Vanderbilt Law Review

Volume 21
Issue 6 *Issue 6 - November 1968*

Article 7

11-1968

Comment

John W. Wade

Comment

*John W. Wade**

I. JUDICIAL PRECEDENTS FOR ADOPTING A RULE OF COMPARATIVE NEGLIGENCE

The majority opinion in the Illinois Supreme Court held that if a change was to be made, the task was for the legislature, not the court. The five in the majority were not ready to deliver an opinion like that in *MacPherson, Henningsen, Greenman.*[1] If they had, there is real reason to believe that a similar consequence of an immediate and substantial judicial following would have developed. Without saying so, they seemed to be influenced by the thought that they would be complete pioneers in uncharted territory, with no precedents to rely upon or to interpret.

Are there any judicial precedents? Yes—quite a number—all relevant, but in varying degrees and in differing respects.

Some courts have adopted a form of comparative negligence. The leading example is Tennessee with its judicially created doctrine of remote contributory negligence, which is actually a form of comparative negligence, though the Tennessee Supreme Court has frequently denied it.[2] The essential difference between the Tennessee rule and ordinary comparative negligence is that in the latter, damages are mitigated or diminished in accordance with the relative degrees of negligence of the parties, while in the former, they are diminished in accordance with the relative closeness of the causal connection. The Tennessee doctrine, which developed gradually through court decisions, is now firmly established.[3] There is still some confusion, how-

* Dean and Professor of Law, Vanderbilt University School of Law. B.A. 1932, J.D. 1934, University of Mississippi; LL.M. 1935, S.J.D. 1942 Harvard University. Advisor to Reporter, RESTATEMENT (SECOND), TORTS.

1. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Greenman v. Yuba Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). All are in the field of products liability.

2. *See especially,* East Tennessee V. & G. Ry. v. Hull, 88 Tenn. 3, 12 S.W. 419 (1889).

3. *See, e.g.,* McCullough v. Johnson Freight Lines, Inc., 202 Tenn. 596, 308 S.W.2d 387 (1957); McClard v. Reid, 190 Tenn. 337, 229 S.W.2d 505 (1950); Williams v. Black, 147 Tenn. 331, 247 S.W. 95 (1923) (remittitur granted); Bejach v. Colby, 141 Tenn. 686, 214 S.W. 869 (1919); Louisville, N. & Great S. R.R. v. Fleming, 82 Tenn. 128 (1885). See Comment, *Remote Contributory Negligence: A Tennessee Concept,* 22 TENN. L. REV. 1030 (1953). In Memphis St. Ry. v. Haynes, 112 Tenn. 712, 81 S.W. 374 (1904), the court seemed to be holding that in every case involving alleged contributory negligence the issue must be submitted to the jury with an instruction on remote contributory negligence. *Cf.* Sharp v. J. C. Penny Co., 361 F.2d 722 (6th Cir.

ever, as to the precise meaning of "remote contributory negligence"[4] and disagreement as to the exact instructions which should be given to the jury. Even more striking from the standpoint of judicial action is the fact that the Tennessee court took an ordinary railroad precautions statute[5] and, with no language on which to base the decision, held in an action against the railroad that contributory negligence on the part of the automobile driver would not bar recovery but would merely mitigate damages.[6] Someday—perhaps soon—the Tennessee courts will review the total history and forthrightly admit that they have been applying comparative negligence all along.

Georgia's comparative negligence rule is usually attributed to a statute, but a historical study indicates that the statute grew out of language in the opinions of previous decisions of the Georgia Supreme Court.[7] Also, in Hawaii there have been judicial statements indicating the present or impending existence of comparative negligence there.[8]

1966) (must be submitted to jury unless court finds contributory negligence is proximate cause as a matter of law).

4. A series of court of appeals cases has defined the "remote cause" as "that which may have happened and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened." De Rossett v. Malone, 34 Tenn. App. 451, 475, 239 S.W.2d 366, 377 (W.S. 1950); Elmore v. Thompson, 14 Tenn. App. 78, 100 (M.S. 1931). Try saying that right fast to recite a real legal conundrum. It can be analyzed if one goes about it carefully, but the exact meaning is still elusive.

Several writers have understandably reached the conclusion that the Tennessee doctrine is a form of last clear chance. *See, e.g.*, W. PROSSER, SELECTED TOPICS IN THE LAW OF TORTS 50-51 (1954). This is erroneous. Last clear chance continues to exist as an independent doctrine in Tennessee and plaintiff's damages are not diminished. *See, e.g.*, Todd v. Cincinnati N.O. & T.P. Ry., 135 Tenn. 92, 185 S.W. 62 (1916); Harbor v. Wallace, 31 Tenn. App. 1, 211 S.W.2d 172 (1946); Smith v. Beattie, 346 F.2d 139 (6th Cir. 1965); Wade, *Torts—Annual Survey of Tennessee Law*, 6 VAND. L. REV. 990, 1003-05 (1953); Comment, *Torts—Last Clear Chance Doctrine*, 20 TENN. L. REV. 288 (1948).

5. TENN. CODE ANN. §§ 65-1208 and 65-1209 (1955).

6. The initial case was Louisville & N. Ry. v. Burke, 46 Tenn. 45 (1868). For other representative cases, see Poe v. Atlantic Coast Line R.R., 205 Tenn. 276, 326 S.W.2d 461 (1959); Tennessee Cent. Ry. v. Page, 153 Tenn. 84, 282 S.W. 376 (1925); Nashville & C.R.R. v. Nowlin, 69 Tenn. 523 (1878); Louisville & N. Ry. v. Farmer, 220 F.2d 90 (6th Cir. 1955). An amendment in 1959 changed this by providing that "the issue of contributory negligence shall be tried and be applied in the same manner . . . as in the trial of other negligence actions under the common law of Tennessee." TENN. CODE ANN. § 65-1209 (Supp. 1968).

7. *See* Macon & W. Ry. v. Winn, 26 Ga. 250, 254 (Super. Ct. 1858); Macon & W. Ry. v. Davis, 27 Ga. 113, 119 (1859); Flanders v. Meath, 27 Ga. 358, 361-62 (1859). *See also* Hilkey, *Comparative Negligence in Georgia*, 8 GA. B.J. 51 (1945); Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 304, 326-33 (1950). The statutes were enacted in the 1860's. *See* GA. CODE ANN. § 94-703 (1958); *id.* § 105-603 (1956).

8. *See* Chapman v. Brown, 198 F. Supp. 78, 85-86 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962); *cf.* Mitchell v. Braneh, 45 Hawaii 128, 363 P.2d 969 (1961) (contribution between joint tortfeasors on basis of relative fault); *see also* Loui v. Oakley, 438 P.2d 393, 397 n.5 (Hawaii 1968) (referring to the appellate court decision in *Maki*).

The Illinois and Kansas experience with slight and gross negligence did not concern true comparative negligence involving mitigation of damages, but it is significant in that it was both initiated and abolished by judicial action without legislative intervention.[9] Thus, the courts were creating without legislative assistance the contributory negligence rules.

Finally, the various recognized exceptions—such as that of intentional, wilful and wanton, or gross misconduct, and especially that of last clear chance—were all judicially created. Did the Lord speak to the prophets, the judges, in the days of Butterfield's violent ride from the public house and of "Davies' dying donkey,"[10] and have such utterings "long since ceased"? Are courts fully authorized to create and establish exceptions to an established doctrine but not to modify it in other ways?

There have been several judicial alterations of the legal principle which is behind and explains the doctrine of contributory negligence. The true basis of contributory negligence has been the subject of much discussion. Courts have talked about the principle that they should not render assistance to a wrongdoer, about rules of causation, and about what rule would discourage negligent conduct; and some legal writers have talked about what rule gives the court control over the jury's conduct.

The principal explanation of the defense of contributory negligence, I think, is something else; it grows out of the nature of the common law and its adversary system. The object of common law pleading was to reduce the dispute between the parties to certain specific issues, and the court then decided for one party or the other. One party won, and the other party lost on each issue. It was black and white—all or nothing. The common law decided issues; it did not compromise them. Compromise was not only anathema, it was not even considered. Thus, if the issue was whether a negligent plaintiff could recover from a negligent defendant, the answer was either yes or no. The plaintiff either recovered all his damages or he recovered nothing. It never even occurred to the court in *Butterfield, Davies* or the other early contributory negligence cases to allow recovery of a proportionate part of the plaintiff's damages. If such a thought had

9. Illinois cases are discussed by the appellate court in Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284, 286-88. *See generally* Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 47-54 (1944); Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946); Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 304, 305-13, 317-18 (1950).

10. The references, of course, are to Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809), and Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842).

occurred, the courts would have dismissed it as unworthy of the common law, and suitable only for the untutored lay mind, or perhaps occasionally in equity. This being true, it is no wonder that, as between all or nothing, a negligent plaintiff should normally receive nothing.[11] Given the precise statement of the issue, one cannot quarrel with the result.

There are numerous illustrations of this principle in the common law. For example, take contribution and indemnity between tortfeasors. Indemnity was always permitted in suitable cases. The issue was whether the plaintiff received everything or nothing, and the court felt competent to decide it. In contribution, the plaintiff was seeking only a part of his loss, and the court was not ready even to consider his suit. Take the case of a wrongdoer who obtains a chattel by theft or fraud from one party and sells it to another. If the original owner sued the purchaser, he recovered either the full value of the chattel or nothing. Take the case of an offer for a unilateral contract which is withdrawn before full performance. The contract was either good or bad, and the offeree recovered all or nothing.

In recent years there has been some change from this all-or-nothing dichotomy, and the change has sometimes come about by action of the courts themselves. Several illustrations occur in the field of restitution, where it is the law which creates the obligation. Perhaps most significant is the case of contribution between joint tortfeasors. A substantial number of courts have, on their own, adopted the rule that contribution will be permitted,[12] and if to them is added the states which have enacted statutes, this is now the majority rule. The analogy should be apparent.

In the case of intervening impossibility in performance of a contract, there have been indications that the amount of recovery might be apportioned;[13] so also with a contract rendered void or unen-

11. Even in the earlier trial cases of Cruden v. Fentham, 2 Esp. 685, 170 Eng. Rep. 496 (N.P. 1799), and Clay v. Wood, 5 Esp. 44, 170 Eng. Rep. 743 (N.P. 1803), where the problem of the effect of contributory negligence seems to have been left to the jury and it found for the plaintiff, the only question was whether the plaintiff received all or nothing.

12. *See, e.g.,* Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Duluth, M. & N. Ry. v. McCarthy, 183 Minn. 414, 236 N.W. 766 (1931).

13. *See, e.g.,* Fibrosa Spolka Akeyjna v. Fairbairn Lawson Combe Barbour, Ltd., [1943] A.C. 32, 144 A.L.R. 1298 (1942), resulting in passage of the Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 GEO. 6, c. 40; Note, *Quasi-Contract—Impossibility of Performance,* 46 MICH. L. REV. 401, 421 (1948); Note, *Apportioning Loss after Discharge of a Burdensome Contract: A Statutory Solution,* 69 YALE L.J. 1054 (1960).

forceable by mistake,[14] with two victims of a defrauder,[15] with the parties to an illegal contract,[16] and with other situations.[17]

A modern supreme court in these days does not—or at least should not—treat as beneath its dignity the laying down of a rule which reaches a compromise settlement between two parties so long as the result is just. The court now knows that there may be answers other than yes and no; it has imbibed and administered equitable principles; and it should no longer find it necessary to leave to the lay jury or the lay legislature the utilization of an obvious means to attain justice between the parties.

The problem with which we are concerned is one which is typically handled by the court rather than the legislature; it is a tort problem. While legislatures are notoriously slow to enact tort legislation,[18] the courts, on the other hand, have been most ready to make changes in judge-made tort law.[19] In the field of tort law, there is no detrimental reliance on the rule, as in commercial and property law.[20]

14. *See, e.g.*, National Presto Indus. v. United States, 388 F.2d 99 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965), *noted in* 65 COLUM. L. REV. 542 (1965), and 53 GEO. L.J. 826 (1965).

15. *See* Devlin, L. J., in Ingram v. Little, [1961] 1 Q.B. 31, 73-74 (C.A.); Seavey, *Embezzlement by Agent of Two Principles: Contribution?* 64 HARV. L. REV. 431, 435 (1951); Grunfield, *A Study in the Relationship between Common Law and Equity in Contractual Mistake*, 15 MOD. L. REV. 297, 318 (1952).

16. *See* Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. PA. L. REV. 261, 304 (1947).

17. "For there is nothing sacred, there is nothing immanent, there is not even great utility, in this whole-hog-or-none approach which is so typical of law. . . . Surely we have in this white-black division an ancient echo, the ghost-voice of premedieval centuries, of a procedure too crude to be far trusted. Only one step back of it would be the time when even law and fact were undistinguished, when a man swore merely, or the court decided, on his 'right.' And in our later, more refined developments the officials often enough have followed better insight. An 'equitable' lien, created by court or by the Betterment Acts, comes in between flat ouster of the owner and flat forfeiture of improvements made in all good faith. The jury, in the teeth of the instructions, will whittle down the verdict of the plaintiff who has been at fault. Ratable sharing is the aim of bankruptcy; return of a going business to the now insolvent is, at least theoretically, the goal of a receivership. There is some trend, then, toward a more intelligent adjustment, toward the discovery of the more *workable* result, of the result that gives some hope of less bad blood." K. LLEWELLYN, THE BRAMBLE BUSH 143 (1960).

18. *See* Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963); Pedrick, *Torts: On Civilizing the Law of Torts*, 6 J. SOC. PUB. TEACH. L. 2, 8 (1961).

19. *See* Green, *The Thrust of Tort Law: Part II Judicial Law Making*, 64 W. VA. L. REV. 115 (1962); Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TEX. L. REV. 1254 (1966) (numerous judge-made tort changes listed); *cf.* Cowan, *Rule or Standard in Tort Law*, 13 RUTGERS L. REV. 141, 156-61 (1958).

20. There would seem to be little effect on liability insurance. *See* Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1960).

The problem is not too complex to be handled by a judicial decision. The state statutes on the subject are short and are written in rather vague language, leaving many difficult problems to be worked out by the courts.[21] Court decisions could not only go as far as the statutes, but could attempt to work out the problems as well.[22]

Finally, the two most significant decisions of the United States Supreme Court since World War II, *Brown v. Board of Education*[23] and *Baker v. Carr*,[24] are direct precedents here. The point? In each the Court had waited long and patiently for the legislatures to take suitable action in the appropriate fields, but it finally gave up the wait as hopeless and decided to act itself. This principle, clearly established by the joint holdings, may turn out in the end to be as important as the express holdings themselves. Its importance is not confined to constitutional law. If the state legislatures are unable or unwilling to act in the contributory negligence area, the courts, in the interest of attaining justice in a practical fashion, must give consideration to the reform of a judge-made law.

II. Plaintiff's Negligence and the Jury

It is often said that the existence of the jury is the principal reason why the contributory negligence rule was created and should be continued. On the one hand, it is suggested that the doctrine of contributory negligence is necessary as a means for the court to maintain control of the action of the jury.[25] On the other, it is urged that there is no need to change the contributory negligence rule because the juries habitually disregard the instructions and by applying their own sense of justice as derived from community standards, they actually have been applying comparative negligence all along.[26] The con-

21. Such problems as: the effect of plaintiff's contributory negligence in an action for strict liability or breach of warranty; whether the doctrine of last clear chance and assumption of risk will continue to have independent significance; the application of the traditional concepts of causation and lack of duty; the *in-pari-delicto* principle; whether there should be proportionate set-offs when both parties suffer damages; and many others. See, for example, the judicial treatment of these problems under one statute in Note, *Torts—Effect of Mississippi's Comparative Statute on Other Rules of Law*, 39 Miss. L.J. 494 (1968). *See generally*, Traynor, *The Courts: Interweavers in the Reformation of the Law*, 32 Sask. L. Rev. 201 (1967).

22. For a suggested opinion simply adopting the comparative negligence rule, see Keeton, *Creative Continuity in the Law of Torts*, 75 Harv. L. Rev. 463, 508 (1962); *see also* W. Seavey, Cogitations On Torts 55-57 (1954); Peck, note 18 *supra* at 304-07; Bress, *Comparative Negligence: Let Us Hearken to the Call of Progress*, 43 A.B.A.J. 127 (1957).

23. 347 U.S. 483 (1954).

24. 369 U.S. 186 (1962).

25. *See, e.g.*, Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005 (1957); and see the treatment of this in Malone, note 9 *supra*.

26. For judicial expressions to this effect, see Holt, J., in Haeg v. Sprague, Warner &

tradiction between these two positions is easily apparent, although it is not quite as real as it appears. The first argument is really confined to the use of a directed verdict for the defendant; the second applies to the case which is turned over to the jury, at which time control is apparently lost.

The second argument, as a basis for keeping the present systems, seems to me to be both hypocritical and dangerous. First, if the jury actually applies comparative negligence ideas and if we are willing for them to do this, why not frankly tell them to do it, explain how to do it, and see that they do it correctly? Second, why encourage the jury, as a part of the court system, to disregard the law announced to them and to apply their own ideas of what they think the law ought to be? In these days of disrespect for the law and of a developing attitude that each individual may decide for himself which laws he will obey, this position seems almost self-destructive—a kind of death wish. If the jury has been applying the moral concepts of the community, the law should be in accord with those concepts. Let the stated law be in accordance with the law in practice. Let us be frank about what is being done.

As for the first argument (court control of jury), it can be effective only when a directed verdict is given for the defendant.[27] There is no control of the jury once it receives the case. Under a comparative negligence system, on the other hand, a court may continue to exercise a real measure of control over the jury, even after the jury has received the case. This can be accomplished by means of instructions telling the jury how to do what it is already inclined to do, and by a provision for a single special verdict, which will help the jury to be sure to do as it is told and permit the court to ascertain if the jury acted in accordance with instructions.[28]

Thus, in an over-simplified form, speaking in terms of legal conclusions, the jury might be told:

> (1) If you find that the defendant was not negligent or that his negligence was not a proximate cause of the plaintiff's injury, you will find for the defendant.

Co., 202 Minn. 425, 430, 281 N.W. 261, 263 (1938); Bell, J., in Karcesky v. Laria, 382 Pa. 227, 234, 114 A.2d 150, 154 (1955); ULMAN, A JUDGE TAKES THE STAND 30-34 (1933).

27. The argument does have some merit. The strong likelihood of incurring a directed verdict may prevent the bringing of a case to trial when it has no inherent merit and is being brought only for its nuisance value. But the injustice of the contributory negligence rule far outweighs this. And directed verdicts still could be granted on the ground either that the defendant was not negligent, or that the plaintiff's negligence was the sole proximate cause of his injury.

28. It is not intended to suggest that any state adopt an intricate and complex special-verdict system like that of Texas, or like that of Wisconsin, which has needlessly complicated application of its principle of comparative negligence.

(2) If you find that the defendant's negligence was a proximate cause of the injury, and that the plaintiff was not guilty of negligence which proximately contributed to his injury, you will render a verdict for the plaintiff in the full amount of his damages.

(3) If you find that both parties were guilty of negligence which proximately contributed to the injury, then you will answer these two questions:

(i) What is the total amount of the damages suffered by the plaintiff?

(ii) What percentage of these damages should be borne by each party, taking into consideration the relative amount of fault of each and the degree to which his conduct contributed to the injury?[29]

Modifications of these instructions to take care of the situation where there is a cross-complaint or where there are more than two parties can be made without difficulty.

It is sometimes argued that a jury is incapable of figuring out the proportionate reduction of damages on a rational basis, since the test is so indefinite. There are several answers to this. In the states adopting comparative negligence as a general rule, there has been no trouble; besides, almost every state now has some form of comparative negligence under a limited statute. If it is true that juries frequently apply comparative negligence despite a contributory negligence instruction, they ought to be able to perform better with an instruction explicitly providing for comparative negligence. In any event, damages in most tort cases are based on jury approximations without specific tests. How does one tell the monetary value of the pain and suffering involved in a broken leg? If the jury can determine this, it is also fully capable of apportioning the damages.

A final remark in this section. The reiterated argument that adoption of a comparative negligence doctrine sounds the death knell of the American jury system is sheer nonsense and probably only a smoke screen. Both those who fear the loss of the jury system in negligence cases and those who fear the loss of the fault concept to a system of

29. Obviously, I have made two assumptions in phrasing this last question: (1) that the Mississippi and FELA rule (allowing plaintiff to recover even though his negligence is greater than that of the defendant) should apply rather than the Arkansas and Wisconsin rule (confining recovery to the case when plaintiff's negligence is less than defendants); and (2) that the proportionate reduction should depend on both the relative degrees of fault and the relative directness of causal relation. I believe both of these positions are preferable and would elaborate if this were an artiele rather than a comment; but either or both could be easily changed by a slight alteration of the language of the question. On the first item, *see Legis., Tort—Comparative Negligence Statute,* 18 VAND. L. REV. 327, 332-34 (1964); and on the second item *see* Cushman v. Perkins, 245 A.2d 846, 850 (Me. 1968).

automatic awards in traffic accidents would be well-advised to seek to perfect the systems they wish to defend, and comparative negligence is a big step in that direction.

III. OBJECTIVE RECOMMENDATIONS TO THE DECIDING AGENCY

The majority opinion in *Maki* gave no consideration to the merits of the question whether contributory negligence should completely bar a plaintiff's recovery or not. It simply held that the determination on that matter was more appropriate for the legislature to make. From the majority opinion, the legislature could obtain no indication as to whether the court thought the present rule should be continued or changed. If there is any indication, it is that the legislature should use its own judgment, with the court being indifferent to the result.

Now the legislature is subjected to many pressures; and with the powerful lobby mounted by liability insurance companies and by attorneys having a personal interest in the outcome, there is little reason to anticipate that legislative action is imminent in Illinois.[30] Might the supreme court have given some consideration to the merits (as the appellate court did—at the specific direction of the supreme court) and then have indicated to the legislature its conclusions as to whether a change is desirable or not? Would this have been effective? Certainly as a disinterested expression by distinguished authorities, it ought to bear much more weight than the arguments of paid lobbyists who were presenting the viewpoints of self-interest groups; and perhaps it would have proved persuasive.[31]

30. "The plaintiff-appellant declares, without contradiction being offered, that since 1937 there have been nine attempts in our legislature to change our contributory negligence rule and that with a single exception none reached the floor of either House. The prospect of securing through legislation a rule better styled to achieve fair dispositions in negligence cases does not appear to be bright." Ward, J., dissenting, in Maki v. Frelk, 239 N.E.2d 445, 450 (Ill. 1968).

31. The strong strictures of the chief justice of Florida against the contributory negligence rule in Louisville & N. Ry. v. Yniesta, 21 Fla. 700, 737-38 (1886), produced legislative action at the next session. *See* FLA. STAT. ANN. § 768.06 (1964); Maloney, *From Contributory Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 157 (1958). Unfortunately, the appeal of the Supreme Court of Minnesota in Haeg v. Sprague, Warner & Co., 202 Minn. 425, 281 N.W. 261 (1938), has had no effect on the legislature over the ensuing 30 years. The Minnesota court has continued to "believe the proper course is to suggest . . . that the legislature can order the need and propriety of any change of the rule." Havanetz v. Anderson, 276 Minn. 543, 545, 148 N.W.2d 564, 566 (1967) (family immunity in torts). It was expressly influenced by the success of its action in the governmental tort immunity case of Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 18 N.W.2d 795 (1962), where it proposed to change the law prospectively, beginning after the adjournment of the next session of the legislature, and the legislature then acted to enact statutory provisions. MINN. STAT. ANN. ch. 466 (1963). For discussion, see Peck, *supra* note 18, at 287, where the interplay of the court and legislature in other states on the issue of governmental immunity is described. What would have happened if the Illinois Supreme Court in

Since Judge Cardozo's paper in 1921 on *A Ministry of Justice*,[32] there have been numerous presentations of the idea that there should be some agency devoted to the full-time study of needed reforms in the substantive or procedural law and which would draft and recommend to the legislature statutes which it ought to be ready to accept. Judge Henry Friendly expresses the idea charmingly in the title to his recent paper, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't.*[33] Need the gap be quite as great, however? Must the judiciary and the legislature be completely separate? Would not some actual cooperation be possible? Why should not the bench—especially the supreme court—make recommendations to the legislature—recommendations which should be treated with respect and due consideration?[34] In the area of law reform, perhaps we have carried entirely too far the traditional separation of the judiciary from the legislature.

The suggestion that an objective recommendation from the court ought to carry significant influence with the legislature gives rise to a question about similar influence upon the court itself. After *Maki v. Frelk* was decided by the appellate court, *The Vanderbilt Law Review* felt that it was such an important decision that it deserved a collection of comments, such as those published here. After arrangements were made and two preliminary comments had been submitted, the decision was reached that since the case was then pending before the supreme court, none of the comments should be published or, indeed, shown to anyone but the other commentators until after the supreme court had made a final ruling. The feeling was that there should be no action which could be construed as

Maki had announced that it would change the contributory negligence rule if the legislature did not take action during its next session? The Illinois experience in the tort immunity cases suggests the possibility that the legislature might have reacted against this as being improper pressure.

32. 35 HARV. L. REV. 113 (1921).

33. 63 COLUM. L. REV. 787 (1963).

34. There are some reasons why this should be particularly applicable to Illinois. For over 130 years, the current Illinois Constitution carried a provision reading: "All judges of courts of record, inferior to the supreme court, shall, on or before the first day of June, of each year, report in writing to the judges of the supreme court such defects and omissions in the laws as their experience may suggest; and the judges of the supreme court shall . . . report in writing to the governor such defects in [*sic*] omissions in the constitution and laws as they may find to exist, together with appropriate forms of bills to cure such defects and omissions in the laws . . ." ILL. CONST. art. VI, § 31 (1870). In 1962 the judicial article of the constitution was completely revised, and the present provision provides for "an annual judicial conference to consider the business of the several courts and to suggest improvements in the administration of justice, and . . . report thereon in writing to the General Assembly not later than January 31 in each legislative year." ILL. CONST. art. VI, § 19 (1962). The Judicial Conference has apparently recently recommended the adoption of a comparative negligence statute.

improperly seeking to influence the court. So, the supreme court did not have the benefit of comments by six torts teachers who have, over many years, given careful consideration to the problems involved.

What else happened? There were three briefs filed by organizations as amici curiae. Two of these were frankly partisan, one becoming almost intemperate; both made one-sided presentations.[35] The parties involved in the organizations submitting these briefs were vitally interested, financially and otherwise, in the outcome of the case, and the briefs sought directly and forcefully to influence that result.

This is not intended to be critical, either of the organizations involved, or of the supreme court. It is intended as a suggestion that consideration should be given to the question of whether our system can be improved. It seems an ironic paradox when objective commentators, who have no personal interest involved, feel constrained by the punctiliousness of the present tradition to keep quiet, while those who frankly seek to influence the court to adopt a result which will favor their own interests are acting in full accordance with established tradition when they file a brief. How to change the system? I am not sure. Court rules for the filing of a brief amicus curiae are such that only a strongly interested person or organization can spend the time and money involved. Yet merely allowing a letter to be sent might swamp the court, would certainly involve wearying duplication of ideas, and, besides other objections, could be seriously abused. Publication of arguments in a legal periodical while a case is still pending also has objections, which can easily be perceived, and it, too, might be subject to serious abuse. The judges of our appellate courts are seriously overburdened now and should not be subjected to a mass of additional materials to peruse. But is it too much to suggest that a way be devised to permit them openly to seek objective advice from experts who have studied and thought in the field?

35. The third dealt primarily, not with the main issue, but with what kind of comparative negligence the court should adopt if it decided to accept the principle.