatives in 1933.[256] The bill received an unfavorable

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in 1983 (Indiana's switch became effective in 1985), and Arizona, Delaware, and Kentucky in 1984. *Id.* at 2-3.

253. *See supra* notes 165 - 168 and accompanying text.

254. *See supra* notes 169 - 170 and accompanying text.

255. North Carolina is the only state where the governor has no veto power. *See* JACK D. FLEER, NORTH CAROLINA GOVERNMENT & POLITICS 115 (1994).

256. HOUSE JOURNAL 71 (1933). The bill, H.B. 177 (1933), was referred to the Judiciary I Committee. *Id.*

A 1932 law review article authored by the law faculty of the University of North Carolina at Chapel Hill School of Law in the *North Carolina Law Review* had urged the legislature to reject contributory negligence for comparative negligence. For a description of the article's contents, see *supra* notes 187 - 193 and accompanying text.

report from the examining committee and was never addressed by the full House.[257] In 1953, a bill providing for the adoption of comparative negligence passed the House and was sent on to the North Carolina Senate.[258] The Senate committee examining the House bill, however, gave the bill an unfavorable report to the full Senate and the full Senate never considered the bill.[259] Four years later, in 1957, a bill providing for comparative fault was introduced in the House,[260] but received an unfavorable report from the examining committee[261] and was not considered by the full House. Comparative fault bills were again introduced in the House or Senate in 1973, 1977, and 1979.[262] These bills, however, received little attention.[263]

The issue of comparative negligence received much attention in the North Carolina General Assembly during the 1980s. Most of the comparative negligence bills came within two or three votes of becoming law. The history of these bills is a very interesting study.

In the 1981 legislative session, nine members of the House introduced a bill to provide for modified comparative negli-

257. HOUSE JOURNAL 264 (1933). No further action on the bill was taken.

258. HOUSE JOURNAL 744-45, 764, 766 (1953); *see Negligence Bill Tops Hurdle*, RALEIGH NEWS & OBSERVER, April 9, 1953, at 20; *Legislative Record*, RALEIGH NEWS & OBSERVER, April 10, 1953, at 11. The bill was H.B. 109 (1953).

259. SENATE JOURNAL 473, 506, 532 (1953).

260. HOUSE JOURNAL 601 (1957). The bill was H.B. 858 (1957).

261. HOUSE JOURNAL 718 (1957).

262. In 1973, H.B. 995 (1973), S. 539 (1973) and S. 704 (1973), providing for comparative negligence, were introduced and referred to committee in the House and Senate, respectively, but received no further attention. HOUSE JOURNAL 408 (1973); SENATE JOURNAL 190, 261 (1973). In 1977, H.B. 568 (1977), providing for comparative negligence, was introduced to the House and referred to committee, HOUSE JOURNAL 287 (1977), but the committee gave the bill an indefinite postponement report, *id.* at 1170. In 1979, a comparative negligence bill introduced in the House, H.B. 821 (1979), HOUSE JOURNAL 306 (1979), was altered to provide for a study commission, *id.* at 824, but was postponed indefinitely, *id.* at 1017. However, Resolution 65 (House Joint Resolution 1177) of the 1979 General Assembly authorized the North Carolina Research Commission to study the issue and report its findings to the General Assembly. The Legislative Research Commission recommended that North Carolina adopt a comparative negligence system. NORTH CAROLINA LEGISLATIVE RESEARCH COMMISSION, LAWS OF EVIDENCE AND COMPARATIVE NEGLIGENCE (1981) (unpaginated) (on file with the *Campbell Law Review*) [hereinafter RESEARCH COMMISSION].

263. *See supra* note 262.

gence.[264] The House Committee on the Judiciary III examined the bill and sent a favorable committee report to the full House.[265] The full House approved the bill by a 78-26 margin and sent the bill to the Senate.[266] The Senate Judiciary III Committee examined the House bill and reported the bill unfavorably to the full Senate, but reported a substitute bill favorably.[267] After approximately two hours of debate, the Senate rejected the bill by a 23-19 margin.[268] Opponents of the bill argued that the bill was "aimed at increasing lawyers' business."[269] One senator argued that " '[n]obody cares but the trial lawyers. The public of North Carolina will not be the ones to profit from this bill.' "[270] Opponents argued also that insurance premiums would rise dramatically if the bill passed.[271]

In the 1983 legislative session, nine senators introduced a bill to provide for modified comparative negligence to the Senate.[272] The Senate Judiciary III Committee received the bill for examina-

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264. The bill was H.B. 377 (1981). *See* HOUSE JOURNAL 167 (1981).

Almost all of the comparative negligence bills introduced in the North Carolina General Assembly during the 1980s provided for the "less than"—or "forty-nine percent"—modified comparative negligence system. For a description of the "less than" system, and some of the difficulties with the "less than" system, see *supra* notes 232-234 and accompanying text *and infra* note 438.

265. HOUSE JOURNAL 237 (1981).

266. The bill passed the second reading by a margin of 79-32 on March 25, 1981, HOUSE JOURNAL 245 (1981); *Comparative Fault*, RALEIGH NEWS & OBSERVER, Mar. 26, 1981, at A9; *House Acts on Damages Claims Bill*, CHARLOTTE OBSERVER, Mar. 26, 1981, at D2, and, following the rejection of a proffered amendment, passed the third reading, 78-26, on March 26, 1981, HOUSE JOURNAL 254 (1981).

267. SENATE JOURNAL 229, 616 (1981) (The bill that passed the House provided that the plaintiff must be more negligent than the defendant for the action to be barred. The Senate's substitute bill provided that the plaintiff's action is barred if the plaintiff and the defendant were equally negligent, and made the bill inapplicable to product liability actions).

268. SENATE JOURNAL 644 (1981); Sherry Johnson, *Senate Kills Comparative Fault Proposal*, RALEIGH NEWS & OBSERVER, June 19, 1981, at 25.

269. Johnson, *supra* note 268, at 25.

270. Johnson, *supra* note 268, at 25 (quoting Senator T. Cass Ballenger (R-Catawba)).

271. Johnson, *supra* note 268, at 25.

272. The bill was S. 145 (1983). *See* SENATE JOURNAL 100 (1983). Sixty-four house members introduced a similar bill, H.B. 319 (1983), in the North Carolina House of Representatives. HOUSE JOURNAL 130 (1983). However, in light of events in the 1981 session, the House waited to see what action the Senate would take.

tion.[273] Opponents of the bill speaking before the committee noted that the bill's sponsors were lawyers and asserted that " '[t]here is no public outcry for changes in the law.' "[274] Opponents contended also that insurance premiums would rise dramatically, along with litigation and taxes.[275] Proponents of the bill argued that there was no proof that other states incurred such substantial increases in insurance costs when they changed to comparative negligence.[276] Proponents also pointed to a tragic situation where contributory negligence prevented a North Carolina family's recovery of damages for the death of their husband and father.[277] After some arguments over procedure, the committee voted to report the bill favorably to the full Senate.[278] Several members of the committee complained that the five days that the committee spent examining the bill were insufficient.[279]

Before the full Senate voted on the bill, the bill was recommitted to the Judiciary III Committee on the motion of Senator Henson P. Barnes (D-Wayne), the bill's sponsor.[280] This recommit occurred in response to efforts by opponent of the bill and chairman of the Senate appropriations panel, Senator Harold W. Hardison (D-Lenoir).[281] Senator Hardison called the bill " 'the best lawyers' welfare bill I've ever seen in my life.' "[282] He announced that he obtained an estimate from the Governor's Office of Budget and Management that the bill may cost state government an extra

273. SENATE JOURNAL 100 (1983).

274. F. Alan Boyce, *Negligence Law Change Endorsed*, RALEIGH NEWS & OBSERVER, Mar. 9, 1983, at C1 (quoting an attorney representing a railroad company before the committee).

275. Boyce, *supra* note 274, at C1.

276. *Id.*

277. *Id.* at C1; Elizabeth Leland, *Accident Lawsuit Renews Calls for Comparative Fault System*, RALEIGH NEWS & OBSERVER, Feb. 15, 1983, at C1. In 1979, Charles M. "Chuck" Short, Jr., was killed when his truck slammed into a bridge. Leland, *supra*, at C1. Mr. Short was returning his truck to the dealer to have a sticky accelerator fixed for the fourth time. *Id.* A jury found that the dealership had been negligent. *Id.* However, the jury—which deliberated for seven hours—found that Short was partly to blame for the accident and, thus, the contributory negligence doctrine prevented his widow from collecting damages against the dealership. *Id.* A juror explained that the jury "wanted to award damages to the widow but felt constrained by the law." *Id.*

278. SENATE JOURNAL 140 (1983); Boyce, *supra* note 274, at C1.

279. Boyce, *supra* note 274, at C1.

280. SENATE JOURNAL 150, 163 (1983).

281. *Cost Estimate Stalls Bill, Piques Legislator*, RALEIGH NEWS & OBSERVER, Mar. 12, 1983, at A1 [hereinafter *Cost Estimate*].

282. *Id.* at A1, A13 (quoting Senator Hardison).

$1,000,000.00 a year in insurance costs.[283] Under Senate rules, a bill that would cost state government more than is already provided in the budget must receive approval from the appropriations committee.[284] Other members of the legislature disapproved of Senator Hardison's maneuver because of the use of budget estimates from outside the legislative staff and " 'using the budget process in taking sides on a bill.' "[285] Senator Hardison explained that he was " 'just protecting the taxpayer.' "[286]

The Judiciary III Committee amended the bill to exempt state government from the change and again provided a favorable report of the bill, as amended, to the full Senate.[287] The Senate rejected the amendment to exempt state government by a 25-22 margin.[288] Then, in a move recognized as the killing of the bill, the Senate referred the bill to the Senate Insurance Committee, from which the bill never emerged.[289]

The initial action on comparative negligence returned to the House in 1985. Twenty-nine members introduced a bill to provide for modified comparative negligence.[290] The House Committee on the Judiciary IV examined the bill and reported it to the full House with a favorable report.[291] Opponents of the bill asserted, as they had in previous debates, that comparative negligence would cause insurance rates to rise.[292] One house member opposing the bill argued that it is not " 'an acceptable process where a person can gain by his own misadventures or negligence.' "[293] Pro-

283. *Id.* The bill's sponsor, Senator Barnes, received cost estimates from legislative fiscal experts which projected a $100,000.00 to $300,000.00 increase. A.L. May, *Comparative Fault Bill's Chances Slim, Sponsor Says*, RALEIGH NEWS & OBSERVER, Apr. 29, 1983, at C14.

284. *Cost Estimate*, *supra* note 281, at A1, A13; SENATE JOURNAL 150-151 (1983) (citing Senate Rule 42.1).

285. *Cost Estimate*, *supra* note 281, at A13 (quoting Rep. J. Allen Adams (D-Wake)).

286. *Id.* at A13.

287. SENATE JOURNAL 290 (1983); May, *supra* note 283, at C14.

288. SENATE JOURNAL 299 (1983); May, *supra*, note 283, at C14.

289. SENATE JOURNAL 299 (1983).

290. HOUSE JOURNAL 418 (1985). The bill was H.B. 1176 (1985).

291. HOUSE JOURNAL 774 (1985).

292. *See* John Drescher, Jr., *House Endorses Bill to Expand Accident Compensation*, RALEIGH NEWS & OBSERVER, July 2, 1985, at C4; *House Approves Changes in Accident Compensation*, RALEIGH NEWS & OBSERVER, July 3, 1985, at A17 [hereinafter *House Approves*].

293. *House Approves*, *supra* note 292, at A17 (quoting Representative George W. Miller, Jr. (D-Durham)).

ponents of the bill argued that " '[t]he doctrine of contributory negligence . . . rewards the negligent' " by allowing negligent defendants to go free from liability.[294] Proponents pointed out that a 1981 Legislative Research Commission study found that businesses' insurance costs rose a maximum of five percent in states where comparative negligence was adopted.[295] One representative stated that " '[i]f this bill is not passed, you may as well place a wreath on the doors of the legislative hall because justice is dead in North Carolina.' "[296] The House approved the bill by a 71-40 margin and sent the bill on to the Senate.[297]

The Senate referred the bill to the Senate Judiciary IV Committee.[298] The committee voted without debate to report the bill unfavorably to the full Senate by a 4-3 margin.[299] Under Senate rules, however, three members of a committee can ask the full Senate to consider a bill even if the bill is reported unfavorably by the committee.[300] The three-person minority exercised this option and sent a favorable minority report to the full Senate.[301]

Considerable dislike for the use of this rarely-used maneuver was voiced by members of the Senate.[302] Much of the debate on the Senate floor centered around Senate rules and the committee

294. *House Approves*, *supra* note 292, at A17.

295. Drescher, *supra* note 292, at C4. For a description of this study, see *infra* part III.C.2.a.

296. Drescher, *supra* note 292, at C4 (quoting Representative A.M. Hall (D-New Hanover)).

297. HOUSE JOURNAL 799-800 (1985); *House Approves*, *supra* note 292, at A17.

298. SENATE JOURNAL 686 (1985). Lieutenant Governor Robert B. Jordan III, President of the North Carolina Senate, rejected efforts by proponents of the bill to send the bill to the Judiciary I Committee where a majority favored the bill. Charles Babington, *Bill on Accident Victims' Claims Likely to be Topic of Senate Fight*, RALEIGH NEWS & OBSERVER, July 5, 1985, at D1. Lieutenant Governor Jordan also rejected efforts by opponents of the bill to send the bill to the Commerce Committee headed by Senator Hardison, who led efforts against the bill in 1981 and 1983. *Id.*

299. Babington, *supra* note 298, at D1. Senator Dennis J. Winner (D-Buncombe) knew that a majority of the committee opposed the bill and, although a proponent of the bill, moved for an unfavorable recommendation to the full Senate to avoid tying the bill up in committee. *Id.* Senator Winner then voted against his own motion. *Id.* Senate majority leader and bill-opponent Senator Kenneth C. Royall, Jr. (D-Durham) stated that " '[i]n my 19 years of legislative experience . . . this is the most unorthodox route I have ever witnessed.' " *Id.*

300. *Id.*

301. SENATE JOURNAL 701 (1985).

302. Babington, *supra* note 298, at D1; *Senate Parliamentary Maneuver a Surprise*, RALEIGH NEWS & OBSERVER, July 7, 1985, at A1 [hereinafter

system.[303] One newspaper reported that "senators quarrelled over the rules, over their integrity and over everything but the merits of the issue."[304] Senator Barnes moved to refer the bill to the Judiciary I Committee.[305] An opponent of the bill responded with a motion to table both Senator Barnes' motion and the bill.[306] The motion to table the bill succeeded, 23-21.[307] A motion to reconsider the motion to table ended in a tie, 22-22, and Lieutenant Governor Robert B. Jordan III, President of the Senate, declined to break the tie, leaving the possibility of full-Senate reconsideration open.[308]

During a weekend break, proponents of the bill tried without success to persuade senators to change their minds and vote to reconsider.[309] One senator stated that "three senators had told him that they wanted to change their negative votes on the bill, but 'they didn't want to get a reputation for flip-flopping.' "[310] Thus, the bill remained tabled and consequently died at the end of the session.

In 1987, nineteen senators introduced a bill to provide for modified comparative negligence.[311] The bill exempted suits

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Maneuver]. The maneuver is so rare that many members were unfamiliar with the rule. *Id.* at A19.

303. Babington, *supra* note 298, at D1; *Maneuver*, *supra* note 302, at A1, A19.

304. Chuck Alston, *Failure to Vote Keeps Comparative Fault Bill Alive*, GREENSBORO NEWS & REC., July 6, 1985, at D1.

305. SENATE JOURNAL 720 (1985).

306. *Id.*

307. Charles Babington, *Senate Rejects Comparative Fault Bill*, RALEIGH NEWS & OBSERVER, July 6, 1985, at A1 [hereinafter Babington, *Senate Rejects*].

308. SENATE JOURNAL 720 (1985); Babington, *Senate Rejects*, *supra* note 307, at A1. After Lieutenant Governor Jordan announced that the vote to table the bill had failed, one senator announced that he had wanted to vote for the motion but had forgot to push his button. Alston, *supra* note 304, at D1. A motion to suspend the rules to allow the senator to vote failed for a lack of a two-thirds majority. SENATE JOURNAL 720 (1985).

309. Charles Babington, *Bill to Expand Accident Compensation Dies in Senate Without Reconsideration*, RALEIGH NEWS & OBSERVER, July 9, 1985, at A1.

310. *Id.* at A1 (quoting Senator R.C. Soles, Jr. (D-Columbus)). Senator Soles said that "one member had told him that lobbying from groups opposed to a comparative fault law was so intense 'that he had cried over the weekend.' " *Id.*

311. SENATE JOURNAL 48-49 (1987). The bill, S. 65 (1987), exempted suits against the state. The same senators introduced S. 66 (1987) which did not provide the exemption. House members introduced H.B. 96 (1987) and H.B. 97 (1987) to provide for comparative negligence, *see* HOUSE JOURNAL 62 (1987), but the House, aware of the history of the previous comparative negligence bills, waited for the Senate to act on the Senate bills.

against the state from its coverage.[312] The Senate Judiciary I Committee, headed by bill-sponsor Senator Barnes, examined and unanimously approved the bill.[313] Senator Barnes, however, believing that the bill did not have the twenty-sixth vote necessary for its approval, exercised his prerogative as committee chairman and did not immediately send the bill to the full Senate.[314] Two weeks after the committee first approved the bill, the committee voted to amend the bill to partially abolish joint and several liability.[315] The committee believed that the amendment, viewed as favorable to defendants, would appease many opponents of comparative negligence.[316] The amendment provided that joint and several liability would be retained in the instance that the plaintiff was not contributorily negligent.[317] Where the plaintiff was contributorily negligent and one of the defendants was insolvent, however, the uncollectible portion of plaintiff's damages would be divided between the plaintiff and other defendants in proportion to their fault.[318] The committee favorably reported the bill, as amended, to the full Senate.[319]

Upon debate, Senator George B. Daniel (D-Caswell) offered an amendment to replace the committee's partial abolishment of joint and several liability with a provision fully abolishing joint and several liability.[320] The Senate vote on Senator Daniel's

312. S. 65 (1987). S. 66 (1987) did not exempt suits against state government.

313. SENATE JOURNAL 134 (1987); Van Denton, *New Twist to Fault Bill Considered by Barnes*, RALEIGH NEWS & OBSERVER, Mar. 24, 1987, at A1, A7 [hereinafter Denton, *New Twist*].

314. Denton, *New Twist, supra* note 313, at A7.

315. Van Denton, *Senate Committee Approves Compromise on Fault Bill*, RALEIGH NEWS & OBSERVER, Mar. 25, 1987, at A8 [hereinafter Denton, *Committee Approves*].

316. *Id.*; *see also* Denton, *New Twist*, *supra* note 313, at A1, A7. Senator Barnes explained that "the concession 'is a change that business and industry, especially hospitals and doctors will like.' " *Senate Panel Approves Comparative Fault Compromise*, CHARLOTTE OBSERVER, Mar. 25, 1987, at B2 (quoting Senator Barnes). However, both proponents and opponents of comparative negligence expressed reservations with the amendment. *Id.*

317. Denton, *Committee Approves*, *supra* note 315, at A8.

318. *Id.*

319. SENATE JOURNAL 134 (1987). The committee also approved S. 66 (1987), which did not exempt state government. Van Denton, *Committee Approves*, *supra* note 315, at A8.

320. SENATE JOURNAL 137 (1987); Van Denton, *Senate Approves Fault Bill*, RALEIGH NEWS & OBSERVER, Mar. 26, 1987, at A1 [hereinafter Denton, *Senate Approves*].

amendment ended in a tie, 25-25.[321] Lieutenant Governor Jordan, as Senate President, cast the deciding vote in favor of full abolishment of joint and several liability.[322] Lieutenant Governor Jordan later said that he had asked Senator Daniel to sponsor the amendment.[323] The Senate approved the bill, as amended, by a 37-10 margin.[324]

The House received the bill and sent it to the House Judiciary IV Committee.[325] The committee, chaired by Representative Dennis A. Wicker (D-Lee), who sponsored a comparative negligence bill in the House, reported the Senate's bill unfavorably to the full House, but favorably reported a substitute bill; the substitute bill provided for comparative negligence but rejected the Senate Bill's provision abolishing joint and several liability.[326] The full House rejected the committee's substitute bill by a margin of 68-45.[327] "Lawmakers attributed the vote to a strong lobbying effort by business groups; . . . lobb[ying] . . . by Gov. James G. Martin . . .; and proponents' refusal to accept a Senate compromise that weakened the bill but might have drawn more supporters."[328] The bill received no further attention from the House.

Comparative negligence bills were introduced in the House in 1989 and referred to the Committee on the Judiciary.[329] The

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321. SENATE JOURNAL 137 (1987); Denton, *Senate Approves*, *supra* note 320, at A1.

322. SENATE JOURNAL 137 (1987); Denton, *Senate Approves*, *supra* note 320, at A1.

323. Denton, *Senate Approves*, *supra* note 320, at A1; Tim Funk, *Senate Gives Tentative Approval to Comparative Fault Measure*, CHARLOTTE OBSERVER, Mar. 26, 1987, at 40.

324. SENATE JOURNAL 142 (1987); Van Denton, *'Comparative Fault' Measure Passes Senate on 37-10 Vote*, RALEIGH NEWS & OBSERVER, Mar. 27, 1987, at A11 [hereinafter Denton, *Measure Passes*].

325. HOUSE JOURNAL 161 (1987); Denton, *Measure Passes*, *supra* note 324, at A11.

326. HOUSE JOURNAL 941 (1987); Van Denton, *House Kills Comparative Fault Plan*, RALEIGH NEWS & OBSERVER, June 11, 1987, at A1 [hereinafter Denton, *House Kills*].

327. HOUSE JOURNAL 958 (1987); Denton, *House Kills*, *supra* note 326, at A1; *Comparative Fault Bill Defeated*, CHARLOTTE OBSERVER, June 11, 1987, at C8 [hereinafter *Bill Defeated*].

328. Denton, *House Kills*, *supra* note 326, at A1. The bill got caught up also in an attempt at political bargaining over an unrelated issue. Van Denton, *GOP, Freshmen, Discontent Beat Fault Bill*, RALEIGH NEWS & OBSERVER, June 12, 1987, at A1, A6 (superior court appointments).

329. The bills were H.B. 1236 (1989) and H.B. 1237 (1989). HOUSE JOURNAL 385 (1989). H.B. 1236 excepted state torts, while H.B. 1237 did not. *Id.*

House, however, perhaps weary of the issue, did not consider the bills.[330]

To date, comparative negligence proponents in the General Assembly have made only one attempt to pass a comparative negligence bill in the 1990s. In 1991, a comparative negligence bill was introduced in the House.[331] Despite a favorable report from the committee examining the bill,[332] the bill failed in the House by a 34-73 margin.[333] Proponents of the bill blamed the bill's defeat on heavy lobbying by the bill's opponents.[334] The bill's sponsor, Representative Harry Payne (D-New Hanover), stated that " '[t]his is the most heavily lobbied issue I've ever seen.' "[335]

2. *Comparative Negligence and the Insurance Rates Argument in North Carolina*

a. *Influencing the North Carolina General Assembly's debate over comparative negligence bills*

One of the principal road blocks to the passage of a comparative negligence bill in the North Carolina General Assembly during the 1980s was the argument that the adoption of the contributory negligence doctrine will cause insurance rates, particularly automobile insurance rates, to increase significantly. This perception was fueled by a group of studies led by a professor at the University of North Carolina at Greensboro, Dr. Joseph E. Johnson, issued every other year during the 1980s predicting that automobile liability insurance in North Carolina will sharply increase following a change to a comparative negligence system.[336] These studies were presented to the General Assembly,

330. The bills apparently never left the Committee on the Judiciary.

331. HOUSE JOURNAL 354 (1991). The bill was H.B. 984 (1991).

332. HOUSE JOURNAL 600 (1991).

333. HOUSE JOURNAL 676 (1991).

334. Van Denton, *Fault Bill Rejected by House*, RALEIGH NEWS & OBSERVER, May 16, 1991, at B1.

335. *Civil Justice Revisions Defeated in the House*, GREENSBORO NEWS & REC., May 16, 1991, at D3.

336. Dr. Johnson led such studies issued in the first year of each session of the North Carolina General Assembly during the 1980s—1981, 1983, 1985, 1987, and 1989. *See* Letter from Joseph E. Johnson & Associates to the Honorable William A. Creech, Chairman of the Senate Judiciary III Committee (April 27, 1981) (on file with the *Campbell Law Review*); Joseph E. Johnson & Associates, An Investigation of the Relative Costs of Comparative v. Contributory Negligence Standards (1983) [hereinafter *Investigation*] (on file with the *Campbell Law Review*); Joseph E. Johnson & George B. Flanigan, Update of an

and Dr. Johnson testified before committees considering comparative negligence bills.

The Studies compare automobile insurance loss costs of contributory and comparative negligence states. The 1987 Study serves as an example.

The 1987 Study concluded that North Carolinians' automobile liability insurance premiums would have been 32.05% to 32.77% higher in 1985 if North Carolina had changed to a modified comparative negligence system.[337] The 1987 Study concluded also that North Carolinians' automobile liability insurance premiums would have been 92.71% to 116.58% higher in 1985 if North Carolina had changed to a pure comparative negligence system.[338] Members of the General Assembly were appropriately troubled by such alarming predictions.

The 1987 Study sets forth a comparison of automobile premiums[339] between states that remained contributory negligence states from 1971 through 1984 and states that operated under a comparative negligence system at any time between 1971 and

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Investigation of the Relative Costs of Comparative Negligence Standards (1985) [hereinafter *Update*] (on file with the *Campbell Law Review*); Joseph E. Johnson, Report on the Relative Costs of Adopting Comparative Negligence Standards (1987) [hereinafter *Report*] (on file with the *Campbell Law Review*); Joseph E. Johnson & William L. Ferguson, Analysis of the Relative Costs of Comparative Negligence (1989) [hereinafter *Analysis*] (on file with the *Campbell Law Review*). These studies, excluding the 1981 and 1989 Studies, are referred to in this article as "the Studies." Particular studies are referred to by year.

The 1981 Study is different from the other Studies in that the 1981 Study is in the form of an opinion letter rather than data analysis. The 1989 Study is also different in that the methodology used to lead to its conclusions is not revealed.

Dr. Johnson participated in similar studies published in September 1989 and June 1991 which employed some analytical refinements over the 1980s studies but did not address North Carolina. *See* Daniel T. Winkler *et al.*, *Cost Effects of Comparative Negligence: Tort Reform in Reverse*, 44 CPCU J. 114 (1991); George B. Flanigan *et al.*, *Experience from Early Tort Reforms: Comparative Negligence Since 1974*, 56 J. OF RISK & INS. 525 (1989).

337. *Report*, *supra* note 336, at 14.

338. *Id.*

339. The Studies used "pure premium" data. "'Pure premium' refers to the loss cost for each insured vehicle without accounting for the administrative or operating expenses of the insurance mechanism." *Report*, *supra* note 336, at 2. The Studies used the weighted average of pure premiums, *i.e.*, the total system losses divided by earned car years. *Id.* at 2, 4, 7, 10. Rather than repeat this designation each time it is referred to, this article uses the term "premium" to encompass these analytical designations.

1984.[340] Although South Carolina remained a contributory negligence state from 1971 to 1984, it is not included in the 1987 Study because data for that state were not available.[341] Tennessee is also not included, presumably because Tennessee had a unique law providing that remote contributory negligence only mitigates damages.[342] The four states included in the study that adhered to the contributory negligence doctrine from 1971 through 1984 are Alabama, Maryland, North Carolina, and Virginia.[343]

The 1987 Study's comparison between such contributory negligence states and pure comparative negligence states is set forth below:

TABLE 1: 1987 STUDY'S ANALYSIS
AVERAGE AUTOMOBILE INSURANCE PREMIUM COST

Year	Consistently Contributory States	Pure Comparative States	Percent Difference
1971	$ 43.23	$ 76.95	78.00%
1972	$ 45.88	$ 79.56	73.41%
1973	$ 51.86	$ 87.73	69.17%
1974	$ 45.13	$ 86.34	91.31%
1975	$ 50.46	$104.34	106.78%
1976	$ 55.62	$109.07	96.10%
1977	$ 57.95	$114.01	96.74%
1978	$ 64.93	$118.43	82.40%
1979	$ 68.91	$129.22	87.52%
1980	$ 73.36	$133.99	82.65%
1981	$ 79.78	$147.97	85.47%
1982	$ 82.05	$162.64	98.22%
1983	$ 83.04	$193.99	133.61%
1984	$100.63	$217.94	116.58%
		Average	92.71%[344]

340. The Studies included data from forty-seven states and excludes states using no-fault insurance systems. *Id.* at 2. Massachusetts, South Carolina, and Texas are the three states whose data were not included in the study. *Id.* at 17. Their data were not available. *Id.*

341. *Id.* at 17.

342. *See* WOODS, *supra* note 13, at 744-45. The Studies classify Tennessee as a modified comparative negligence state. *Report*, *supra* note 336, at 17.

343. Indiana statutorily adopted modified comparative negligence in 1983 to take effect January 1, 1985. WOODS, *supra* note 13, at 581. It appears that the Studies did not include Indiana in the states adhering to contributory negligence from 1971 to 1984. *Report*, *supra* note 336, at 17 (listing Indiana as a modified comparative negligence state as of December 1984, but noting the effective date as 1985).

344. *Report*, *supra* note 336, at 10. This table is a portion of Table 3 of the 1987 Study labelled "Weighted Average of Pure Premiums—Total System

Based on this comparison, the 1987 Study concluded that North Carolinians' automobile liability insurance premiums would have been from 92.71% to 116.58% higher in 1985 if North Carolina had changed to pure comparative negligence.[345] As revealed in Table 1, the 92.71% figure is the average percent difference between the average premium in Alabama, Maryland, North Carolina, and Virginia and the average premium in all of the pure comparative negligence states for the years 1971 through 1984. The 116.58% figure is the percent difference between the average premium in Alabama, Maryland, North Carolina, and Virginia and the average premium in all of the pure comparative negligence states for the year 1984.

The Studies' conclusions are not reliable predictions of the effect of the adoption of the comparative negligence doctrine on insurance rates in North Carolina. The conclusions made in the Studies simply do not follow from the Studies' analysis. This is the result of three related flaws in the Studies' methodology.

First, the Studies use a methodology that compares premium data between states. The National Association of Insurance Commissioners ("NAIC"), an organization that gathers and analyzes insurance data for the industry, warns that "[c]omparisons of . . average premiums between states can be misleading."[346] The NAIC explains that the average premium is an "imperfect measure[ ] of the relative 'price' of insurance across states because . . . the auto insurance product is not homogenous across states. For instance, a state's . . . average premium will be relatively higher if policyholders in that state tend to purchase higher limits or insure more expensive cars."[347] In further explaining the potentially misleading nature of interstate comparisons, the NAIC noted that the "type and amount of coverage purchased by an individual is influenced by various factors, both economic and non-economic."[348] At least one expert has explained that interstate comparisons used in analyzing the effect of the adoption of the

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Losses/Earned Care Years by Negligence Systems-Fault Only States—Consistent Contributory With States Changing Systems 1971 to 1984". *Id.*

345. *Id.* at 14.

346. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, STATE AVERAGE EXPENDITURES & PREMIUMS FOR PERSONAL AUTOMOBILE INSURANCE IN 1993 6 (1995) [hereinafter NAIC, AVERAGE EXPENDITURES & PREMIUMS].

347. *Id.*

348. *Id.*

comparative negligence doctrine on insurance rates "is likely to be very misleading."[349]

Second, even if premium data could be compared between states, the Studies ignore many variables that contribute to premium costs. Consequently, the Studies make untenable assumptions. The premium cost for a particular state depends on a large number of variables. These variables include population density, quality of roads, quality of drivers, quality of drivers training, weather, character of the population density, insurance regulations, competition between insurance companies within the state, type of fault system, and other laws.[350] The type of fault system is just *one* factor. By ignoring all other factors, the Studies consider all factors but the type of fault system to contribute zero to the premium cost. This is an incorrect assumption on its face. If this assumption was true, then the premium cost for North Carolina would have been the same as the premium cost for New York during the time that both were contributory negligence states. In fact, New York's premium was more than twice that of North Carolina's premium during this time.[351]

In this same vein, it is important to note that while the Studies purport to analyze cost impacts on North Carolina automobile liability insurance, *no factors related to North Carolina are taken into account* in concluding the percentage that North Carolinians' premiums would rise under comparative negligence. The Studies' offered predictions could apply just as well to any contributory negligence state.

The third flaw in the Studies is related to the second one, but includes further analytical errors and results in highly questionable conclusions. The methodology used by the Studies to predict an increase in premium rates attributes any difference between the average premium rates of contributory states and the average premium rate of comparative states to what type of negligence system the state uses alone, and uses the *entire difference* to predict the consequences of switching systems.

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349. Bernard L. Webb, Contributory Negligence, Comparative Negligence, and the Cost of Automobile Insurance 7 (1983) (on file with the *Campbell Law Review*).

350. NAIC, AVERAGE EXPENDITURES & PREMIUMS, *supra* note 346, at 2 (citing seventeen categories of variables).

351. Webb, *supra* note 349, at Tables 42 and 43.

Note the large jump in the average comparative negligence state premium in 1975 as shown by the 1987 Study data.[352] 1975 is the year that both California and New York, along with Alaska, switched to pure comparative negligence systems.[353] Before they adopted the pure comparative negligence doctrine, both California and New York were contributory negligence states and had premium rates that were more than double North Carolina's premium rate, and were more than 75% higher than the average consistent-contributory state.[354] The Studies' methodology finds the entire over-75%-difference attributable to the comparative negligence doctrine even though the difference was present before the switch and is obviously attributable to other factors. This methodology greatly inflates the percentage increase predicted for North Carolina by the Studies.

A simple example reveals this basic flaw in the Studies' methodology and conclusions. Consider a three-state comparison with high, medium, and low premium costs where the costs increase by five percent each year regardless of type of fault system.[355] The low-cost and high-cost states are contributory negligence states in 1971 while the medium-cost state is a comparative negligence state in 1971. The high-cost state switches to comparative negligence in 1978.

TABLE 2: THREE-STATE EXAMPLE
AVERAGE AUTOMOBILE INSURANCE PREMIUM COST

Year	State One	State Two	State Three	Consistently Contributory	Comparative	Percent Difference
1971	$10.00	$15.00	$20.00	$10.00	$15.00	50.00%
1972	$10.50	$15.75	$21.00	$10.50	$15.75	50.00%
1973	$11.03	$16.54	$22.05	$11.03	$16.54	50.00%
1974	$11.58	$17.36	$23.15	$11.58	$17.36	50.00%
1975	$12.16	$18.23	$24.31	$12.16	$18.23	50.00%
1976	$12.76	$19.14	$25.53	$12.76	$19.14	50.00%
1977	$13.40	$20.10	$26.80	$13.40	$20.10	50.00%
1978	$14.07	$21.11	$28.14	$14.07	$24.62	75.00%
1979	$14.77	$22.16	$29.55	$14.77	$25.86	75.00%
1980	$15.51	$23.27	$31.03	$15.51	$27.15	75.00%
1981	$16.29	$24.43	$32.58	$16.29	$28.51	75.00%
1982	$17.10	$25.66	$34.21	$17.10	$29.93	75.00%
1983	$17.96	$26.94	$35.92	$17.96	$31.43	75.00%
1984	$18.86	$28.28	$37.71	$18.86	$33.00	75.00%
					Average	62.50%

352. *See supra* note 344 and accompanying text.
353. *See supra* notes 223 and 251 and accompanying text.
354. *See* Webb, *supra* note 349, at Tables 10, 14, 30, 42, 43, and 56.
355. This example is easily expanded to fifty states.

Using the Studies' methodology, one would conclude that State One's automobile liability insurance premiums would have been from 62.50% to 75.00% higher in 1985 if State One had changed to pure comparative negligence. This is obviously false. The 62.50% and 75.00% numbers merely reflect the fact that State Two's and State Three's premiums are higher than State One's premium for *some reason*, and were higher at the point of change and continued to be higher. The two numbers do not reflect *why* State Two's and State Three's premiums are higher. It is likely that hypothetical State Two and State Three are larger states than State One, with higher population densities, less hospitable climates, and higher wages. All three of the states experienced a constant five percent annual growth rate. There is absolutely no basis to conclude from this data that a switch from contributory to comparative negligence would cause State One to experience such a high rise in insurance premiums. Yet this is exactly the methodology employed by the Studies.

Experts criticize the Studies. Dr. J. Finley Lee, a professor at the University of North Carolina at Chapel Hill, in examining the 1983 Study, concluded that "the analyzed data and the method used to analyze the data are not . . . sufficient or adequate to support the specific conclusions reached."[356] Dr. Lee explained that "[s]ignificant conceptual problems are encountered in reaching conclusions such as those posed" in the study.[357] Dr. Lee noted nine "potentially important variables" that the study omitted.[358] Dr. Lee noted also that several of the larger states "influence the data to a disproportionate extent."[359]

Dr. Bernard L. Webb, a professor at Georgia State University, explained that the Study "has been subjected to substantial criticism on technical grounds."[360] Dr. Webb concluded that "it is apparent that interstate comparisons [, upon which the Studies solely rely,] are not reliable indicators of the cost effects of various negligence standards."[361]

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356. Letter from J. Finley Lee to the Honorable Henson P. Barnes at 2-3 (Apr. 8, 1983) (on file with the *Campbell Law Review*).

357. *Id.* at 1.

358. *Id.* at 2.

359. *Id.*

360. Webb, *supra*, note 349, at 1. Dr. Webb is a professor of actuarial science and insurance.

361. *Id.* at 26.

Unfortunately, members of the North Carolina General Assembly were influenced by the Studies and relied on the Studies' conclusions in considering the passage of the comparative negligence bills.[362] It is impossible to know the exact extent of the Studies' influence. What is important to now realize, however, is that the Studies caused the debates in the General Assembly over the comparative negligence bills to be based on flawed assumptions which unarguably affected the legislatures' deliberations and, considering the extremely close margin of most of the bills' defeat and the alarming nature of the Studies' conclusions, very probably affected the outcome of the votes.

b. Other considerations

Other studies either conclude that switching from contributory to comparative negligence results in minimal effects on insurance rates and burdens on the courts or find the data inconclusive.[363] For example, in 1981, the North Carolina Legis-

362. It is not difficult to conclude that such dire predictions would wield considerable influence over many legislators' thoughts. For example, in 1983 one senator warned that "the bill could cost North Carolina more than $120 million a year in higher insurance premiums." Boyce, *supra* note 274, at C1. The 1983 Study concluded that the adoption of modified comparative negligence would have meant that North Carolina's automobile insurance premiums would have been, among other estimates, $117,648,000.00 more in 1980 than they were under the contributory negligence standard. *Investigation*, *supra* note 336, at 11. In 1987 one member of the house "said the bill would result in a 32% increase in insurance premiums." *Bill Defeated*, *supra* note 327, at C8. The 1987 Study concluded that the adoption of modified comparative negligence would have meant that North Carolinian's automobile insurance premiums would have been, among other estimates, 32.77% more in 1985 than they were under the contributory negligence standard. *Report*, *supra* note 336, at 14. *See also* Richard T. Boyette, *A Case Against Comparative Negligence*, NORTH CAROLINA ST. BAR Q., Fall 1991, at 22, 23-24 (setting forth the 1989 Study's conclusions and citing the Study's conclusions as likely influences over North Carolina legislators considering a comparative fault bill).

363. *See, e.g.*, Cornelius Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689, 707-22, 726-28 (1960) (generally, no effect on insurance rates appears in the data as a result of switching from a comparative to a contributory negligence system); John E. Rolph et al., *Automobile Accident Compensation: Who Pays How Much How Soon?*, 56 J. OF RISK & INS. 667, 667, 674 (1985) (empirical evidence on the effects of shifting from a contributory negligence system to a comparative negligence system is weak); Webb, *supra* note 349, at 12, 26 (actual data does not support the conclusion that insurance costs or claim frequency will increase); Maurice Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*. 13 ARK. L. REV. 89, 108-09 (1959) (switching from a contributory negligence to a

lative Research Commission published a study on comparative negligence for the General Assembly.[364] The committee sent a questionnaire to the insurance commissioners of the thirty-five states that had adopted comparative negligence at that time. The questionnaire requested information on any insurance rate increase due to switching from contributory to comparative negligence. Of the twenty-four states that responded, only one state, Alaska, reported a significant increase—approximately five percent—due to switching. Two states, Minnesota and Rhode Island, reported that no increase resulted from the switch. Fifteen states reported that they could not determine the effect of the switch on insurance rates. The insurance commissioner or a representative of ten of these fifteen states stated that in their opinion the switch from contributory to comparative negligence had no impact on insurance costs. Five of the fifteen states opined a slight increase in insurance premiums due to comparative negligence. The remaining six states reported that they had insufficient data upon which to base an estimate or opinion. Based on this survey, and other inquiries, the committee concluded it could not "find any strong evidence to support the contention that insurance rates would increase substantially as the result of adoption of a comparative negligence system in North Carolina."[365]

Robert Byrd, former dean of the University of North Carolina at Chapel Hill School of Law, offered an astute observation on this point. He noted that "if higher costs were indeed the consequence, it's unlikely there would be a national trend toward comparative fault in damage suits."[366]

Moreover, it must be recognized that costs associated with an injured person unable to recover from the person mostly responsible for the injuries in the civil justice system due to the contribu-

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comparative negligence system did not drastically alter the Arkansas courts' burdens); *Comparative Negligence—A Survey of the Arkansas Experience*, 22 ARK. L. REV. 692, 713 (1969) (same conclusion); *see also* SCHWARTZ, *supra* note 207, § 21.1, at 355; Mutter, *supra* note 2, at 237-45; *cf.* Stuart Low & Janet K. Smith, *The Relationship of Alternative Negligence Rules to Litigation Behavior and Tort Claim Disposition*, 17 LAW & SOC. INQUIRY 63 (1992) (projecting greater probabilities of attorney involvement, higher average award levels, and longer delays in securing payment for comparative negligence systems).

364. RESEARCH COMMISSION, *supra* note 262 (unpaginated). The study came at the direction of a joint resolution of the General Assembly. *See id.*

365. RESEARCH COMMISSION, *supra* note 262 (unpaginated).

366. *See Fair Shake for Victims*, RALEIGH NEWS & OBSERVER, Mar. 5, 1983, at A4.

tory negligence doctrine are ultimately borne by someone.[367] The injured person bears much of the cost alone. Others, however, are joined in the person's plight. Hospitals who treat victims of the contributory negligence doctrine who cannot afford to pay their hospital bill are collateral victims of the contributory negligence doctrine. Other creditors also bear some costs of a contributory negligence system. Taxpayers may bear the cost of unemployment payments, welfare payments, food stamps, Medicare, Medicaid, and similar social programs when the recipient should have recovered from the defendant partially responsible for the injuries.

Social costs also may be high. Victims of the contributory negligence doctrine may face tremendous pressure at home from remaining out of work for some time with mounting medical and other bills. Such a situation creates a high-pressure situation for the victim and the victim's family.

Thus, the adoption of comparative negligence should alleviate costs borne elsewhere. For example, the ability of a contributorily negligent plaintiff to pay his share of the hospital bills from a recovery under comparative negligence should result in a decrease in medical insurance premiums. A contributorily negligent plaintiff who can avoid resorting to welfare or other social programs because comparative negligence allowed the plaintiff to recover the damages attributable to the defendant from the defendant should result in decreased costs to those programs and translate into a reduced tax burden for others. It is much more efficient and just for a party causing the injury to bear the damages attributable to that party.[368]

Providing a reliable prediction in regard to the effect of the adoption of a comparative fault system in North Carolina on insurance costs is beyond the scope of this article. It seems intuitive that some increase in insurance rates would occur, but this may be balanced by the recognized practice of "substantial justice" juries, more settlements, repudiation of the all-or-nothing

367. *See* William F. Horsely, *The Argument for Comparative Fault*, NORTH CAROLINA ST. BAR. Q., Fall 1991, at 18, 19.

368. Commentators assert that the comparative negligence doctrine is more efficient also in providing "incentives for precaution to both parties rather than strong incentives to one party and weak incentives to the other." Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067, 1071, 1079-1101 (1986); *see also* Daniel Orr, *The Superiority of Comparative Negligence: Another Vote*, 20 J. OF LEGAL STUD. 119 (1991).

approach of the contributory negligence and last clear chance doctrines, and alleviations of costs in tangential areas. The insurance-rate issue is a legitimate and important concern and should be taken into account when considering changes in North Carolina's civil justice system. This concern, however, must be kept in perspective and not be considered in a vacuum.

In concluding this section, it is worthwhile to quote the Supreme Court of Kentucky's view of this issue. The court explained: "To those who speculate that comparative negligence will cost more money or cause more litigation, we say there are no *good* economies in an *unjust* law."[369]

IV. *STARE DECISIS,* CONTRIBUTORY NEGLIGENCE, AND THE NORTH CAROLINA SUPREME COURT

Nearly all of the forty-six states that rejected the contributory negligence doctrine for the comparative negligence doctrine had been contributory negligence states for well over a century.[370] North Carolina has been a contributory negligence state since at least 1869.[371] This long history heightens *stare decisis* concerns.

A few state supreme courts have cited *stare decisis* and associated principles to justify clinging to the contributory negligence doctrine even in the face of outright acknowledgement of the overwhelming criticism and rejection of the doctrine. The North Carolina Supreme Court's *stare decisis* jurisprudence, however, reveals that the supreme court should not adhere to the outmoded contributory negligence doctrine when asked to reject it in favor of the comparative negligence doctrine. This part examines the supreme court's *stare decisis* jurisprudence, paying particular

369. Hilen v. Hays, 673 S.W.2d 713, 718 (Ky. 1984).

370. For example, Illinois had followed the contributory negligence doctrine since at least 1852, *see Aurora Branch Railroad Co. v. Grimes*, 13 Ill. 585 (1852), before rejecting it for the comparative negligence doctrine in 1981, *see Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981). South Carolina had followed the contributory negligence doctrine since at least 1851, *see Freer v. Cameron*, 38 S.C.L. (4 Rich.) 228 (1851) (dictum), before rejecting it for the comparative negligence doctrine in 1991, *see Nelson v. Concrete Supply Co.*, 399 S.E.2d 783 (S.C. 1991). Tennessee had followed the contributory negligence doctrine since at least 1858, *see Whirley v. Whiteman*, 38 Tenn. 610 (1858), before rejecting it for the comparative negligence doctrine in 1992, *see McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

371. *See* Morrison v. Cornelius, 63 N.C. 346 (1869). For a discussion of the history of the contributory negligence doctrine in North Carolina, see *supra* part I.A.

attention to its application to the contributory negligence doctrine.[372]

A. *Stare Decisis Concerns*

As appropriate, the North Carolina Supreme Court "has always attached great importance to the doctrine of *stare decisis*, both out of respect for the opinions of [the supreme court's] predecessors and because it promotes stability in the law and uniformity in its application."[373] The supreme court "never overrule[s] its decisions lightly."[374]

Equally as appropriate, however, the supreme court has long recognized that one of the foremost strengths of the common law is its ability to change and adapt in light of experience and reason in order to further justice. The supreme court has always refused to take an arbitrary and inflexible approach to *stare decisis*.[375]

In 1856 the supreme court explained:

> One excellence of the common law is that it *works itself pure* by drawing from the fountain of reason, so that if errors creep into it, upon reasons which more enlarged views and a higher state of enlightenment, growing out of the extension of commerce, and other causes, prove to be fallacious, they may be worked out by subsequent decisions.[376]

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372. The North Carolina Court of Appeals has appropriately recognized that it is not empowered to reject the contributory negligence doctrine for the comparative negligence doctrine. *See* Corns v. Hall, 112 N.C. App. 232, 237, 435 S.E.2d 88, 90-91 (1993) (citation omitted); *see also* Cannon v. Miller, 313 N.C. 324, 327 S.E.2d 888 (1985) (court of appeals can never overrule decisions of the supreme court), *vacating* 71 N.C. App. 460, 322 S.E.2d 780 (1984).

373. Wiles v. Welparnel Constr. Co., 295 N.C. 81, 85, 243 S.E.2d 756, 758 (1978) (citing Bulova Watch Co. v. Brand Distributors of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974)); *see also* Hill v. Atlantic & N.C. R. Co., 143 N.C. 539, 573-77, 55 S.E. 854, 867-68 (1906).

374. State v. Lynch, 334 N.C. 402, 410, 432 S.E.2d 349, 352 (1993) (" 'No court has been more faithful to *stare decisis*.' " (quoting Rabon v. Rowan Memorial Hosp., Inc., 269 N.C. 1, 20, 152 S.E.2d 485, 498 (1967)); *see also* Mims v. Mims, 305 N.C. 41, 54-55, 286 S.E.2d 779, 788 (1982); Mial v. Ellington, 134 N.C. 131, 139, 46 S.E. 961, 963-64 (1903).

375. The North Carolina Supreme Court states that "the compulsion of the doctrine is, in reality, moral and intellectual, rather than arbitrary and inflexible." Sidney Spitzer & Co. v. Commissioners of Franklin County, 188 N.C. 30, 32, 123 S.E. 636, 638 (1924); *see also Wiles*, 295 N.C. at 85, 243 S.E.2d at 758.

376. Shaw v. Moore, 49 N.C. 25, 27 (1856). Justice William J. Adams described this language as a "special tribute" to the common law. William J. Adams, *Evolution of Law in North Carolina*, 2 N.C. L. REV. 133, 143 (1924).

Justice (later Chief Justice) Richard M. Pearson, in language quoted with approval by Chief Justice William T. Faircloth and Justice Robert M. Douglas, summarized an important principle of the supreme court's *stare decisis* jurisprudence: "It is true, law should be fixed and steady, but it is also true, it should be reasonable and right. The latter is the most important, because without it the former object cannot be attained."[377]

Similarly, Chief Justice Walter Clark observed that

> [c]ourts can only maintain their authority by correcting their errors to accord with justice, and the advance and progress of each age. They should slough off that which is obsolete and correct whatever is erroneous or contrary to the enlightenment and sense of justice of the age, and to the spirit of new legislation.[378]

The North Carolina Supreme Court follows these principles today. The supreme court holds that "nothing is settled until it is settled right."[379] The supreme court has many times held that the court will not apply *stare decisis* "when it results in perpetuation of error or grievous wrong."[380] In addition, the court has explained that it will alter judicially-created common law when the court "deems it necessary in light of experience and reason."[381]

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377. Gaskill v. King, 34 N.C. 211, 223 (1851) (Pearson, C.J., dissenting), *quoted with approval in* Malloy v. Fayettville, 122 N.C. 480, 492, 29 S.E. 880, 884 (1898) (Faircloth, C.J., dissenting) *and* McIlhaney v. Southern Ry., 122 N.C. 995, 998, 30 S.E. 127, 127 (1898) (Douglas, J., concurring); *see also Stare Decisis*, 2 N.C. J.L. 243 (1905); Perry v. Scott, 109 N.C. 374, 376 (1891) (quoting *Gaskill*, 34 N.C. at 223 (Pearson, C.J., dissenting)).

378. State v. Falkner, 182 N.C. 848, 864, 108 S.E. 756, 763 (1921) (Clark, C.J., dissenting). For an in-depth biographical analysis of Chief Justice Clark and his jurisprudence, see Willis P. Whichard, *A Place for Walter Clark in the American Judicial Tradition*, 63 N.C. L. REV. 287 (1985).

379. Sidney Spitzer & Co. v. Commissioners of Franklin County, 188 N.C. 30, 32, 123 S.E. 636, 638 (1924); *see also* State v. Ballance, 229 N.C. 764, 51 S.E.2d 731, 733 (1949); *Stare Decisis*, *supra* note 377, at 244 ("We think we have heard the present Chief Justice [(Chief Justice Walter Clark)] more than once say that a case is not decided until it is decided right.").

380. Wiles v. Welparnel Constr. Co., 295 N.C. 81, 85, 243 S.E.2d 756, 758 (1978) (citing State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949)); *see also* State v. Mobley, 240 N.C. 476, 487, 83 S.E.2d 100, 108 (1954); Patterson v. McCormick, 177 N.C. 448, 456-57, 99 S.E. 401, 405 (1919); Mason v. Nelson Cotton Co., 148 N.C. 492, 509-11, 62 S.E. 625, 631 (1908); Johnson v. Western Union Tel. Co., 144 N.C. 410, 413, 57 S.E. 122, 123-24 (1907); *Hill*, 143 N.C. at 573-76, 55 S.E. at 867-68.

381. Mims v. Mims, 305 N.C. 41, 55, 286 S.E.2d 779, 788 (1982) (quoting State v. Freeman, 302 N.C. 591, 594-95, 276 S.E.2d 450, 452 (1981)); *see* Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301, 306 (1986) (citations omitted); *see also* Sides

The continuing application of the contributory negligence doctrine is a perpetuation of error. Synonyms for "error" include "failure," "flaw," and "mistake." One cannot help but conclude that these terms effectively describe the contributory negligence doctrine when considering the onerous criticism of the doctrine.[382] Antonyms of "error" include "accuracy" and "truth." These two words undeniably cannot be associated with the contributory negligence doctrine. The all-or-nothing conclusion mandated by the contributory negligence doctrine is an inaccurate result on its face, and leaves a truthful description of the event at issue far behind. More pointedly, one need know of only a few meritorious plaintiffs denied any recovery against highly negligent defendants by the contributory negligence doctrine to discover the meaning of "grievous wrong."[383]

The experiences of other jurisdictions overwhelmingly point to comparative negligence. North Carolina is in a good position to adopt the comparative negligence doctrine on its own terms. North Carolina has the benefit of the experiences of the forty-six states that previously adopted a comparative negligence system. Revealingly, not one jurisdiction that switched from a contributory negligence system to a comparative negligence system has switched back. In making its decisions, the supreme court has numerous times recognized the importance and influence of trends in the common law as evidenced by the changing law of other jurisdictions and scholarly works.[384] These influences all urge the adoption of the comparative negligence doctrine.

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v. Duke Hosp., 74 N.C. App. 331, 344, 328 S.E.2d 818, 827 (the "genius" of the common law "is not only its age and continuity, but its vitality and adaptability" (citations omitted)), *disc. rev. denied*, 314 N.C. 331, 335 S.E.2d 13 (1985).

382. *See supra* part II.

383. *See, e.g.*, Leland, *supra* note 277, at C1 (describing tragic situation where North Carolina's contributory negligence doctrine prevented recovery against a negligent defendant).

384. *See, e.g.*, Mazza v. Medical Mutual Ins. Co., 311 N.C. 621, 624, 319 S.E.2d 217, 219 (1984) (noting "the recent trend of those courts considering the public policy questions . . . allow[ing] insurance coverage for punitive damages" (citations omitted)); Nicholson v. Hugh Chatham Memorial Hosp., Inc., 300 N.C. 295, 304, 266 S.E.2d 818, 823 (1980) ("In so holding, this jurisdiction once again returns to the mainstream of American legal thought."); State v. Warren, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960); Hinnant v. Tidewater Power Co., 189 N.C. 120, 127, 126 S.E. 307, 311-12 (1925) (in overruling a 1921 case, the court noted the weight of authority in other jurisdictions (citations omitted)) (cited in and overruled in part by *Nicholson*, 300 N.C. at 299-300, 266 S.E.2d at 820); *see*

Another factor favoring the rejection of the contributory negligence doctrine is that North Carolina's experience with the contributory negligence doctrine reveals that the contributory negligence rule is not the strict tenant of North Carolina law that a reading of the original *Morrison* statement indicates.[385] Limitations on the rule considerably eroded the strict rule over the years.[386] It is generally recognized that such limitations are designed to lessen the harsh impact of the strict rule. North Carolina, through the efforts of both the General Assembly and the supreme court, has slowly drifted away from a following of the strict contributory negligence rule since the rule was first announced.[387]

Perhaps the most important factor urging the re-examination and rejection of the contributory negligence doctrine is that the grounds upon which the North Carolina Supreme Court based its adoption of the contributory negligence doctrine have vanished. As discussed *supra*, the supreme court based the adoption of the contributory negligence doctrine on four rationales: (1) The injured party "brought the injury upon himself"; (2) No rule existed to allow for the apportionment of damages; (3) All other American jurisdictions followed the doctrine; and (4) The plaintiff's negligence was "the proximate cause" of the injury, while the defendant's negligence was not "the proximate cause."[388] None of these four rationales can withstand scrutiny today.

It cannot now be said that a contributorily negligent plaintiff "brought the injury on himself." In reality, the injured plaintiff *and the negligent defendant* brought the injuries on the plaintiff.

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also Sides, 74 N.C. App. at 339, 328 S.E.2d at 824 ("In recent years, the rule has come under increasing criticism from scholars." (citations omitted)).

One precedent leans the other way. In *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985), the supreme court declined to "adopt the rule of twenty-eight states" in relation to insanity as an affirmative defense. *Id.* at 18, 337 S.E.2d at 795. The *Avery* court stated that "we continue to believe our rule to be the better view, while recognizing that reasonable arguments can be made to the contrary." *Id.* (citation omitted)). It is difficult to imagine, however, the supreme court finding the contributory negligence doctrine "the better view."

385. *See generally* Juenger, *supra* note 2, at 24-28. For a description of the *Morrison* case, see *supra* notes 21 - 30 and accompanying text.

386. For a description of these limitations, see *supra* part I.C.

387. For a discussion of the history of the contributory negligence doctrine in North Carolina, including its several exceptions and limitations, see *supra* parts I.A. and I.C.

388. *See supra* part I.B.

To adhere to the "brought the injury on himself" rationale is to adhere to a catchy phrase while ignoring reality and reason.

The second rationale upon which the supreme court based its adoption of the contributory negligence doctrine is now patently untenable. There is no doubt that there today exists a rule to allow for the apportionment of damages. The comparative negligence doctrine exists in nearly every negligence system, both within and without the United States.

The third rationale has similarly disappeared. While at the time that the supreme court adopted the contributory negligence doctrine all American jurisdictions followed the doctrine, forty-six states have since realized the inequities of the doctrine and rejected it. Today, nearly all American jurisdictions follow the comparative negligence doctrine.

The fourth rationale was rejected as unsound long ago. Scrutiny reveals that a contributorily negligent plaintiff's negligence is not "*the* proximate cause" of the plaintiff's injuries. Dean Prosser observed that such an analysis "cannot be supported unless a meaning is assigned to proximate cause which is found nowhere else."[389] For example, "[i]f two automobiles collide and injure a bystander, the negligence of one driver is not held to be a superseding cause which relieves the other of liability."[390]

The supreme court repudiated such reasoning in 1922 in *West Construction Co. v. Atlantic Cost Line Railroad*.[391] The court explained that "it is sufficient if [the plaintiff's] negligence is *a* cause, or *one* of the causes, without which the injury would not have occurred. If the plaintiff's negligence be the sole and only cause of the injury it would not be contributory negligence at all, but rather the source of a self-inflicted injury."[392] Thus, this fourth rationale also is no longer a reasonable rationale for the contributory negligence doctrine.

The North Carolina Supreme Court holds that "[i]n the event that an application of a common law rule cannot achieve its aim, . . . then adherence to precedent is the only justification in support of the rule, and the courts are *compelled* to re-examine the common law doctrine."[393] Justice Oliver Wendell Holmes, Jr., in his

389. Prosser, *supra* note 2, at 468.

390. *Id.*

391. 184 N.C. 179, 113 S.E. 672 (1922).

392. *Id.* at 181.

393. State v. Freeman, 302 N.C. 591, 595, 276 S.E.2d 450, 453 (1981) (citations omitted) (emphasis added); *see also* Wilson Lumber & Milling Co. v. Hutton, 159

noted address, *The Path of the Law*, eloquently captured this principle.[394] He explained that "[i]t is revolting to have no better reasons for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[395]

The *stare decisis* rules developed by the North Carolina Supreme Court strike the proper balance in examining common-law rules. These rules, when considered in light of the factors discussed above, urge the review and rejection of the contributory negligence doctrine.

B. *Judicial vs. Legislative Adoption of the Comparative Negligence Doctrine*

Litigants opposing the abrogation of the contributory negligence doctrine in other jurisdictions have argued that the courts should simply defer the decision to the legislature.[396] Twelve state supreme courts have rejected this contention. The states adopting the comparative negligence doctrine by the judicial path are Alaska,[397] California,[398] Florida,[399] Illinois,[400] Iowa,[401] Kentucky,[402] Michigan,[403] Missouri,[404] New Mexico,[405] South Carolina,[406] Tennessee,[407] and West Virginia.[408] The United States

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N.C. 445, 448, 74 S.E. 1056, 1057 (1912) ("when the reason ceases, the law ceases" (Clark, C.J., dissenting)); A.A.F. Seawell, *Keeping the Law Alive*, 25 N.C. L. REV. 365, 374 (1947) (Justice Seawell explains that "[t]he validity of precedent depends on the soundness of its reason and its expression of living truth within the frame of the case in hand.").

394. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

395. *Id.* at 469.

396. A well-read law review article on this subject is *Comments*, *supra* note 2; *see also* SCHWARTZ, *supra* note 207, §§ 1.5, 1.6.

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

398. Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975).

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

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

401. Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982).

402. Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984).

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

404. Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983).

405. Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981).

406. Nelson v. Concrete Supply Co., 399 S.E.2d 783 (S.C. 1991).

407. McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992). For a thorough article examining the debate over comparative negligence and contributory negligence in Tennessee, see Mutter, *supra* note 2.

Supreme Court has also rejected a similar contention.[409] Similarly, the North Carolina Supreme Court's *stare decisis* jurisprudence repudiates such an argument.

When a common-law rule has not been codified, the North Carolina Supreme Court has full authority to alter or abolish the rule.[410] The supreme court has rejected the argument that the court should simply defer to the General Assembly in changing the common law several times.[411] The supreme court's *stare decisis* jurisprudence provides that the only issue where the supreme

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408. Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979).

409. *See* United States v. Reliable Transfer Co., 421 U.S. 397, 409-11 (1975) (unanimous opinion rejecting argument that switch to pure comparative negligence in maritime collision cases should be left to Congress).

410. *See* State v. Freeman, 302 N.C. 591, 594, 276 S.E.2d 450, 452 (1981) ("Absent a legislative declaration, [the North Carolina Supreme Court] possesses the authority to alter judicially created common law when it deems it necessary in the light of experience and reason." (citation omitted)); State v. Wiseman, 130 N.C. 726, 41 S.E. 884 (1902); Mims v. Mims, 305 N.C. 41, 55, 286 S.E.2d 779, 788 (1982); *see also* State v. Josey, 328 N.C. 697, 704, 403 S.E.2d 479, 483 (1991) ("We have the power to change the common law rule.").

411. *See* Mims v. Mims, 305 N.C. 41, 55, 286 S.E.2d 779, 788-89 (1982) ("[F]rom time to time when this Court has been convinced that changes in the way society or some of its institutions functioned demanded a change in the law, it rejected older rules which the Court itself developed in order that justice under the law might be better achieved. These decisions were sometimes made in the face of arguments that such changes ought to be made, if at all, by the legislature." (citing *Nicholson*, 300 N.C. at 295, 266 S.E.2d at 818; Great Am. Ins. Co. v. C.G. Tate Constr. Co., 303 N.C. 387, 279 S.E.2d 769 (1981); *Rabon*, 269 N.C. at 1, 152 S.E.2d at 486; Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787 (1977); Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976))).

Examples of cases in which the supreme court surveyed the common law of other jurisdictions and, finding absolutely no change in the common law, noted that the sought-after change must therefore come from the legislature include *Gillikin v. Bell*, 254 N.C. 244, 118 S.E.2d 609, 611 (1961) (the court surveyed the common law of other states and determined that the cause of action that plaintiff claimed was nowhere found in the common law, but noted that the legislature could create such a cause of action if the legislature wished); *Elliott v. Elliott*, 235 N.C. 153, 69 S.E.2d 224, 227 (1952) (the court surveyed the common law, found absolutely no support for abrogating a common-law rule, and noted that "this Court does not make law"); and *Scholtens v. Scholtens*, 230 N.C. 149, 52 S.E.2d 350, 352 (1949) (same).

The supreme court's statement that it "does not make law" in *Elliott* and *Scholtens* does not, of course, support adherence to the contributory negligence doctrine. This language explains that the court will not make changes that are not supported by the common law. In other words, the court will not, for example, create a new cause of action that has absolutely no support in the common law of other jurisdictions.

court will refuse to exercise its power to change the common law and will instead defer to the legislature are, in recognition of their unique status, common-law rules regarding vested property rights.[412] Vested property rights, of course, are not affected by the contributory negligence doctrine.

Nicholson v. Hugh Chatham Memorial Hospital[413] is a recent example of the supreme court's rejection of the deferment argument. In *Nicholson*, the court rejected the defendant's arguments that "if [the court is] tempted to an 'activist' role in dealing with [prior decisions of the court, the court] should rely on legislative action rather than forsake . . . '*stare decisis*.' "[414] The court stated that this "argument overlooks the fact that this entire area of the law has been developed by judicial decree."[415] The court noted that the question at issue in *Nicholson* had been examined and altered several times.[416] The court noted also "the policy of modern law to expand liability in an effort to afford decent compensation . . . to those injured by the wrongful conduct of others."[417] The court concluded that "[i]n view of such a history of judicial activity, we do not believe legislative fiat is necessary."[418]

412. *See Bulova Watch Co.*, 285 N.C. at 473, 206 S.E.2d at 145 (A "decision, subsequently concluded to have been erroneous, may properly be overruled when such action will not disturb property rights previously vested in reliance on earlier decisions."); Rabon v. Rowan Memorial Hosp., Inc., 269 N.C. 1, 20, 152 S.E.2d 486, 498 (1967) (The North Carolina Supreme Court's policy "in matters involving title to property [is] . . . to leave changes in the law to the legislature."); Woodard v. Clark, 236 N.C. 190, 72 S.E.2d 433, 436 (1952) (leaving personal property issue to the legislature); *see also Mims*, 305 N.C. at 55, 286 S.E.2d at 788.

413. 300 N.C. 295, 266 S.E.2d 818 (1980).

414. *Nicholson*, 300 N.C. at 304, 266 S.E.2d at 823.

415. *Id.*

416. *Id.*

417. *Id.* at 300, 266 S.E.2d at 821 (citations omitted).

418. *Id.*

Justice A.A.F. Seawell made similar observations on this point. In examining the role of the courts and the legislature in "keeping the law current," Justice Seawell explained that sometimes "emphasis on responsibility, and sometimes priority, must carry the initiative to the courts." Seawell, *supra* note 393, at 367. He reasoned "that the field in which the need for adjustment is more often felt, instances which advertise the existing inadequacy of out-moded rules most frequently encountered, is peculiarly and traditionally that of the court—the field of judge-made law." *Id.* at 367. The contributory negligence doctrine fits squarely within Justice Seawell's reasoning.

Ten courts acquiesced to the legislative-deferment argument.[419] These cases, however, are easily differentiated from North Carolina's situation. Two of the courts deferring to their respective legislatures had to contend with statutes that some argued implicitly codified the contributory negligence doctrine.[420] There are North Carolina statutes that provide for the administration of the contributory negligence doctrine, and that mitigate against its harshness,[421] but none that codify the doctrine or prevent its rejection.[422]

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419. *See* Harrison v. Montgomery County Bd. of Educ., 456 A.2d 894, 905 (Md. 1983); Golden v. McCurry, 392 So. 2d 815, 817 (Ala. 1980); Codling v. Paglia, 298 N.E.2d 622, 630 (N.Y. 1973); Krise v. Gillund, 184 N.W.2d 405, 409 (N.D. 1971); Bridges v. Union Pacific R.R., 488 P.2d 738, 740 (Utah 1971); Peterson v. Culp, 465 P.2d 876 (Ohio 1970); Johnston v. Tourangeau, 259 N.W. 187, 188-89 (Minn. 1935); McGraw v. Corrin, 303 A.2d 641, 644 (Del. 1973); Bissen v. Fuji, 466 P.2d 429, 431 (Haw. 1970); Vincent v. Pabst Brewing Co., 177 N.W.2d 513, 516-17 (Wis. 1970).

Justice James H. Faulkner of the Alabama Supreme Court, dissenting, stated that "[t]he majority's holding that, 'even though this Court has the inherent power to change the common law rule of contributory negligence, it should, as a matter of policy, leave any change . . . to the legislature' is like shaking the clammy, lifeless, hand of another man. It has no meaning." *Golden*, 392 So. 2d at 819 (Faulkner, J., dissenting).

The legislatures in all but two of the ten states whose supreme courts deferred the decision later adopted the comparative negligence doctrine.

420. *See Golden*, 392 So. 2d at 816-17; *Bridges*, 488 P.2d at 740; *see also* Williams v. Delta Int'l Machinery Corp., 619 So. 2d 1330 (Ala. 1993).

North Carolina has a similar statute that provides that English common law applies in North Carolina. N.C. GEN. STAT. § 4-1 (1986). It has been long recognized that this statute did not codify 1776 common law, but that it indicates that such common law applies until modified or repealed by the General Assembly or the supreme court. *See* Hall v. Post, 323 N.C. 259, 264, 372 S.E.2d 711, 714 (1988).

421. *See, e.g.*, N.C. GEN. STAT. § 1-139 (1983); N.C. GEN. STAT. § 20-126(c) (1989); N.C. R. CIV. P. 7-8.

422. One statute bears particular mention. Under North Carolina's Tort Claims Act, the state is liable for negligent acts of its agents under the same laws governing a private person's liability. N.C. GEN. STAT. § 143-299.1 (1983) (hereinafter "§ 143-299.1") states that "[c]ontributory negligence on the part of the claimant . . . shall be deemed a matter of defense on the part of the State . . . , and . . . [the] State . . . shall have the burden of proving that the claimant . . . was guilty of contributory negligence." It is not clear whether § 143-299.1 codifies the contributory negligence doctrine for claims against the state or whether it, like N.C. GEN. STAT. § 1-139 (1983) (hereinafter "§ 1-139"), merely mitigates the harshness of the doctrine by shifting the burden of proving the presence of contributory negligence to the party asserting it as a defense.

Taking the view that administrative and harshness-mitigating statutes prevent the supreme court from abrogating common-law doctrines would allow such doctrines to be codified without actual ratification by the legislature. There are many problems with such a view. One of the most alarming is that it would turn legislative intent on its head to construe a legislator's vote in favor of mitigating the harshness of a common-law doctrine as a vote in favor of codifying the doctrine. There is no support for such a view in the North Carolina Supreme Court's jurisprudence.[423]

The events precipitating the introduction and passage of § 143-299.1 exactly mirror those causing the enactment of § 1-139. In 1883 the North Carolina Supreme Court held that it was the *plaintiff's* burden to prove that the plaintiff was not contributorily negligent in order for the plaintiff to recover against a negligent defendant. *See supra* part I.C.3. This rule required the plaintiff to show the absence of contributory negligence as a part of the plaintiff's case. The 1887 North Carolina General Assembly, recognizing the inequity of such a rule, passed § 1-139 to provide that it is the *defendant's* burden to prove the plaintiff's contributory negligence if the defendant asserts the contributory negligence doctrine as a defense. *See supra* part I.C.3.

In 1955 the supreme court held that it was the *plaintiff's* burden to prove that the plaintiff was not contributorily negligent in order to recover against the state under the Tort Claims Act. Floyd v. North Carolina State Highway Commission, 241 N.C. 461, 85 S.E.2d 703 (1955); *see also* MacFarlane v. Wildlife Resources Commission, 244 N.C. 385, 93 S.E.2d 556 (1956). The 1955 General Assembly, like the 1887 General Assembly, recognized the inequity of this rule, and overruled *MacFarlane* and *Floyd* by statute, § 143-299.1. *See* Barney v. North Carolina State Highway Commission, 282 N.C. 278, 192 S.E.2d 273 (1972). This historical similarity and the General Assembly's apparent intent in enacting § 143-299.1 indicates that § 143-299.1 does not codify the contributory negligence doctrine for suits against the state, but just makes it clear that the party asserting the doctrine as a defense—the state—has the burden of proof, and that it is not part of the plaintiff's case. *See* Tucker v. North Carolina Highway & Public Works Comm'n, 274 N.C. 171, 100 S.E.2d 514, 519 (1957). The language of § 143-299.1, though, is different than § 1-139's language, and may be read to codify the doctrine for suits against the state. The second clause of § 143-299.1 appears to accomplish all that § 1-139 entails, shifting the burden to the one asserting the doctrine as a defense. It is arguable that the first clause of § 143-299.1 is merely a preamble to the operative second clause, indicating that contributory negligence is, in fact, a "*defense*," and not part of the plaintiff's case. The answer to this question awaits resolution by the North Carolina courts. In any event, § 143-299.1 does not codify the doctrine generally and in no way impedes the ability of the supreme court to reject the contributory negligence doctrine in the common law.

423. Similar statutes existed in the states whose supreme courts rejected the contributory negligence doctrine. Moreover, none of the comparative fault bills introduced in the General Assembly sought to amend these statutes. *See supra* part III.C.1.

Six of the courts deferring to their respective legislatures made their decision to defer before the tide of jurisdictions made the switch to the comparative negligence doctrine and thus did not have the experience and reasoning of many other jurisdictions on the issue to examine. The remaining two courts, Ohio and Maryland,—and nearly all of the other courts—deferring to their respective legislatures do not follow the same *stare decisis* principles that the North Carolina Supreme Court follows. The Ohio Supreme Court did not offer any rationale for its decision to defer.[424] In direct contrast to the *stare decisis* jurisprudence of North Carolina, Maryland's high court has very often declined to change the common law and expressly deferred to the Maryland legislature.[425]

Litigants have argued that courts should merely defer to the legislature on this issue because issues associated with the comparative negligence doctrine will need to be addressed. It is theoretically true that a legislature is in a better position to adopt a set of rules for applying a new doctrine, for it can address all associated issues at once. This variation of the deferment argument fails in practice, however, because legislatures, for the most part, do not address issues beyond the rejection of the contributory negligence doctrine for the comparative negligence doctrine when they progress their respective states to a comparative negligence system by the legislative path. Such bills leave the vast majority of issues associated with the comparative negligence doctrine to the courts. Indeed, the several comparative negligence bills introduced in the North Carolina General Assembly left many questions for the courts to decide.[426]

The history of the comparative negligence bills addressed in the North Carolina General Assembly during the 1980s provides further reason for the North Carolina Supreme Court to reject the deferment argument. The debates over these bills were impaired by intensive lobbying on both sides, flawed insurance-cost studies,

424. *Baab*, 399 N.E.2d at 88. The Ohio court did cite a group of cases from the late 1960s and early 1970s that deferred to their respective legislatures on the issue. *Id.* at 88-89. These cases all came before the "stampede" to the comparative negligence doctrine, and at least one of them, *Maki v. Frelk*, 239 N.E.2d 445 (Ill. 1968), was later overruled when the Illinois Supreme Court judicially adopted the comparative negligence doctrine in *Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981).

425. *See Harrison*, 456 A.2d at 903 (citing eleven such occasions).

426. For a description of the legislative history of the comparative negligence bills in the North Carolina General Assembly, see *supra* part III.C.1.

arguments over legislative procedure, arguments over legislators' integrity, and posturing on unrelated issues.[427] There is little reason not to believe that future comparative negligence bills will be met by similar influences. The deferment argument rests in large part on the ability of the legislature to deliberately and thoughtfully address the several issues associated with the comparative negligence doctrine. The comparative negligence bills, however, raise influences which, as evidenced by the 1980s, sharply divide legislators[428] and hamper the General Assembly's exercise of this ability.

In this same vein, it should be noted that an argument can be made that the General Assembly's several rejections of comparative negligence bills should be given some weight by the supreme court in favor of retaining a contributory negligence system. This argument's force, whatever it may be, is, however, nullified by the influence of the debate-impairing factors discussed above, particularly the seemingly-alarming-but-flawed insurance-cost studies.[429] Moreover, it is generally recognized that a legislature's rejection of a bill is not always the same as the legislature's rejection of the doctrine or idea underlying the bill. Undeniably, legislators vote for or against a bill for a wide variety of reasons.

Of course, the General Assembly would remain free to address any issues associated with the comparative negligence doctrine following the doctrine's adoption by the supreme court. It is important to note that the development of the contributory negligence doctrine and its associated rules has been a combined effort between the North Carolina Supreme Court and the North Carolina General Assembly.[430] There is no reason why this part-

427. *See supra* part III.C.1. The unrelated issue referred to is superior court appointments. *See supra* note 328 and accompanying text.

428. An amazingly high percentage of votes on this issue resulted either in a tie or a difference of only two or three votes. *See supra* part III.C.1.

429. *See supra* part III.C.2.a. and footnotes 362 and 427 and accompanying text.

430. *See supra* part I.C.

At the turn of the century, the Honorable George Rountree, in a speech to the University of North Carolina at Chapel Hill law class, addressed the growth of the common law. He reminded his audience that

> it is necessary to remember that the law is not only a body of rules, but that this body is not lifeless—it is a living organism, ever growing, expanding, developing—constantly shedding outworn forms and adopting newer and more efficient means of administering justice between man and man—and that this growth is due as well to the action of the courts as to that of the legislature.

nership could not successfully continue with the comparative negligence doctrine.

The supreme court's language in *State v. Freeman* bears repeating at this point: "In the event that an application of a common law rule cannot achieve its aim, . . . then adherence to precedent is the only justification in support of the rule, and the courts are *compelled* to re-examine the common law doctrine."[431] A decision to merely defer to the legislature on this issue will not comport with the meaningful *stare decisis* rules that have served the supreme court and the state of North Carolina well for two centuries.[432] As Justice A.A.F. Seawell explained: "It is inconceivable that justice should lag when the power, the opportunity, the necessity, and the propriety all meet and wait upon the occasion."[433]

C. *Summary: Judicial Restraint in the Contributory Negligence Crucible*

Judicial restraint is very important, both to maintain the integrity of the courts and to preserve our balanced system of government. There is no question that the justices of the North Carolina Supreme Court must exercise judicial restraint in carrying out their duties, including their responsibilities as common-law judges. This restraint, though, is not a paralyzing straightjacket. As the supreme court has recognized, there occasionally comes a time when a common-law doctrine must be re-examined and altered. The supreme court, over the period of its existence, has carefully developed rules within its *stare decisis* jurisprudence to

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George Rountree, *The Development of the Law*, 1 N.C. L. J. 155, 157 (1900) (Annual Address to the Law Class of the University of North Carolina at Chapel Hill on May 4, 1900).

Justice A.A.F. Seawell made similar observations on this point. In examining the role of the courts and the legislature in "keeping the law current," Justice Seawell explained that sometimes "emphasis on responsibility, and sometimes priority, must carry the initiative to the courts." Seawell, *supra* note 393, at 367. He reasoned "that the field in which the need for adjustment is more often felt, instances which advertise the existing inadequacy of out-moded rules most frequently encountered, is peculiarly and traditionally that of the court—the field of judge-made law." *Id.* at 367. The contributory negligence doctrine fits squarely within Justice Seawell's reasoning.

431. State v. Freeman, 302 N.C. 591, 595, 276 S.E.2d 450, 453 (1981) (citations omitted) (emphasis added).

432. For additional discussion of these rules, see *supra* parts IV.A. and IV.C.

433. Seawell, *supra* note 393, at 371.

let the sitting justices know when this time has come.[434] These rules are not rules of convenience. The supreme court has not spoken of them in permissive terms.[435] These rules are as much a part of the supreme court's jurisprudence as the court's most-cited common-law rules. Their appropriately-infrequent operation does not diminish their importance or force. Judicial restraint must be measured not only by close adherence to statutory language and legislative intent, and dedication to *stare decisis* jurisprudence requiring devotion to precedent, but also by the observance of considered *stare decisis* jurisprudence indicating when a common-law doctrine must be re-examined and altered.

The North Carolina Supreme Court's considered *stare decisis* jurisprudence indicating when a common-law doctrine must be re-examined and altered is straightforward. When the rationale for a common-law rule has vanished or become unreasonable, and the only justification for adhering to the rule is precedent, or when experience and reason urge it, the North Carolina Supreme Court will re-examine the rule.[436] When the continued adherence to a common-law rule is a perpetuation of error or grievous wrong, or when experience and reason reveal that justice under the law can be better achieved by the alteration or rejection of the rule, the North Carolina Supreme Court will alter or reject the rule.[437] As explained above, the North Carolina Supreme Court's *stare decisis* jurisprudence calls for the court to re-examine and reject the contributory negligence doctrine.

CONCLUSION

The contributory negligence doctrine is unjust and outmoded. It is nearly-universally recognized as such. Consequently, forty-

434. For a discussion of these rules, see *supra* parts IV.A. and IV.B.

435. *See, e.g.*, State v. Freeman, 302 N.C. 591, 594-95, 276 S.E.2d 450, 453 (1981) ("compelled"); Wiles v. Welparnel Constr. Co., 295 N.C. 81, 85, 243 S.E.2d 756, 758 (1978) ("will"); State v. Mobley, 240 N.C. 476, 487, 83 S.E.2d 100, 108 (1954) ("never"); State v. Ballance, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949) ("will").

436. *See supra* parts IV.A. and IV.B.; State v. Freeman, 302 F.2d 591, 595, 276 S.E.2d 450, 453 (1981).

437. *See supra* parts IV.A. and IV.B.; Mims v. Mims, 305 N.C. 41, 54-55, 286 S.E.2d 779, 788-89 (1982); *see also* Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 8 (1936) ("the law itself is something better than its bad precedents, and to open the way for recognition that the bad precedent must on occasion yield to the better reason").

six states, the United States Supreme Court, and nearly all civilized countries have rejected the doctrine.

The comparative negligence doctrine makes all parties responsible for the results of the party's conduct. It offers an effective solution to the several difficulties associated with the contributory negligence doctrine. The jurisdictions rejecting the contributory negligence doctrine adopted the comparative negligence doctrine. None have switched back.

Both the North Carolina Supreme Court and the North Carolina General Assembly have the power to reject the contributory negligence doctrine for the comparative negligence doctrine.[438] This article's concentration on the common-law development of

438. Ultimately, the North Carolina Supreme Court or the North Carolina General Assembly will have to decide which type of comparative negligence system to adopt—pure, "less than or equal to" modified, "less than" modified, or "slight/gross" modified. For a description of each of these types, see *supra* part III.A. There are several law review articles and treatises that describe the merits of each of the types of comparative negligence very well. *See, e.g.*, WOODS, *supra* note 13, at 85-94; SCHWARTZ, *supra* note 207, at 45-76; Mutter, *supra* note 2, at 245-58. Thus, their work is not repeated here. A few, brief notes on this issue, however, are important to North Carolina's examination of this issue.

The pure comparative negligence system is recognized as the most equitable and just system. *See supra* note 219 - 227 and accompanying text. Nearly all of the courts that have adopted the comparative negligence system have chosen the pure system. It is also generally recognized that the "slight/gross" system has a wide variety of problems and is very similar to the contributory negligence doctrine. *See supra* notes 235 - 238 and accompanying text.

Most state legislatures adopting the comparative negligence doctrine have chosen one of the modified comparative negligence systems. It is generally acknowledged that the selection of a modified system is the result of political compromise. *See supra* note 228. Nearly all of the comparative negligence bills introduced in the North Carolina General Assembly provided for the "less than" modified comparative negligence system. *See supra* part III. C. 1. Other states' experience with the "less than" system, however, reveals some difficulties with such a system. Although in theory not significantly different than the "less than or equal to" system, the "less than" system is disfavored because juries sometimes gravitate towards finding the parties equally at fault—fifty/fifty—and intend to award the plaintiff half of the plaintiff's damages and, instead, unintentionally leave the plaintiff with no recovery. *See* WOODS, *supra* note 13, § 1:11, at 28; SCHWARTZ, *supra* note 207, § 2.1, at 32. Experience with the "less than" system has so far led nine states that initially adopted the "less than" system to switch to the "less than or equal to" system. WOODS, *supra* note 13, § 1:11, at 28-29.

Thus, based on the analysis presented by the courts and commentators examining the issue, and on other states' experience with the "less than" system, North Carolina should adopt either a pure comparative negligence system or a "less than or equal to" modified comparative negligence system.

negligence law in North Carolina is not meant to minimize the importance of the General Assembly's ability to act on this issue. The General Assembly should pass a comparative fault bill. Indeed, the General Assembly is arguably the preferential body to deal with the issue. This is because the General Assembly can provide for issues associated with the comparative negligence doctrine in one bill, whereas it may take some time for the supreme court to address such issues. This arguably-preferential status, however, is not an exclusive status.

The contributory negligence doctrine is a creature of the common law in North Carolina. Experience and reason, including consideration of the overwhelming criticism levelled at the doctrine, reveal that continued adherence to the doctrine is a perpetuation of error and a grievous wrong. Tellingly, all of the rationales upon which the supreme court adopted the doctrine have long-since vanished. The *stare decisis* jurisprudence carefully developed by the North Carolina Supreme Court over the past two centuries urges the court to re-examine and reject the contributory negligence doctrine. The supreme court should not make this change lightly, but it should make this change.

Either the North Carolina General Assembly or the North Carolina Supreme Court should, without delay, reject the contributory negligence doctrine and adopt the comparative negligence doctrine in its stead. The citizens of North Carolina deserve no less.