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Believing that the holdings and opinions in the case of Maki v. Frelk *are significant legal developments, the* Vanderbilt Law Review *has solicited comments on these decisions, which it is now pleased to publish. These comments by six distinguished torts teachers and writers bear on the relative merits of comparative and contributory negligence, but more importantly, they discuss whether the judicial or legislative method is most appropriate for adoption of a rule of comparative negligence. It is hoped that these comments will be used as a sound basis for action, whether the problem arises before the courts or legislatures.*

On October 16, 1964, Minnie Maki's husband, Raymond, was killed in an automobile accident in Illinois. As administrator of his estate, she filed a wrongful death action and alleged that: "If there was any negligence on the part of the plaintiff or the plaintiff's decedent it was less than the negligence of the defendant, Calvin Frelk, when compared."[1] On defendant's motion, the trial court dismissed this count of the complaint for failure to state a cause of action on the ground that under the Illinois rule of contributory negligence a plaintiff must allege due care. Plaintiff appealed directly to the Illinois Supreme Court, alleging that the rule of contributory negligence violated her constitutional rights under the state constitution and the fourteenth amendment. Although finding no denial of constitutional rights, the supreme court remanded the case to the Appellate Court

1. Maki v. Frelk, 85 Ill. App. 2d 439, 440, 229 N.E.2d 284, 285 (1967).

for the Second District of Illinois, stating: "There remains for consideration the question of whether, as a matter of justice and public policy, the rule should be changed."[2]

The appellate court, after a thorough examination and discussion, judicially adopted a rule of comparative negligence:

> [C]ontributory negligence shall not bar recovery . . . if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damage allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.[3]

In answer to the defendant's argument that the legislature was the proper forum for the abrogation of contributory negligence, the appellate court said:

> [T]he doctrine of contributory negligence was a creature of the courts and having found the doctrine to be unsound and unjust under the present conditions the courts have, not only the right, but the duty to abolish the defense.[4]

On appeal, the Illinois Supreme Court reversed, five to two, holding that:

> After full consideration we think, however, that such a far-reaching change, if desirable, should be made by the legislature rather than by the court. The General Assembly is the department of government to which the constitution has entrusted the power of changing the laws.[5]

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2. *Id.*
3. *Id.* at 451, 229 N.E.2d at 290.
4. *Id.* at 452, 229 N.E.2d at 291.
5. Maki v. Frelk, 239 N.E.2d 445, 447 (Ill. 1968). For comments and discussion of the appellate court opinion, see Lambert, *The Common Law Is Never Finished (Comparative Negligence on the March)*, 32 ATL. L.J. 741 (1968); 17 BUFFALO L. REV. 573 (1968); 43 NOTRE DAME LAW 422 (1968); 20 S.C. L. REV. 146 (1968); 1967 U. ILL. L. F. 351; 70 W. VA. L. REV. 253 (1968).