Vanderbilt Law Review

Volume 21
Issue 6 *Issue 6 - November 1968*

Article 4

11-1968

# Comment

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## I. A STEP FORWARD—SMALL BUT SIGNIFICANT

Part of the price we pay for a system wisely dedicated to even-handed justice under law is that courts often fail to identify those exceptional cases in which the highest aims of the system are served rather than threatened by a judicial break with precedent. Thus it happens that in the long, slow story of law reform, a recent case in the Illinois courts raised hopes for a rare and distinctive breakthrough.

In *Maki v. Frelk*, responding to an invitation from the state's supreme court to reexamine the well entrenched rule that contributory negligence of an injured person is a complete bar to recovery for harm negligently caused by another, the appellate court for the second district proposed to abrogate the traditional rule and establish instead a rule apportioning damages.[1] On appeal, however, by a five-to-two decision, the Supreme Court of Illinois adhered to the old rule and suggested that if change is to come, it must come from the legislature.[2] But since today's dissenting opinion may be tomorrow's judgment, *Maki v. Frelk* deserves to be rated not merely as an opportunity lost, but also as a step forward toward more enlightened rules on the legal effect of contributory fault. It is a small step, perhaps, but significant nonetheless.

### A. *The Intermediate Court's Opinion*

Though proposing abrogation of a long-standing rule, the intermediate court's opinion in *Maki v. Frelk* is a model of restraint. Three distinctive aspects of the opinion bear upon this appraisal.

1. *Capitalizing on Illinois' Distinctive Precedents.*—As luck would have it, Illinois has a distinctive legal history on contributory fault. The jurisprudence of most states contains no hint of decisional precedents for comparative negligence. Illinois, in contrast, has been blessed with such treasures as these:

> [I]n proportion to the negligence of the defendant, should be measured the degree of care required of the plantiff—that is to say, the more gross the

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1. 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967).
2. Maki v. Frelk, 239 N.E.2d 445 (Ill. 1968).

> 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 . . . whenever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action.[3]

> [I]f the defendant was guilty of a higher degree of negligence . . . [and that of the plaintiff] was greatly disproportioned or slight, he still might recover. But we are not inclined to extend the rule . . . . [Plaintiff] can not recover, unless the negligence of the defendant clearly and largely exceeds his.[4]

> [A] plaintiff who is even guilty of slight negligence may recover of a defendant who has been grossly negligent, or whose conduct has been wanton or wilful. Hence the doctrine of comparative negligence.[5]

Observe, as did the appellate court for the second district,[6] that though these Illinois precedents referred to the rule as one of "comparative negligence," no attempt was made to apportion damages. Plaintiff recovered all or nothing, in theory, though one may suppose that such "comparative negligence" instructions did in fact encourage juries to compromise by blinking at contributory negligence and reducing damages.

In time, this early Illinois version of comparative negligence was abandoned in favor of a set of contributory fault rules essentially like those in most other states. The appellate court makes the interesting and suggestive comparison that this occurred with the increase in master-servant cases incident to the Industrial Revolution, whereas the current reexamination is spurred by a new revolution—the transportation revolution—that clogs our courts with accident cases and confronts us with the dilemma that "negligence" no longer has its earlier significance, because today we find that "anyone can have an accident."[7]

In light of this history of an early "comparative negligence" rule in Illinois, the intermediate court in the instant case was able to reason that adopting a "comparative negligence" rule in 1967 is returning to a principle once recognized and later abandoned. The court was candid, however, in observing that the old rule did not apportion damages. Thus at best, the proposed change is a return to an earlier principle but not to an earlier rule. But changing a legal rule for the purpose of serving more effectively in a new context a basic principle

3. Galena & Chi. Union R.R. v. Jacobs, 20 Ill. 478, 497 (1858).
4. Illinois Cent. R.R. v. Baches, 55 Ill. 379, 389-90 (1870).
5. Illinois Cent. R.R. v. Hammer, 72 Ill. 347, 351 (1874).
6. Maki v. Frelk, 85 Ill. App. 2d at 445, 229 N.E.2d at 287-88.
7. *Id.* at 446, 229 N.E.2d at 288.

that was served by a different rule in a different context is accomplishing change with fidelity to a traditional of judicial restraint.

2. *Limiting Retroactivity.*—The decision of the intermediate court in *Maki v. Frelk* was cautiously limited, too, in relation to retroactivity. The new rule of apportioning damages in cases of contributory fault was declared to apply only to the instant case and other cases based on future occurrences.[8] There has been much controversy about prospective overruling[9] (or, as viewed from another perspective, limitation of an overruling decision to prospective, but not retroactive, application generally).[10] Even more controversial, perhaps, is the technique of applying the new rule retroactively only to the case at hand.[11] But indisputably, this combination is a more cautious and restrained course of action than fully retroactive overruling; indeed in part, controversy over this technique is spawned by critics who think the courts should do more. This is not to say, however, that prospective overruling is traditional. This form of judicial action was relatively unfamiliar as recently as the 1950's. But in Illinois[12] and a few other states[13] it is today an accepted technique. Thus, the intermediate court's decision in *Maki v. Frelk* was breaking no new ground in this respect.

3. *Limiting Apportionment.*—A third way in which the intermediate court's action in *Maki v. Frelk* was cautiously limited concerns the scope of the new rule of apportioning damages. It was declared to be applicable only if the injured person's negligence "was not as great as" that of the defendant.[14] As noted by the court, there is

8. *Id.* at 453, 229 N.E.2d at 291.

9. *See, e.g.*, Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

10. *Id.* at 58, 65. Professor Mishkin points out that the power of prospective limitation, if recognized at all, should be extended not only to instances of overrulings, but also to instances in which there is a substantial change from what has been previously considered the law, even if no specific precedent is overruled.

11. *See* discussion in subsection B of Part II *infra*.

12. *E.g.*, McDaniel v. Bullard, 34 Ill. 2d 487, 216 N.E.2d 140 (1966); Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960).

13. *E.g.*, Myers v. Genesee County Auditor, 375 Mich. 1, 133 N.W.2d 190 (1965); Parker v. Port Huron Hosp., 361 Mich. 1, 26-28, 105 N.W.2d 1, 13-15 (1960); Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966); Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967); Kojis v. Doctors Hosp., 12 Wis. 2d 367, 107 N.W.2d 131, *modified on rehearing*, 12 Wis. 2d 367, 107 N.W.2d 292 (1961).

14. 85 Ill. App. 2d at 451, 229 N.E.2d at 290.

precedent for this limited rule in some statutes,[15] but others have enacted a broader or "pure" rule of apportionment that applies even when the plaintiff's negligence is greater than defendant's.[16] This, too, is a debatable choice, and the court took the more cautiously restrained course in leaving a substantial area for application of the old rule of contributory fault as a complete bar. Indeed, in theory, it might be said that the court left about as much scope for the old rule as it set apart for the new, since one might suppose that there are about as many cases in which an injured person is as much or more at fault than anyone else in bringing about his injuries as there are cases in which someone else was more at fault than he. When due consideration is given to the greater practical pressures in favor of finding defendants negligent, however, it becomes apparent that, in fact, far less scope is preserved for the old rule. Yet it remains true that in this choice, as in others, the intermediate court takes the course of judicial restraint in effecting change.

### B. *The Opinions in the Supreme Court of Illinois*

The position adopted by the majority in the supreme court is summed up in two brief sentences from the majority opinion:

> After full consideration we think, however, that such a far-reaching change [as overruling the contributory negligence rule in favor of a rule of apportionment], if desirable, should be made by the legislature rather than by the court. The General Assembly is the department of government to which the constitution has entrusted the power of changing the laws.[17]

A minor theme is also sounded:

> As *amici* have pointed out, the General Assembly has incorporated the present doctrine of contributory negligence as an integral part of statutes dealing with a number of particular subjects . . . and *the legislative branch is manifestly in a better position than is this court to consider the numerous problems involved.*[18]

The latter part of this assertion is perhaps ambiguous. If construed as an assertion that a legislature is in a better position in general to consider problems involved in fashioning a new rule of apportionment, the statement seems unsound for reasons explained later in this article.[19] It seems unsound also if construed as an assertion that a legislature is in a better position to consider that particular

15. *E.g.*, ARK. STAT. ANN. §§ 27-1730.1, 27-1730.2 (1962); WIS. STAT. § 331.045 (1961).
16. *E.g.*, MISS. CODE ANN. § 1454 (1942).
17. Maki v. Frelk, 239 N.E.2d 445, 447 (Ill. 1968).
18. *Id.* at 447-48 (emphasis added).
19. *See* text accompanying notes 26-27.

set of problems arising from the fact that the legislature has enacted a number of statutes incorporating the contributory fault rule expressly or impliedly. The dissenting opinion wisely observes:

> These statutes indicate to me only a legislative awareness of the rule or a design to avoid the harsh result of its operation. I do not know of a legislative declaration that it is to be the rule of this State that a plaintiff to whom any want of care whatever attaches be barred from recovering. Too, it must be remembered in evaluating the validity of the majority's holding that the various positions Illinois has taken on the question of contributory negligence have been taken by actions of this court and not by legislative action. 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.[20]

## II. AN ASSESSMENT OF BROADER APPLICATIONS OF COMPARATIVE NEGLIGENCE

Understandably and quite properly, neither the majority nor the dissenting opinion in the Supreme Court deals with problems of detail and method that the intermediate court faced in proposing abrogation of the contributory negligence rule. Though omitted from the opinions in light of the decision reached by the majority, however, these are among the questions a judge would wish to consider in deciding whether to cast his judicial vote for overruling the contributory negligence rule; the feasibility of any alternative rule and of its implementation must be given thoughtful attention before a vote is cast to embark on this new route.

Is it essential to the propriety of judicial action, such as that proposed by the intermediate court, that a court make the more cautiously restrained choices, first, to preserve the rule that contributory fault bars if the injured person was as much or more at fault than the defendant and, second, to overrule prospectively except as to the case at hand rather than retroactively in general? Further, was the intermediate court's position critically dependent on the distinctive history of precedents on "comparative negligence" in Illinois? Or would it be appropriate—perhaps even equally appropriate—for comparative negligence to be adopted by judicial decision in states with a consistent history of judicial pronouncements for the rule that contributory negligence is a complete bar?

These questions will be faced as advocates elsewhere seek to establish the comparative negligence doctrine in their respective jurisdictions.

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20. 239 N.E.2d at 450.

### A. *"Pure" or "Partial" Comparative Negligence*

The "pure" form of comparative negligence seems the superior rule of apportionment. It is difficult to justify discriminating between the case in which the plaintiff is a little more negligent than the defendant and the case in which the defendant is a little more negligent than the plaintiff. Apportionment seems a fairer solution in both cases than making one party bear all his own loss. Moreover, in one sense, the more limited form of comparative negligence would only aggravate this unfair discrimination if it really worked according to its theory, because the party a little more negligent would bear all his own loss plus a little more than half the loss flowing from the injury to the other. The fact that we may believe that as a practical matter it would not work that way—that juries would still blink at the greater negligence of the more severely injured person so as to allow compensation—is no good reason for adding to the pressures of sympathy as this rule would do. It would add a new pressure to find the defendant at least more negligent than the plaintiff so as to evade the rule that the more severely injured but more negligent plaintiff is supposed to receive no compensation at all.

### B. *Special Treatment of the Case at Hand*

On the narrow question whether a prospective overruling shall be applied also to the case at hand, the negative seems the better answer. Applying the new rule only to the case at hand and future cases discriminates between, first, the case in which the plaintiff and his lawyer dispose of the claim by settlement or otherwise in reliance on precedents that contributory negligence bars and, second, the case in which the plaintiff and his lawyer take an appeal and secure an overruling decision. Even apart from the curiosity of thus rewarding peaceful protest more than fidelity to existing law, it is hard to find good grounds for rewarding one litigant alone (or only him and others whose claims are closely related to his). Surely it is often largely fortuity that his is the case so rewarded—that is, often many other factors rather than his deserving conduct bring about the result that his is the case in which the overruling decision occurs.

Moreover, the reliance interests, on the basis of which it is argued that a fully retroactive decision would be improper, seem to be outweighed by other factors in relation to this specific rule that contributory fault bars. Added to the injustice of the rule, and its consequent unfairness to all those whose claims it affects, adversely, is the fact that the deviations from its application are widespread but lacking in evenhandedness. That is, the unpoliced and unlawful apportion-

ment of damages that occurs in many jury awards today adds irregularity in its application to all the other injustices of the present rule. If overruling is the answer, then outright, retroactive overruling—the kind of overruling that was traditionally used in the few overruling decisions that occurred more than a decade ago—is the kind more appropriate to this problem.

### C. *How Distinctive Are the Illinois Precedents?*

Every state has its devices for excusing the plaintiff from the bar of contributory fault. Sometimes it is a version of last clear chance,[21] sometimes it is a dichotomy distinguishing conditions from causes,[22] and sometimes it is a rule that ordinary contributory negligence is no bar to damages for harm caused by defendant's recklessness.[23] All such devices are, in a sense, ways of comparing the conduct of the plaintiff with the conduct of the defendant on some kind of standard—qualitative, quantitative, or a bit of both. The Illinois precedents for "comparative negligence" may have differed more in terminology than in substance from these excuses from the bar of contributory fault that have been recognized in other jurisdictions. The lack of precedents like those of Illinois should not deter a court of another jurisdiction from following the lead of the intermediate court and the dissenting justices of the Illinois Supreme Court in supporting a rule of apportioning damages. The choice should be made, instead, on more basic considerations—among them the substantive merits of apportioning damages and the fundamental issues of legal process involved in determining whether changes are to be made by courts or legislatures. The remainder of this article will be directed to these more basic issues.

## III. APPORTIONMENT OR COMPLETE BAR

Concerning the relative merits of a rule of apportionment and a rule that contributory fault bars completely, the legal literature is extensive[24] and the better choice seems clear. The rule that contributory

21. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 479, 480 (1965).
22. *E.g.*, Wall v. King, 280 Mass. 577, 182 N.E. 855 (1932).
23. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 503 (1965).
24. *See, e.g.*, C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936); 2 F. HARPER & F. JAMES, TORTS §§ 22.1-22.3 at 1193-1209, § 22.11 at 1236-41 (1956); INSTITUTE OF JUDICIAL ADMINISTRATION, COMPARATIVE NEGLIGENCE (1955, Supp. 1959); W. PROSSER, TORTS § 66 at 443-449 (3d ed. 1964); G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE (1951); Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1 (1936); Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958); Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 604

fault bars completely is a curious departure from the central principle of nineteenth century Anglo-American tort law—that wrongdoers should bear the losses they cause. Comparative negligence more faithfully serves that central principle by causing the wrongdoers to share the burden of resulting losses in reasonable relation to their wrongdoing, rather than allocating the heavier burden to the one who, as luck would have it, happened to be more severely injured. Nor is the rule that contributory fault bars recovery any more defensible within the framework of modern trends toward strict liability. It is a rule that few legal writers today even attempt to defend on the merits.

The contributory fault rule is heartily disapproved by laymen too. Countless jury verdicts in negligence cases represent deviations of the law in action from the law in theory; juries are instructed that contributory negligence is a complete bar, but they are permitted, in fact, to apply a rough, largely unpoliced, and uneven form of comparative negligence. Thus the need for change is compelling, not only because comparative negligence is superior to the contributory negligence rule on the merits, but also because the existing clash between law and practice is a deplorable blight on the legal system.

## IV. Other Questions of Substantive Law

Consistently with traditional judicial method, and quite appropriately it would seem, the intermediate court's opinion in *Maki v. Frelk* and the opinion of the dissenting justices of the Supreme Court do not attempt to anticipate and answer the many questions that will arise over the course of time as courts fashion a suitable doctrine of comparative negligence. Is percentage apportionment the ideal solution? If ideal for some cases, is it so for all? Perhaps it is fair to say that in our preoccupation with the major question whether to abrogate the rule that contributory fault bars, we have rarely turned our minds to the question whether rules better than those of the existing comparative negligence statutes and decisions could be developed. Perhaps there are even better ways of serving the principle that the burden of loss should be allocated fairly among those whose negligence contributed to it. For example, might it be better, either in general or for some partieular classes of cases, to bar damages for pain and suffering, limiting the negligent plaintiff's right of recovery to what-

(1932); Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 Mich. L. Rev. 689 (1960); Philbrick, *Loss Apportionment in Negligence Cases*, 99 U. Pa. L. Rev. 572, 766 (1951); Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 Ark. L. Rev. 89 (1959); Turk, *Comparative Negligence on the March*, 28 Chi.-Kent L. Rev. 189, 304 (1950).

ever proportion of the economic loss seems appropriate to the fact-finder in light of the relative fault of the parties and the denial of damages for pain and suffering? An obvious characteristic—arguably a disadvantage—of such a rule is the want of effective controls over the broad discretion it would openly grant to juries. But one may question the extent to which the scope of discretion under such a rule would exceed that which juries in fact possess under percentage rules of apportionment or under the practical operation of a rule that theoretically bars the plaintiff completely for contributory fault. Indeed, such a rule would at least place some objective limits on the range of discretion—limits related to economic loss. The purpose here, however, is not to propose a comparative negligence rule that excludes damages for pain and suffering but only to suggest that familiar rules of comparative negligence may not be beyond improvement. Moreover, even apart from any such substantial challenge as this to familiar rules of comparative negligence, there are many questions of detail that a court making the basic change to comparative negligence may wisely leave for resolution in the future.[25] In doing so, it will be following the lead of legislatures, since comparative negligence statutes have commonly been inexplicit on many questions of detail.

## V. ISSUES OF LEGAL PROCESS

The major issue of legal process—the question whether a court should change the outmoded contributory negligence rule or instead wait for the legislature of its state to act—is actively disputed. There is little doubt that ten years ago a majority of judges and perhaps academic commentators as well would have answered that this is a task for legislatures. A significant change has occurred in these ten years. More than half of the state courts of last resort have contributed to a total of more than ninety overruling decisions on more than thirty separate rules of tort law.[26] It is becoming an accepted

25. Among these are questions concerning "difficulties of administering comparative negligence in multi-party litigation [consider, for example, the claim of P, who is 40% at fault, against A and B who are respectively 40% and 20% at fault, or the claim of Q, who is 30% at fault, against C and D who are respectively 40% and 30% at fault]; the device of special interrogatories to juries in aid of judicial control and judicial review of comparative negligence findings by juries; . . . whether liability insurance [does or] ought to cover only the liability of an insured after an offset because of his own losses or whether insurance [does or] ought to cover percentages of loss proportioned to fault without offset; [and] problems relating to comparative contribution; . . . ." R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 521-22 (1965) (footnotes omitted). Another such question is the continued role of "assumption of risk" once comparative negligence is adopted.

26. Most of such decisions through the years 1958-65 are collected in Keeton,

principle that courts should take a more active role in reforming outmoded tort law than they had done before this past decade. Although no judicial opinions previous to those filed in *Maki v. Frelk* had brought this new spirit to bear upon the contributory negligence rule, this seems a very appropriate area for law reform by judicial decision. Moreover, consideration of this possibility has been suggested in at least one other judicial opinion, which is interesting as well for what it holds in relation to apportionment in a case of successive injuries.[27]

Courts are at least as well situated as legislatures to inform themselves about all the factors that should be taken into account even for fashioning a new doctrine in full detail and announcing it all at once. They are better situated than legislatures for developing a doctrine of comparative negligence gradually, resolving questions of detail as they are presented in the context of concrete cases, rather than attempting—always unsuccessfully—to anticipate and answer at once every question that may arise in the future.

Inertia of the process imposes a heavy burden, apart from the merits, on any proposal for legislation. This burden weighs most heavily on proposals for reforming legal doctrine developed through the common law tradition of case decisions. This factor must be weighed, however, along with the values underlying stare decisis. It is especially relevant in this weighing process that a wide-scale judicial change to comparative negligence would produce less stress on the doctrine of stare decisis than is commonly supposed.

The essence of stare decisis is continuity, and sometimes continuity is better served by changing a rule than by steadfastly adhering to it. The point is well expressed by the New York Court of Appeals in

*Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TEX. L. REV. 1254 (1966). The question of legal process discussed briefly in the text here is more fully explored, both generally and in relation to the contributory fault rule particularly, in this article and in Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962). The outline of a proposed judicial opinion on the subject appears at 508-09 of the latter article.

27. Loui v. Oakley, 438 P.2d 393 (Hawaii 1968). Plaintiff was injured by several alleged tortfeasors in accidents occurring months and years apart. Held, error for the trial court to instruct the jury that if it could not apportion the damages by a preponderance of the evidence it could hold the first alleged tortfeasor liable for the total of all damages to which his conduct contributed, even though aggravated by later accidents. If the jury is unable to determine by a preponderance of the evidence how much of the plaintiff's damages can be attributed to the defendant's negligence, it should make a rough apportionment, and if the evidence is insufficient for such apportionment, it should allocate the damages equally among all the accidents regardless of the possibility that the plaintiff may, for any reason, such as contributory negligence or limitations, be barred from recovering from one or more of the alleged tortfeasors. The opinion calls attention to the relationship of this problem to comparative negligence and suggests that the time may be ripe for judicial reconsideration of the rule that contributory negligence is a complete bar.

*Bing v. Thunig*.[28] That court, rather than rest a decision on the ground that negligence of nurses at a hospital might be classified as "administrative" and not "medical," chose to overrule precedents for the hospital's immunity. The court observed that, from the earlier decisions applying the administrative-medical distinction, "there is to be deduced neither guiding principle nor clear delineation of policy; they cannot help but cause confusion, cannot help but create doubt and uncertainty.[29]

Comparative negligence is more faithful than contributory negligence to the principle of basing liability on fault. It adheres more fully to that theme. Sometimes fidelity to principle contributes more than fidelity to specific rules could contribute to the objectives that underlie the doctrine of stare decisis—to stability, predictability and evenhandedness of law.

In relation to contributory negligence, as elsewhere in the law, uncertainty and lack of evenhandedness are produced by casuistic distinctions. This has happened, for example, in doctrines of last clear chance and in distinctions between what is enough to sustain a finding of primary negligence and what more is required to sustain a finding of contributory negligence. Perhaps even more significant, however, is the casuistry of tolerating blatant jury departure from evenhanded application of the legal rules of negligence and contributory negligence, with the consequence that a kind of rough apportionment of damages occurs, but in unpoliced, irregular, and unreasonably discriminatory fashion. Moreover, the existence of this practice sharply reduces the true scope of the substantive change effected by openly adopting comparative negligence.

Thus, stability, predictability, and evenhandedness are better served by the change to comparative negligence than by adhering in theory to a law that contributory fault bars when this rule has ceased to be the law in practice.

## VI. CONCLUSION

The views expressed here lead inexorably to the conclusion that courts of the many jurisdictions with no history of precedents for comparative negligence should not delay in overruling the outmoded doctrine of contributory negligence. They lead, also, to the conclusion that it would even better serve the interests of justice if the overruling were fully retroactive, and if the new rule of apportionment were not limited to cases in which the defendant's negligence was greater

28. 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957).
29. *Id.* at 661, 163 N.Y.S.2d at 6, 143 N.E.2d at 5.

than the plaintiff's. But lest these expressions of preference for a solution differing in detail from that of the intermediate court in *Maki v. Frelk* be misconstrued as more critical than they are intended to be, let it be clear that the three choices of the course of restraint—in relying on the distinctive Illinois history of precedents, in overruling prospectively except as to the case at hand, and in preserving the contributory negligence rule for cases in which defendant's negligence is not greater than plaintiff's—are defensible as ways of satisfying a compelling need for change while using methods that offer as little challenge to continuity as possible. My applause for the dissenting justices in the supreme court and for the justices of the Appellate Court for the Second District of Illinois is unrestrained.