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No one today denies that appellate courts have a creative function, but argument persists as to how extensive the function is. The argument is particularly loud and continuous in the tort cases, not because these cases are any more or less susceptible to judicial innovation than are cases in other areas of the law, but because (along with constitutional cases, including criminal ones) they attract more popular attention than do most other types of litigation.

For one thing, it is clear that the scope of the function depends initially upon what type of appellate court is involved. An intermediate appellate court, which takes its law from a higher court in its own jurisdiction, is ordinarily not in a position to make new law and to make it stick. The Appellate Court for the Second District of Illinois, which first decided that a rule of comparative negligence should replace the rigid rule of contributory negligence in that state,[1] would never have done so had it not been directed by the Supreme Court of Illinois to consider that very question. What the intermediate court did was to set up a case for subsequent review by the higher court at the latter's request.[2] This does not mean that an intermediate court, or even a court of first instance, never should and never will announce new rules of law on its own initiative. On some matters the decisions of these courts may be final, and on these matters the lower court is really the highest one and is, therefore, in a position to "make law" just as effectively as the higher court is. Apart from those matters, the function of setting up cases for subsequent review by the highest court may be appropriate even without a formal request from above, if the issue seems ripe for consideration, even though the higher court may not be aching to get at it. A hint contained in an earlier concurrence or dissent may be enough to serve as an invitation, but not even this much of a suggestion is necessary. The lower court's own appraisal of the socio-legal situation is enough, particularly where it is supported by willing and competent counsel. The fact remains,

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

2. "It is not within the province of this Court to overrule decisions of the Supreme Court and the foregoing suggestions are made by this Court in conformity with [the Supreme Court's] order of transfer directing us to consider, as a matter of justice and public policy, whether the contributory negligence rule should be changed." *Id.* at 453, 229 N.E.2d at 291.

though, that in such cases the lower court is not actually making new law, any more than the Appellate Court for the Second District of Illinois did in 1967. It is only creating a readier opportunity for the highest court to make new law.

In *Maki v. Frelk* the majority of the Illinois Supreme Court declined to take advantage of the opportunity for which they had previously asked. Why? The reasoning in the majority opinion goes no further than to say "that such a far-reaching change, if desirable, should be made by the legislature rather than by the court. . . . and the legislative branch is manifestly in a better position than is this court to consider the numerous problems involved."[3] The common report in Illinois is that members of the court (and of the bar as well) were frightened by the complexity of a good comparative negligence system and were unwilling to promulgate a new rule of law that would require so many subordinate adjudications—subprovisions and subparagraphs—to be added then or later, as would inevitably be necessary before a workable system of comparative negligence could be made fully operative.

One of the commonest characteristics of judicial overrulings in the tort field (and in other fields as well) has been that they involved clearcut and uncomplicated issues, matters that could be answered one way or the other, without any necessity for considering incidental problems and providing elaborate judicial implementation. For example, when judges changed the old common law to permit recovery for prenatal injuries,[4] they did not need to worry about companion problems or about procedure. The change in the law was complete within itself. There was no felt need even for use of the *Sunburst*[5] technique to make the overruling a prospective one. The establishment of products liability[6] was equally unitary and complete within itself, as was recognition of the right of privacy.[7] The same was true when intrafamily immunities were eliminated.[8] For elimination of charitable immunities,[9] prospective overruling to give charitable associations time to take out liability insurance took care of the only incidental problem that raised serious difficulties. The abandonment of governmental tort immunity, when not accomplished by the erosive technique afforded by the governmental-proprietary dichotomy, was, despite its tax and insurance side-effects, in fact similarly simple, so

3. Maki v. Frelk, 239 N.E.2d 445, 447-48 (Ill. 1968).
4. Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951).
5. See Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. Rev. 631 (1967).
6. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
7. Olan Mills, Inc. v. Dodd, 234 Ark. 495, 353 S.W.2d 22 (1962).
8. Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966).
9. Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966).

that prospective overruling afforded adequate opportunity to the new defendants[10] to plan the precautionary programs that the new law called for. None of these were problems that the overruling court itself had to answer in order to make the new law a workable one. How do these innovations compare with the initiation of a system of comparative negligence?

In contrast, a judicial pronouncement merely promulgating comparative negligence would be baldly incomplete, because it would leave so many relevant questions unanswered:

> (1) Should injured persons recover only in cases in which their negligence is less than that of the other party, as in Arkansas[11] and Wisconsin,[12] or in every case in which the negligences can be apportioned, as under the model Prosser statute[13] and in most English-speaking states outside the United States?[14]
>
> (2) Should the comparison of negligences be in terms of percentages, as in most jurisdictions, or in terms of "slight" and "gross", as in others?[15]
>
> (3) If the comparison is to be in terms of percentages, should they be percentages of causal responsibility for the injury, or percentages of fault (relative badness)?
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> (4) If both parties be injured, should each be allowed to recover from the other, with a setoff?[16] Or, recognizing that recoveries really are from insurance companies, should each injured party be entitled to his full comparative recovery from the other's insurer, without setoff, on the theory that a liability policy covers actual liabilities regardless of separable rights in others?[17]
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> (5) What about the multi-defendant case in which, for example, injured plaintiff is responsible for 15 percent of the negligence, D for 45 percent, E for 25 percent and F for 15 percent? May the plaintiff recover from any, all, or which of the others?

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10. 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).

11. "[C]ontributory negligence . . . is of less degree than" that of the defendant. ARK. STAT. § 27-1730.2 (1962).

12. "[I]f such negligence was not as great as" that of the defendant. WIS. STAT. ANN. § 895.045 (1966).

13. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 508 (1953), 41 CALIF. L. REV. 1, 37 (1953).

14. These statutes are reviewed in Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 238-245 (1950).

15. NEBR. REV. STAT. § 25-1151 (1964); S.D. CODE § 47.0304-1 (Supp. 1960).

16. This is the practice in Mississippi. *Cf.* Johnson v. Richardson, 234 Miss. 849, 108 So. 2d 194 (1959).

17. *Cf.* Leflar and Wolfe, *Panel on Comparative Negligence and Liability Insurance*, 11 ARK. L. REV. 71 (1956-57).

(6) If comparative negligence, permitting recovery by a negligent injured person, is established, do not logic and equal fairness require that a rule of contribution between joint tortfeasors be established at the same time as part of the same system?

(7) If comparative negligence is put into effect, should the last clear chance doctrine, if any, previously accepted in the jurisdiction be abandoned or retained?

(8) Should the rule, followed in some states, allowing full recovery for wilful and wanton misconduct despite the injured person's contributory negligence[18] be retained, or does comparative negligence take its place?

(9) What about assumption of the risk? Should that defense be regarded as something completely embodied in contributory negligence? If not, what part of it still remains as a separate defense?[19]

(10) Should special verdicts or answers to interrogatories be required to set out the total value of injury suffered and the specific percentages of negligence charged to each party, so that a court can doublecheck the jury's damage calculations, or should the jury be left free to return a damages verdict without supporting figures?[20]

(11) If the state has a host-guest statute, does the comparative negligence system supersede it, or does it remain as an exception within the system?

Procedural questions such as burden of proof will have to be answered too, but it does not seem quite right to speak of them as added complexities, since they must always be answered with reference to every rule of substantive liability law. Even without them, the list of problems that are peculiar to the initiation of comparative negligence is awesome; one cannot be surprised that the Illinois court was frightened by it. The list seems to call for the enactment of a comprehensive statute, with sections and subsections carefully worked out in advance by a legislative drafting committee aided by an advisory commission.

Is that the way our few American systems of comparative negligence have come into the law? It seems not.

The crude system of comparative negligence which Illinois em-

18. Williams v. Carr, 68 Cal. Rptr. 305, 440 P.2d 505 (1968).

19. *See* the history of RESTATEMENT (SECOND) OF TORTS §§ 496A *et seq.* (1965), recited by Greenhill, J., in Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 377-78 (Tex. 1963).

20. If there are no supporting figures, the jury's award may be open to the suspicion that the apportionment instructions were disregarded by the jury. *See* Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 497 (1953), 41 CALIF. L. REV. 1, 28 (1953).

ployed a century ago,[21] then abandoned, was judge-made. The Nebraska and South Dakota statutes say no more than that a plaintiff's recovery shall not be barred when his negligence "was slight and the negligence of the defendant was gross in comparison."[22] The present Arkansas statute,[23] which like those in Georgia[24] and Maine[25] is modeled after that of Wisconsin,[26] provides simply:

> § 1. Contributory negligence shall not bar recovery of damages for any injury, property damage or death where the negligence of the person injured or killed is of less degree than the negligence of any person, firm or corporation causing such damage.
>
> § 2. [P]rovided that where such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence.

The 1956 Puerto Rican statute is even shorter. In its entirely, as added to an earlier statute imposing liability for "damage to another through fault or negligence," it reads: "Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity."[27]

The model statute[28] which Dean William L. Prosser drafted some years ago is more comprehensive:

> 1. In all actions hereafter accruing for negligence resulting in personal injury or wrongful death or injury to property, including those in which the defendant has had the last clear chance to avoid the injury, the contributory

21. *E.g.*, Galena & Chicago Union R.R. v. Jacobs, 20 Ill. 478 (1858); Wabash R.R. v. Henks, 91 Ill. 406 (1879).

22. NEB. REV. STAT. § 25-1151 (1964); S.D. CODE § 47.0304-1 (Supp. 1960).

23. ARK. STAT. §§ 27-1730.1, 27-1730.2 (1962).

24. GA. CODE § 105-603 (1956).

25. ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1967).

26. WIS. STAT. ANN. § 895.045 (1966).

27. LAWS OF PUERTO RICO ANN. tit. 31, § 5141 (Supp. 1967).

28. Prosser, *supra* note 13. It is interesting that this statute was enacted in Arkansas in 1955 (Ark. Acts of 1955, No. 191) after a visit by Dean Prosser to the state, and then was replaced in 1957 by the much less comprehensive and more ambiguous statute now in force. ARK. STAT. §§ 27-1730.1, 27-1730.2 (1962). A number of reasons, none of them as convincing now as they seemed to the legislators in 1957, were given for the changeover. For one thing, it was argued that the Prosser procedure was too complicated. The answer to that should be that the complications are there whether they be covered by the statute or not. The argument most used against the Prosser statute, however, was based upon a suppositious case. Plaintiff, driving an ordinary car, collides with defendant's heavy freight truck. Plaintiff, chargeable with 25% of the negligence, suffers $4,000 damages, and can collect $3,000 from defendant. The defendant, chargeable with 75% of the negligence, suffers $40,000 damages. He can collect $10,000 from plaintiff. On setoff the plaintiff must pay the defendant $7,000. Personal injury lawyers traditionally representing small clients argued that this was grossly unfair. Insurance companies were opposed to the whole idea of extending liabilities, particularly if a setoff should not be allowed, though they operated only in the background of the legislative repeal and replacement battle. For a review of the early Arkansas experience, see Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959).

> negligence of the person injured, or of the deceased, or of the owner of the property, or of the person having control over the property, shall not bar a recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the injured person . . . .
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> 2. [T]he court shall make findings of fact or the jury shall return a special verdict which shall state:
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> (a) the amount of the damages which would have been recoverable if there had been no contributory negligence; and
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> (b) the extent to which such damages are diminished by reason of such contributory negligence.

The Mississippi statute[29] is essentially the same as the first section of the Prosser draft, except that Mississippi does not mention "last clear chance."

Every one of these enactments was short and simple, leaving unanswered many of the companion problems that a one-line ukase, "Let there be comparative negligence," would inevitably present. Likewise, every one of them had to be fleshed out by the courts in working details.

The Wisconsin courts have had more experience in fleshing out their statute, enacted in 1931, than have the courts in any other state. Since contribution between negligent joint tortfeasors had already been accepted judicially[30] without any legislative enactment in Wisconsin, the desirable correlation between contribution and comparative negligence was easy to achieve, though it was not until 1962 that contribution was changed by the court from a flat 50-50 division between joint tortfeasors to a division of the loss based on their comparative negligence.[31] Also, it was not until 1962 that the relationship between assumption of the risk and contributory negligence was established; the defense of assumption of the risk was abolished by the courts,[32] at least where the assumption might be implied from conduct unreasonably exposing one's self to hazards. This was thereafter to be classified as negligence and to be compared. In the same year, 31 years after the comparative negligence statute was enacted, the Wisconsin court concluded that "gross" negligence, which, like "wilful and wanton" misconduct in other states,[33] had previously in Wisconsin

29. MISS. CODE ANN. § 1454 (1942).

30. Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 167 N.W. 1048 (1918); *accord,* Frankfort Gen. Ins. Co. v. Milwaukee Elec. Ry. & Lt. Co., 169 Wis. 533, 173 N.W. 307 (1919). *See* Comment, 1960 WIS. L. REV. 478.

31. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962); *accord,* Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

32. McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962) (automobile case); Colson v. Rule, 15 Wis. 2d 387, 113 N.W.2d 21 (1962) (farm labor case). This overruling was forecast by concurring opinions in Baird v. Cornelius, 2 Wis. 2d 284, 297, 303, 107 N.W.2d 278, 285, 288 (1961).

33. Williams v. Carr, 68 Cal. Rptr. 305, 440 P.2d 505 (1968).

resulted in full recovery despite a plaintiff's contributory negligence,[34] should thereafter be dealt with as an aspect of comparative negligence with a reduced recovery only.[35]

The Wisconsin court easily decided that the comparison of negligences between plaintiffs and defendants under the statute should be in terms of percentages,[36] and not in terms of "slight" and "gross" negligences as in some other states.[37] However, it was harder for them to decide whether the reduction of recovery should be in terms of the percentages compared with each other or compared with 100 percent. The problem is presented when an auto driver chargeable with 33-1/3 percent of the negligence suffered a $30,000 injury. At first the court held that the two percentages, the plaintiff's 33-1/3 percent and the defendant's 66-2/3 percent, should be compared with each other, so that the plaintiff's recovery would be reduced by one-half, to $15,000 on these facts.[38] But it soon reversed itself, concluding that the reduction should be in the proportion of the plaintiff's negligence to the total 100 percent,[39] which in this illustration would permit a $20,000 recovery. A problem remained as to allocation of percentages when there were multiple defendants. If a plaintiff's negligence were set at 40 percent and that of two joint defendants at 30 percent each, the combination of the defendants' negligences would have enabled the plaintiff to recover for 60 percent of his injury from them as joint tortfeasors. The Wisconsin court decided that this should not be allowed, that the separate negligences would have to be individually compared,[40] so that the plaintiff could recover nothing on these facts, since his negligence was greater than that of

34. *See* Wedel v. Klein, 229 Wis. 419, 282 N.W. 606 (1938). In Arkansas and Maine, whose comparative negligence statutes are like Wisconsin's, it remains an open question whether a defendant's "wilful and wanton misconduct" still permits a 100% recovery by a contributory negligent plaintiff. *See* Billingsley v. Westrac Co., 365 F.2d 619 (8th Cir. 1966) (an Arkansas case); Moses v. Scott Paper Co., 280 F. Supp. 37 (S.D. Me. 1968); Ellis v. Ferguson, 238 Ark. 776, 385 S.W.2d 154 (1965). On last clear chance and comparative negligence, see Loftin v. Nolin, 86 So. 2d 161 (Fla. 1956), Annot., 59 A.L.R.2d 1257 (1958). Wisconsin had not accepted the last clear chance doctrine, Switzer v. Detroit Inv. Co., 188 Wis. 330, 206 N.W. 407 (1925), but its gross negligence rule served most of the same purposes until the advent of comparative negligence.

35. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). *Cf.* Atlantic Coast Line R.R. Co. v. Street, 116 Ga. App. 465, 157 S.E.2d 793 (1967) (assumption of the risk retained as independent defense).

36. Engebrecht v. Bradley, 211 Wis. 1, 247 N.W. 451 (1933).

37. NEB. REV. STAT. § 25-1151 (1964); S.D. CODE § 47.0304-1 (Supp. 1960).

38. Paluczak v. Jones, 209 Wis. 640, 245 N.W. 655 (1932).

39. Cameron v. Union Auto. Ins. Co., 210 Wis. 659, 246 N.W. 420 (1933); *accord,* Bohlmann v. Penn. Elec. Corp., 232 Wis. 232, 286 N.W. 552 (1939).

40. Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721, (1934); Schwenn v. Loraine Hotel Co., 14 Wis. 2d 601, 111 N.W.2d 495 (1961). *Contra,* under a substantially identical statute, Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20 (1962).

either defendant. If a plaintiff's negligence were fixed at 30 percent, one defendant's at 15 percent, and the other defendant's at 55 percent, the plaintiff would collect nothing from the 15 percent party but would collect 70 percent from the 55 percent party. And a plaintiff would collect 85 percent from all the defendants as joint tortfeasors in a case in which his negligence is rated at 15 percent, while the multiple defendants are rated at 40 percent, 25 percent, and 20 percent respectively.[41]

On the question whether the comparison should be between percentages of causal responsibility or percentages of fault (relative badness), the Wisconsin court has given a somewhat ambiguous answer, saying that the test is one of "causal negligence,"[42] without answering the question whether this means proportion of causation or proportion of negligence:

> [T]his court has never attempted to lay down any formula for determining how much weight is to be accorded to the element of negligence and how much to that of causation in comparing causal negligence. Neither do we think it advisable now to attempt to do so. This is something that had best be left to the common sense of juries.[43]

However in Wisconsin comparative negligence cases, juries are required to return special verdicts setting out the total amount of the plaintiff's injury and the percentages of negligence attributable to each of the parties. Specific answers to other relevant questions are also required. The Wisconsin comparative negligence statute did not itself require special verdicts, but the procedure existed independently and was adapted by the courts to the comparative negligence problem.[44] Thus the impossibility of effective jury control, inherent in a general verdict procedure, was avoided in Wisconsin by judicial action, whereas general verdicts are still used in several other states.

Since Wisconsin has never had a host-guest statute, it did not have to deal with that complication. Other states have not faced the problem squarely. It would be easy to conclude that a comparative

41. Chille v. Howell, 34 Wis. 2d 491, 149 N.W.2d 600 (1967) (plaintiff 5% negligent got 95% recovery against joint tortfeasors; D was 75% negligent and E was 20% negligent, but whole judgment was collected from E since D was financially irresponsible).

42. "The comparison of negligence is determined not by the kind or character or the number of respects of causal negligence but upon the degree of the contribution to the total of such negligence to the occurrence of the accident attributable to the persons involved." Grana v. Summerford, 12 Wis. 2d 517, 521, 107 N.W.2d 463, 465 (1961).

43. Kohler v. Dumke, 13 Wis. 2d 211, 216, 108 N.W.2d 581, 584 (1961); *accord*, Cirillo v. City of Milwaukee, 34 Wis. 2d 705, 150 N.W.2d 460 (1967).

44. *See* Callan v. Wick, 269 Wis. 68, 68 N.W.2d 438 (1955) (aggregate of negligence must always equal 100%); Catura v. Romanofsky, 268 Wis. 11, 66 N.W.2d 693 (1954); Schumacher v. Wolf, 247 Wis. 607, 20 N.W.2d 579 (1945).

negligence statute should completely supersede an earlier host-guest statute, but most states have merely assumed that their guest statutes remained in force.[45]

Puerto Rico's[46] is the most broadly and vaguely worded of all the comparative negligence statutes in the United States; yet it has apparently been working satisfactorily for twelve years without a great deal of judicial interpretation. It was held that the word "imprudence" as used in Puerto Rico's statute included the doctrine of assumption of the risk, so that both assumption of risk and contributory negligence are bases for apportionment of damages.[47] The last clear chance doctrine, however, is not so clearly subsumed under comparative negligence and may persist as a separate justification for complete recovery.[48] Comparative damage awards have been sustained when the parties are equally negligent[49] and when the plaintiff's negligence was equal to that of the two defendants combined,[50] thus making it clear that recovery was not limited to cases in which the plaintiff's negligence was less than that of a single defendant or the combined negligence of two or more defendants. The equivalent of a special verdict in the lower court is required, in that the trial judge must state the degree of fault attributed to the plaintiff and set out the reduction in recovery correspondingly.[51] Though not all of the ambiguities in the Puerto Rican statute have yet been resolved, it is apparent now, as it was in 1956,[52] that the complexities left for judicial solution are about as great as if the change had come by judicial decision instead of statutory enactment.

Examination of the record shows that the actual performance of legislatures in enacting comparative negligence laws has not been much, if any, better than might be achieved by courts using their traditional one-step-at-a-time technique. If the legislatures had foresightedly thought about all the problems that would arise under their enactments and had included in the enactments reasonable answers to the problems, so correlated as to afford a logical and consistent system of law and administration, their approach would clearly have

45. *See, e.g.*, Landrum v. Roddy, 143 Neb. 934, 12 N.W.2d 82 (1943).

46. LAWS OF PUERTO RICO ANN. tit. 31, § 5141 (Sup. 1967).

47. Vinas v. Pueblo Supermarket, 86 P.R.R. 31 (1962).

48. *See* Quiñones v. Hernández, 83 P.R.R. 206 (1961); Ortiz v. Puerto Rico Transp. Authority, 80 P.R.R. 227 (1958).

49. Flores v. F. & J. M. Carrera, Inc., 83 P.R.R. 320 (1961).

50. Viñas v. Pueblo Supermarket, 86 P.R.R. 31 (1962).

51. Serrano v. Lugo, 83 P.R.R. 290 (1961).

52. The writer spent a week in Puerto Rico in September, 1956, at the invitation of the University of Puerto Rico Law School and the Bar Association of the Commonwealth, discussing implementation of the new comparative negligence statute. Many of the problems then discussed still remain to be solved, presumably because they have not yet been presented to the Supreme Court of Puerto Rico.

been superior. Legislatures have the opportunity, with the aid of drafting bureaus, study commissions and the like, to come up with carefully planned statutes which foresee and prescribe the rules and procedures for all the variations that are apt to arise under their enactments. Such careful pre-planning can produce better new law and correspondingly better guidance for trial judges, lawyers, and citizens, who have to comply with and administer the new law, than can the one-shot pronouncements of an appellate court that has to decide one narrow question at a time, then wait for litigation to present, in unanticipated form, the next aspect of the problem that it will have to pass upon. There is no assurance that oncoming questions will reach the court in any logical order, nor that related matters that ought to be considered together will even be mentioned by counsel when such matters do not bear directly upon the outcome of the immediate litigation. Important questions may not receive authoritative answers for years or decades after the basic rule is promulgated, and in the meantime, lawyers and trial judges may simply bypass the problem because they cannot know the answer to it. New rules that are laid down gradually over the years heap confusion upon everyone who is concerned with them. Yet the whole body of the common law came into being in that fashion, and every one of the legislatively created systems of comparative negligence in the United States has had the same sort of confusing gradualist history. The reason for this is that the legislatures, in their slap-dash fashion, have promulgated laws as incompletely planned as those that the courts would have been compelled, by the nature of the judicial process, to promulgate had they been doing the same job. The details of the job have been left for the courts to work out anyway.

There are of course other factors, in addition to the complexity of the area to which the suggested new law relates, that affect the conclusion as to whether judicial, rather than legislative, lawmaking is appropriate. Probably the best summary of these factors, relevant to this sort of problem, is that given by Professor Robert E. Keeton of Harvard.[53] In "an epilogue of application," Professor Keeton tested his list of considerations against the comparative negligence proposal specifically and concluded that this is an area appropriate for judicial initiative.[54] Though the present writer a few years ago would have reached the opposite conclusion, primarily because of fears that an appellate court could not do as good a job as could a well-equipped and far-seeing legislature in planning for all the complexities inherent

53 .Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 476 (1962).

54. *Id.* at 506.

in a system of comparative negligence, he has now come around to agreement with Professor Keeton's analysis. The assumption of legislative superiority is too patently a theoretical one only, not based on history.

If a given legislature has chosen to act, either in broad, vague language or in meticulous detail, the courts go on from there. Their task may be, and historically has been, as difficult as if they had initiated the rule of comparative negligence themselves. The question presented by *Maki v. Frelk* is whether an appellate court should promulgate the new rule when the legislature has not done so and shows no signs of soon doing so. That is the usual situation in this country today.

The fact that legislatures in the United States have taken few steps in recent years toward establishing comparative negligence[55] seems to be the key fact. It must be assumed that for the late twentieth century the apportionment of losses between negligent parties is fairer than, and generally preferable to, the old harsh rule of contributory negligence. That will not be argued here; it has been amply discussed elsewhere. The change is one that ought to be made, somehow. Why have the legislatures not taken care of the matter within the last fifteen or twenty years?

The explanation probably lies in the nature of legislatures and legislative action. Comparative negligence involves a type of social progress to which no potent social action group is politically committed. The organized liability insurers are, for their own reasons, generally against it; the plantiffs' bar is lukewarm about it; and the general public, except for the minority involved in accident lawsuits, hardly knows what the problem is. Legislatures are seldom alert to social needs that are not backed up by political pressures. Social needs with no potent lobby behind them, particularly if there is an active lobby against them, ordinarily do not receive much favorable attention in state legislatures. They are the sort of thing that courts have to take care of.

With reference to the sort of private problems that are normally settled by litigation, courts are more social-minded than legislators. At least the attention of courts is constantly called to the social problems which make up the standard grist of their daily work. They know about these problems and, if the judges are forward-looking and intellectually alive, they know something of what the answers should be. They are not equipped to foresee and to fore-answer all of the questions that might possibly arise, as well as a legislature

55. To this can be added the fact, already discussed, that no legislatures which have acted in the area have done a good job.

theoretically is, but they can foresee more of them than the ordinary legislator can.

It is increasingly common today for courts to render opinions as they did in an earlier common law era, that is, to answer the principally litigated issue first, then to give answers to incidental questions that are apt to arise thereafter.[56] Admittedly these incidental answers are dicta only, but they are substantially authoritative and serve useful purposes. By employing such a technique, appellate courts can do a better job than legislatures usually have done in promulgating comparative negligence rules.

With respect to matters upon which the legislature has never taken any position, legislative inaction constitutes no affirmative assertion of legislative intent to leave the law as it has always been. When the socio-legal need for a change in judge-made law is evident, when the courts which made the law in the first place can do as good a job and possibly a better one than the legislature is likely to do in updating it, and when the legislature gives no sign of acting on the matter, it seems that judicial action is fully justified.

In such a situation, judicial inertia induced by reluctance to take on a difficult task is no virtue.

56. *E.g.*, Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), which, after abrogating municipal immunity in tort, set out in some detail the "scope of abrogation" as to other governmental bodies. *See* McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962), in which certain questions that might arise in future trials were carefully answered. The technique of laying down new rules of law comprehensively is in keeping with what Karl Llewellyn called the "Grand Style of the Common Law." *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 36, 427 (1960).