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ADOPTING COMPARATIVE NEGLIGENCE: SOME THOUGHTS FOR THE LATE REFORMER

KENNETH S. ABRAHAM*

During the last decade comparative negligence became the law in the vast majority of American jurisdictions.¹ The swiftness of this change is almost unparalleled in the history of American tort law.² That this action was taken by different branches of government in different states is itself remarkable, signalling as it does the unsettled character of our ideas about the proper scope of judicial law-making authority.³ The backing and filling that is necessary to construct a fully developed body of doctrine is now proceeding. Yet, as Edward Digges and Robert Dale Klein have noted in this issue,⁴ Maryland remains one of the few jurisdictions still in the contributory negligence camp.⁵

It would be easy to interpret this stance as stubborn unwillingness by the Maryland General Assembly to adopt an almost universally praised reform, as the triumph of interest group politics over considerations of principle,⁶ or as an ultra-conservative refusal by the courts of Maryland to overturn a legal doctrine created by the courts in the first place.⁷ These factors may well explain the continuing reign of contributory negligence in this state, as may others. But explanation is not justification. Wise reform often occurs for the worst of reasons, and ill-advised changes are sometimes made for the best of motives. The

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1. Thirty-eight states now operate under some form of comparative negligence. See Digges & Klein, *Comparative Fault in Maryland: The Time Has Come*, 41 MD. L. REV. 276, 277 (1982). Thirty-one have adopted the doctrine since 1969. See *id.* at 280 nn.30 & 35.

2. The only other development in tort law that seems to have occurred this swiftly is the rise of strict liability for injuries caused by defective products. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 98, at 657-58 (4th ed. 1971).

3. The literature on the general issue is voluminous. For examples of three different sorts of analysis, see generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); HENDERSON, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); *Comments on Maki v. Frelk — Comparative vs. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889 (1968).

4. Digges & Klein, *supra* note 1, at 277.

5. The others are Alabama, Arizona, Delaware, Indiana, Iowa, Kentucky, Missouri, North Carolina, South Carolina, Tennessee, Virginia and the District of Columbia. See *id.* at 277 n.6.

6. Insurance companies and their lobbyists typically oppose the adoption of comparative negligence.

7. Maryland adopted contributory negligence in *Irwin v. Sprigg*, 6 Gill 200 (Md. 1847). See Digges & Klein, *supra* note 1, at 278 n.19.

proper question for the legal analyst is not simply, "Why is the law as it is?", but also "Should the law be as it is?" The need to assess the justifications for contributory and comparative negligence therefore remains paramount, regardless of the explanation for the present state of Maryland law.

The context in which the issue arises is a special one. Thirty-eight states now have experience with comparative negligence. The decision whether to adopt the doctrine need no longer be exclusively analytical and abstract. In addition, background legal and economic considerations have changed enough since the debate about comparative negligence began in earnest that the balance between the costs and benefits of adoption may differ from what it was a decade or more ago.

In short, the issue facing decision-makers today is not the same issue that faced the comparative negligence pioneers. In what follows, therefore, I shall try to canvass some of the considerations that make the issue different today. I make no pretense of discussing all the issues that bear on the ultimate question whether to adopt comparative negligence; these have been ably analyzed by many of the commentators on whom Digges and Klein have relied.⁸ But because Maryland faces this question toward the end of a cycle of reform, it may be worthwhile to attend to those factors that add a new dimension to the question now facing Maryland. In doing so, we may also gain some insights into the differences between legal reform that blazes a new path and reform by jurisdictions that decide to follow along behind.

Finally, I should add that I am not opposed to the adoption of comparative negligence. But it would be a sad commentary if Maryland, after a decade of inaction, were to adopt comparative negligence only for reasons that would have justified such action long ago. In reevaluating its position, a jurisdiction that has lagged behind should consider not only those arguments that have been recognized from the outset, but also the new developments that will help it find its way.

I. THE EXPERIENCE OF OTHER STATES

One of the supposed geniuses of the federal system is that it authorizes fifty local experiments in law and governance. Those experiments which succeed may then be more widely adopted, and the failures may be discarded. This theory suggests, then, that the way to begin evaluating the comparative negligence doctrine is by looking at the experiences of the states now experimenting with the doctrine. An apparently good theory, however, often fails to work in practice. In

8. See Digges & Klein, *supra* note 1, at 282 n.32.

this case, there is almost no information about the effects of adopting the doctrine, and what information there is explains little. Maryland will have to face the issue and make its decision without comprehensive data to inform it.

Some of the available information is based on surveys of lawyers' and judges' impressions. It is very out of date and statistically insignificant. The impressions, for what they are worth, were that the adoption of comparative negligence somewhat increased the number of claims, number of settlements, and percentage of successful claims, but that the doctrine had no other significant effect on litigation.⁹ Other studies attempted to compare statistics from comparative negligence states with those from similar states that had not adopted the doctrine, but these studies yielded inconclusive results.¹⁰ Even Wisconsin and Minnesota, or Kansas and Nebraska, it seems, are too different to be reliably compared. One observer who studied a single insurance company's closed claim files discovered no noticeable difference in the treatment of claims from comparative and contributory negligence states.¹¹

Why is there so little data? First, many states have only recently adopted comparative negligence. It takes time for accidents to occur, suits to be filed, and data concerning settlements and the characteristics of trials and appeals to accumulate. Second, to acquire the kind of data that would be useful, retrospective study would probably be inadequate. The information that would be helpful — the average length and complexity of trials before and after the adoption of comparative negligence, just to give two examples — is very difficult to retrieve after-the-fact. Someone has to decide in advance to follow developments longitudinally. And even if only the period after enactment were to be studied, data collection would have to be planned prospectively, because court systems often do not systematically maintain data in ways that would be helpful. This is expensive and time-consuming. Moreover, there have been so many other changes in the past decade — economic, demographic and legal — that it would be very difficult to isolate the effect of only one of these many changes on the characteristics of negligence claims. Perhaps this does not entirely explain why there is no data at all on recent experience, but it does tend to suggest that we should expect very little.

9. See generally Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959); Note, *Comparative Negligence — A Survey of the Arkansas Experience*, 22 ARK. L. REV. 692 (1969).

10. See, e.g., Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1960).

11. See H. ROSS, *SETTLED OUT OF COURT* 211 (2d ed. 1980).

Nevertheless, some inferences can be drawn even from the absence of evidence. Insurance companies typically oppose the enactment of comparative negligence. Their intuition that the doctrine will result in greater payouts or increased defense costs should lead them to request insurance commissioners to authorize premium increases in jurisdictions adopting the doctrine. There is almost no evidence that insurance companies have been able to support these requests with statistical proof.¹² Yet they have greater access to data than any other party to the controversy. Whatever the other effects of comparative negligence, then, it has not demonstrably increased the total cost of operating the negligence system. On the other hand, no one yet has been able to show that the doctrine has the opposite effect. There is no proof that there has been a cost saving in any of the states that have adopted comparative negligence. One of two conclusions might be drawn here. The first is that the doctrine has produced positive or negative effects, but that they have been difficult to isolate and measure. The alternative is to conclude that adopting comparative negligence does not have a significant impact on the cost of operating the negligence system. The latter explanation seems the more probable.

This does not necessarily mean, however, that comparative negligence has no effect. Its adoption may rearrange the way compensation is distributed, as those who favor the doctrine intend. For example, more plaintiffs might receive a lower average payment under comparative negligence. Trials also might be more complex and costly because of the need to focus on the comparative fault of plaintiff and defendant, but fewer trials might be held because of increased settlements. There could be other effects as well. It is unfortunate that Maryland decision-makers will not have access to studies that would help them predict the shape of the changes that would flow from adopting the doctrine. But information of this sort may never be available in reliable form. A decision to adopt or not to adopt will therefore have to be made without such information, except for the assurance that comparative negligence reform probably will not have a significant statistical impact on the overall cost of operating the negligence system.

II. LEGISLATURE OR COURT?

Seven state courts have made comparative negligence the law in

12. The only exception seems to have occurred in New York. Letter from Mr. Michael Walters, Vice President, Insurance Services Office, to Mr. William Martin, Vice President and General Counsel, American Insurance Association (Sept. 26, 1977) (survey of closed California claims suggests there will be a 5% effect in New York after the enactment of comparative negligence) (on file with the *Maryland Law Review*).

their jurisdictions.¹³ The remaining thirty-one comparative negligence states adopted the doctrine through legislative action.¹⁴ There is no dispute that the latter approach is appropriate, although some of course dispute the wisdom of the doctrine. There is considerable disagreement, however, about the propriety of judicial adoption of comparative negligence.

The states that have retained contributory negligence have a special purchase from which to view this issue. The argument that adopting a comparative negligence rule is beyond the province of the courts has always had a hollow ring to it. Contributory negligence, after all, is a court-created doctrine; the courts would seem not to be automatically precluded from modifying what they have created. And the reasons often given for abolishing contributory negligence — its unfairness in penalizing plaintiffs for very small amounts of carelessness¹⁵ and the case-to-case inconsistencies that result from relying on a rule that conflicts with the jury's intuitive notions of fairness¹⁶ — are characteristically the kinds of arguments that courts consider in fashioning legal doctrine.

Furthermore, at this point in the development of comparative negligence, a court considering the doctrine has more than theory to inform it. The argument against judicial adoption is ultimately that it would be antidemocratic — that so fundamental a decision about civil liability should be made by a representative branch of government. Yet never has a judicial decision to adopt comparative negligence been legislatively overturned — even in those states whose legislatures had considered, but had not enacted comparative negligence prior to judicial adoption of the doctrine.¹⁷ That legislatures in these states did not overrule this judicial action obviously does not prove anything about the desires of the people of Maryland or their representatives. But it does suggest that concern about legislative prerogatives can be overemphasized. Legislatures are often happier when problems just go away, and judicial resolution of a problem is one way to make it go away. Little but a whisper was heard from the Maryland General Assembly,

13. See Digges & Klein, *supra* note 1, at 279 n.28.

14. See *id.* at 279 n.29.

15. See W. PROSSER, *supra* note 2, § 67 at 433; 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1207 (1956).

16. Keeton, *Comment, Comments on Maki v. Frelk — Comparative vs. Contributory: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 906, 916 (1968).

17. The states are Alaska, California, Florida, Illinois, Michigan, New Mexico and West Virginia. For summaries of the rules adopted in these states, and of the comparative negligence statutes enacted in the remaining thirty-one states operating under the doctrine, see H. WOODS, *COMPARATIVE FAULT* 421-595 (1978 & Supp. 1980).

for example, when the Court of Appeals overturned another long-standing common law rule by imposing strict liability on manufacturers of defective products.¹⁸

Finally, it is sometimes said that although the decision to adopt comparative negligence resembles the kind of choices typically made by courts, the subsidiary issues that must be faced in implementing a comparative negligence system are characteristically legislative.¹⁹ For example, if courts adopt comparative negligence, they also will have to decide how to treat the problems of joinder and set-off and the role of such doctrines as assumption of risk and last clear chance.²⁰ Put this all together, the argument goes, and it amounts to a wide-ranging tort reform statute enacted by a court.

The weakness of this argument is twofold. First, much of the law regarding these problems is judge-made. The courts have the authority and the competence to modify it.²¹ And no court would have to announce in a declaratory judgment its resolution of all these issues. At least some of these problems could be resolved on a case-by-case basis, in the way that courts usually make decisions. Second, and more important, the typical comparative negligence statute deals with few of

18. See *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976). Bills dealing with products liability were introduced in each house in subsequent sessions. None was enacted. See S.B. 813 (1981) (prohibiting products liability actions against sellers of defective products sold in sealed containers, with exceptions); H.B. 1128 (1981) (establishing presumption that an injury was not caused by a defective product if more than 10 years had elapsed between purchase and injury; setting standard of proof; providing affirmative defenses for sellers of defective products under certain circumstances and with certain exceptions); H.B. 1317 (1981) (providing affirmative defenses for sellers of defective products sold in sealed containers under certain circumstances and with certain exceptions); S.B. 495 (1980) (defining and prohibiting product liability actions against sellers of defective products sold in sealed containers with certain exceptions); S.J. Res. 23 (1980) (proposing the appointment of a commission to study Maryland product liability law); H.J. Res. 27 (1980) (reintroducing H.J. Res. 27 (1978) which proposed the appointment of a Product Liability Insurance Commission); H.B. 1568 (1979) (defining product liability cause of action, standard of care, limitations period and defenses); S.B. 1203 (1978) (outlining standard of reasonable care in manufacturing, design, and consumer use; defining limitations period and defenses); H.J. Res. 27 (1978) (proposing the appointment of a Product Liability Insurance Commission to study the impact of product liability on manufacturers and to recommend legislative changes); S.B. 988 (1977) (defining product liability cause of action, limitations period, and defenses).

19. See, e.g., V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 355 (1974); Kalven, *Comment, Comments on Maki v. Frelk — Comparative vs. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 897, 899-900 (1968).

20. See Leflar, *Comment, Comments on Maki v. Frelk — Comparative vs. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 918, 920-21 (1968).

21. See generally Phillips, *The Case for Judicial Adoption of Comparative Fault in South Carolina*, 32 S.C.L. REV. 295 (1980).

these issues.²² The argument that the courts should defer to legislatures on such matters thus has no practical significance. Even in states whose legislatures have mandated comparative negligence the courts have had to develop detailed frameworks for implementing the doctrine and resolving the issues that arise after its adoption.

In sum, the proper allocation of authority between legislatures and courts on this question is not crystal clear. Some of the issues that must be resolved in deciding whether to adopt comparative negligence are characteristically judicial issues. Others are less typically the kind that can be easily resolved by a court, but seem to have been left for judicial resolution even in the states that have enacted comparative negligence legislation. Unlike judicial resolution of constitutional questions, a court's decision to adopt comparative negligence can be overturned or modified by the legislature. Thus, any threat to popular government from judicial adoption of comparative negligence can be remedied easily. Yet in none of the seven states whose courts have adopted comparative negligence has the legislature overturned that judicial decision. In each case, rather, legislatures have acquiesced in the adoption of the doctrine.²³ Although there are arguments against the existence of judicial authority to adopt this doctrine, then, such action certainly is not obviously inappropriate. If anything, the balance seems to lie on the side of judicial authority to adopt comparative negligence.

III. COMPARATIVE NEGLIGENCE AS REPAIR OF THE NEGLIGENCE SYSTEM

The absence of evidence that comparative negligence has produced positive effects in the states that have adopted it and disagreement regarding the proper branch of government to make any change are both obstacles to reform in this field. Even after hurdling these obstacles, however, the proponents of comparative negligence ought to consider an argument that strikes at the central purpose of comparative negligence reform. The argument is that comparative negligence merely attempts to repair a system that is fraught with inefficiency and unfairness. We are now moving away from a system in which the right to compensation turns on whether the injuring party was at fault. There is, for instance, a clear movement away from reliance on recov-

22. The statutes of only six states deal with any of these issues. See CONN. GEN. STAT. ANN § 52-572h (West 1981); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); OKLA. STAT. ANN. tit. 23, § 12 (West 1981); OR. REV. STAT. § 18.475 (1977); R.I. GEN. LAWS § 9-20-4.1 (1980); UTAH CODE ANN. § 78-27-37 to -38 (1977). None deals with all these issues. Some of the other statutes deal with others. See H. WOODS, *supra* note 17.

23. See *supra* note 17.

ery in tort and toward first-party insurance compensation systems for accident victims. Comparative negligence may run counter to this trend, and could impede it.

Ultimately, I believe, this argument fails. It is a straw man that I shall set up only to knock down. Nevertheless, it presents a serious problem, because it calls on the reformer to locate his proposal for the adoption of comparative negligence within a larger context — the changes that are occurring in the way tort and compensation systems provide recompense for accidental injury.

In analyzing this argument we need not rehearse the criticisms that have been levelled at the negligence system,²⁴ nor explore the classic choice between reform through a series of small improvements and deliberate tolerance of the mounting inadequacies in a legal regime in order to promote its complete abolition. The considerations that bear on these problems are very much the same as they were over a decade ago, when the wholesale adoption of comparative negligence began. But the spread of compensation devices that parallel, and in some cases replace the negligence system is new. Their significance for the decision whether to adopt comparative negligence deserves consideration.

Ten years ago debate raged over the value of retaining the negligence system. As so often happens, that debate was not settled in all-or-nothing fashion. A slow accretion of reforms, some direct and some indirect, have begun a limited but distinct trend away from heavy reliance on the negligence system, in this jurisdiction and in others. In the past ten years there has been a quiet but very extensive increase in the amount and scope of insurance coverage protecting the citizens of Maryland. For example, Blue-Cross, Blue Shield, and other forms of private health care coverage are more widespread and provide greater coverage than ever before. Governmentally provided coverage, such as medicare and medicaid, has also increased. All told, approximately eighty-two percent of the people of Maryland have some such health insurance.²⁵ In addition, homeowners' and most tenants' insurance policies include medical coverage protecting visitors and non-residents injured on the premises. The owner of every motor vehicle registered in Maryland must purchase "personal injury protection," covering medical expenses and lost income, for himself, members of his household, passengers, those driving the vehicle with permission, and pedes-

24. A good discussion is Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

25. I have calculated the figure based on data in HEALTH INS. INST., SOURCE BOOK OF HEALTH INSURANCE DATA 18-19, 41 (1979-1980).

trians injured in accidents involving the vehicle.²⁶ Insurance companies also must offer collision coverage to every insured, although there is no requirement that anyone purchase it.²⁷ None of these developments, statutory or market-based, precludes recovery in tort for the injuries against which they provide protection,²⁸ although duplicate recovery is sometimes prohibited.²⁹ But the effect of each is to decrease a potential tort plaintiff's incentive to bring suit, by providing a relatively simple and expeditious means of recovering at least some, and sometimes all of his out-of-pocket expenses, without regard to fault.³⁰

This emerging statutory and economic framework provides a potential alternative to the fault system for recovering out-of-pocket damages. This framework of insurance protections has not been planned exclusively for this purpose. Indeed, the extent to which planning has affected the growth of any component is debatable. And full coverage is not yet in place. But what started out as a few small pockets of first-party coverage has grown to the point that, aside from pain and suffering, a sizeable portion of the losses that are recoverable in tort are also reimbursable from another source. In short, though this growth has occurred in somewhat haphazard and unsystematic fashion, we have a regime of increasingly widespread accident insurance.

A negligence system is often thought to be the very antithesis of such a regime, especially if it incorporates the contributory negligence doctrine. In one sense, this view is accurate. First-party accident insurance disregards fault and the deterrence of faulty behavior in favor of swift and certain compensation for accident victims. It focuses on the victim's injuries, not on the conduct of the victim and the party injuring him. The negligence system, on the other hand, is conduct-oriented. In a traditional negligence system, the plaintiff may recover only if he is totally without blame for his injury and can prove that the defendant was negligent in causing it. In contrast, a comparative negligence system arguably is more compensation-oriented. Although it still makes conduct, rather than injury and compensation, the focus of decision, in

26. MD. ANN. CODE art. 48A, § 539 (1979). The minimum coverage required is \$2500 per person.

27. *Id.* § 541(d).

28. Insurers paying benefits under coverage issued pursuant to § 539 have no rights of subrogation to recover these benefits from any third party. *Id.* § 540.

29. *See id.* § 543.

30. The incentive to sue is further weakened by the relation between the subrogation rights of the claimant's insurers and his potential tort recovery. If the claimant does bring suit, the collateral source rule admittedly allows him to recover damages from the defendant even for expenses already paid by the claimant's own insurers. But in many instances the claimant's insurers will then have contract rights to reimbursement for such payments out of the claimant's tort recovery. R. KEETON, BASIC TEXT ON INSURANCE LAW 159-60 (1970).

pure comparative negligence plaintiffs are almost never totally foreclosed from recovering compensation.³¹ They receive at least a portion of their losses. Under this view, the contributory negligence approach is the furthest removed from a system of first-party, non-fault based accident insurance. Because comparative negligence relaxes the rigidity of the all-or-nothing approach and allows more plaintiffs to recover, it achieves more of the aims of accident insurance.

An entirely different view, however, would see comparative negligence as the servant of the negligence system and contributory negligence as producing results more consistent with the movement toward a no-fault accident compensation system. This may not be what the defenders of contributory negligence normally have in mind, but the relation may exist nonetheless.

The contributory negligence doctrine discourages some tort claims and may encourage settlement of others that are made, because it holds out the possibility that the plaintiff will be denied recovery even when the defendant was negligent.³² But this is not to say that the plaintiff receives no compensation from other sources. With the spread of various forms of accident insurance, the plaintiff is increasingly likely to receive (or already has received) compensation for his out-of-pocket losses anyway. To the extent that this is the case, negligence litigation becomes mainly a contest over pain and suffering damages.³³ The effect of the contributory negligence doctrine in such a context is not to deny the plaintiff compensation; it is to deny him general damages for pain and suffering from the defendant.

Yet this is exactly what a system of no-fault accident insurance that replaced the negligence system would do also — provide compensation for out-of-pocket losses, but not for pain and suffering. The no-fault approach would forego awarding pain and suffering damages to tort claimants in order to finance smaller awards to a much larger

31. In "modified" comparative negligence, the plaintiff is only entitled to recover if his negligence is "not as great as" or "not greater than" the defendant's. See Digges & Klein, *supra* note 1, at 281-82.

32. Data from the University of Chicago jury study showed that in trials where contributory negligence was an issue, the jury found for the defendant in 46% of the cases. Where contributory negligence was not an issue, the figure dropped to 22%. See Kalven, *supra* note 19, at 903. Comparative negligence, however, may promote increased settlement of certain kinds of claims. See Rosenberg, *supra* note 9, at 91; Note, *supra* note 9, at 702. But see H. Ross, *supra* note 11, at 123-35 (because juries reach compromise verdicts where plaintiffs were contributorily negligent, claims adjustors take this into account in evaluating claims).

33. This is especially true when the plaintiff is denied double recovery of his out-of-pocket expenses because of his own insurer's right to reimbursement out of any ultimate tort recovery. See *supra* note 30.

group of accident victims.³⁴ The contributory negligence system strikes a compromise; it leaves those plaintiffs who are partially to blame for their injuries to seek compensation from accident insurance sources. It allows compensation for pain and suffering only to plaintiffs without fault whose claim to general damages is also significant enough to warrant their attempting to overcome the economic³⁵ and legal obstacles to recovery. In this sense, the contributory negligence doctrine acts as a gatekeeper for the tort system, permitting only selected claims to pass into it, and channelling the remainder into an increasingly important system of first-party insurance that rarely requires litigation as a prerequisite to recovery.

This accident insurance perspective provides an argument for retaining contributory negligence, but the argument has two weaknesses. First, the practical differences between the operation of contributory and comparative negligence are probably marginal. Comparative negligence may encourage reliance on the tort system, because it relaxes the restriction on plaintiffs' recoveries, entitling every plaintiff to at least some of the pain and suffering damages that are often the principal reason for bringing suit in the first place.³⁶ On occasion trials in comparative negligence jurisdictions may even be more costly, because of the difficulty of comparing plaintiff's and defendant's negligence rather than simply determining whether each party was at fault. Yet the number of claims processed by the tort system probably is not much greater under comparative negligence. Although contributory negligence perhaps helps to minimize the number of claims that are resolved within the tort system, many accident victims file suit despite the possibility of being found contributorily negligent. Given the nearly universal admission that juries in contributory negligence jurisdictions apply a rough comparative negligence standard,³⁷ and given that most contributory negligence questions are submitted to the jury, retaining contributory negligence simply to encourage marginally

34. For analysis of the many different forms of no-fault systems, see J. O'CONNELL & R. HENDERSON, *TORT LAW, NO-FAULT AND BEYOND* (1975). Of course, such systems would not necessarily abolish all negligence claims, or totally preclude payment for pain and suffering.

35. See F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 28 (1964); Franklin, Chanin & Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1 (1961); Reeder, *Contingent Fees in Litigation with Special Reference to Medical Malpractice*, in *THE ECONOMICS OF MEDICAL MALPRACTICE* 211 (S. Rottenberg 1978).

36. See *supra* text accompanying notes 32-33.

37. See, e.g., H. ROSS, *supra* note 11, at 123-25 (belief by claims adjusters that compromise verdicts regularly occur).

greater reliance on first-party insurance does not seem warranted.³⁸ Adopting comparative negligence would change few but the unusual cases in which a claims adjuster or jury strictly and stubbornly follows the law. Adoption, however, would make more controllable what now is hidden and thus help assure that similar cases are treated similarly.³⁹

The second weakness in the argument favoring contributory negligence is that it too quickly suggests that negligence litigation is mainly a contest over pain and suffering damages. We have not yet reached the point at which this is true. First-party insurance is widespread; but it is not universal. And there are gaps and limitations in coverage, especially coverage against lost income. First, insurance against wage-loss is not so widespread as insurance against health care costs.⁴⁰ Even some relatively small losses may not be fully compensated because of this gap. Second, relatively large losses are unlikely to be fully covered, because generally neither health insurance, which usually is available, nor wage-loss insurance, which often is not, fully cover catastrophic losses.

Nevertheless, because of the nuisance value of small claims, those with small losses often recover far more than their out-of-pocket losses in tort — their claims do tend to be contests over general damages. Because first-party insurance coverage is not universal, however, and because liability insurers have a strong incentive to contest large claims, tort claimants with sizeable losses tend not to recover even their full out-of-pocket expenses at present.⁴¹ Thus, a move to comparative

38. If contributory negligence were retained for this reason, the doctrine might even have to be strengthened by reducing the heavy allocation of discretion to juries in this area, and ruling more conduct contributorily negligent as a matter of law. Such an approach has classic, if not venerable roots. See *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66 (1927); *Lorenzo v. Wirth*, 170 Mass. 596, 49 N.E. 1010 (1898); O.W. HOLMES, *THE COMMON LAW* 98-99 (M. Howe ed. 1963); Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946). Recent decisions of the Maryland courts relaxing the harsh effect of the so-called "boulevard rule" would then take on a different cast. See, e.g., *Covington v. Gernert*, 280 Md. 322, 373 A.2d 624 (1977); *Dean v. Redmiles*, 280 Md. 137, 374 A.2d 329 (1977); *Hansen v. Kaplan*, 47 Md. App. 32, 421 A.2d 113 (1980); *Gazvoda v. McCaslin*, 36 Md. App. 604, 375 A.2d 570 (1977).

39. See Keeton, *supra* note 16, at 916.

40. Comprehensive Maryland data is not available. Though a very high percentage of wage earners have the limited lost income protection available through workers' compensation and social security, a much smaller percentage has private disability insurance. Nationally, for example, less than twenty million people in 1979 had disability coverage that provided protection for more than two years disability. See SOURCE BOOK OF HEALTH INSURANCE DATA, *supra* note 25 at 20.

41. For example, in the most systematic study of automobile accident victims to date, those tort claimants with economic losses greater than \$10,000 recovered less than half of those losses in tort, whereas those with economic losses less than \$1000 recovered more than twice their actual economic losses in tort. See U.S. DEP'T OF TRANSP., ECONOMIC CONSE-

negligence conceivably could encourage those small claimants who now are content to receive only first-party insurance compensation to seek pain and suffering recoveries in tort. But retaining contributory negligence could more significantly effect those with large claims. The doctrine may not only inhibit to some extent the recovery of pain and suffering damages by large claimants; it may also contribute to the difficulty these claimants encounter in recovering their full out-of-pocket losses.

Of course, the possibility that adopting comparative negligence would increase the number of claimants entitled to pain and suffering recoveries might be attacked on principled rather than practical grounds. Where the plaintiff is innocent and the defendant blameworthy, there is a strong argument that the former should not be denied his full losses. But where the plaintiff is also blameworthy, according to this view, his claim to compensation for intangible losses should be much weaker.⁴² The problem with this attack, however, is that defendants are almost always insured against liability. The moral quality of their conduct therefore seems indirectly relevant at most.

In fact the moral inequity, if there is any in comparative negligence, lies in the disparity it creates among potential plaintiffs. The dilemma that now faces all of tort law concerns the choice between those who are entitled to full tort damages and those who are left to systems that pay out-of-pocket losses only.⁴³ Victims of automobile accidents or dangerous products can often recover in tort; victims of falls in bathtubs usually cannot. Contributory negligence reduces some of the tension arising from this differential treatment by limiting the right to recover tort damages to innocent claimants. Comparative negligence would exacerbate the tension. Even negligent victims of automobile or product accidents would be entitled to some tort damages; yet innocent victims of many household accidents would receive only out-of-pocket damages, if that. From the standpoint of the injured party, the causal role of the defendant in the cases where there is tort recovery will often seem insufficient to justify this difference in treatment.⁴⁴ This is especially true where most defendants are insured, and diffuse deterrence is

QUENCES OF AUTOMOBILE ACCIDENT INJURIES 47 (1970). Both figures are net of legal costs, which averaged 25% of gross tort recoveries. *Id.* at 48. When non-tort sources were added in, large claimants still recovered less than 70% of their economic losses. *Id.* at 47.

42. For discussion of the effect that recent discoveries about the causes and nature of pain should have on pain and suffering awards, see Peck, *Compensation for Pain: A Reappraisal in the Light of New Medical Evidence*, 72 MICH. L. REV. 1355 (1974).

43. See Atiyah, *No Fault Compensation: A Question That Will Not Go Away*, 54 TUL. L. REV. 271, 275-78 (1980).

44. See *id.* at 284.

therefore only a secondary consequence of imposing liability.⁴⁵

These issues are significant not simply because they resurrect old debates about no-fault and pain and suffering awards, but because they emphasize the context within which proposals to adopt comparative negligence should be viewed. In the final analysis, it would be much more sensible to achieve the goals of a non-fault based system of liability by adopting such a system, rather than by holding the line against comparative negligence and hoping that a series of ad hoc first-party insurance devices will achieve no-fault for us. And if pain and suffering awards require regulation or modification, then they should be regulated or modified directly. Yet personal injury law as a whole is moving away from its reliance on fault as a touchstone for compensation. It has been doing so, legislatively⁴⁶ and judicially,⁴⁷ for a long time. The role to be played by comparative negligence in these developments must be considered if the doctrine is to function in tandem with the rest of the law, as that law grows and changes.⁴⁸

45. Moreover, adopting comparative negligence probably would have little effect on those areas of negligence law where achieving deterrence through the imposition of liability is still an important goal. The reasonableness of the plaintiff's conduct is rarely at issue in most medical malpractice or environmental pollution cases, for example. So a move to comparative negligence would have almost no impact on the deterrent effect of tort liability in these fields. Even in other cases, the adoption of comparative negligence is not likely to have much effect one way or the other on the deterrence of negligent conduct. Comparative negligence might provide some additional deterrence of negligent conduct, because some defendants who were previously exonerated would now be found liable for a portion of the plaintiff's damages. But there would also be a corresponding loss in deterrence, because some plaintiffs who previously were barred from recovery would now be paid a portion of their losses, despite their comparative negligence. Thus, even if tort liability for negligent driving, for example, promotes careful driving, there is little reason to believe that a move from contributory to comparative negligence would noticeably alter this effect. For an excellent analysis of the potential effects on accident prevention of various forms of contributory and comparative negligence, see Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 703-21 (1978).

46. See, e.g., MD. ANN. CODE art. 48A, § 539 (1979) (personal injury protection for victims of motor vehicle accidents); MD. ANN. CODE art. 101, § 15 (1979) (workmen's compensation).

47. See, e.g., *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976) (strict liability imposed for injury caused by defective products); *Goldman & Freiman Bottling Co. v. Sindell*, 140 Md. 488, 117 A. 866 (1922) (*res ipsa loquitur* applied to exploding beverage container).

48. For instance, comparative negligence might well undermine the purpose of certain no-fault liability standards. Importing comparative negligence into strict products liability is a possible example. However, because products liability embodies both a no-fault liability standard and the right to recover pain and suffering damages, this would probably be a sensible compromise. Digges and Klein do not rely on this rationale to explain their support for applying comparative negligence to products liability claims, although applying the doctrine in such cases seems to be an important part of their proposal. See Digges & Klein *supra* note 1, at 286-90. For those who represent defendants in products liability cases, theirs is an understandable, though in scholarly terms perhaps not an entirely unbiased position.

The question, therefore, is not whether to move away from the fault system, but what the form and extent of that move should be, and how it should relate to the pockets of negligence liability that remain. We may debate the trade-offs entailed in various moves. We may also consider how to fine-tune the relationship between the insurance and negligence systems while they exist together, as they undoubtedly will for a considerable time to come. It is even possible that change akin to the political reversal that recently has taken place in national politics will occur in tort law.⁴⁹ But even this would be unlikely to set our compensation clocks back to the year 1900. The history of personal injury law in this state and across the country for the past eighty years is largely the story of the progressive breakdown of negligence as a dominant paradigm and the substitution of a series of compensation alternatives, both within and outside the tort system.

Thus, the big picture is of a move toward no-fault of various sorts that is likely to prove irreversible. The differences between contributory and comparative negligence may eventually be swallowed up by this overarching development. We need not decide whether to adopt comparative negligence exclusively by reference to this development. Indeed, adoption of comparative negligence is probably a sensible way to ameliorate some of the formal unfairness of negligence law while other fundamental changes in the overall compensation system evolve. But it would be a mistake to recommend adopting the doctrine without recognizing that it will help repair a system that has in many ways begun to fail.

CONCLUSION

On this as on so many questions of legal reform, there is unfortunately no objective standard against which the arguments for and against change can be assessed. Comparative negligence enjoys wide support as a progressive means of remedying a signal unfairness in the law of torts. Yet there is little hard evidence of its effect in the jurisdictions where it is in operation, and no consensus about which branch of government should decide whether to adopt the doctrine. The relation between the negligence system that the doctrine would help repair and the spreading regime of first-party insurance also requires scrutiny. Although these are matters that cannot be authoritatively resolved, neither can they be ignored. A reform that seems straightforward and just at the beginning of an era later may reveal layers of complexity

49. For an argument that such a retrenchment should occur, see Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976).

impossible to anticipate. Perhaps the greatest burden of a jurisdiction that comes late to reform is the necessity of grappling with such complexity.