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## Comment

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## Comment

*Fleming James, Jr.\**

The plaintiff's complaint in a wrongful death action contained a third count which did not allege due care on the part of plaintiff and decedent; but instead alleged that "if there was any negligence on the part of plaintiff or plaintiff's decedent it was less than the negligence of the defendant, Calvin Frelk, when compared."<sup>1</sup>

On defendant's motion, the circuit court dismissed this count for failure to state a cause of action, because it failed to allege due care on behalf of plaintiff's decedent. The appellate court for the second district, upon finding the existing doctrine of contributory negligence to be "unsound and unjust under present conditions," reversed the circuit court.<sup>2</sup> Since the existing doctrine was itself created by the courts, the appellate court concluded that the matter should not be left to the legislature (as defendant urged) but that "the courts have, not only the right, but the duty to abolish the defense."<sup>3</sup>

The state supreme court then granted petitions by both plaintiff and defendant for leave to appeal from the appellate court judgment. A majority of the supreme court were of the opinion that the circuit court was correct in striking the third count and that the appellate court erred in reversing that order. The judgment of the appellate court was therefore reversed, and the order of the circuit court affirmed. Justices Ward and Schaefer dissented. The majority did not seek to defend the rule of contributory negligence on its merits but, rather, felt "that such a far-reaching change, if desirable, should be made by the legislature and not by the court." The dissenting justices took a position very much like that of the appellate court.<sup>4</sup>

I shall not attempt here to discuss the merits of a comparative or proportional negligence rule, but rather the propriety of a court's adopting it judicially without benefit of legislation. The superiority over the present all-or-nothing contributory negligence rule of some

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

2. Plaintiff appealed directly to the state supreme court on the ground that the Illinois rule of contributory negligence violated the federal and state constitutions. That court found no such constitutional issue as to justify direct appeal and on its own motion transferred the case to the appellate court, since "[t]here remains for consideration the question of whether, as a matter of justice and public policy, the rule should be changed." *Id.* at 440, 229 N.E.2d at 285.

3. *Id.* at 452, 229 N.E.2d at 291.

4. *Maki v. Frelk*, 239 N.E.2d 445 (Ill. 1968).

such rule as that adopted by the appellate court in *Maki* has often been convincingly reasoned and is widely (though not universally) conceded. While recognizing that the issue may be debatable, it is significant to note that those who defend the present rule do not generally seek to justify its theory (even under a fault system of liability), but rather they point to possible complications in administering proportional negligence,<sup>5</sup> or to the fact that juries apply a rule of proportional fault today, although they are told not to. From this, it is argued that a change in the present rule is unnecessary to obtain the (apparently conceded) benefits of proportional negligence.<sup>6</sup>

While the desirability of the proportional negligence rule<sup>7</sup> is assumed in this piece, the nature of the objections to it, I believe, points strongly to the propriety of the court's deciding whether the change should be made.

The proposition that changing the law is properly and exclusively the function of the legislature runs counter to Anglo-American tradition.<sup>8</sup> It has long been the boast of the common law that it was able to adapt itself to changing conditions. Many great changes have been wrought by the courts without the aid of statute. The law of trusts, the doctrine of consideration in contract, the equity receivership as a device for reorganizing corporations, and indeed pretty much the whole of tort law, are a few familiar structures erected largely by judicial decision.<sup>9</sup>

It is true that periods of reluctance to use this creative power broadly have alternated with periods of relative boldness. And it is also true that in the field of torts we are just beginning to emerge from a period of relative stability and judicial reluctance to make changes.

5. See, e.g., Benson, *Comparative Negligence—Boom or Bane*, 23 INS. COUNSEL J. 204 (1956). This includes the difficulties which juries would supposedly have in administering the rule and, also, the asserted tendency of the rule to discourage settlements and increase court congestion. See *Maki v. Frelk*, 85 Ill. App. 2d 439, 450, 229 N.E.2d 284, 290 (1967).

6. See, e.g., Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005 (1957). This argument was made to the appellate court, but that court was "not impressed" with it. 85 Ill. App. 2d 439, 450, 229 N.E.2d 284, 290. The argument was not specifically mentioned in the supreme court opinions.

7. For discussion of the merits of proportional negligence, see, e.g., Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125, 142-147 (1945); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 508 (1953); Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 304, 341-44 (1950).

8. See, e.g., B. CARDOZO, *THE GROWTH OF THE LAW* (1924); B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); GREEN, *The Thrust of Tort Law, Part II: Judicial Law Making*, 64 W. VA. L. REV. 115 (1962) (with extensive citation of sources at 116 n.6); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1963).

9. Cf. James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315, 340-342 (1959).

This has encouraged conservative minds to view as judicial usurpation some changes that are well within the historical common law framework.<sup>10</sup> But the signs of emergence are clear. Within the past few years, courts have put nearly the whole field of products liability on a strict liability basis, free from the restrictions of privity; they have reversed the rule of non-liability for pre-natal injuries; they have virtually destroyed charitable immunity, while making serious inroads on governmental immunity.

Some, of course, have deplored the role of courts in making these changes, and they will probably applaud the Illinois Supreme Court's decision in the *Maki* case. But for those of us who accept or welcome the present regeneration of judicial law making in the field of torts, further questions are presented: What are the proper limits to the judicial function in this situation? What considerations should guide its exercise? Finally, does the judicial function properly include the kind of change sought in the present case?<sup>11</sup> It is my conclusion that the appellate court's decision does not transgress the proper limits of the judicial function, and that its subject is a peculiarly appropriate one for judicial decision.

### I.

The first question concerns primarily the proper relationship between the court and the legislature. All concede that it is a proper legislative function to make and to change the law and that the courts should always respect the exercise of this function by a coordinate branch of government. Whether courts are ever justified in overriding or modifying statutory commands need not detain us. Sometimes the courts have at least come close to doing so—witness the judicial treatment of the statute of uses and the statute of frauds, to take venerable examples. But the question of their wisdom on these occasions is not raised here. The all-or-nothing rule of contributory negligence is itself a child of the common law judicial process. What the courts themselves have wrought to meet one set of circumstances, they may presumably undo or modify, when circumstances or prevailing values change, without treading on the toes of the legislature.

Sometimes, to be sure, a rule of common law origin is taken as a point of departure for extensive legislative enactments, so that in time it becomes impossible to change the basic rule judicially without

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10. See, e.g., Cooperrider, *A Comment on the Law of Torts*, 56 MICH. L. REV. 1291 (1958).

11. For a thoughtful and perceptive appraisal of the considerations that should guide the judicial process, see, Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).

disrupting the fabric of the superimposed legislation.<sup>12</sup> But that is scarcely the situation presented in *Maki*. In Illinois and elsewhere there have been modifications of contributory negligence, notably the last clear chance doctrine and the rule that plaintiff's negligence is no bar to an action for injuries wilfully or wantonly inflicted upon him. But these modifications are also products of judicial decision. The entire subject of contributory negligence, both in its origin and its modification, has traditionally been handled by courts rather than legislatures. Indeed, the Illinois history contains a former chapter of judicial adoption of a sort of comparative negligence and its later judicial rejection in favor of the all-or-nothing rule, then generally prevailing elsewhere in America.<sup>13</sup>

It is true that the Illinois legislature, in extending liability for negligence into new fields, has on at least three occasions, as pointed out in the majority opinion,<sup>14</sup> expressly provided that the liability should be subject to the existing defense of contributory negligence. But this scarcely constitutes the kind of elaborate legislative superstructure that courts should be reluctant to disturb by pulling its common law basis out from under it. This kind of legislation indicates little or nothing more than legislative acquiescence in an apparently well-established, existing common law rule.

This brings us to the argument sometimes made that courts should not change a well-known and long-standing judicial rule which the legislature has left unchanged. When it comes to drawing the line

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12. A case in point is the early repudiation of the English law of cattle trespass by courts in our great plains and intermountain territories. This was followed by an elaborate structure of statutes dealing with fencing, herds, and other matters, regulating the reciprocal rights and duties of the owners of stock and other land owners. When courts were later asked to reverse the basic rule and adopt the English law of cattle trespass because of intervening changes in the circumstances, they quite properly declined to do so, since the basic law had become an integral part of an extensive scheme of legislative regulation. See, e.g., *Delaney v. Errickson*, 10 Neb. 492, 6 N.W. 600, (1880).

13. The Illinois history is recounted by the appellate court in the *Maki* case. 85 Ill. App. 2d 439, 442-446, 229 N.E.2d 284, 286-288.

14. The opinion points to statutory provisions imposing liability for negligence on firemen and on county superintendents of highways, and indemnifying policemen. ILL. ANN. STAT. ch. 24, § 1-4-4 (Smith-Hurd 1962); *id.* ch. 121, § 385 (Supp. 1967); *id.* ch. 24 § 1-4-6. As the dissenting justices note, legislative acquiescence in the contributory negligence rule has been far from complete in Illinois. They point to other instances (e.g., The Safety Appliance Act, The Workmen's Compensation Act, The Workmen's Occupational Disease Act, and The Scaffold Act) where the legislature excepted the situation "from the strict operation of the barring rule of contributory negligence." These justices found that all the statutes mentioned indicated "only a legislative awareness of the rule or a design to avoid the harsh results of its operation" and not a legislative declaration that the old rule should be the law of Illinois. They also remarked: "It can be argued that the legislature's inaction in this area is attributable to its feeling that it is more appropriate, considering the history of the question in Illinois, for the judiciary to act."

which limits the proper function of a court, legislative acquiescence in a judicial rule does not, however, have anything like the same significance as the legislative creation of a new rule. Such acquiescence should, of course, be considered by the court, but its weight should be assessed in light of the real nature of the legislative process. Perceptive commentators have noted widespread legislative indifference toward the reform of tort law,<sup>15</sup> a field in which the forces of inertia are great. This fact and something of the nature of "legislative acquiescence" are pointed up in the present case by the observation made by the dissenting justices that since 1937 there had been nine attempts to get the Illinois legislature to change the contributory negligence rule "and that with a single exception none reached the floor of either House." These justices concluded: "The prospect of securing through legislation a rule better stated to achieve fair dispositions in negligence cases does not appear to be bright."<sup>16</sup> Another factor which makes legislative reform appear unlikely is the fact that rules of immunity—and for this purpose contributory negligence may be classed with such rules—have strong support from highly interested and articulate pressure groups. On the other hand, the "fortuitous victims of negligence . . . form no natural or integrated economic, social, or political group."<sup>17</sup> Perhaps the American Trial Lawyers' Association (successor to NACCA) is potentially such a group.<sup>18</sup> But so far as the present reform is concerned, much of the steam is probably taken out of their drive by the fact that juries now do for plaintiffs illicitly what the change would do for them forthrightly.

This behavior on the part of juries, which is mentioned by the appellate court<sup>19</sup> and is widely conceded, points up two things which are highly relevant to the question dealt with in the present article: (1) Juries, which are not caught up in the cross currents of power politics, probably speak for the community sense of fairness more faithfully than do legislatures. Consistent jury acceptance of proportional negligence, therefore, suggests that legislative failure to enact this reform reflects inertia rather than community sentiment.

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15. Cf. Cowan, *Rule or Standard in Tort Law*, 13 *RUTGERS L. REV.* 141, 159 (1958); Peck, *supra* note 11, at 268-70, 282-83; Pedrick, *On Civilizing the Law of Torts*, 6 *J. Soc. PUB. TEACHERS L.* 2, 8-9 (1961).

16. *Maki v. Frelk*, 239 N.E.2d 445, 450 (Ill. 1968).

17. Peck, *supra* note 11, at 282. See also *id.* at 305 n.180 (recounting the fate of proportional negligence bills in state legislatures). It is probably significant that the only legislative modifications of contributory negligence mentioned in any of the opinions affected workmen who (unlike accident victims generally) have considerable political power through their unions.

18. *But cf.* Peck, *supra* note 11, at 283.

19. 85 Ill. App. 2d 439, 450, 229 N.E.2d 284, 290.

(2) The present rule probably does greater harm to the integrity of the system itself than it does to any group of litigants.

The first point is a relevant consideration under the present section, the second under the next. But before proceeding to the affirmative case for judicial action, two more possible grounds of limitation should be disposed of. First, it is clear that the present change requires no complex implementing legislation. Second, this change will disturb no fabric of custom, unsettle no titles or property rights, and disappoint no reasonable expectations based on the common law rule.<sup>20</sup>

## II.

The subject of the present decision is peculiarly appropriate for judicial action, as indicated by the nature of the two principal objections made to the substantive change, both of which intimately affect the process of judicial administration, which should be a special province of judicial concern and expertise.

The claim that proportional negligence is too complex for practical administration by juries or courts, or that it will entail collateral disadvantages for litigation, is clearly of this kind. No one should be better able to assess the merits of this objection than the judges, who direct and participate in the practical administration of legal rules.

The other objection, based on consistent disregard by juries of the present rule, concerns the integrity of part of the judicial process. To be sure, many persons—including this writer—believe that jury equity and lawlessness may add to the strength of the jury system. But that is no reason for the continuing insistence upon a rule which is so out of step with community notions of fairness as to place upon the juries the need to override the rule.<sup>21</sup> Jury lawlessness, like lawlessness in *any* form, has grave disadvantages. Though it may be the salvation of the law in some circumstances, it does no credit to the law, and it does not enhance the moral stature of the judiciary to persist in rules that regularly call for salvation through lawlessness. Surely it is a proper function of the courts to preserve the integrity of the judicial process.

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20. Only insurance companies could make any plausible claim "to have made commitments and taken action in reliance" on the existing rule. Peck, *supra* note 11, at 306. But their rates are based on gross losses rather than legal analysis, and the effect of change on such losses will probably be minimal, since juries now apply the rule under consideration and settlements are made on this basis. *But cf.* Benson, *supra* note 5.

21. *See also* Keeton, *supra* note 8, at 506-509.