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## Alas and Alack, Modified Comparative Negligence Comes to West Virginia

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# **SYMPOSIUM ON BRADLEY V. APPALACHIAN POWER CO. — WEST VIRGINIA ADOPTS COMPARATIVE NEGLIGENCE**

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## **Alas and Alack, Modified Comparative Negligence Comes to West Virginia**

THOMAS C. CADY\*

### INTRODUCTION

On July 10, 1979, the West Virginia court issued its now famous *Bradley*<sup>1</sup> decision rejecting contributory negligence and adopting comparative negligence. The court's decision reminds me of a scene from "On the Waterfront" where Marlon Brando, as a punch drunk, has-been fighter, tells his brother, "Ya know, I could have been really something, I could have been champion. I could have been really great." I also am reminded of the southern hustler who ran a fleece called "Dare to be Great." Well, the court dared to be great and it could have been really great, but like

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Ellen S. Cappellanti, West Virginia College of Law, Class of 1980, assisted me with this article. It's more hers than mine. Thanks, Ellen.

<sup>1</sup> *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979). *Bradley* consists of two cases consolidated for appeal: *Bradley v. Appalachian Power Co.*, Appeal No. 14310 (wrongful death action); *Napier v. Elk Grocery*, Appeal No. 14345 (personal injury suit).

Marlon Brando and the southern hustler, the court ends up, shall we say, not a champion, not so great but a runner-up, almost a half a century behind.

Contributory negligence entered the English common law in the infamous *Butterfield v. Forrester*,<sup>2</sup> where the plaintiff, who was riding his horse as fast as it could go, did not observe a pole that the defendant negligently had placed across the highway. The plaintiff ran into it, was severely hurt, and sued the defendant. The trial court charged the jurors that if they determined the plaintiff had not used due care, they should find for the defendant. The plaintiff's attorney objected on the grounds that the clear precedent was to leave to the jury the question of whether to allow the plaintiff to recover all or nothing.<sup>3</sup> On appeal, Lord Ellenborough (who had proved only one year prior that his forte was not common sense when he decided that there was no such thing as a wrongful death action at common law<sup>4</sup>) created the contributory negligence doctrine. He stated as justification, "[a] party is not to cast himself upon an obstruction."<sup>5</sup> Moreover, Judge Bayley thought the accident "appeared to happen entirely from his [the plaintiff's] own fault."<sup>6</sup>

Those statements are not the language of contributory negligence but are the words of assumption of risk. While *Butterfield* certainly could have been so read, such was not to be. Instead, *Butterfield* became the source of the broad rule of common law contributory negligence: the plaintiff's negligence, however slight, proximately contributing to the accident, is a complete bar to any recovery. Theoretically in a tort system based on fault, it is clear that the plaintiff's fault should affect his recovery. There is no logic, however, in the rule that plaintiff's fault should completely bar any recovery.

Despite its illogic, the stern, all or nothing rule of contributory negligence proved to be a favorite of the morally staunch nineteenth century judiciary. It swept the common law world, making its first appearance in the United States via an 1825 Mas-

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<sup>2</sup> 11 East 60, 103 Eng. Rep. 926 (1809).

<sup>3</sup> For cases reflecting this precedent see *Cruden v. Fentham*, 2 Esp. 685, 170 Eng. Rep. 496 (1799); *Clay v. Wood*, 5 Esp. 44, 170 Eng. Rep. 732 (1803).

<sup>4</sup> *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

<sup>5</sup> 11 East at 61, 103 Eng. Rep. at 927.

<sup>6</sup> *Id.*

sachusetts case,<sup>7</sup> factually similar to *Butterfield*, and in West Virginia in an 1877 case.<sup>8</sup> Indeed, a Pennsylvania jurist in 1854 remarked that the contributory negligence doctrine was a "rule from time immemorial" and that it was "not likely to be changed in all time to come."<sup>9</sup> The jurist was wrong in two respects: his knowledge of history was too shallow as the rule was created in 1809, hardly "time immemorial" by 1854, and his predictive ability was too short as the rule was soon to be changed in Illinois in 1858<sup>10</sup> and in Kansas in 1887.<sup>11</sup>

The popularity of the doctrine was manifested by a judicial readiness to rule as a matter of law that the plaintiff had been contributorily negligent. Perhaps a high water mark of such judicial behavior is the West Virginia case of *Mathews v. Cumberland & Allegheny Gas Company*.<sup>12</sup> There, the plaintiff was an innocent bystander who was watching the defendant's workmen purge a gas line with a pressure hose. The hose came loose and whirled about in the air. The plaintiff and the other bystanders scattered for their safety but the plaintiff was struck by a passing auto. On these facts, Judge Haymond ruled not only that the defendant was not negligent and that defendant's non-negligence was not a proximate cause of plaintiff's injuries,<sup>13</sup> but that the plaintiff's contributory negligence was the sole proximate cause of plaintiff's injuries.<sup>14</sup>

Strangely enough, while the doctrine was a judicial favorite, it was also a judicial disfavorite. In short, the courts became schizoid about its harshness and how strictly it was applied. As soon as the doctrine was adopted, courts began to formulate counter-doctrines to mitigate the rule's harshness. Some of the standard counter-doctrines include:

(1) Contributory negligence is not a defense when defendant's conduct is intentional,<sup>15</sup> or wilfull, wanton, and reckless.<sup>16</sup>

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<sup>7</sup> *Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824).

<sup>8</sup> *Snyder v. Pittsburgh, C. & St. L. Ry.*, 11 W. Va. 14 (1877).

<sup>9</sup> *Railroad Co. v. Aspell*, 23 Pa. 147, 149 (1854).

<sup>10</sup> *Galena & C. Union R.R. v. Jacobs*, 20 Ill. 478 (1858).

<sup>11</sup> *Wichita & W.R.R. v. Davis*, 37 Kan. 743, 16 P. 78 (1887).

<sup>12</sup> 138 W. Va. 639, 77 S.E.2d 180 (1953).

<sup>13</sup> *Id.* at 651, 77 S.E.2d at 187.

<sup>14</sup> *Id.* at 655, 77 S.E.2d at 189.

<sup>15</sup> *Stone v. Rudolph*, 127 W. Va. 335, 32 S.E.2d 742 (1944); RESTATEMENT

(2) Contributory negligence is not a defense when the defendant violates a statute which is designed to protect the plaintiff from the risk encountered<sup>17</sup> (e.g., a child injured by a weapon sold by the defendant to the plaintiff in violation of the gun control laws).

(3) Contributory negligence is defeated when the defendant has the last clear chance to avoid injury to the plaintiff.<sup>18</sup> This is the familiar jackass doctrine from *Davies v. Mann*<sup>19</sup> (1842), decided very soon after *Butterfield* (1809).

(4) Contributory negligence is neither a defense in strict liability cases<sup>20</sup> nor in products liability cases.<sup>21</sup>

(5) Contributory negligence is distinctly a jury issue so that the jury can apply its own rough and illegal standard of comparative negligence.<sup>22</sup> Indeed, West Virginia became a *de facto* comparative negligence jurisdiction in 1977 with *Freshwater v. Booth*,<sup>23</sup> where the West Virginia court expressly approved compromise verdicts, noting:

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(SECOND) OF TORTS § 481 (1965).

<sup>16</sup> *Stone v. Rudolph*, 127 W. Va. 335, 32 S.E.2d 742 (1944); RESTATEMENT (SECOND) OF TORTS § 482 (1965). Section 482(2) states an exception to this general rule: "A plaintiff whose conduct is in reckless disregard of his own safety is barred from recovery against a defendant whose reckless disregard of the plaintiff's safety is a legal cause of the plaintiff's harm."

<sup>17</sup> *Pitzer v. M.D. Tomkies & Sons*, 136 W. Va. 268, 67 S.E.2d 437 (1951). RESTATEMENT (SECOND) OF TORTS § 483 provides that "[t]he plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute, unless the effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant."

<sup>18</sup> *Barr v. Curry*, 137 W. Va. 364, 71 S.E.2d 313 (1952); RESTATEMENT (SECOND) OF TORTS § 480 (1965). According to § 480 this doctrine will defeat the defense of contributory negligence only when the defendant knows of the plaintiff's situation, realizes that the plaintiff will be unable to discover his peril in time to avoid injury, and is negligent in using the existing opportunity to avoid the harm.

<sup>19</sup> 10 M. & W. 546, 152 Eng. Rep. 588 (1842).

<sup>20</sup> *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), *aff'd* L.R. 1 Ex. 265 (1866); *Weaver Merchandise Co. v. Thurmond*, 68 W. Va. 530, 70 S.E. 126 (1911); RESTATEMENT (SECOND) OF TORTS § 524 (1965).

<sup>21</sup> *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666 (W. Va. 1979); RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965).

<sup>22</sup> V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 7 (1974). Deference to the findings of the jury in such cases is illustrated by *Bourne v. Mooney*, 254 S.E.2d 819 (W. Va. 1979).

<sup>23</sup> 233 S.E.2d 312 (W. Va. 1977).

it has long been accepted in practice if not in the theory of jury instructions, that the jury takes into consideration relative degrees of fault in awarding compensation. If we really wished to have juries decide the question of damages without regard to gradations of fault, then we would bifurcate the trial process and have separate juries pass on each issue.<sup>24</sup>

(6) Courts routinely held the plaintiff to an easier standard of due care in evaluating his negligent conduct compared to the standard of due care used in judging the defendant's negligent conduct.<sup>25</sup> Typical is the West Virginia case of *Wager v. Sine*<sup>26</sup> where the lower court ruled as a matter of law that plaintiff was not negligent but left the task of evaluating the defendant's conduct to the jury although the conduct of both parties was remarkably similar.

(7) Contributory negligence is either not a defense or a difficult defense to raise when the plaintiff is a child.<sup>27</sup> For example, in West Virginia there is a rebuttable presumption that a child between the ages of seven and fourteen is incapable of being contributorily negligent.<sup>28</sup>

These mitigating rules adopted by the courts, including the West Virginia court, eroded the concept of contributory negligence as a complete all or nothing defense and produced comparative negligence reform.

As of today comparative negligence is by far the majority rule in the United States. Only fourteen states still cling to the old common law rule of contributory negligence.<sup>29</sup> Thirty-five American jurisdictions have adopted comparative negligence by legislation<sup>30</sup> and five states have adopted comparative negligence by

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<sup>24</sup> *Id.* at 317.

<sup>25</sup> See James, *Contributory Negligence*, 62 Yale L.J. 691 (1953).

<sup>26</sup> 201 S.E.2d 260 (W. Va. 1973).

<sup>27</sup> RESTATEMENT (SECOND) OF TORTS § 283A, comments a and b (1965); *Jordan v. Bero*, 210 S.E.2d 618, 625 (W. Va. 1974).

<sup>28</sup> *Jordan v. Bero*, 210 S.E.2d 618, 625 (W. Va. 1974).

<sup>29</sup> These states are: Alabama, Arizona, Delaware, Illinois, Indiana, Iowa, Kentucky, Maryland, Missouri, New Mexico, North Carolina, South Carolina, Tennessee and Virginia. The District of Columbia also has contributory negligence.

<sup>30</sup> See ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); C.Z. CODE tit. 4, § 1357 (1979); COLO. REV. STAT. § 13-21-111 (1973); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1979); GA. CODE ANN. § 105-603 (1968 Revisions); GUAM. CIV. CODE § 1714 (1979); HAW. REV. STAT. § 663-31 (1976); IDAHO CODE § 6-801 (1979); KAN.

court decision.<sup>31</sup> Further, the United States Supreme Court, rejecting 120 years of precedent in 1975, adopted comparative negligence in admiralty cases.<sup>32</sup> In civil law countries, comparative negligence is and has been the almost universal rule.<sup>33</sup> England dumped *Butterfield* in 1945<sup>34</sup> and most of the rest of the common law world has also adopted comparative negligence.<sup>35</sup>

### COMPARATIVE NEGLIGENCE MODELS

Before discussing the *Bradley* decision, it is helpful to examine the different forms of comparative negligence from which the West Virginia court could have chosen. Although the specific language and impact of comparative negligence laws vary from state to state, there are only two general models of comparative negligence: modified comparative negligence and pure comparative negligence.

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STAT. ANN. § 60-258a (1976); LA. CIV. CODE ANN. art. 2323 (West Supp. 1980); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MASS. ANN. LAWS ch. 231, § 85 (Michie/Law Co-op Supp. 1979); MINN. STAT. ANN. § 604.01 (West Supp. 1979); MISS. CODE ANN. § 11-7-15 (1972); MONT. REV. CODES ANN. § 58.607.1 (Supp. 1977); NEB. REV. STAT. § 25-1151 (1975 reissue); NEV. REV. STAT. § 41.141 (1977); N.H. REV. STAT. ANN. § 507:7a (Supp. 1979); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1979); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); N.D. CENT. CODE § 9-19-07 (1975); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1979); OR. REV. STAT. § 18.470 (1977); PA. STAT. ANN. tit. 17, § 2101 (Purdon Supp. 1979); P.R. LAWS ANN. tit. 31, § 5141 (1968); R.I. GEN. LAWS § 9-20-4 (Supp. 1979); S.D. COMP. LAWS ANN. § 20-9-2 (1979 revision); TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1980); UTAH CODE ANN. § 78-27-37 (1977); VT. STAT. ANN. tit. 12, § 1036 (1973); V.I. CODE ANN. tit. 5, § 1451 (1979); WASH. REV. CODE ANN. § 4.22.010 (Supp. 1978); WIS. STAT. ANN. § 895.045 (West Supp. 1979); WYO. STAT. § 1-1-109 (1977).

Ohio recently enacted a comparative negligence statute which will become effective June 20, 1980. This statute will be codified at OHIO REV. CODE ANN. § 2315.19.

<sup>31</sup> *Kaatz v. State*, 540 P.2d 1037 (Alaska 1978); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Kirby v. Larson*, 400 Mich. 585, 256 N.W.2d 400 (1977); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

<sup>32</sup> *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

<sup>33</sup> W. PROSSER, *LAW OF TORTS* 435 (4th ed. 1971).

<sup>34</sup> SCHWARTZ, *supra* note 22, at 4 n.42.

<sup>35</sup> PROSSER, *supra* note 33, at 436 nn.80 & 81; SCHWARTZ, *supra* note 22, at 4; Wade, *A Uniform Comparative Fault Act—What Should It Provide?*, 10 U. MICH. J.L. REF. 220, 224 (1977).

*Modified Comparative Negligence*

**Slight-Gross.** The plaintiff may recover if his negligence is slight and the defendant's negligence is gross. The plaintiff's damages are reduced by the percentage of fault attributed to the plaintiff and the defendant cannot recover. This form exists in only two states, Nebraska<sup>36</sup> and South Dakota,<sup>37</sup> and has been dismissed by Dean Wade as having no current support.<sup>38</sup>

**Not as great as or the 49%/51% form.** The plaintiff may recover if his negligence is not as great as the defendant's. The plaintiff's damages are reduced by the percentage of his fault, and the defendant cannot recover. When the negligence of both parties is equal, neither may recover. This form was introduced by Wisconsin in 1931 and was once the most popular form, but is now in effect in only eleven jurisdictions.<sup>39</sup>

**Not greater than or the 50% form.** The plaintiff may recover if his negligence is not greater than the defendant's. The plaintiff's damages are reduced by the percentage of his fault, and the defendant cannot recover. When the parties are equally negligent, each party may recover 50% of his damages. If each party's negligence is adjusted by one percentage point so that the plaintiff is 49% negligent and the defendant is 51%, negligent, the plaintiff gets 51% of his damages but the defendant gets no damages at all. This form is the most popular as it is in effect in fifteen jurisdictions.<sup>40</sup>

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<sup>36</sup> NEB. REV. STAT. § 25-1151 (1975 reissue).

<sup>37</sup> S.D. COMP. LAWS ANN. § 20-9-2 (1979 revision).

<sup>38</sup> Wade, *supra* note 35, at 224.

<sup>39</sup> See *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979); ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); COLO. REV. STAT. § 13-21-111 (1973); GA. CODE § 105-603 (1968 revisions); GUAM CIV. CODE § 1714 (1979); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258a (1976); ME. REV. STAT. ANN. tit. 14, § 156 (1980); N.D. CENT. CODE § 9-10-07 (1975); UTAH CODE ANN. § 78-27-37 (1977); WYO. STAT. 1-1-109 (1977).

Ohio recently enacted this type of statute which will become effective on June 20, 1980. This statute will be codified at OHIO REV. CODE ANN. § 2315.19.

<sup>40</sup> See CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1979); HAW. REV. STAT. § 663-31 (1976); MASS. ANN. LAWS ch. 231, § 85 (Michie/Law. Co-op Supp. 1979); MINN. STAT. ANN. § 604.01 (West Supp. 1979); MONT. REV. CODES ANN. § 58:607.1 (Supp. 1977); NEV. REV. STAT. § 41.141 (1977); N.H. REV. STAT. ANN. § 507:7a (Supp. 1979); N.J. STAT. ANN. § 2A: 15-5.1 (West Supp. 1979); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1979); OR. REV. STAT. § 18.470 (1977); PA. STAT. ANN. tit.



*Pure Comparative Negligence*

Each party may recover his damages reduced by the percentage of his fault. Pure comparative negligence has been adopted in eleven jurisdictions.<sup>41</sup> While the pure form is not the form used in the majority of comparative negligence jurisdictions, it has been adopted in the two most populous states, and it is the form utilized in England, most states in Australia, most provinces in Canada, and in most other common law and civil law countries.<sup>42</sup> It served as the beginning model for the Uniform Comparative Fault Act.<sup>43</sup>

It is especially noteworthy that in those jurisdictions adopting comparative negligence by statute, the legislatures, tainted by political realities, have almost invariably selected the modified forms,<sup>44</sup> while in those jurisdictions adopting comparative negli-

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17, § 2101 (Purdon Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1980); VT. STAT. ANN. tit. 12, § 1036 (1973); V.I. CODE ANN. tit. 5, § 1451 (Cum. Supp. 1979); WIS. STAT. ANN. § 895.045 (West Supp. 1979).

<sup>41</sup> See: *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Kirby v. Larson*, 400 Mich. 585, 256 N.W.2d 400 (1977); C.Z. CODE tit. 4, §1357 (1979); LA. CIV. CODE ANN. art. 2323 (West Supp. 1980); MISS. CODE ANN. § 11-7-15 (1972); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); P.R. LAWS ANN. tit. 31, § 5141 (1968); R.I. GEN. LAWS § 9-20-4 (Supp. 1979); WASH. REV. CODE ANN. § 4.22.010 (Supp. 1978).

The United States Supreme Court also adopted the pure form of comparative negligence for apportioning property damages in admiralty suits. *United States v. Reliable Transfer Co.*, 421 U.S. 387 (1975).

<sup>42</sup> Wade, *supra* note 35, at 225; SCHWARTZ, *supra* note 22, at 49 & n.31.

<sup>43</sup> The Uniform Comparative Fault Act was prepared by a special committee of the National Conference of Commissioners on Uniform State Laws and presented at the national conference's 1977 annual meeting. Torts covered by the act are actions "for injury to person or property based on negligence [of any kind], recklessness [wanton misconduct], strict liability or breach of warranty or a tort action based on a statute unless otherwise indicated by the statute . . ." UNIFORM COMPARATIVE FAULT ACT § 1, reprinted in Wade, *supra* note 35, at 226.

<sup>44</sup> Of the 35 American jurisdictions which have adopted comparative negligence by statute, *supra* note 30, all but seven (Canal Zone, Louisiana, Mississippi, New York, Rhode Island, Washington and Puerto Rico) have chosen modified forms.

In those states adopting comparative negligence by statute, it has been suggested that the statutes "were hastily and inartistically drafted. Determinations were sometimes made as a result of the influence of special interest pressure groups [target defendants and their insurers], and these conflicting pressures often produced undesirable compromises." Wade, *supra* note 35, at 221-22.

gence by judicial decision, the judges, in the quiet reflection of judicial chambers, have chosen the pure form.<sup>45</sup> Nevertheless, in 1979, despite the reasoned decisions by the courts in Alaska, California, Florida, and Michigan and the United States Supreme Court and despite the academic wisdom of Dean Keeton,<sup>46</sup> Dean Prosser,<sup>47</sup> Professor Wade,<sup>48</sup> Professor Keeton<sup>49</sup> and Professor Schwartz,<sup>50</sup> among others,<sup>51</sup> the West Virginia court in *Bradley* adopted modified (not-as-great-as) form. The modified form is a remnant of the thirties<sup>52</sup> while the pure form is the brain-child of the seventies.<sup>53</sup> Why would the court reject the freshness of youthful wisdom for the staleness of antiquated doctrine? According to Justice Miller: "we are not willing to abandon the concept that where a party substantially contributes to his own damages, he should not be permitted to recover for any part of them."<sup>54</sup>

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<sup>45</sup> See note 31 *supra*. Of the six jurisdictions which have adopted comparative negligence judicially, all but West Virginia (in *Bradley*) chose the pure form.

<sup>46</sup> See Keeton, *Torts, Annual Survey of Texas Law*, 28 SW. L.J. 1, 9 (1974).

<sup>47</sup> See Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953).

<sup>48</sup> See Wade, *supra* note 34.

<sup>49</sup> See Keeton, *Comparative v. Contributory Negligence: Should the Court or Legislature Decide*, *Comments on Maki v. Frelk*, 21 VAND. L. REV. 899, 916 (1968).

<sup>50</sup> See SCHWARTZ, *supra* note 22, at 342.

<sup>51</sup> See GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* (1936); Campbell, *Recent Developments of the Law of Negligence in Wisconsin — Part II*, 1956 WIS. L. REV. 4; Davis, *Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases*, 10 IND. L. REV. 831 (1977); Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1 (1936); Juenger, *Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae*, *Parsonson v. Construction Equipment Co.*, 18 WAYNE L. REV. 3 (1972).

<sup>52</sup> Although the modified forms can be traced to three Georgia cases decided more than 100 years ago (*Macon & W.R. Co. v. Winn*, 26 Ga. 250, 254 (1858); *Macon & W.R. Co. v. Davis*, 27 Ga. 113, 119 (1859); *Flanders v. Meath*, 27 Ga. 358, 362 (1859)), the Wisconsin modified comparative negligence statute, WIS. STAT. ANN. § 895.045 (1931) (amended 1971), adopted in 1931, became the universal model for many other states. SCHWARTZ, *supra* note 22, at 75. This statute originally provided that the plaintiff could not recover if his negligence was equal to or greater than that of the defendant. However, this was amended in 1971 to permit recovery by the 50% negligent plaintiff. WIS. STAT. ANN. § 895.045 (West Supp. 1979).

<sup>53</sup> See notes 41 and 43 *supra*.

<sup>54</sup> *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 885 (W. Va. 1979).

In other words, the West Virginia court believes that in a fault-based system of liability it is immoral (akin to no-fault) to allow a fault-ridden party who is more at fault or equally at fault to recover anything from a party less at fault or equally at fault. Rubbish. The court misses the fundamental premise of a fault-based system of liability.

That premise is to search for a party at fault and to shift the loss from the victim to the wrongdoer by requiring the wrongdoer to repair the loss in the form of money damages. The error of the contributory negligence doctrine is its all-or-nothing harshness. The doctrine penalizes and rewards the parties: no one recovers and no one pays. The error of the modified forms of comparative negligence is that they only soften the old harshness; one recovers something but pays nothing. Moreover, the modified forms, depending on the percentage of fault, result in erratic allocations of damages.<sup>55</sup> Only the pure form allocates damages to all parties

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<sup>55</sup> SCHWARTZ, *supra* note 22, at 347. Wade, *supra* note 35, at 224-25, points out that the extreme distortion with modified forms arises when there are multiple plaintiffs and cross claims:

To compare the two forms [modified and pure], take variations of a case in which A and B were both negligent and both injured. Assume A's negligence is found to be 25% and B's is found to be 75%.

Case (1). Assume each party suffers \$8,000 damages. Under the modified form, A recovers \$6,000; B recovers nothing. A's loss is \$2,000 (all his own), or 12.5% of the total of \$16,000. B's loss is \$14,000 (\$6,000 to A, and \$8,000 of his own) for 87.5% of the total. Under the pure form (assuming no set-off), A recovers \$6,000; B, \$2,000. A's loss is \$4,000 (\$2,000 to B and \$2,000 of his own) for 25% of the total; B's loss is \$12,000 (\$6,000 to A and \$6,000 of his own) for 75% of the total.

Case (2). Assume A suffers \$4,000 damages; B, \$12,000. Under the modified form, A recovers \$3,000; B, nothing. A incurs \$1,000 (all his own) for 6% of the total; B incurs \$15,000 (\$3,000 to A and \$12,000 of his own) for 94% of the total. Under the pure form, A recovers \$3,000; B, \$3,000. A incurs \$4,000 loss (\$3,000 to B and \$1,000 of his own) for 25% of the total; B incurs \$12,000 (\$3,000 to A and \$12,000 of his own) for 75% of the total.

Case (3). Assume A suffers \$12,000 damages; B, \$4,000. Under the modified form, A recovers \$9,000; B, nothing. A incurs \$3,000 loss (all his own) for 19% of the total; B incurs \$13,000 loss (\$9,000 to A, \$4,000 of his own) for 81% of the total. Under the pure form, A recovers \$9,000; B, \$1,000. A incurs \$4,000 loss (\$1,000 to B and \$3,000 of his own) for 25% of the total; B incurs \$12,000 loss (\$9,000 to A and \$3,000 of his own) for 75%.

Case (4). Now change the fault percentage. Assume that each party

with complete justice: all parties recover and pay according to their respective faults. The court, however, felt that the "pure comparative negligence rule and its resulting singular emphasis on the amount of damages and insurance coverage as the ultimate touchstone of the viability of instituting a suit"<sup>56</sup> was basically inequitable. Again rubbish. The focus of tort law is two fold: fault and damages. The pure comparative negligence rule does not singularly emphasize damages: it synthesizes fault and damages by sorting out fault and assigning damages collectible for that degree of fault. The error of the court is its simple minded emphasis on negligence — only one half of the premise of a fault-based system. The court's resolution in adopting the 49%/51% rule is only partial "complete justice."

The court's reluctance to abandon what it conceives to be the concept of a fault-based system is reinforced by the typical dog-in-the-manger hypothetical. It states:

[A] plaintiff who has sustained a moderate injury with a potential jury verdict of \$20,000, and who is 90 percent fault-free, may be reluctant to file suit against a defendant who is 90 percent at fault, but who has received severe injuries and whose case carries a potential of \$800,000 in damages from a jury verdict. In this situation, even though the defendant's verdict is reduced by his 90 percent fault to \$80,000, it is still far in excess of the plaintiff's potential recovery of \$18,000.<sup>57</sup>

One wonders where the court found such an extreme illustration. However, one need look no further than Professor Schwartz's authoritative text on comparative negligence where he presents a similar example.<sup>58</sup> Professor Schwartz destroys this type of hypothetical as unusual, unrealistic, and unfair.<sup>59</sup> Furthermore, the

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suffered \$8,000 damages and that A was 49% negligent; B, 51%. Under the modified form, A recovers \$4,080; B, nothing. A incurs \$3,920 loss (all his own) for 24.5% of the total; B incurs \$12,080 loss (\$4,080 to A and \$8,000 of his own) for 74.5% of the total. Under the pure form, A incurs \$7,840 loss (\$3,920 to B and \$3,920 of his own) for 49% of the total; B incurs \$8,160 loss (\$4,080 to A, and \$4,080 of his own) for 51% of the total.

<sup>56</sup> 256 S.E.2d at 885.

<sup>57</sup> *Id.* at 888 (footnote omitted).

<sup>58</sup> SCHWARTZ, *supra* note 22, at 344-45.

<sup>59</sup> Schwartz's hypothetical consists of a 90% negligent plaintiff who suffered \$100,000 in damages and recovered \$10,000 from a 10% negligent defendant. The defendant suffered \$1,000 in damages. After a set-off, the defendant had to pay

court's resolution of its own hypothetical is incomplete. Let us complete the resolution of the hypothetical by applying the court's own rule and then comparing that result with the outcome under the pure comparative negligence rule.

Table I will simplify the task. The two rules are compared above and below each other. Notice particularly that under the court's rule the 10% negligent plaintiff bears only .24% of the total cost of the accident while the 90% negligent defendant bears a whopping 110.8% of the total cost of the accident. Thus, under the court's rule the plaintiff is rewarded in excess of his culpability and the defendant is punished in excess of his culpability. However, under the pure comparative negligence rule, damages received and paid are consistently proportionate to the party's percentage of fault.

The court later notes: "The courts which have adopted the pure comparative negligence rule have not discussed this type of result [referring to the result of a recovery of \$18,000 but payment of \$80,000]."<sup>80</sup> Of course the courts have not discussed the

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the plaintiff \$9,100.

He rebuts this example by stating:

On the surface, the result of the hypothetical case seems hard to justify. Nevertheless, there is a convincing answer in justification. First, making a judgment about an entire comparative negligence system based on an unusual hypothetical case is a classic example of a hard case making bad law. Mississippi has had pure comparative negligence since 1910 in all personal injury actions; yet a search of the pages of annotations to that statute will not reveal any cases in which a 90% at fault plaintiff obtained a substantial recovery from a defendant.

Even judging the hypothetical case as if it were likely to occur, the fault of the plaintiff has not been ignored. He has been made to bear 90% of his costs and 90% of the defendant's costs from an accident for which he was 90% at fault. Why should he bear 100% of all costs? Or even all of his own costs plus 90% of defendant's? This would tax him beyond his culpability.

Finally, any surface unfairness of pure comparative negligence is reduced by the fact that proximate cause rules may bar the claims of plaintiffs when their negligence was the substantial cause of the accident.

SCHWARTZ, *supra* note 22, at 344-45 (footnotes omitted.).

<sup>80</sup> 256 S.E.2d at 883 n.11.

TABLE I

A	B	C	D	E	F	G	H	I	J	K	I	J
The Rule	Total Loss of Both Parties in Accident	Parties	%, Negligent	Loss Suffered	Loss Caused to Self by Party	Loss Caused to Other Party	Total Loss Caused By Party	Recovery from Other Party	Payment to Other Party	Total Loss to Be Born By Party E + J - I	% of: Total Loss to Be Born By Party Caused by Party K/H	% of: Total Loss to Be Born By Party of Both Parties K/B
W. Va. Court's Modified Comparative Negligence Rule Not as Great as (49%/51%)	\$320,000	PLAINTIFF	10%	\$20,000	\$2,000	\$0,000	\$82,000	\$18,000	\$0	\$2,000	2.4%	2.4%
		DEFENDANT	90%	\$300,000	\$720,000	18,000	\$738,000	\$0	\$18,000	\$318,000	110.8%	99.76%
The Pure Comparative Negligence Rule	\$320,000	PLAINTIFF	10%	\$20,000	\$2,000	\$0,000	\$82,000	\$18,000	\$20,000	\$82,000	10%	10%
		DEFENDANT	90%	\$300,000	\$720,000	18,000	\$738,000	\$80,000	\$18,000	\$738,000	90%	90%

result for the reasons given by Professor Schwartz.<sup>61</sup> *Bradley* also states that the pure comparative negligence courts "appear to proceed on the unstated assumption that all accidents will be covered by sufficient insurance to pay all the verdicts stemming from a multi-party accident."<sup>62</sup> The court's concern is unpersuasive because the problem of sufficient insurance to pay off any verdict arising from a single or multi-party accident exists in any system of fault-based liability, contributory, modified or pure.

The court then goes on to hypothecate further by adding an insurance resolution to its previous example:

If we consider the text illustration and assume the plaintiff has a modest insurance limit of \$50,000 for any one injury, the potential exposure to an \$80,000 net verdict in favor of the 90-percent-at-fault, but seriously damaged defendant, creates a substantial practical bar to a suit. It is doubtful that a competent attorney would advise the plaintiff to sue, since the plaintiff's claim has a maximum jury potential of \$20,000, which nets \$18,000 when reduced by his 10 percent fault or contributory negligence. This leaves the plaintiff with a potential \$12,000 uninsured exposure even after he recovers his \$18,000 and pays it to the defendant along with his \$50,000 worth of insurance to satisfy the defendant's \$80,000 net verdict.<sup>63</sup>

The short answer to this problem is that while the plaintiff's attorney may advise his client not to sue, the defendant's attorney will race to the courthouse to get an \$80,000 net verdict, \$50,000 from the plaintiff's insurance and \$30,000 from the plaintiff's assets at a cost to defendant of only \$18,000. Of course under the court's rule, the defendant is absolutely precluded from any recovery of the \$80,000 damages caused by the plaintiff, in essence, resurrecting the harsh all-or-nothing aspect of the abandoned contributory negligence rule.

#### THE WEST VIRGINIA RULE

Despite the unfairness of the "not as great as" rule, West Virginia attorneys are stuck with it, pending legislative reform. Until the legislature acts (which is highly unlikely), or the court

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<sup>61</sup> See note 59 *supra*.

<sup>62</sup> 256 S.E.2d at 883 n.11.

<sup>63</sup> *Id.* at 883-884 n.11.

does an about face and adopts the pure form (which is equally unlikely), attorneys will have to cope with an inadequate rule. The rule, as enunciated in *Bradley*, is:

(1) A party may recover even though his negligence proximately contributed to his injury so long as his negligence does not equal or exceed the combined negligence of the other parties involved in the accident.<sup>64</sup>

(2) The proximate cause requirements are not altered by the new rule; fault is not assessed unless it is the proximate cause of the opposing party's injuries.<sup>65</sup>

(3) The jury is to return a general verdict specifying each party's damages and a special interrogatory stating the percentage of fault attributed to each party.<sup>66</sup> The judge will calculate the net amount by reducing each party's gross award by the percentage of fault assessed by the jury to each party.<sup>67</sup>

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<sup>64</sup> *Id.* at 885. It is difficult to determine what the court means by "other parties to the accident" as this phrase is capable of two constructions: either all tortfeasors both present and absent, or those tortfeasors actually joined. See Buffa, *The Plaintiff's View of Comparative Negligence, Symposium on Bradley v. Appalachian Power Co.—West Virginia Adopts Comparative Negligence*, 82 W. VA. L. REV. 523, 528-29 (1980); Emch, *Comparative Negligence in West Virginia: A Defense Overview, Symposium on Bradley v. Appalachian Power Co.—West Virginia Adopts Comparative Negligence*, 82 W. VA. L. REV. 493, 496 (1980).

<sup>65</sup> 256 S.E.2d at 885. An argument can be made that although there will be no theoretical change in proximate cause requirements, there may be a change reflected in the application of this doctrine:

It has been suggested that the harshness of the common law contributory negligence doctrine has at times led courts to allow recovery — even when it is found that the claimant failed to exercise reasonable care for his own safety — by concluding that his contributory negligence was not a 'proximate cause' of his injury. The subject of proximate cause is one of the most murky in the law of negligence. It is difficult to determine where, in the law of any particular jurisdiction, 'cause in fact' leaves off and 'legal cause' takes over. However, to the extent that legal cause involved consideration of public policy, it is not incredible that cases employing the proximate cause rationale to ameliorate the harshness of the common law contributory negligence rule might exist. It appears clear that comparative negligence should alleviate the necessity to resort to such a device.

DEFENSE RESEARCH INSTITUTE, *COMPARATIVE NEGLIGENCE PRIMER* 13 (1975) (footnotes omitted).

<sup>66</sup> 256 S.E.2d at 885-86.

<sup>67</sup> *Id.* at 386. See *Sample Special Interrogatory Forms, Symposium on Brad-*



(4) In regard to joint and several liability, the plaintiff can still opt to sue only one of several joint tortfeasors.<sup>68</sup> In turn, the sued joint tortfeasors may implead other third-party defendants.<sup>69</sup> The plaintiff may elect to collect his joint judgment from only one or any number of the joint tortfeasors sued by the plaintiff.<sup>70</sup> Joint tortfeasors can apportion damage payments on the basis of their number without regard to their percentage of fault<sup>71</sup> and can still obtain *pro tanto* credit from settlements made by the plaintiff with other joint tortfeasors.<sup>72</sup>

(5) The doctrine of last clear chance is still available to the plaintiff.<sup>73</sup> However, the court does not give any indication of

*Id.* v. *Appalachian Power Co.* — *West Virginia Adopts Comparative Negligence*, 82 W. VA. L. REV. 545, 548 (1980).

The court does not state whether the jury will be told that if the plaintiff's negligence is equal to or greater than the defendant's, the plaintiff will not be permitted to recover. For a discussion of this problem, see *Sample Interrogatory Forms*, *supra*, at 548 n.5.

<sup>68</sup> 256 S.E.2d at 886.

<sup>69</sup> *Id.* See Emch, *supra* note 64, at 501-07, for a discussion of factors that should be evaluated by the defendant's attorney in making the decision to implead other tortfeasors.

<sup>70</sup> 256 S.E.2d at 886.

<sup>71</sup> *Id.* Some commentators suggest, however, that the more equitable approach is comparative contribution. Under this principle, each tortfeasor contributes payment in proportion to his or her fault. See SCHWARTZ, *supra* note 22, at 260-71; Emch, *supra* note 64 at 497; UNIFORM COMPARATIVE FAULT ACT § 2, reprinted in Wade, *supra* note 35 at 228.

<sup>72</sup> 256 S.E.2d at 886-87. It is suggested, however, that:

a *pro tanto* decrease in the final judgment is an insufficient device to protect either the settling joint tortfeasor from a later action for contribution, or the non-settling tortfeasor from the possibility of having to pay more of the total judgment than would be his share under the principles of contribution.

Emch, *supra* note 64, at 514.

<sup>73</sup> *Id.* at 887. See note 18 *supra* and accompanying text. As this doctrine was developed by the courts to mitigate the harshness of the contributory negligence rule, the necessity for this rule disappears when comparative negligence is adopted. W. PROSSER, LAW OF TORTS 439 (4th ed. 1971).

By retaining the doctrine of last clear chance, the courts are effectively by-passing the comparative negligence law and unjustly burdening the defendant by allowing a plaintiff, who has in fact been contributorily negligent, to have full recovery. The result is, in effect, the harshness of the old contributory negligence doctrine in reverse.

Note, *Torts: Comparative Negligence and the Doctrine of Last Clear Chance — Are They Compatible?*, 28 OKLA. L. REV. 444, 450 (1975).

whether assumption of the risk will remain an absolute defense.<sup>74</sup>

(6) As contributory negligence was never a defense to an intentional tort, the court reasons that comparative negligence "would not come into play" to diminish the damages of a plaintiff who has been intentionally harmed.<sup>75</sup> Thus, the comparative negligence doctrine should not apply to other actions where contributory negligence is not a bar to the plaintiff's claim such as workmen's compensation excess suits,<sup>76</sup> penal suits against employers who are not subscribers in good standing with the Workmen's Compensation Fund,<sup>77</sup> and suits where the defendant is subject to strict liability.<sup>78</sup>

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<sup>74</sup> Although there are many ways to sub-categorize assumption of risk cases, they typically fall into two main categories. One is express assumption of the risk in which the plaintiff agrees in fact that he will not hold the defendant liable for potential harm resulting from the defendant's conduct; the other is implied assumption of risk wherein plaintiff's consent to assume the risk and to bear the risk of harm is implied from the plaintiff's conduct in light of his knowledge of the circumstances. See RESTATEMENT (SECOND) OF TORTS § 496 B, C (1965).

Express assumption of the risk should remain a complete defense. However, the plaintiff's implied assumption of the risk should be merged into the comparative negligence system as conduct to be considered by the fact-finder when apportioning fault. For a very thorough discussion of this doctrine and how other comparative negligence jurisdictions have incorporated it into their apportionment schemes, see Shaw, *The Role of Assumption of Risk in Systems of Comparative Negligence*, 46 INS. COUNSEL J. 361 (1979).

<sup>75</sup> 256 S.E.2d at 887.

<sup>76</sup> W. VA. CODE 23-4-2 (1976 Replacement Vol.) provides in part:

If injury or death result to any employee from the deliberate intention of his employer to produce such injury or death, the employee, the widow, widower, child or dependent of the employee shall have the privilege to take under this chapter, and shall also have cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable under this chapter.

The West Virginia court in *Mandolidis v. Elkins Industries Inc.*, 246 S.E.2d 907 (W. Va. 1979) construed the phrase "deliberate intention" to include, for the purposes of the Workmen's Compensation Act, wilful, wanton or reckless misconduct. Contributory negligence was not a bar to either intentional or wilful, wanton or reckless conduct. See notes 15, 16 and accompanying text.

<sup>77</sup> Penal suits are authorized by W. VA. CODE § 23-2-8 (1978 Replacement Vol.). The statute provides that the defendant "shall not avail himself of the following common law defenses: The defense of the fellow-servant rule; the defense of the assumption of risk; or the defense of contributory negligence. . . ."

<sup>78</sup> See notes 20 and 21 *supra*. The application of comparative negligence to tort product liability situations appears to depend on the court's future treatment

(7) The court concludes that "the new rule of comparative negligence is fully retroactive,"<sup>79</sup> yet fails to state expressly what is meant by "fully retroactive." By implication, however, it appears that the court adopted the definition of full retroactivity used by the Michigan court in *Placek v. City of Sterling Heights*.<sup>80</sup> Applying the Michigan rule to the *Bradley* decision, the rule is retroactive in the following circumstances:

(a) Those cases in which trial commences after July 10, 1979, including those in which a retrial is to occur because of remand on any other issues;

(b) Those cases pending on appeal before and after July 10, 1979, at which counsel made a request for comparative negligence instructions at the trial level and preserved the issue for appeal; and

(c) Any case commenced but not submitted to the trier of fact prior to July 10, 1979, but only if there is a request for comparative negligence instructions by counsel prior to submission to the trier of fact.

### CONCLUSION

Three months before the *Bradley* decision the West Virginia court rent asunder the common law of products liability law in *Morningstar v. Black & Decker Manufacturing Co.*<sup>81</sup>—finding truth, beauty, and light in strict liability (no-fault) for manufac-

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of assumption of risk. In *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666 (W. Va. 1979), the court stated that "contributory negligence of the plaintiff is not a defense when such negligence consists merely of a failure to discover the defect in the product, or to guard against the possibility of its existence." *Id.* at 666 (quoting RESTATEMENT (SECOND) OF TORTS § 402A, comment n). However, the court also stated that "the defense of assumption of risk is available against the plaintiff, where it is shown with full appreciation of the defective condition he continues to use the product." *Id.* at 683-84. Thus, if West Virginia incorporates assumption of risk into the comparative negligence scheme of apportionment, the next logical step is to apply comparative fault to tort products liability actions.

Furthermore, as *Morningstar* adopted the rule expressed by the California Court in *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), the West Virginia court may also follow the California court's decision in *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), where it was held that comparative fault would apply in all future strict tort products liability cases.

<sup>79</sup> 256 S.E.2d at 890.

<sup>80</sup> 405 Mich. 638, 275 N.W.2d 511, 521-22 (1979), cited in 256 S.E.2d 889 n.23.

<sup>81</sup> 253 S.E.2d 666 (W. Va. 1979).

turers' duty to consumers. Yet the court refused to continue this progressive trend in *Bradley* as evinced by its rejection of pure comparative negligence since "the eye of the needle is no fault and we are asked not to think about the larger aspect—the camel representing fault."<sup>82</sup> Perhaps 49% of the camel is better than no camel at all. However, the fact remains that the court has left us with an inadequate rule which misrepresents the whole concept of liability based on fault.

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<sup>82</sup> 256 S.E.2d at 883.

