Duquesne Law Review

Volume 16
Number 4 *Criminal Law and Criminal Procedure: Some Current Issues*

Article 13

1978

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The Pennsylvania Comparative Negligence Act—An "Alien Intruder in the House of Common Law"*

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On July 9, 1976, the Governor of Pennsylvania signed into law Act No. 152[1] abolishing contributory negligence as an absolute defense to trespass actions and replacing that much maligned doctrine[2] with a modified form of comparative negligence.[3] The Act was effective September 7, 1976, and by its express terms applied to "all actions brought to recover damages for negligence resulting in death or injury to person or property . . . ."[4]

At the time Act No. 152 was signed into law *Costa v. Lair* was pending in the Court of Common Pleas of Allegheny County,[5] but had not yet been tried.[6] *Costa* dealt with a motorcycle-car collision

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* Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 13-15 (1936). See text accompanying note 47 *infra*, for Justice Stone's complete quotation.

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1. Act of July 9, 1976, No. 152, 1976 Pa. Laws 855, PA. STAT. ANN. tit. 17, § § 2101, 2102 (Purdon Supp. 1977-1978).

2. More than a quarter century ago Dean Prosser said: "The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free. No one ever has succeeded in justifying that as a policy, and no one ever will." Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953).

Other criticisms of the doctrine, both judicial and academic, are numerous and vitriolic. See, for purposes of illustration, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), where the Court referred to contributory negligence as a "discredited doctrine"; Li v. Yellow Cab Co., 13 Cal. 3d 804, 812, 532 P.2d 1226, 1231, 119 Cal. Rptr. 858, 863 (1975), where the court said, "The basic objection to the doctrine—grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability—remains irresistible to reason and all intelligent notions of fairness."; and Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 508-09 (1962).

3. The Pennsylvania Act does not provide for "pure" comparative negligence, which—as is the case in maritime law—permits even a plaintiff who is 99% responsible for his injury to recover the remaining 1% of his damages from a minimally negligent defendant. The Act benefits only those plaintiffs whose negligence "was not greater than the casual negligence of the defendant or defendants against whom recovery is sought . . . ." PA. STAT. ANN. tit. 17, § 2101 (Purdon Supp. 1977-1978).

4. *Id.*

5. No. G.D. 75-2200 (Pa. C.P. Allegheny County, Aug. 31, 1976).

6. Indeed, the case has not yet reached trial.

that had occurred before passage of the Comparative Negligence Act, and the defendant had asserted the plaintiff's alleged contributory negligence as a defense. Because it was unclear whether the Comparative Negligence Act applied to such cases, we filed a Motion for Partial Summary Judgment and/or a Motion for Declaratory Judgment on behalf of plaintiff Lawrence Costa, seeking a ruling that the doctrine of comparative negligence applied to his case. We contended that this should be so as a matter of statutory construction and, alternatively, as a matter of common law even should it be judicially determined that the statute does not apply to cases pending but untried as of the Act's effective date. Both arguments were found valid by Judge (now Justice) Larsen at the trial level.[7] Both were rejected by the superior court, which held that contributory negligence should continue to apply to all causes of action premised upon occurrences that took place prior to the Act's effective date, regardless of when filed or tried.[8]

Biased as we are, we nonetheless accept the appellate court's decision on the statutory construction issue as one upon which reasonable people may differ.[9] We feel, however, that the issues raised in the part of our brief dealing with the ability—indeed, the duty—of the courts to incorporate the legislative policy into areas of the common law beyond the statute's reach are of critical and far-reaching importance, and should be further explored.

What follows is in large measure a portion of the brief we filed with the superior court. The issues are, as a consequence, framed around the doctrine of comparative negligence. The arguments are not alone confined to that issue, however, and apply with equal force to many other "settled" areas of the common law which are only partially altered by legislative action. What frequently happens in such instances is precisely what happened in Pennsylvania with the legislative adoption of the doctrine of comparative negligence—the legislation is silent as to whether it should apply to pending cases and to cases that, although filed after the effective date of the legislation, are based on occurrences that predate the legislation. What, if any, role should the legislation have in molding the common law as it applies to the pre-Act cases?

7. Costa v. Lair, No. G.D. 75-2200 (Pa. C.P. Allegheny County, Aug. 31, 1976).

8. 241 Pa. Super. Ct. 517, 363 A.2d 1313 (1976). A Petition for Allowance of Appeal to the Supreme Court was denied.

9. For a discussion of the statutory interpretation issue, see 15 DUQ. L. REV. 531 (1977).

To conclude that the Act's failure to reach pending cases precludes judicial tampering with the law applicable to those cases may well result in a dual system of inconsistent laws for a considerable future time. That is the case with contributory negligence in this commonwealth, and will continue to be the case for the foreseeable future.[10] It is not inconceivable that by now there exist jurors who have been instructed in one case to permit a plaintiff to recover even though he may have been 49% responsible for his own injury, and who, in the very next case, were ordered to find against a plaintiff only a fraction of a percent responsible for his predicament. In some instances this may be necessary. We doubt very strongly, however, that this should normally be the case, and can hardly condemn such a juror should he give full approval to Scott Turow's observation: " 'Legal thinking is nasty,' I said to Gina at one point in our conversation, and I began to think later I'd hit on a substantial truth."[11]

The arguments generally given to support the contention that the legislative policy should not be applied to pending cases beyond the statute's reach are that the matter is one beyond the court's common law competence; that retroactive application of the policy of the act would deprive the defendant of a vested or otherwise protected right; and that the legislature, by virtue of the Act, has preempted the field. None of those arguments hold water in the area of comparative negligence nor in many other areas where they have been and can be raised. Yet, each contention was asserted by the successful defendant in *Costa v. Lair.*

Initially, we were confronted with the argument that the venerability of the "contributory negligence as a complete bar to recovery" doctrine made it an appropriate vehicle for legislative change, and that it should not be altered by judicial action. Were that so and since the legislation does not apply to pending cases, those cases would be forever frozen in a limbo—unentitled to the benefits of the statute yet controlled by its narrow scope. Any judge-made doctrine must be capable of judicial change should it be deemed of no present usefulness. And, it should not matter that legislation has nar-

10. The superior court's decision made the Act applicable only to causes of action arising on or after September 7, 1976. Because of Pennsylvania's two year statute of limitations, the congested nature of its metropolitan courts, and the need to occasionally retry cases that have been appealed, it is not inconceivable that jurors will be instructed to apply the doctrine of contributory negligence as a complete bar to recovery well into the next decade.

11. S. TUROW, ONE L (1977).

rowed the impact of the judicial error by correcting the law as to future cases. As stated by Justice Eagen, "[W]isdom should never be rejected merely because it comes late."[12] Nor, to paraphrase Justice Eagen, should wisdom be rejected merely because it will affect a small number of litigants. Moreover, it is at least questionable whether the pre-Act Pennsylvania Supreme Court precedents that contributory negligence acts as a complete bar to recovery can be controlling in cases tried after the statutory enactment since the judges in the prior cases considered the issue in the absence of the public policy inherent in the legislation. Thus, a trial court or intermediate appellate court considering the issue of comparative negligence after the effective date of the legislation for application to a case not within the scope of that legislation is, in reality, considering a case of first impression and should not be absolutely bound by the contrary pre-Act authorities.

It is our belief—and was Judge Larsen's conclusion—that the trial court was not precluded from judicially creating a doctrine of comparative negligence applicable to cases outside the scope of the Act's reach even though there was settled appellate court precedent to the contrary. Since the common law of torts is a judicial interpretation of the Commonwealth's policy as it relates to the allocation of responsibility for injury, the legislative intent articulated in the newly enacted legislation cannot be ignored. Public policy as articulated by the legislature is at least as important a consideration, if not actually a far more persuasive authority, than the prior judicial precedent. Thus, the principle of stare decisis did not preclude either the trial court or the intermediate appellate court from adopting a common law rule of comparative negligence applicable to cases beyond the scope of the Comparative Negligence Act.[13] The conclu-

12. Gilbert v. Korvette's Inc., 457 Pa. 602, 612-13, 327 A.2d 94, 100 (1974).

13. For an enlightened statement of the role of stare decisis in our jurisprudence, see Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584 603-06, 305 A.2d 877, 886-88 (1973) (citations omitted):

> Appellee urges that abrogation of the immunity doctrine disturbs the principle of *stare decisis.* It seems obvious, however, that appellee not only misconceives the mission of the *stare decisis* principle, but also ignores the admonition of Chief Justice Cardozo: "We tend sometimes, in determining the growth of a principle or a precedent, to treat it as if it represented the outcome of a quest for certainty. That is to mistake its origin. Only in the rarest instances, if ever, was certainty either possible or expected. The principle or the precedent was the outcome of a quest for probabilities. Principles and precedents, thus generated, carry throughout their lives the birthmarks of their origin. They are in truth provisional hypotheses, born in doubt and travail,

sion that pending cases should continue to be governed by the contributory negligence rule should only have resulted from a reasoned reexamination of the problem in light of the legislative pronouncement, and from the conclusion that—the Act notwithstanding—public policy would be better served by a limited retention of the doctrine during the transition period. No such policy-oriented examination was made by the superior court. Moreover, we can think of no conceivable reason, other than depriving a defendant of a vested or some other right, that would lead to such a conclusion. That contention is dealt with in a subsequent portion of this article and is not believed to be meritorious.

The second argument with which we were met is that the judiciary lacks the power to implement any form of comparative negligence. An entire generation of scholars has rejected this thesis and their conclusions have been echoed by virtually all courts—including those reluctant to make the change in the absence of legislative action—that have considered the matter. Perhaps the arguments in favor of judicial intervention to remedy the admittedly unjust result occasioned by application of the contributory negligence concept are best summed up by Professor Fleming James. In commenting upon *Maki v. Frelk*,[14] he argued that: "The proposition that changing the law is properly and exclusively the function of the legislature runs counter to Anglo-American tradition. It has long been the boast of the common law that it was able to adapt itself to changing conditions."[15] Professor James then noted that courts have radically altered the entire face of tort law, eliminating scores of previously existing defenses in the process; that the legislature has proved to be singularly ineffective in adapting tort law to

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expressing the adjustment which commended itself at the moment between competing possibilities."

. . . . "When precedent is examined in the light of modern reality and it is evident that the reason for the precedent no longer exists, the abandonment of the precedent is not a destruction of stare decisis but rather a fulfillment of its proper function.

"Stare decisis is not a confining phenomenon but rather a principle of law. And when the application of this principle will not result in justice, it is evident that the doctrine is not properly applicable."

. . . .

The controlling principle which emerges . . . is clear—the doctrine of *stare decisis* is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish.

14. 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), *rev'd*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).
15. James, *Comments on Maki v. Frelk*, 21 VAND. L. REV. 891, 892 (1968).

changing conditions;[16] and that retention of the antiquated concept of contributory negligence has resulted in jurors having to disregard the law in order to effectuate just decisions. As to the latter fact, and the disrespect for the law it engenders, he noted:

> Jury lawlessness, like lawlessness in any form, has grave disadvantages. Though it may be the salvation of the law in some circumstances, it does no credit to the law, and it does not enhance the moral stature of the judiciary to persist in rules that regularly call for salvation through lawlessness. *Surely it is a proper function of the courts to preserve the integrity of the judicial process.*[17]

Surely, the disrespect for the law and the invitation toward lawlessness engendered by the patently unfair doctrine of contributory negligence will be enhanced when a juror may, in one case, be instructed to apply comparative negligence and in the very next case

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16. This has been particularly true in the Commonwealth of Pennsylvania. See the statement of Mr. Justice Pomeroy dissenting in Laughner v. Allegheny County, 436 Pa. 572, 588, 261 A.2d 607, 615 (1970), that

> the scattered victims of governmental negligence, are not a coherent or identifiable group so situated that they might mobilize themselves and make their collective voice heard in the legislature. In all probability, remedial legislation providing redress for victims of governmental torts would not be retroactive so as to compensate for past losses; hence there is little incentive on their part to press for such legislation.

In the more callous observation of Professor Potter: "[T]here has never been a legislator voted out of office for indifference to the plight of uncompensated victims of governmental torts." Potter, *Sovereign Immunity in Pennsylvania: An Open Letter to Mr. Justice Pomeroy,* 38 U. PITT. L. REV. 185, 193 (1976). What is true of victims of governmental torts is equally true of tort victims generally.

17. James, *Comments on Maki v. Frelk,* 21 VAND. L. REV. 891, 896 (1968). In Li v. Yellow Cab Co., 13 Cal. 3d 804, 812, 532 P.2d 1226, 1231, 119 Cal. Rptr. 858, 863, the court said:

> [P]ractical experience with the application by juries of the doctrine of contributory negligence has added its weight to analyses of its inherent shortcomings: "Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff's fault. But the process is at best a haphazard and most unsatisfactory one." . . . It is manifest that this state of affairs, viewed from the standpoint of the health and vitality of the legal process, can only detract from public confidence in the ability of law and legal institutions to assign liability on a just and consistent basis.

For similar authority, see Keeton, *Creative Continuity in the Law of Torts,* 75 HARV. L. REV. 463, 509, stating:

> [T]he rule of contributory neligence is so out of keeping with the prevailing thought of the community that to a very considerable degree it has been vitiated by verdicts that in effect apply a rule of apportionment in direct opposition to jury instructions—a situation that promoted disrespect for law and legal institutions . . . .

in which he sits be told to completely bar a plaintiff from any recovery whatsoever if the plaintiff's negligence contributed in the slightest manner toward his injury. Rules of law, if they are to be afforded respect, must be premised upon more rational bases than mere form. And, acting to insure that respect for the law is preserved is a matter for the judiciary.[18]

The belief that the judiciary possesses the power to abrogate the common-law doctrine of contributory negligence is not alone confined to legal scholars. More than a century ago the Georgia courts fashioned a comparative negligence rule applicable to all plaintiffs out of a statute applicable only to those injured as the result of railroading operations.[19] More recently, the courts of Florida, California, and Alaska have, without any legislative assistance, abrogated the doctrine of contributory negligence.[20]

The California and Florida decisions are particularly illuminating since contributory negligence had been a part of the common law of both states from their inceptions, and since both states had statutes incorporating the common law as the governing law in their courts. Notwithstanding these impediments, neither court felt restrained from replacing the doctrine of contributory negligence with the doctrine of comparative negligence. In disposing of the argument that the specific statutory incorporation of the doctrine of contributory negligence into the statutory law made the matter one properly within the exclusive province of the legislature, the California Supreme Court said:

> We have concluded that the foregoing argument, in spite of its superficial appeal, is fundamentally misguided. As we proceed to point out and elaborate below, it was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for the purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.[21]

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19. *See* Macon & W.R. Co. v. Winn, 26 Ga. 250 (1858); Flanders v. Meath, 27 Ga. 358 (1859). *See also* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.5, at 17-29 (1974) (extensive discussion of judicial adoption of comparative negligence).

20. *See* Hoffman v. Jones, 280 So.2d 431 (Fla. 1973); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

21. 13 Cal. 3d at 815, 532 P.2d at 1333, 119 Cal. Rptr. at 865.

The Florida court circumvented the problem by noting that its more general statute adopted the common law in force in 1776, and that, as of that date, contributory negligence was probably not an articulated part of the common law. The court went out of its way to observe, however, that even if the doctrine had been statutorily incorporated into the law of Florida it remained subject to judicial overruling because of its common law origins.[22]

Without doubt, the doctrine of contributory negligence was originally, and yet remains, a creation of the common law, even when for purposes of judicial and precedential continuity, the common law has been statutorily adopted as the governing body of law to be applied in constitutionally or legislatively created courts.[23] While the legislature may abrogate or change certain aspects of that law, it cannot be said to have taken away the traditional powers of the courts to change those laws to meet changing conditions and demands without specific prohibitions aimed toward that end. Bluntly, as the courts of Florida, California, and Alaska, as well as virtually all commentators, have recognized, suspension of the judicial power—coupled with the ineffectiveness of legislatures in formulating a comprehensive statutory body of tort laws—would serve only to suspend vital areas of the common law in another century, where they would remain out of step and tune with modern society. Wisely, as illustrated by the willingness of the courts to change such "settled" tort defenses as governmental and charitable immunity, few courts have felt incapable of changing tort law, regardless of its vintage, to meet current needs and problems.

The third argument against the judicial application of comparative negligence to pending cases is that it takes away from the defendants in those cases some "vested right."[24] In disposing of this con-

22. 280 So. 2d 431, 435-36 (Fla. 1973).

23. Pennsylvania has a statute making consistent provisions of the English and Colonial common law a part of the common law of this Commonwealth. PA. STAT. ANN. tit. 46, § 152 (Purdon 1969). It has never been successfully contended, however, that the statute precludes judicial alteration of the common law concepts in effect at the time of the statute's adoption.

24. The superior court, ignoring the fact that most overturned tort defenses have been applied to the case in which the issue arose and also to cases pending but yet untried at that time, emphasized that " '[r]etroactive legislation is so offensive to the Anglo Saxon sense of justice that it is never favored.' " 241 Pa. Super. Ct. at 521, 362 A.2d at 1315. In a note, the superior court said:

> We do not wish this opinion to be construed as holding that there is a vested right to the defense of contributory negligence. We hold solely that the retroactive application of the Act would affect the legal character of past actions in a substantive, rather

tention, it should first be noted that the supreme courts of California, Alaska, and Florida considered this problem and concluded that the newly applicable doctrine of comparative negligence should be applied to all pending cases not yet tried.[25] Indeed, the Florida court went so far as to make comparative negligence applicable to cases on appeal at the time of the doctrine's judicial enactment where the issue had been specifically preserved,[26] and the California court ordered comparative negligence applied to cases then on appeal which for any reason were remanded for a new trial.[27] In reaching the conclusion to apply the newly formed doctrine to pending but not yet tried cases, the California court stressed that "determinations of this nature turn upon considerations of fairness and public policy."[28] Obviously, none of the above courts felt that the defendants in the pending but not yet tried cases had any "vested right" or otherwise protected interest in the contributory negligence defense. Other authority, both judicial and academic, buttresses that conclusion and the conclusion that considerations of fairness and public policy demand application of the doctrine to cases pending at the time it is judicially or legislatively concluded that the concept of contributory negligence has outlived its usefulness and thus detracts from, rather than adds to, our system of jurisprudence.

The "rights" which a tort defendant asserting contributory negligence claims are not property or contract rights—the kind that are

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than a procedural, manner. Thus, we believe that a vested right and a substantive right are not necessarily identical . . . .

Id. at 521 n.4, 362 A.2d at 1315 n.4. We are not persuaded that a substantive-procedural dichotomy is any more valid, or any easier to apply, in the area of tort defenses than in the area of ascertaining what law to apply in a federal court diversity case. The important criteria in both instances is whether application of the rule of the case is outcome determinitive—which is no more or less true of the contributory negligence defense that was true of the rejected defenses listed by the court in Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973). And, all of those outcome determinitive defenses were applied to the case in which the issue was raised as well as to all cases then pending in the Commonwealth. Thus, regardless of nomenclature, the net result of the superior court's decision was to give defendants a vested right to a defense existing before the effective date of the Comparative Negligence Act.

25. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 832, 532 P.2d 1226, 1244, 119 Cal. Rptr. 858, 876 (1975); Hoffman v. Jones, 280 So. 2d 431, 439-40 (Fla. 1973); Kaatz v. State, 540 P.2d 1037, 1050 (Alaska 1975).

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

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

28. *Id.* at 832, 532 P.2d at 1244, 119 Cal. Rptr. at 876.

accorded respect when change is contemplated. As stated by the Supreme Court of Washington in *Godfrey v. State*:[29]

> [T]here is no vested right to a common law bar to recovery that is provided by the affirmative defense of contributory negligence . . . . A defendant has no vested right in a tort defense, the merits of which are not determined until a subsequent trial and upon which he did not and could not have relied at the time the accident happened . . . . Further, such a right does not rise to any higher status by the mere passage of time.
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> . . . .
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> A vested right, entitled to protection from legislation, must be something more than a *mere expectation* based upon an anticipated continuance of the existing law; *it must have become a title,* legal or equitable, *to the present or future enjoyment of property, a demand, or legal exemption from a demand by another.*[30]

Similarly, Professor James states that an immediate change to comparative negligence "will disturb no fabric of custom, unsettle no titles or property rights, and disappoint no reasonable expectations based on the common law rule."[31] In elaborating on this conclusion Professor James notes:

> Only insurance companies could make any plausible claim "to have made commitments and taken action in reliance" on the existing rule . . . . But their rates are based on gross losses rather than legal analysis, and the effect of change on such losses will probably be minimal, since juries now apply the rule under consideration and settlements are made on this basis.[32]

Other scholars are in complete agreement.[33]

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29. 84 Wash. 2d 959, 530 P.2d 630 (1975).

30. *Id.* at 962, 530 P.2d at 631-32 (emphasis supplied by court).

31. James, *Comments on Maki v. Frelk,* 21 VAND. L. REV. 891, 896 (1968).

32. *Id.*

33. See Wade, *Comments on Maki v. Frelk,* 21 VAND. L. REV. 938, 942 (1968), where the author bluntly states, "In the field of tort law, there is no detrimental reliance on the rule [of contributory negligence] as in commerical and property law," and Keeton, *Comments on Maki v Frelk,* 21 VAND. L. REV. 906, 911 (1968), where the author, in arguing for a completely retroactive application of a judicially created comparative negligence rule, states:

> [T]he reliance interests, on the basis of which it is argued that a fully retroactive decision would be improper, seem to be outweighed by other factors in relation to this specific rule that contributory fault bars. Added to the injustice of the rule, and its

The courts of virtually all jurisdictions have in recent years radically overhauled and supplemented basic tort concepts, eliminating in the process many previously existing defenses to tortious conduct. In most instances the judicial decisions affected all pending but untried cases.[34] In no instances have the courts believed that so doing deprived any litigant of a vested or otherwise protected right. There is no rational basis upon which the defense of contributory negligence can be distinguished. No person acts negligently in reliance upon the fact that the person injured by that negligence may himself be guilty of some small degree of negligent conduct and will not be absolved by some mitigating doctrine, such as "last clear chance." The anachronistic defense of contributory negligence is not relied upon by anyone planning future actions, as is true of rights secured by contract or property devices. It represents, at best, an unanticipated windfall that far too frequently has served to exonerate a negligent party from the responsibility that he should logically assume. Unanticipated windfall gains have never been deemed "vested," or otherwise legally protected from judicial change brought about by renewed or recently found judicial or legislative wisdom.[35]

The final argument that can be made against judicially formulat-

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consequent unfairness to all those whose claims it affects, adversely, is the fact that the deviations from its application are widespread but lacking in evenhandedness. That is, the unpoliced and unlawful apportionment of damages that occurs in many jury awards today adds irregularity in its application to all the other injustices of the present rule. If overruling is the answer, then outright, retroactive overruling—the kind of overruling that was traditionally used in the few overruling decisions that occurred more than a decade ago—is the kind more appropriate to this problem.

See also Keeton, *Creative Continuity In the Law of Torts*, 75 HARV. L. REV. 463, 508-09; Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 Minn. L. Rev. 265, 304-308 (1963) (both arguing for judicially implemented retroactive application of the doctrine of comparative negligence).

34. See the long list of judicially altered tort principles discussed in Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973). The highlighted decisions ranging from the rejection of the rule imputing a driver's contributory negligence to an owner-passenger to the adoption of RESTATEMENT (SECOND) TORTS § 402A, all permitted the plaintiff bringing suit to recover and also permitted the plaintiffs with then pending cases to benefit from the judicially decreed change in tort law. In no instance was the previously defense deemed to have provided the tort feasor with a vested or otherwise protected right. *See* 453 Pa. at 605-06, 305 A.2d at 888.

35. See Peterson v. City of Minneapolis, 285 Minn. 282, 173 N.W.2d 353 (1969), where the Supreme Court of Minnesota said in a slightly different context: " 'As of the time of the accident a person did not have a vested right at common law to avoid paying for the consequences of his negligence merely because there were other tortfeasers involved.' " *Id.* at 290, 173 N.W.2d at 358.

ing a doctrine of comparative negligence applicable to cases pending but not yet tried on the effective date of the Comparative Negligence Act is that the legislature, by promulgation of that Act, pre-empted the field. That argument too fails to hold water.

The best that can be said for the pre-emption position is that the Act makes no provision for cases pending before its effective date. Clearly, the statute cannot be construed as in any way affirmatively providing that, as to such cases, contributory negligence shall apply. Failure to legislate in an area where the legislature is free to act does not necessarily, nor even usually, indicate a legislative intent to pre-empt from the courts an area previously within their purview.[36] Perhaps the clearest analagous situation is found in *Vincent v. Pabst Brewing Co.*[37] There, plaintiff contended that the Wisconsin courts were free to adopt a rule of comparative negligence applicable to those cases beyond the scope of the Wisconsin comparative negligence act—*i.e.*, to all cases where the plaintiff's negligence exceeded that of the defendant's negligence. These cases are beyond the scope of the Wisconsin Act because that act, as does the Pennsylvania Act, precludes any recovery where the plaintiff's negligence exceeds that of the defendant, and is thus not a "pure" comparative negligence act.[38] The Wisconsin court, over a vigorous dissent by its Chief Justice, refused to judicially adopt a "pure comparative negligence doctrine," and was content to continue barring any recovery by a plaintiff whose negligence exceeded that of the defendant. But, a majority of the justices agreed that the court had the power to

36. For analagous authority, see Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961). In dismissing the contention that piece-meal legislative abrogation of the doctrine of governmental immunity precluded judicial intervention in areas beyond the scope of the statutes, the court said:

> We are not here faced with a situation in which the Legislature has adopted an established judicial interpretation by repeated re-enactment of a statute . . . . Nor are we faced with a comprehensive legislative enactment designed to cover a field. What is before us is a series of sporadic statutes, each operating on a separate area of governmental immunity where its evil was felt most. Defendant would have us say that because the Legislature has removed governmental immunity in these areas we are powerless to remove it in others. We read the statutes as meaning only what they say: that in the areas indicated there shall be no governmental immunity. They leave to the court whether it should adhere to its own rule of immunity in other areas.

Id. at 217, 359 P.2d at 461. The same reasoning seems to apply with equal force to the Comparative Negligence Act which, by judicial interpretation, does not apply to pending cases or to causes of action based on occurrences before its effective date. Costa v. Lair, 241 Pa. Super. Ct. 517, 363 A.2d 1313 (1976).

37. 47 Wis. 2d 120, 177 N.W.2d 513 (1970).

38. *See* note 3 *supra*.

implement this change, and that the Wisconsin Comparative Negligence Act promulgated some forty years before had by no means pre-empted the field. Chief Justice Hallows, dissenting in a widely praised opinion, summarized the beliefs of a majority of the court that the judiciary had not been pre-empted when he said:

> The history of this statute is clear that it was a reaction against the doctrine of contributory negligence but there is nothing in its history or in its language which evinces any intent to pre-empt this field of common law to the exclusion of this court . . . . I think the argument against pre-emption can be based upon an analogy to our action in *Holytz v. Milwaukee* . . . where we abolished governmental immunity even though there was a statutory enactment allowing recovery in a limited area. I find no pre-emption based upon a negative inference of what sec. 895.045, Stats., did not do. The doctrine of pre-emption applied to common-law areas should rest only on affirmative action; otherwise, the death of the common law is near at hand. The doctrine of contributory negligence is a child of the common law and the court can and should replace it with the doctrine of pure comparative negligence.[39]

That reasoning, and the illustrations set forth therein, are equally applicable to the *Costa v. Lair*[40] situation. And, if the Wisconsin statute did not pre-empt even the field in which it operated—*i.e.*, cases occurring after its effective date—it is inconceivable that the Pennsylvania Comparative Negligence Act could have foreclosed judicial entry into an area in which the statute was deemed to be inoperative.

Nowhere, in either the language of the Pennsylvania Act nor in its scanty legislative history is there any indication that the legislature intended to do anything other than abolish a doctrine universally condemned as being at odds with the fault concept upon which our system of tort law is premised.[41] Thus, the courts must be deemed yet to possess the authority to extend that legislatively recognized policy into areas beyond the statute's reach. This point was cogently made by the Supreme Court of the United States in

39. 47 Wis. 2d at 135, 177 N.W.2d at 523.
40. 241 Pa. Super. Ct. 517, 363 A.2d 1313 (1976).
41. *See* note 2 *supra*.

Moragne v. States Marine Lines, Inc.[42] where it was held that the courts had the power to judicially create a general maritime law cause of action for wrongful death even though such a cause of action had not previously been thought to exist and notwithstanding that Congress, in several separate enactments, had provided wrongful death remedies for many persons within the admiralty jurisdiction.[43] In particular, the Court noted that the congressional enactment of the Death on the High Seas Act—with which the judicially created cause of action would in many instances work concurrently in providing an alternative remedy—did not work to preempt the judiciary from the field, stating:

> To put it another way, the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.[44]

In short, pre-emption does not occur simply because there is legislation in the area. That legislation, or its legislative history, must affirmatively indicate that the legislative policy will be thwarted by judicial implementation or intervention. Where, as in the area of comparative negligence, judicial action will in no way stultify the legislative intent but will, instead, simply further carry out the policies inherent in the legislation, there can be no claim of pre-emption. Indeed, as *Moragne*[45] makes clear, far from being pre-empted, the policies inherent in the legislation may impose an affirmative duty upon the courts to further refine and implement the legislation by judicial decision. As stated by the *Moragne* Court in arguing that the legislative enactments may well impose an affirmative duty upon the courts to judicially expand the legislative policy:

> These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evi-

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42. 398 U.S. 375 (1970).

43. See, for purposes of illustration, the Jones Act (46 U.S.C. § 688 (1970)) and the Death on the High Seas Act (46 U.S.C. § 761 (1970)) which had long enabled both "member of the crew" seamen and those killed beyond a marine league of shore, respectively, to recover in the admiralty for wrongfully imposed death.

44. 398 U.S. at 400.

45. *See* note 42 and accompanying text *supra*.

dence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. *This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law* . . . .

This appreciation of the broader role played by legislation in the development of the law reflects the practices of common-law courts from the most ancient times. As Professor Landis has said, " . . . *It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles—many of them deriving from earlier legislative exertions.*"[46]

This common-sense recognition of statutory enactments as policy determinations by our highest law-making bodies and, as such, a consideration to be integrated into the common-law—which is itself reflective of the policies by which all our actions must be gov-

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46. 398 U.S. at 390-92 (emphasis added). *See also* the dissent of Justice Schaefer in Sweney Gasoline & Oil Co. v. Toledo, Peoria & Western R.R., 42 Ill. 2d 265, 270, 247 N.E.2d 603, 606 (1969):

> I agree that the statute as written violates the constitution, for the reasons stated in the opinion of the majority. But I regard the enactment of the statute as an expression of the public policy of the State which this court should respect, even though it cannot be given complete effect according to its terms. That statute declares "void as against public policy and wholly unenforceable" every exculpatory clause in any lease, business or residential, with the narrow and irrational exception in favor of particular lessors and lessees of business property which totally defeats its major purpose. I would hold that the statute, despite its invalidity, is an expression of public policy which fully justifies this court in now holding, as a matter of common law, that exculpatory clauses in leaseholds are void.

Reference is also made to Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 412-413 (1961), where the court, in overturning prior case law and judicially creating an implied warranty of habitability said:

> Legislation and administrative rules, such as the safeplace statute, building codes and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards.

See also Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).

erned—was long ago recognized by Justice Stone when, in an address commemorating Harvard's Tercentenary Celebration, he said:

> I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning . . . . Apart from its command, the social policy and judgment, expressed in legislation by the lawmaking agency which is supreme, would seem to merit that judicial recognition which is freely accorded to the like expression in judicial precedent.
> . . . It is difficult to appraise the consequences of the perpetuation of incongruities and injustices in the law by this habit of narrow construction of statutes and by the failure to recognize that, as recognitions of social policy, they are as significant and rightly as much a part of the law, as the rules declared by judges . . . .
> . . . A statute is not an alien intruder in the house of common law, but a guest to be welcomed and made at home there as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social needs.[47]

The policy inherent in the Comparative Negligence Act is clear. No longer shall the unjust, unsound, and universally condemned doctrine of contributory negligence be permitted to visit the entire loss upon the least negligent of negligent parties. That policy, resulting from the deliberations of the Pennsylvania Senate and House, is not aimed at only certain litigants, but is intended to broadly apply throughout the entire field of torts. If the legislation fails to completely accomplish that goal, and the courts are in a position to further implement that policy to more fully effectuate the broad legislative purpose, they should do so. Our integrated system of judge-made and leglislatively-enacted laws cannot condone conflicting laws premised on contradictory policies.

Costa v. Lair,[48] by permitting the common law to deviate from legislative policy for what may well turn out to be the better part of a decade, does violence to the goals espoused by Justice Stone and Professor Landis, and adopted by the United States Supreme Court

47. Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4, 13-15 (1936).
48. 241 Pa. Super. Ct. 517, 363 A.2d 1313 (1976).

in *Moragne v. States Marine Lines, Inc.*[49] No court should have the power to wreak such havoc upon a clearly articulated legislative policy. Where a judicial decision seems patently to conflict with legislative policy, it should be incumbent upon the court to clearly show why its decision is in reality in accord with that policy. Only when this becomes a standard judicial procedure can the doubts expressed by Scott Turow[50] be laid to rest.

49. 398 U.S. 375 (1970).

50. S. TUROW, ONE L. (1977). *See* note 11 and accompanying text *supra*.