UIC Law Review

Volume 22 | Issue 2 Article 1

Winter 1988

Comparing Comparative Negligence: Is There a Difference between the Pure and Modified Forms, 22 J. Marshall L. Rev. 243 (1988)

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ARTICLE

COMPARING COMPARATIVE NEGLIGENCE: IS THERE A DIFFERENCE BETWEEN THE "PURE" AND "MODIFIED" FORMS?

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INTRODUCTION

Few topics have been the subject of as much debate during the past few years as the "insurance crisis."[1] State and local governments, corporations, small businesses, and professional groups claim that a sharp rise in the number and size of damage awards against them[2] has resulted in an increase in their costs and made liability insurance more difficult and expensive to obtain.[3] These critics place the blame on the legal profession and expanding liability law which they urge must be reformed.[4] Consumer groups and plaintiffs' lawyers, on the other hand, point to studies showing that large jury ver-

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1. For recent analysis of the "insurance crisis," see *Perspectives on the Insurance Crisis*, 5 YALE J. ON REG. 367-516 (1988); Comment, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401 (1988); *Symposium on Tort Reform*, 10 HAMLINE L. REV. 345-622 (1987); ABA, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM (1987).

2. *See* Brunelli, *Study Shows Growth in Big Verdicts Here*, Chicago Daily L. Bull., Feb. 26, 1987, at 1, col. 5; Unger, *Tort System Cost Put Near $30 Billion*, Chicago Daily L. Bull., Aug. 4, 1986, at 1, col. 3.

3. *See* Wermeil, *Costs of Lawsuits Growing, Blamed for Rising Insurance Rates*, Chicago Daily Law Bull., June 9, 1986, at 1, col. 3; Lindsey, *Businesses Change Ways in Fear of Suits*, Chicago Daily L. Bull., Nov. 20, 1985, at 2, col. 2.

4. *See* Schweit, *More Tort Reform Needed: Business Group*, Chicago Daily L. Bull., Mar. 10, 1987, at 1, col. 3; Kuhlman, *Is Tort Reform a Cure or a Disease?* Chicago Daily L. Bull., May 28, 1986, at 2, col. 2; Wermeil, *Tort Reform Effort Joined by Labor, Business*, Chicago Daily L. Bull., May 27, 1986, at 2, col. 2; Poust, *Tort Law Changes Needed Because System is Unfair to Defendants*, Chicago Daily L. Bull., Apr. 26, 1986, at 5, col. 1.

dicts are often reduced or thrown out on appeal and note that, overall, awards have barely kept up with inflation.[5] They place the blame for rising insurance rates on the bad business practices of the insurance industry.[6]

In response to the demands for tort reform, many state legislatures have enacted statutes limiting tort liability and altering procedures and remedies in tort cases.[7] An example of such legislation is *An Act in Relation to the Insurance Crisis*[8] adopted by the Illinois General Assembly in 1986. The changes this act made in the tort system are similar to those made in other states: alteration of joint and several liability, modification of the collateral source rule, revision of the procedure for obtaining punitive damages, and the provisions of sanctions for filing frivolous lawsuits.[9] In addition, the act abolished the pure form of comparative negligence originally adopted by the Illinois Supreme Court in *Alvis v. Ribar*[10] in favor of a modified system of comparative negligence.[11]

The switch by the Illinois General Assembly from the pure form of comparative negligence to a modified system was a surprise. Of the nine states that adopted the pure form of comparative negligence by judicial decision,[12] only Iowa and Illinois later replaced it by legislation with a modified system.[13] One study conducted in Illinois indicated that, although the change from traditional contributory negligence to pure comparative negligence increased by about 10 percent the number of plaintiffs recovering damages, the total damages awarded remained about the same.[14] Although some early

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5. *See* Wermeil, *supra* note 3, at 10.

6. *Id. See also*, Brunelli, *Tort 'Crisis' Blame Shared; Lawyer*, Chicago Daily L. Bull., Nov. 21, 1986, at 1 col. 2; Decker, *Insurance Industry has Transformed Its Problems Into Tort System Crisis*, Chicago Daily L. Bull., Apr. 26, 1986, at 5, col. 1.

7. For a summary of legislative attempts to enact "tort reform," see, Chiang, *1986 Was An Epic Year for Tort Reform In Many States*, Chicago Daily L. Bull., Dec. 26, 1986, at 1, col. 3; *Liability: A Scorecard of Liability-related Laws Enacted in 1986*, INS. REV. Sept. 1986, at 14; Barron, *40 Legislatures Act to Readjust Liability Rules*, New York Times, July 14, 1986, at A1, col. 1; Kristof, *Nationwide Move to Amend Laws on Liability Suits*, Chicago Daily L. Bull., Mar. 31, 1986 at 1, col. 2.

8. P.A. 84-1431 (1986).

9. *See* P.A. 84-1341, art. 2 (frivolous lawsuits); art. 3 (punitive damages); art. 5 (joint liability); art. 6 (collateral source).

10. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

11. P.A. 84-1431, art. 4.

12. The following states judicially adopted comparative negligence: Alaska, California, Florida, Illinois, Iowa, Kentucky, Michigan, Missouri and New Mexico. Cooter & Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L.REV. 1067, 1068 n.4 (1986).

13. IOWA CODE ANN. § 668 (West Supp. 1986); Illinois P.A. 84-1431, art. 4 (1986).

14. McConnell, *Damages About the Same Under Comparative Negligence*, Chicago Daily L. Bull., Mar, 18, 1986, at 2, col. 2. According to the study, 61.5% of plaintiffs received some compensation in the two years after *Alvis* compared with 51.3% of plaintiffs in the two years before. *Id.* Approximately $50 million was

critics argued that the pure form would substantially increase insurance costs,[15] later studies have concluded that the differences in insurance rates under the pure and modified systems are inconsequential.[16]

The impact of the modified system of comparative negligence in Illinois on the number of plaintiffs recovering damages and the total amount awarded will not be known until cases filed after November 25, 1986 reach a jury verdict.[17] However, in order to simulate the effect, the new act was applied to 140 Cook County jury verdicts decided in 1985 in which the pure form of comparative negligence was used. The results reveal that at least 20% of the plaintiffs who received some compensation under the pure form would have been completely barred from recovery under the new modified system. Before examining the findings of the study in detail, this article will briefly examine the development of comparative negligence in Illinois, the scope of its application, and the alternatives that were available to the general assembly in dealing with plaintiff's contributory negligence.

I. The Judicial Development of Comparative Negligence in Illinois

Contributory negligence is the failure of a plaintiff to use ordinary care for his or her own safety or the safety of his or her property.[18] The doctrine has been part of the common law since the English decision in *Butterfield v. Forrester*.[19] In *Butterfield*, the defendant put a pole across a road while he was making repairs to his house. The plaintiff left a "public house" at eight o'clock on an August evening "while there was still light enough left to discern the obstruction at 100 yards distance."[20] However, the plaintiff was "riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident."[21] Although the defendant had placed the pole across the public road,

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awarded in the period before comparative negligence while $56 million was awarded in the two years following its adoption. *Id.*

15. V. Schwartz, Comparative Negligence 361 n.58 (2d ed. 1986) (quoting Minutes of Judiciary Committee on Automobile Accident Liability, Wisconsin Legislative Council 10-13 (July 16, 1970)).

16. *See* Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 Mich. L. Rev. 689, 727-28 (1960).

17. That is the date on which P.A. 84-1431, art. 4, became effective.

18. Illinois Pattern Jury Instructions, No. A10.03 (2d ed. Special Supp. 1981). This instruction was approved by the appellate court in Bartimus v. Paxton Community Hosp., 120 Ill. App. 3d 1060, 458 N.E.2d 1072 (1983) and Coleman v. Hermann, 116 Ill. App. 3d 448, 452 N.E.2d 620 (1983).

19. 11 East 60, 103 Eng. Rep. 926 (1809).

20. *Id.* at 60, 103 Eng. Rep. at 927.

21. *Id.*

the court held that the plaintiff could not recover because "[o]ne person being at fault will not dispense with another's using ordinary care for himself."[22]

The decision in *Butterfield* was quickly adopted in the United States to protect new industries from overly sympathetic juries.[23] These courts interpreted the holding to mean that a plaintiff who was partially at fault for his or her injury was completely barred from recovering despite the fault of the defendant.[24] This interpretation has been criticized for giving broader scope to the decision than was intended by its authors who meant only to bar recovery when plaintiff assumed the risk or had the last opportunity to avoid the accident.[25]

In *Aurora Branch Railroad v. Grimes*,[26] the Illinois Supreme Court adopted contributory negligence and required that:

> [w]here a party seeks to recover damages for a loss which has been caused by his own negligence or misconduct, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury, and the burden of proof is upon the plaintiff to show not only negligence on the part of defendant, but also that he exercised proper care and circumspection; or, in other words, that he was not guilty of negligence.[27]

Six years after its decision in *Aurora Branch Railroad*, the Illinois Supreme Court shifted to a form of comparative negligence. According to the court in *Galena & Chicago Union Railroad v. Jacob*,[28] contributory negligence was not fair to plaintiffs who were only slightly at fault:

> [T]he question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff but upon the relative degree of care or want of care as manifested by both parties, for all care or negligence is at best relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think is, that in proportion to the negligence of the defendant, should be measured the degree of care required of the plaintiff — that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover . . . . We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered and wherever it shall appear that the plain-

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22. *Id.* at 61, 103 Eng. Rep. at 927.

23. *See* H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT 8 (1978); Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 137 (1958); Turk, *Comparative Negligence on the March*, 28 CHI[-]KENT L. REV. 189, 201 (1950).

24. *See* Smith v. Smith, 19 Mass. (2 Pick.) 621, 13 Am.Dec. 464 (1824).

25. See, V. SCHWARTZ, *supra* note 15, at 12.

26. 13 Ill. 585 (1852).

27. *Id.* at 587.

28. 20 Ill. 478 (1858).

> tiffs' negligence is comparatively slight, and the defendant gross, he shall not be deprived of his action.[29]

The standard of comparative negligence set out in *Galena* lasted twenty-seven years. In *Calumet Iron & Steel Company v. Martin*,[30] the supreme court returned to contributory negligence, making it clear that any negligence on the plaintiff's part barred recovery. In addition, the plaintiff was again required to plead and prove freedom from contributory negligence as an essential element of the negligence action.[31] The failure to do so was a complete bar to recovery.[32]

Because of the harsh effect of contributory negligence,[33] Illinois courts and the General Assembly developed a number of exceptions to it. Children, for example, were presumed to be incapable of contributory negligence.[34] Courts also created the seat-belt defense under which the plaintiff's failure to wear a seat belt was not contributory negligence but was a factor to be taken into account in mitigating the plaintiff's damages.[35] In addition, courts held that in those actions in which the plaintiff was required to prove that the defendant's conduct was wilful and wanton, contributory negligence was not a defense.[36] Although the last clear chance doctrine was explicitly repudiated in Illinois,[37] some courts implicitly applied it under the name of "conscious indifference to consequences."[38] Finally, a number of statutes specifically excluded the defense of contributory negligence.[39]

In 1968, the Illinois Supreme Court refused to adopt comparative negligence, saying that it was an issue for the legislature.[40] Despite repeated requests from Illinois chief justices that the general assembly adopt comparative negligence, no such legislation was en-

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29. *Id.* at 497.

30. 115 Ill. 358, 3 N.E. 456 (1885). *See also*, City of Lanark v. Dougherty, 153 Ill. 163, 38 N.E. 892 (1894).

31. Carter v. Winter, 32 Ill. 2d 275, 204 N.E.2d 755 (1965).

32. Long v. City of New Boston, 91 Ill. 2d 456, 440 N.E.2d 625 (1982).

33. For a criticism of contributory negligence, see Justice Ward's dissent in Maki v. Frelk, 40 Ill. 2d 193, 198 239 N.E.2d 445, 448 (1968).

34. Schranz v. Halley, 128 Ill. App. 3d 125, 469 N.E.2d 1389 (1984). Contributory negligence is not a defense in a private action based upon a violation of the Child Labor Law. ILL. REV. STAT. ch. 48, ¶ 31.19 (1981). In Rost v. F.H. Noble & Co., 316 Ill. 357, 147 N.E. 258 (1925), the court held that contributory negligence will not prevent recovery when an illegally employed child is injured.

35. Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968).

36. Iverson v. Iverson, 56 Ill. App. 3d 297, 370 N.E.2d 1135 (1977).

37. Specht v. Chicago City R.R., 233 Ill. App. 384 (1924).

38. Waldren Express & Van Co. v. Krug, 291 Ill. 472, 477, 126 N.E. 97, 99 (1920).

39. For examples of such legislation, see Road Construction Injuries Act, ILL. REV. STAT. ch. 121, ¶ 314.1 (1981); Structural Work Act, ILL. REV. STAT. ch. 48, ¶ 69 (1981); Workers' Compensation Act, ILL. REV. STAT. ch. 48, ¶ 138.1 - 138.30 (1981).

40. Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

acted. This led the supreme court, in *Alvis v. Ribar*,[41] to hold that "the common law doctrine of contributory negligence is no longer the law in the State of Illinois, and in the instances where applicable it is replaced by the doctrine of comparative negligence."[42] The court adopted the pure form of comparative negligence under which the plaintiff's damages are reduced by the percentage of fault attributable to him.[43] It explicitly rejected any modified system of comparative negligence under which a plaintiff is completely barred from recovery if his negligence is equal to or greater than the defendant's.[44]

Under the pure form of comparative negligence adopted in *Alvis*, a jury must first determine the total amount of damages to which the plaintiff would be entitled if he or she was not contributorily negligent. It must then determine what proportion or percentage of fault of the total combined negligence of the plaintiff and negligence of the defendants is attributable to the plaintiff. Finally, the jury must reduce the total amount of the plaintiff's damages by the proportion or percentage of negligence attributable to the plaintiff.[45] Under this approach, a plaintiff who is 1%, 50% or 99% at fault for his or her injuries still recovers a judgment from defendant.

II. The Scope of Comparative Negligence in Illinois

The only issue decided by the Illinois Supreme Court in *Alvis* was that in actions based upon negligence, the doctrine of contributory negligence was abolished and replaced by the pure form of comparative negligence. Other issues, such as the application of the decision to wilful and wanton conduct, the seat-belt defense, the defense of assumption of risk, products liability cases, and actions based on other theories of recovery were left to future cases.

A. *Wilful and Wanton Conduct*

Illinois law requires a plaintiff to prove wilful and wanton conduct by a defendant in a number of situations.[46] Prior to the adoption of pure comparative negligence in *Alvis*, contributory negligence

41. 85 Ill. 2d 1, 421 N.E.2d 886 (1981). For a discussion of the effect of *Alvis*, see Elovitz, *The Burden of Proof and Contributory Negligence*, 72 Ill. Bar J. 519 (1984); Comment, *Illinois Comparative Negligence: Multiple Parties, Multiple Problems*, 1982 S.I.U. L. Rev. 89 (1982).

42. 85 Ill. 2d at 25, 421 N.E.2d at 896-97.

43. *Id.* at 28, 421 N.E.2d at 898.

44. *Id.* at 25-28, 421 N.E.2d at 897-98.

45. Illinois Pattern Jury Instruction, No. A45.05 (2d ed. Special Supp. 1981).

46. For an example of a situation where a plaintiff must prove wilful and wanton conduct, see Davis v. United States, 716 F.2d 418 (7th Cir. 1983).

was not a defense in those actions.[47] The Illinois Supreme Court has not yet addressed the issue of the effect of comparative negligence on wilful and wanton actions. Although the appellate court has considered the question, there is a split of opinion.

In *Montag v. Board of Education, School District Number 40, Rock Island County*,[48] the plaintiff argued that the doctrine of wilful and wanton misconduct had been abolished in favor of the weighing of the relative fault of the parties. The Third District Appellate Court disagreed:

> The adoption of comparative negligence principles in other states has not led to the elimination of the wilful and wanton standard of conduct . . . . Some courts have continued the pre-comparative negligence principle that a reckless defendant cannot raise the issue of the plaintiff's contributory negligence. Others have allowed the defendant to establish contributory negligence on the part of plaintiff in order to weigh the relative fault of the parties . . . . Had our supreme court wished to eliminate posthaste the wilful and wanton standard it would have so indicated in Alvis. It did not do so and we shall not do so here.[49]

In *State Farm Mutual Automobile Insurance Co. v. Mendenhall*,[50] the plaintiff argued that comparative negligence should not be applied in cases involving wilful and wanton conduct because they are "only degrees different from intentional wrongdoings."[51] The Fourth District Appellate Court, however, held that comparative negligence does apply to allegations of wilful and wanton conduct:

> We conclude the public policy issues which have resulted in limitation on use of comparative negligence [in strict and product liability and structural work actions] are not present in wilful and wanton cases. Because of the possible small differences between negligence and wilful and wanton negligence, it appears the fact finder's ability to prorate the damages between plaintiff and defendant best serves justice and is most consistent with the reasons for comparative negligence enunciated in *Alvis*.[52]

B. *Seat-Belt Defense*

In *Clarkson v. Wright*,[53] the Illinois Appellate Court followed

47. Yelinich v. Capalongo, 38 Ill. App. 2d 199, 186 N.E.2d 777 (1962); Green v. Keenan, 10 Ill. App. 2d 53, 134 N.E.2d 115 (1956).
48. 112 Ill. App. 3d 1039, 446 N.E.2d 299 (1983).
49. *Id.* at 1044-45, 446 N.E.2d at 303.
50. 164 Ill. App. 3d 58, 517 N.E.2d 341 (1987).
51. *Id.* at 59, 517 N.E.2d at 344.
52. *Id.* at 61, 517 N.E.2d at 344.
53. 121 Ill. App. 3d 230, 459 N.E.2d 305 (1984), *rev'd* 108 Ill. 2d 129, 483 N.E.2d (1985).

the earlier view that the failure to wear a seat belt does not affect the question of liability but is an issue to be taken into account in determining the amount of damages. However, the supreme court reversed that decision and held that evidence of the failure to wear a seat-belt was not admissible either on the question of liability or in determining the amount of damages.[54]

C. *Assumption of Risk*

The Illinois Supreme Court's opinion in *Alvis* did not discuss the effect of the decision on the defense of assumption of risk. In *Coney v. J. L. G. Industries*,[55] a products liability case based upon strict liability, the supreme court held that assumption of risk no longer bars the plaintiff's recovery but is compared with the defendant's fault in apportioning damages. In *Duffy v. Midlothian Country Club*,[56] a negligence action brought by a spectator who was struck by a golf ball at a golf tournament, the appellate court held that under the doctrine of comparative negligence, secondary implied assumption of risk is no longer a complete bar to recovery but is an aid in the apportionment of damages.

D. *Products Liability*

Another question left open by *Alvis* was the application of comparative negligence to products liability cases based on strict liability. In *Coney*,[57] the Illinois Supreme Court chose a modified system of comparative fault for strict liability. According to the court:

> We believe that a consumer's unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect should not be compared as a damage-reducing factor . . . . However, the defenses of misuse and assumption of the risk will no longer bar recovery. Instead, such misconduct will be compared in the apportionment of damages . . . . Once defendant's liability is established, and where both the defective product and plaintiff's misconduct contribute to cause the damages, the comparative fault principle will operate to reduce plaintiff's recovery by that amount which the trier of fact finds

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54. Clarkson v. Wright, 108 Ill. 2d 129, 483 N.E.2d 268 (1985).

55. 97 Ill. 2d 104, 454 N.E.2d 197 (1983).

56. 135 Ill. App. 3d 429, 481 N.E.2d 1037 (1985). *See also* Kionka, *Implied Assumption of the Risk: Does It Survive Comparative Fault*, 1982 S.I.U. L. REV. 371 (1982).

57. 97 Ill. 2d 104, 454 N.E.2d 197 (1983). For analysis of *Coney*, see Levitt, *Strict Liability and Comparative Fault: What Standard Should Apply*? 75 ILL. B. J. 218 (1986); Steagall, *Illinois Adopts Comparative Assumption of Risk and Misuse in Strict Products Liability Cases*, 72 ILL. B. J. 476 (1984); Note, *The Application of Comparative Negligence to Strict Products Liability*, 59 CHI[-]KENT L. REV. 1043 (1983); Note, *Comparative Fault and Strict Liability - Unanswered Questions*, 1983 S.I.U. L. REV. 567; Dripps, *Comparative Fault and Comparative Negligence - Is There A Difference?*" 72 ILL. B. J. 16 (1983).

him at fault.[58]

An example of the application of comparative fault to a products liability claim was *Simpson v. General Motors Corp.*[59] In that case, the plaintiff's decedent was killed when an earth-scrapping machine, manufactured by the defendant, overturned while the plaintiff was operating it. At trial there was evidence that the machine was unreasonably dangerous because it lacked an effective roll-over protective structure. The court instructed the jury on the substantive elements of assumption of risk and gave them two special interrogatories.[60] The first asked whether the decedent had assumed the risk. If the jury answered "yes," the second interrogatory asked them to assess what portion of the combined fault for the accident was attributable to the decedent and what portion to the defendant. The jury returned a verdict for the plaintiff but found that he had assumed the risk and that he was five percent at fault. The jury then reduced his damages by that amount. This was upheld by the appellate court[61] and the supreme court.[62]

E. *Other Areas of Tort*

Illinois courts have not developed a consistent criteria for the application of comparative negligence to other areas of tort law. They have held that plaintiff's contributory negligence does not affect damages in negligence actions brought by children under age seven[63] or in actions brought under the Structural Work Act.[64] However, they have held comparative negligence applicable to actions brought under the Local Governmental and Governmental Employees Tort Immunity Act,[65] the Wrongful Death Act,[66] and in medical malpractice actions.[67] An appellate court has also held that a jury must determine a defendant's comparative negligence when deciding a counterclaim against a plaintiff.[68]

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58. 97 Ill. 2d at 119, 454 N.E.2d at 104.
59. 118 Ill. App. 3d 479, 455 N.E.2d 137 (1983).
60. *Id.* at 480, 455 N.E.2d at 139.
61. 118 Ill. App. 3d 479, 455 N.E.2d 137 (1983).
62. 108 Ill. 2d 146, 483 N.E.2d 1 (1985).
63. Toney v. Mazariegos, 166 Ill. App. 3d 399, 519 N.E.2d 1035 (1988).
64. ILL. REV. STAT. ch. 48, ¶¶ 60-69 (1981). *See* Simmons v. Union Elec. Co., 104 Ill. 2d 444, 473 N.E.2d 946 (1984).
65. ILL. REV. STAT. ch. 85, ¶ 1-101 to 9-107 (1987). *See* Palladini v. City of East Peoria, 134 Ill. App. 3d 345, 480 N.E.2d 530 (1985).
66. ILL. REV. STAT. ch. 70, ¶¶ 1-2 (1987). *See* Carter v. Chicago & I.M.R.R., 130 Ill. App. 3d 431, 474 N.E.2d 458 (1985).
67. Lebrecht v. Tuli, 130 Ill. App. 3d 457, 473 N.E.2d 1322 (1985).
68. Hasty v. Kilpatrick, 130 Ill. App. 3d 859, 474 N.E.2d 867 (1985).

III. The Forms of Comparative Negligence

A court or legislature confronted with the question of how to deal with plaintiffs' contributory negligence in tort actions has a broad range of choices. Traditional contributory negligence completely bars plaintiffs from recovery regardless of the amount of fault attributable to them.[69] This choice favors defendants and their insurance companies which are frequently responsible for paying their losses. Although it has been criticized for its harsh results,[70] contributory negligence is still applied in six states and the District of Columbia.[71]

At the other end of the spectrum of options is pure comparative negligence.[72] This system was defended by the court in *Alvis* as the only one that truly apportions damages according to the relative fault of the parties.[73] However, it has been criticized on the ground that it favors plaintiffs by giving them a day in court even if they are 95% at fault.[74] Nine states have adopted the pure form judicially[75] and six have done so by legislation.[76] Pure comparative negligence was also supported by the drafters of the Uniform Comparative Fault Act.[77]

In between these two poles lie the modified systems of comparative negligence adopted by twenty-nine states.[78] Supporters claim

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69. For a discussion of contributory negligence, see W. Keeton & W. Prosser, Prosser & Keeton on the Law of Torts 451-62 (5th ed. 1984). For arguments in favor of contributory negligence as a bar to plaintiff's recovery, see V. Schwartz, *supra* note 15, at 353-56.

70. *See* Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 468 (1953); Maloney, *supra* note 23, at 151.

71. The following states retain contributory negligence: Alabama, Maryland, North Carolina, South Carolina, Tennessee, and Virginia. Cooter & Ulen, *supra* note 12, at 1067 n.2.

72. For a discussion of the pure form of comparative negligence, see, Prosser & Keeton, *supra* note 69, at 471-73; A. Budman & R. Clifford, Comparative Negligence 2-4 - 2-14 (1988); 5 M. Minzer, Damages in Tort Actions 48-14 to 48-19 (1988); H. Woods, Comparative Fault, 87-90 (2d ed. 1987); J. Palmer & S. Flanagan, Comparative Negligence Manual ch. 1, 16-20 (1986); V. Schwartz, *supra* note 15, at 47-54; 3 S. Speiser, C. Krause & A. Gans, The American Law of Torts 716-18 (1986).

73. 85 Ill. 2d at 27, 421 N.E.2d at 898.

74. S. Speiser, C. Krause, A. Gans, *supra* note 72, at 719.

75. The following states have adopted the pure form judicially: Alaska, California, Florida, Kentucky, Michigan, Missouri and New Mexico. Cooter & Ulen, *supra* note 12, at 1068 n.4. Iowa and Illinois also adopted the pure form of comparative negligence by judicial decision but later legislation switched to a modified system. *See, supra* note 13.

76. The following states have adopted the pure form legislatively: Arizona, Louisiana, Mississippi, New York, Rhode Island, and Washington. Cooter & Ulen, *supra* note 12, at 1068 n.4.

77. See Unif. Comparative Fault Act, § 1(a) comment, 12 U.L.A. 40-41 (1985).

78. *See* V. Schwartz, *supra* note 15, at 67. The adoption of a modified system of comparative negligence by Illinois in 1986 brings the total to 29 states.

that these forms are superior since they encourage settlements and reduce insurance costs.[79] States considering a modified system of comparative negligence have three alternatives. The first option is sometimes referred to as the "fifty percent rule."[80] Under this approach, plaintiffs are completely barred from recovery if their fault is equal to or greater than the defendant's. When a plaintiff's fault is less then the defendant's, their damages are still reduced by the proportion of their fault. Under the second alternative, known as the "fifty percent plus rule," plaintiffs are completely barred from recovery only if their fault was greater than the defendant's fault.[81] However, even under this approach, plaintiffs' recoveries are reduced by the percentage of their fault. Finally, there is the slight/gross alternative of comparative negligence.[82] Under this rule, plaintiffs are not barred from recovery if their negligence was "slight" and the defendant's negligence was "gross" in comparison. Although this standard is still used in two states,[83] the courts have not defined what constitutes "slight" or "gross" negligence.

In 1986 the Illinois General Assembly adopted *An Act in Relation to the Insurance Crisis*,[84] which amended the *Code of Civil Procedure*[85] by changing the pure form of comparative negligence adopted in *Alvis* to a modified system. Section 2-1116 of the Code now provides:

> Limitation on recovery in tort actions. In all actions on account of bodily injury or death or physical damages to property, based upon negligence or product liability based upon strict tort liability, the plaintiff shall be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is more than 50% of the proximate cause of the injury or damages for which recovery is sought. The plaintiff shall not be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is not more than 50% of the proximate cause of the injury or damages for which recovery is sought but any damages allowed shall be diminished in the proportion to the amount of fault attributable to the plaintiff.

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79. S. SPEISER, C. KRAUSE & A. GANS, *supra* note 72, at 719-21. *See also* V. SCHWARTZ, *supra* note 15, at 361-62; Sobelsohn, *'Pure' vs. 'Modified' Comparative Fault: Notes on the Debate*, 34 EMORY L.J. 65 (1985); Haddock & Curran, *An Economic Theory of Comparative Negligence*, 14 J. LEG. STUD. 49 (1985).

80. *See* M. MINZER, *supra* note 72, at §§ 48-21 to 48-24; J. PALMER & S. FLANAGAN, *supra* note 72, ch. 1 at 11-16; S. SPEISER, C. KRAUSE & A. GANS, *supra* note 72, at 722-32.

81. *See* M. MINZER, *supra* note 72, at 48-25 to 48-26; S. WOODS, *supra* note 72, at 92-93; S. SPEISER, C. KRAUSE & A. GANS, *supra* note 72, at 732-34.

82. *See* BUDMAN & CLIFFORD, *supra* note 72, at 2-22 to 2-26; V. SCHWARTZ, *supra* note 15, at 59 - 66; WOODS, *supra* note 72, at 93-94; S. SPEISER, C. KRAUSE & A. GANS, *supra* note 72, at 734-36.

83. The states using the "slight" and "gross" negligence standards are Nebraska and South Dakota. See Cooter & Ulen, *supra* note 12, at 1068 n.3.

84. P.A. 84-1431 (1986).

85. ILL. REV. STAT. ch. 110, ¶ 2-1116 to 2-1118 (1987).

In addition, Section 2-1107.1 of the Code requires that the jury must now be instructed "in writing that the defendant shall be found not liable if the jury finds that the contributory fault of the plaintiff is more than 50% of the proximate cause of the injury of damages for which recovery is sought."

Although section 2-1116 appears to place Illinois within the group of states that apply the "fifty percent plus" rule, there are a number of significant differences that will make guidance from the decisions of those states difficult. First, the Illinois act speaks of "the contributory fault on the part of the plaintiff" rather than comparative negligence. However, the term "contributory fault" is not defined in the act. It is not clear whether, in a products liability action, it includes a plaintiff's simple contributory negligence, as well as assumption of risk and misuse of the product. Second, section 2-1116 extends to "actions on account of bodily injury or death or physical damage to property, based on negligence or products liability based on strict tort liability." Thus, a products liability count based on warranty is excluded. Third, some states compare a plaintiff's negligence with each defendant's and permit a plaintiff to recover only against defendants whose negligence is greater than the plaintiff's.[86] Section 2-1116, however, is more favorable to a plaintiff since it does not compare the plaintiff's negligence with the negligence of any defendant but with the standard of "50% of the proximate cause of the injury or damage for which recovery is sought."

IV. The Impact of Contributory Fault

It is unclear what effect sections 2-1116 and 2-1107.1 will have on the intended goal of easing the liability insurance crisis. However, the author attempted to simulate the effect of modified comparative negligence by applying section 2-1116 to jury verdicts under the pure form. This provides some insight into the number of plaintiffs who may recover damages and the type of cases which may be affected by the new act.

In order to carry out this simulation, a study of the 1985 Cook County Jury Verdict Reporter was conducted. One hundred and forty cases were found and analyzed in which the juries found that the plaintiffs were contributory negligent.[87] The fault attributed to the plaintiffs in those cases ranged from 2% to 97% of the total

86. See Soczka v. Rechner, 73 Wis. 2d 157, 242 N.W.2d 910 (1976).

87. *See* 2A Cook County Jury Verdict Rep. (1985). The cases can be divided into nine categories: AA = automobile accident cases; SH = street hazard cases; SF = slip and fall cases; WI = work related injuries; MC = malpractice cases; CTA = injuries involving the Chicago Transit Authority; PL = product liability cases; LT = landlord-tenant cases; O = other cases.

fault. Since the cases were decided under pure comparative fault,

Case Number	Category	% Contributory Negligence
2A 13/2	AA	50%
2A 14/1	SH	15%
2A 15/1	WI	50%
2A 15/5	SH	32.5%
2A 15/15	AA	50%
2A 16/2	0	15%
2A 16/3	AA	10%
2A 16/4	AA	20%
2A 16/6	SF	20%
2A 16/7	AA	50%
2A 16/8	AA	25%
2A 16/10	AA	25%
2A 16/12	LT	75%
2A 16/13	AA	40%
2A 16/14	AA	35%
2A 16/16	AA	18%
2A 16/30	AA	15%
2A 16/32	AA	80%
2A 17/3	AA	78%
2A 17/8	AA	30%
2A 18/3	SH	33.3%
2A 18/5	AA	85%
2A 19/3	WI	35%
2A 19/9	AA	33.3%
2A 19/16	AA	40%
2A 19/17	AA	50%
2A 20/1	SH	2%
2A 20/1A	O	97%
2A 20/4	AA	20%
2A 20/7	MC	28%
2A 20/8	SH	43%
2A 20/10	SH	74.05%
2A 20/12	O	50%
2A 20/14	AA	50%
2A 20/17	AA	50%
2A 20/19	AA	90%
2A 20/20	SH	50%
2A 21/4	AA	81.25%
2A 21/6	AA	25%
2A 21/7	AA	50%
2A 21/9	SH	90%
2A 21/10	SF	70%
2A 22/8	WI	20%
2A 22/9	AA	27.5%
2A 22/15	CTA	20%
2A 23/1	WI	20%
2A 23/3	PL	18.75%
2A 23/10	SF	75%
2A 23/12	AA	40%
2A 23/14	MC	20%
2A 25/9	SH	25%
2A 26/4	SH	45%
2A 26/5	AA	35%
2A 27/3	AA	55%
2A 27/5	SF	50%
2A 27/6	AA	50%

plaintiffs' damages were reduced by the percentage of fault attribu-

2A 27/11	AA	50%
2A 27/12	AA	50%
2A 27/15	AA	10%
2A 27/16	CTA	89%
2A 27/20	AA	45%
2A 28/9	SF	50%
2A 29/6	AA	49%
2A 29/7	AA	50%
2A 29/16	AA	20%
2A 29/17	AA	50%
2A 29/20	AA	50%
2A 30/4	MC	60%
2A 30/10	AA	40%
2A 31/3	AA	20%
2A 31/8	SF	30%
2A 31/9	WI	49%
2A 31/12	AA	85%
2A 31/16	SH	50%
2A 32/11	AA	50%
2A 33/3	WI	50%
2A 33/7	CTA	50%
2A 33/11	AA	12.5%
2A 34/10	SF	50%
2A 35/5	AA	35%
2A 35/6	AA	50%
2A 36/1	LT	50%
2A 36/7	AA	10%
2A 37/5	SF	25%
2A 37/7	SF	26%
2A 37/8	O	50%
2A 37/10	O	65%
2A 38/4	SF	50%
2A 38/5	SH	50%
2A 38/7	AA	50%
2A 38/8	AA	94.89%
2A 39/1	WI	25%
2A 39/2	O	25%
2A 39/3	AA	5%
2A 39/7	AA	50%
2A 39/9	AA	17%
2A 40/6	AA	90%
2A 40/9	AA	25%
2A 41/1	AA	37%
2A 41/2	AA	10%
2A 41/4	LT	73%
2A 41/7	AA	15%
2A 41/10	AA	40%
2A 41/11	AA	30%
2A 41/14	AA	90%
BB 1/3	AA	25%
BB 1/6	SH	50%
BB 2/7	AA	33.3%
BB 2/9	AA	50%
BB 3/1	AA	33%
BB 3/4	SF	20%
BB 3/10	AA	10%
BB 4/3	MC	20%
BB 4/9	SH	60%

table to them.

The 140 cases can be divided into three groups to assess the effect that section 2-1116 would have had on the damages had it been in effect. Group One is composed of cases in which the plaintiffs were less then 50% at fault for total injuries. Under the pure form of comparative negligence and section 2-1116, the plaintiffs would receive identical recoveries in such cases. Group Two comprises cases in which the jury determined that the plaintiffs fault was exactly 50%. Although section 2-1116 permits plaintiffs to recover in such cases, the percentage is so near the level at which recovery is barred that other factors must be considered. Group Three consists of cases in which the plaintiffs were found to be more than 50% at fault. It is in this group that section 2-1116 will have the greatest impact since, unlike the pure form of comparative negligence, it will completely bar any recovery by the plaintiffs.

In Group One there were 72 out of the 140 cases where the jury found the plaintiff less than 50% at fault. Applying section 2-1116 to these cases reveals that, in 51% of the jury verdicts, the new statute would not have any effect on the result. In Group Three, juries found 29 plaintiffs to be more than 50% contributorily negligent for their injuries. If section 2-1116 had been applied to those cases, 21% of the plaintiffs found contributorily negligent and permitted some recovery would have been completely barred from recovery under the new statute.

BB 4/10	SF	48%
BB 4/18	PL	10%
BB 5/3	SF	33.3%
BB 6/2	PL	10%
BB 6/3	PL	43.7%
BB 6/7	AA	50%
BB 7/4	AA	20%
BB 7/5	AA	50%
BB 7/6	AA	68%
BB 7/9	AA	95%
BB 8/1	MC	5%
BB 8/6	CTA	83%
BB 8/7	CTA	70%
BB 8/12	SF	56%
BB 10/9	AA	70%
BB 10/11	CTA	10%
BB 10/12	AA	50%
BB 10/13	AA	80%
BB 11/3	O	30%
BB 11/4	WI	30%
BB 11/6	AA	50%
BB 11/8	AA	70%
BB 11/12	AA	50%
BB 12/3	MC	50%
BB 13/8	AA	50%

The cases in Group Two are difficult to analyze because it is impossible to determine what effect sections 2-1116 and 2-1107.1 would have had on the jurys' determinations of plaintiffs' fault. Of the 39 verdicts in this category, the plaintiffs were found to be exactly 50% at fault for their injuries. Strictly applying section 2-1116 to those cases would still permit the plaintiffs to recover one-half of their damages since the act bars recovery only if plaintiffs are more than 50% responsible for their injuries. However, it is impossible to determine whether the juries would have applied the same percentage of fault if they had known that a finding of 1% more fault attributable to the plaintiffs would have completely barred their recovery.

If the jurors in the cases in Group Two would have arrived at their finding of 50% fault regardless of whether pure or modified comparative fault was used, then section 2-1116 will not change the results in almost 80% of jury verdicts. However, if the jurors in Group Two cases would have found some of the plaintiffs 51% at fault, the effect of section 2-1116 is more significant yet difficult to determine. In that situation, the number of plaintiffs completely barred from recovery by section 2-1116 would be between 21% and 49% of all the 1985 cases reviewed. However, because jurors must be instructed on the effect of their finding of contributory negligence, it is unlikely that they will add an additional 1% finding of fault to the cases in which they find plaintiffs to be 50% negligent if they know it will result in the plaintiff recovering nothing. Instead, it is more likely that, in close cases, jurors will continue to simply divide the fault evenly between the plaintiff and defendant and permit the plaintiff some recovery.

The potential effect of section 2-1116 can also be seen by dividing the types of cases covered by the jury verdicts into nine categories: (1) automobile accidents; (2) street hazards; (3) slip and fall cases; (4) work-related injury cases; (5) malpractice cases; (6) cases involving the Chicago Transit Authority; (7) products liability cases; (8) landlord-tenant cases; and (9) other cases.

1. Automobile Accident Cases

Automobile related personal injury actions accounted for 78 of the 140 jury verdicts. Among these cases were automobile collisions with pedestrians and bicycles, rear-end collisions, collisions at intersections and on entering and leaving driveways. Thirty-nine of these cases (50%) fell into Group One (less than 50% contributory negligence); 24 of the cases (31%) fell into Group Two (exactly 50% contributory negligence); and 15 of the cases (19%) fell into Group Three (more than 50% contributory negligence).

Applying section 2-1116 to automobile injury cases reveals that at least 50% of the plaintiffs would be unaffected by the new act. However, 19% of the plaintiffs who received some compensation in 1985 would be completely barred from recovery under the new act because their fault exceeded 50%. For reasons discussed earlier, it is also likely that the 31% of the plaintiffs who were found to be exactly 50% contributorily negligent would continue to recover one-half of their losses under section 2-1116.

2. *Street Hazard Cases*

Fourteen of the cases involved personal injuries resulting from various forms of street hazards such as defective or broken sidewalks, potholes, raised curbs, missing manhole or water main covers, and holes in streets or alleys. These suits were brought against the City of Chicago or the property owners responsible for maintenance of the sidewalks.

In seven of the cases (50%) the juries found that the plaintiffs were less than 50% contributorily negligent. In four cases (28%) plaintiffs were found exactly 50% at fault for their injuries. In three cases (22%) the plaintiffs were more than 50% at fault and would be completely barred from recovery under section 2-1116.

3. *Slip and Fall Cases*

Slip and fall cases involving injuries on private property accounted for fourteen of the 140 cases examined. Applying section 2-1116 to the cases reveals that seven of the plaintiffs (50%) fell into Group One and would not be affected by the new act. Group Three accounted for three of the plaintiffs (22%). Thus, plaintiffs would have been completely barred in at least 22% of the cases. The remaining four plaintiffs (28%) would probably also continue to recover under section 2-1116 since their fault was exactly 50%.

4. *Work-Related Injury Cases*

Work-related injury cases accounted for eight of the 140 jury verdicts. These injuries resulted from a fall into an elevator shaft, a truck hitting a worker at a work site, falling concrete, crossing a railroad yard, a shifting load on a truck, and a passing truck striking a garbage collector.

In six of the work-related injury cases the plaintiffs were found to be less than 50% contributorily negligent and would not be affected by section 2-1116. In the other two cases, the plaintiffs were held to be exactly 50% at fault. In none of the cases did the negli-

gence of the plaintiffs exceed 50%. Thus, section 2-1116 will probably have little effect on work-related injuries.

5. *Malpractice Cases*

Malpractice cases constituted six of the 140 cases surveyed. Four of these cases involved medical malpractice and two were financial malpractice involving insurance agents. In four of the cases the plaintiffs were held to be less than 50% contributorily negligent. In one case the plaintiff was 50% at fault; in another plaintiff was 60% at fault. That case involved a claim for dental malpractice in which the plaintiff was found to be at fault for not seeking treatment sooner.

6. *Injuries Involving the Chicago Transit Authority*

There were five jury verdicts against the Chicago Transit Authority for injuries involving buses and the "L" trains. These injuries involved a hand and a leg caught in closing doors, injuries while getting off buses, and a leg caught between a train and platform when getting off the train. In two of the cases, plaintiffs were held to be less than 50% contributorily negligent. In one case, plaintiff was exactly 50% at fault. In one of the two cases in which the plaintiffs were found to be more than 50% negligent, the plaintiff was intoxicated at the time of the injury.

7. *Products Liability Cases*

Products liability cases accounted for four of the 140 cases reviewed. Like work-related injuries, products liability litigation will probably not be affected by the adoption of the modified form of contributory negligence. In all four of the cases, the plaintiff was found to be less than 50% at fault.

8. *Landlord-Tenant Cases*

Four cases involved suits by tenants against their landlords for personal injuries or property damage. Two cases involved injuries from broken windows and two actions resulted from injuries and property loss due to fires. In one case the plaintiff was held to be less than 50% contributorily negligent, in another the plaintiff was exactly 50% at fault. In the other two cases, the plaintiffs were found to be more than 50% liable.

9. Other Cases

The study included seven cases which did not fit into any of the other categories. A female guest in a hotel who was assaulted by an unknown person was held 25% at fault. A man whose airplane was damaged while it was being painted by the defendant was found to be 30% contributorily negligent. Two persons who were injured in fights were held to be 50% responsible for their injuries. A man who fell from a rented horse was held to have assumed the risk and his recovery was reduced by 65%. A trespasser on railroad tracks was held 89% liable. A person who suffered loss from a negligent representation in an insurance inspection report was held 97% at fault.

Applying section 2-1116 to the 140 cases in the 1985 Cook County Jury Verdict Reporter indicates that about 21% of the plaintiffs who received some compensation in cases where comparative negligence was an issue would have been completely barred from recovery by the act. In another 28% of the cases, the plaintiffs and defendants were found to have been equally at fault. Under pure comparative negligence there is no incentive for plaintiffs not to litigate such cases since they are assured of recovering some of their losses. However, it is impossible to determine how many of the 28% of the plaintiffs who were found to be exactly 50% at fault would not have brought their suits at all if section 2-1116 had been in effect because of a fear that they jury might find them slightly more than 50% at fault and award them nothing. Although it is likely that the instruction given section 2-1107.1 will cause juries to continue to divide fault equally in close cases, the uncertainty as to what juries will in fact do and the possibility of no recovery at all may make plaintiffs' attorneys unwilling to gamble in some cases. Thus, section 2-1116 may have a significant impact on tort litigation not only by denying recovery when a plaintiff's fault exceeds 50% but also by deterring some litigation in cases where the plaintiff's fault approximates 50%.

V. The Standard of Review in Comparative Fault Cases

Prior to the adoption of comparative negligence, Illinois courts held they would not set aside a jury verdict unless it was against the manifest weight of the evidence and all reasonably intelligent minds would reach a different conclusion,[88] or unless it was clear that the jurors had reached a wrong conclusion or incorrect result.[89] In *Alvis*,

88. Richard v. Illinois Bell Tel. Co., 66 Ill. App. 3d 825, 852, 383 N.E.2d 1242, 1254 (1978).

89. Rowlett v. Hamann, 112 Ill. App. 2d 121, 126, 251 N.E.2d 358, 360 (1969); Cochran v. Parker, 91 Ill. App. 2d 56, 60, 233 N.E.2d 443, 445 (1968).

the Illinois Supreme Court was aware that the shift to comparative negligence would create an issue of the jury's apportionment of relative fault.[90] However, it thought that "guidelines can assist a jury in making apportionment decisions" and that "the necessary subtle calculations [are] no more difficult or sophisticated for jury determination than others in a jury's purview, such as compensation for pain and suffering."[91] Although the court did not set out a standard for review of comparative negligence verdicts, it quoted with approval a statement that "small imperfections can be disregarded, small inequities tolerated, if the final result is generally satisfactory."[92] In the first case involving the standard of judicial review of a jury verdict under pure comparative negligence, the appellate court adopted the manifest weight of the evidence standard.[93]

Despite their stated reluctance to set aside a jury's verdict under pure comparative fault, Illinois courts did order new trials when, in their opinion, juries erred in apportioning damages. In *Junker v. Ziegler*,[94] the Illinois Supreme Court reviewed a negligence action in which the jury found the plaintiff 65% contributorily negligent. The plaintiff was a duck hunter who was struck in the eye by a pellet fired from defendant's shotgun. The supreme court reviewed the facts and held that the percentage of contributory negligence attributed to the plaintiff was against the manifest weight of the evidence. Since the plaintiff did not argue that the amount of damages found by the jury was inadequate, the court ordered a new trial on the issue of the apportionment of fault. Similarly, in *Bofman v. Material Service Corporation*,[95] the appellate court found that the jury's finding that each plaintiff's fault comprised 82% of the "total combined negligence" was not supportable and ordered a new trial on the issue of apportionment of negligence.

The shift from the pure to a modified form of comparative negligence is unlikely to have any effect on the standard of review applied by Illinois courts. In part, this is because the manifest weight of the evidence standard was applied both to traditional contributory negligence and pure comparative negligence. Other states which have adopted a modified form of comparative negligence also continue to follow a similar standard.[96] In addition, the adoption of sec-

90. Alvis v. Ribor, 85 Ill. 2d 1, 17, 421 N.E.2d 886, 893 (1981).
91. *Id.* at 17-18, 421 N.E.2d at 893.
92. *Id.* at 18, 421 N.E.2d at 893.
93. Bofman v. Material Service Corp., 125 Ill. App. 3d 1053, 1060, 466 N.E.2d 1064, 1070 (1984).
94. 113 Ill. 2d 332, 498 N.E.2d 1135 (1986).
95. 125 Ill. App. 3d 1053, 466 N.E.2d 1064 (1984).
96. *See* Smith v. Carriere, 316 N.W.2d 574 (Minn. 1982); Caldwell v. Piggly Wiggly Madison Co., 32 Wis. 2d 447, 145 N.W.2d 745 (1966). *See also* V. SCHWARTZ, *supra* note 15, ch. 18.

tion 2-1116 makes it even more important that appellate courts exercise restraint in reviewing jury findings since a more active standard might result not simply in a reapportionment of the degree of fault but in a complete bar to any recovery by a plaintiff. As was indicated by the study of the 1985 Cook County jury verdicts, in 28% of the cases the jury found that the plaintiff was 50% at fault. Under section 2-1116, a finding of just 1% of additional negligence will completely bar plaintiff from any recovery.

CONCLUSION

With the demise of contributory negligence as a complete bar to plaintiffs' recovery in tort actions in the United States, the debate has shifted to whether Illinois should continue the pure form adopted by the supreme court or move to a modified system. With the enactment of section 2-1116, the Illinois General Assembly has chosen a modified system that differs from other states.

Whether section 2-1116 will significantly alter the number of plaintiffs who receive compensation, and the size of their awards, is still unclear. However, the application of section 2-1116 to 1985 Cook County jury verdicts involving pure comparative negligence gives some indication of the effects that a modified system may have. Overall, approximately 21% of the plaintiffs who received some compensation would have been completely barred by the new act. In addition, some of the 28% of the plaintiffs who were found to be exactly 50% at fault may be discouraged from filing suit since a finding by a jury of 51% fault will completely bar any recovery. However, there are reasons to believe that juries will continue to give plaintiffs the benefit of the doubt in close cases and divide the fault equally, thus permitting them some recovery.