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### Comment on Maki v. Frelk--Comparative v. Contributory Negligence: Should the Court or Legislature Decide?

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## Comment

*Harry Kalven, Jr.\**

My first reaction to the performance of the Illinois Appellate Court in *Maki v. Frelk*<sup>1</sup> was to recall the old joke about the man who, when asked if he believed in baptism, replied: "Believe in it, hell, I've seen it done!" In any event the decision provides a twin stimulus to the commentator: first, to say something about the limits of common law change, and second, to say something about comparative negligence itself. Despite the spectacular novelty of the court's action, these remain well-worn topics on which it will not be easy to say anything fresh. I am, however, moved by the occasion<sup>2</sup> and the congenial format of the short comment to talk informally on three or four points. I should perhaps add as a final prefatory observation that, although on various counts I have been uneasy about the daring of the Illinois Appellate Court, I must admit to some feeling of let-down, of some loss of excitement and potentiality now that the decision of the Illinois Supreme Court<sup>3</sup> has brought a return to sanity. At the very least it must be agreed that the Illinois Appellate Court really made news!

### I.

Let me begin then with the question of whether this was an appropriate change for a court to make. It is, I think, evident that we do not have any agreed upon theory on the limits of the powers of common law courts. In recent decades the American legal community has been so fascinated with the performance of the Supreme Court of the United States that it has spent much of its energies brooding over the limits of judicial activism at the constitutional level. It might well be that the Warren Court would not look so controversial to some, were more attention paid to the rate of change that has become common among common law courts these days.

The first thing to note is that the change came as a surprise. It was not predictable to the close student as was perhaps *MacPherson v.*

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

2. In a sense I speak as an eye witness. The appeal in *Maki* to the Illinois Supreme Court was argued in the Kirkland court room at the University of Chicago, and I was thus able to attend it, along with the entire first year class.

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

*Buick Motor Co.*,<sup>4</sup> or to take more recent examples, *Gideon v. Wainwright*,<sup>5</sup> *Wycko v. Gnodtke*,<sup>6</sup> or the products liability cases.<sup>7</sup> Thus, Fleming James, writing back in 1938 about last clear chance as a "transitional doctrine,"<sup>8</sup> did not argue that it was a common law adjustment of the contributory negligence rule that would by gradual evolution grow into comparative negligence. His point was rather that, logically, last clear chance performed many of the functions of comparative negligence, performed them crudely and that "these difficulties would all be swept away by a statutory adoption of the principle of proportional fault."<sup>9</sup> And the last words on the matter from Dean Prosser in 1964 read as follows:

There never has been any essential reason why the change could not be made without a statute, but it is so sweeping an alteration of the law, affecting so many thousands of cases, that there has been understandable reluctance on the part of the courts to take such a step; and there appears to be very little likelihood that they will do so, at least until legislation becomes much more common and unopposed than it is.<sup>10</sup>

Finally, there is the case of Professor Keeton, who not only dealt directly with the problem in his striking essay on growth in the common law process in torts,<sup>11</sup> but actually went on to draft the opinion for a court disposed to make the change—a gesture of help which ironically the Illinois courts and lawyers did not seem to be aware of. Even his case, as I read it, is not evidence to the contrary. Professor Keeton was not predicting; he was taking what he must have regarded as the hardest case for his thesis and arguing that even there one could write a satisfactory opinion.

There is also the fact that the difficulties and weaknesses of the common law rule as to contributory negligence had been fully disclosed and argued out for generations. There was no technological or sociological change that made the doctrine now look different than it had in prior years—as there has been, for example, in the problem of measuring damages for the death of a young child.<sup>12</sup> In brief, nothing was producing any new insight about the rule nor was there any new reason for changing it that had not been fully

4. 217 N.Y. 382, 111 N.E. 1050 (1916).

5. 372 U.S. 335 (1963).

6. 361 Mich. 331, 105 N.W.2d 118 (1960).

7. See, e.g., Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

8. James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 705 (1938).

9. *Id.* at 722.

10. W. PROSSER, TORTS 445 (3d ed. 1964).

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

12. See *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960); Note, *Damages for the Wrongful Death of Children*, 22 U. CHI. L. REV. 538 (1955).

evident to all those courts which for all those years had refused to make the change. Moreover, as the quotation from Dean Prosser suggests, there is the stubborn fact of the legislative response. The Federal Employers Liability Act had offered a model of the comparative negligence formula since 1908; Mississippi has had a statute since 1910; the well-known Wisconsin statute was adopted back in 1931. In brief, although statutory models have been visible for a long time, there has been notably little legislative momentum. In recent decades only Arkansas has acted, and its example dating from 1956 has not moved any other state legislatures to follow suit.<sup>13</sup> Further, bills have been introduced without success in many state legislatures. We have then a situation in which legislation is possible, and has indeed been tried, but in which there is clearly no legislative consensus in favor of the reform.<sup>14</sup>

It is often urged that a court ought to be able to undo any rule of law which is purely judge-made in origin. There is, however, a distinctive, logical quality about the contributory negligence rule that complicates the application of this principle. There is an analogy here to the problem Professor Paul Freund noted in his recent discussion of the Court's hesitancy to overrule the Civil Rights Cases.<sup>15</sup> It was, thought Professor Freund, not immediately clear what principle would be put in their place by the overruling—it could scarcely be that all private action is now state action. Similarly with the contributory negligence rule. To overrule it is not by that act alone to put something in its place.<sup>16</sup> There are a basic variety of comparative negligence formulae, and the court rejecting the old rule must select one full-blown alternative to put in its place. It is not just a matter of say-

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13. See Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959).

14. It should perhaps be added that while there has been considerable comparative negligence legislation in the United States to cover limited and specialized types of accidents, there is a lack of legislation for comparative negligence of *general* application. See Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1 (1953). And we should add the puzzling fact that the United States alone has been cool toward such legislation; the United States apart, there is an apparently worldwide consensus in favor of comparative negligence. See Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950).

15. P. FREUND, ON LAW AND JUSTICE 16 (1968).

16. Compare the discussion by Justice Schaefer of the companion problem of contribution among joint tortfeasors: "In a few jurisdictions the problem has been met by provisions requiring contribution among joint tortfeasors. So far as I am aware, that change in the law has always been accomplished by statute. The reason, I think, is that the problem is not self-contained. It cannot be satisfactorily solved by judicial announcements of a rule requiring contribution among joint tortfeasors. To operate satisfactorily a system of comparative negligence would be necessary with resulting complications as to jury verdicts." SCHAEFER, PRECEDENT AND POLICY 10-11 (1955). *But cf.* Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 477 n.32 (1962).

ing yes where we had previously said no. Given the incidence of modern tort law, the court cannot abolish the old rule and evolve slowly over time a solution to the problem of the victim's negligence.

Perhaps it is this aspect which accounts for the oddity of the appellate court in *Maki* literally adopting someone else's statute, as it did with Wisconsin's.<sup>17</sup> This would seem to go a good way beyond the oft-noted possibility of a court reasoning by analogy from a statute.<sup>18</sup>

Finally, there is the question of whether, if a common law court were to take this step, an Illinois court was the appropriate one. Much has been made of Illinois' prior flirtation with common law comparative negligence in the *Galena* case,<sup>19</sup> as though it gave Illinois an hereditary claim to make the change. However, its old common law rule was not an application of comparative negligence, but rather involved a shifting of the total loss from one party to another. And in any event it had been abandoned in Illinois in 1894.<sup>20</sup> More to the point, I would suggest, are two distinctive Illinois rules which place Illinois in an extreme minority of states vis-à-vis contributory negligence. The first is the rule which places the burden of proof of no contributory negligence on the plaintiff;<sup>21</sup> the second is the rule rejecting any variant of last clear chance.<sup>22</sup> One could well argue that prior Illinois law had shown a distinctive lack of sympathy for the negligent plaintiff.

Having exploited these points of doubt, I must confess that the issue leaves me highly perplexed. As Professor James has taught us, surely last clear chance is an adjustment of the contributory negligence rule—a partial repeal of it. And whatever we may think of its gothic details as doctrine, the proliferation of it is common law process in its purest form. Why, if a court can erode the common law rule by this route, it is inappropriate for it to do it by a more direct and more rational route?

## II.

Part of the case for judicial action with respect to the contributory negligence rule is that the comparative rule is far better on the merits.

17. The court even "adopted" the Wisconsin special verdict procedure.

18. See Landis, *Statutes and the Sources of Law*, HARVARD LEGAL ESSAYS 213 (1934).

19. *Galena & Chicago Union R.R. v. Jacobs*, 20 Ill. 478 (1858). Judge Moran carefully reviews the Illinois precedents under the *Galena* rule in *Maki v. Frelk*, 85 Ill. App. 2d 439, 442-45, 229 N.E.2d 284, 286-88 (1967).

20. *City of Lanark v. Dougherty*, 153 Ill. 163, 38 N.E. 892 (1894).

21. Illinois Pattern Jury Instructions § 201 (1961).

22. See *Carson, Pirie, Scott & Co. v. Chicago Ry.*, 309 Ill. 346, 141 N.E. 172 (1928). It has been suggested, however, that Illinois, despite its disavowal, applies a disguised version; see W. PROSSER, *TORTS* 439 (3d ed. 1964).

I am aware that this is the consensus among able and distinguished students. Nevertheless it may not be amiss to bring back into the discussion certain familiar difficulties. First, there is the illusory precision. In general, commentators have been critical of the concept of degrees of negligence, but in this one instance it is greeted enthusiastically. The point is not whether exactitude is possible here, which assuredly it is not, but rather whether the very idea of comparison is intelligible—when both parties on hypothesis have been negligent and the negligence has been causal. Whatever the difficulties are thought to be with the fault concept in general, surely great strains are put on it under comparative negligence. Can the human mind honestly aspire to do more in these matters than split the loss between the parties? Second, one consequence of the common law rule seems not to have been sufficiently appreciated, namely, that the defendant is also barred by his negligence from collecting from the plaintiff. The rule works with a rough equity of letting losses lie where they fall in cases where both parties are negligent and both are injured. Indeed one wonders whether the argument on the merits of comparative negligence has not been worked out with a single stereotype in mind—the ten per cent negligent plaintiff who is badly injured by the ninety per cent negligent defendant who suffers no injury. As we move away from this case, familiar problems arise. Is it fair to permit the dominantly negligent plaintiff to recover, or should we follow the Wisconsin strategy and provide a cut-off? And if we use a cut-off can we avoid arbitrary discriminations as we get close to the 50-50 point? Moreover, where both parties are injured, is it fair to let damages go “up stream,” that is, from the less negligent to the more negligent? Finally, if we use the “pure” form, in cases where there is damage on both sides, will not the discounts tend to cancel and offset each other so as to trivialize what we are accomplishing? These are all points which trouble the average law class and on which, in my experience as a teacher, there is no easy consensus. In sum, I think insufficient attention has been paid in rationalizing comparative negligence to the situation which the auto accident has made commonplace—negligence and damage on both sides.

### III.

Another wing of the argument for judicial change here is that the court is simply legitimating a change the jury had already made. In, for example, Professor Keeton's argument for the change the jury loomed large. He urged that the duplicity of instructing juries under the contributory negligence rule knowing they would not follow it was “deplorable.” He urged also that jury revolt against the rule was

strong evidence that the rule was contrary to "the prevailing sense of justice of laymen." From my special vantage point perhaps the most interesting aspect of the *Maki* phenomenon is this argument, based on an asserted factual premise about how juries behave.<sup>23</sup> It is a prime example of what might be called the myth-making propensities of legal realism, or better, perhaps the sentimentality of realism.

Whether or not juries do in fact act this way seems not to have touched anyone's curiosity. There has been a kind of universal "judicial notice" taken. How, we might wonder, does the argument for judicial intervention look if the premise about jury behavior is not so secure?

At this juncture I should like to summarize the impressions we have garnered from our studies of the jury. Due to the vicissitudes that seem to attach to large-scale, long-term research projects, our materials on the civil jury have not yet been reported out systematically. This is unfortunate because the data is somewhat complex and needs to be seen in full. To reduce the conclusions to a sentence or two: the data show that the jury is highly *ambivalent* in its response to the negligence of the victim. The popular view of the jury's de facto repeal of the common law rule is a half-truth at best; the jury sometimes acts in stringent support of the rule. In sum, it is doubtful that anyone would seek to mount an argument for reform of the common law rule on contributory negligence based on our impressions of the jury's behavior toward the rule.

We have two lines of data. The first comes from the technique of comparing judge and jury verdicts for the same case. It is the method devised by my colleague Hans Zeisel, and used in *The American Jury*,<sup>24</sup> and it offers the judge as a baseline against which to measure the jury performance. What then can we say about how differently from the judge the jury responds when the case involves contributory negligence? According to our data: (1) In cases where contributory negligence is an issue, judge and jury still agree roughly 80 percent of the time. (2) In the large, the upper limit of disagreement between judge and jury because of jury leniency toward contributory negligence is ten percent, since this is roughly the percentage of cases in which contributory negligence is an issue where the jury finds for the plaintiff when the judge would not. (3) And more important perhaps for present purposes, in such cases another ten percent of the disagreements are occasioned by the reverse phenomenon—the judge deciding in favor of the plaintiff where the jury would not. (4) Further,

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23. It should be noted that the *Maki*-court itself does not rest its case on jury behavior toward contributory negligence.

24. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY*, chs. 4, 7 (1966).

if we compare the patterns of judge-jury disagreement in cases where contributory negligence is an issue to cases where it is not an issue, we find no significant differences. (5) Moreover when we look at disagreements over damages, we find an appreciable number of cases where the jury gives a lower award, suggesting that the jury was discounting for contributory negligence even though the judge would have given the plaintiff a full award. (6) When we look in the individual case at the reasons the judge offers for disagreements, we find the judge only with relative infrequency assigning the jury revolt against the common law rule as the reason. And we have a roughly equal number of cases where the disagreement is in the other direction where the judge's explanation runs in terms of jury stringency toward negligent victims. (7) Finally, if we look directly at the verdicts of the jury alone without using the judge as a baseline, we see that in 46 percent of the cases where contributory negligence was an issue the jury decided for the defendant. In cases where there is no contributory negligence issue, this figure falls to 22 percent. Moreover, as we group the cases by the strength of the proof of contributory negligence, we find the jury verdicts moving with the evidence: as we go from slight proof to close cases to considerable proof, the percentage of jury verdicts for the defendant moves from 34 percent to 45 percent to 69 percent.

The second line of data comes from the use of the experimental jury technique.<sup>25</sup> At one point in the project we ran an experiment in which a key variable was the instruction on victim's negligence. Half the juries were instructed under the common law rule and half under the "pure" form of comparative negligence. Two other details of the design need to be noted. We were able to vary the injuries from one party to the other so that in half the cases the dominantly negligent party was injured, and in the other half the less negligent party was the injured plaintiff. Finally, we had obtained from a prior set of jury experiments which did not involve any contributory negligence a jury "price" for this set of injuries.<sup>26</sup>

In briefest compass these were the relevant results: (1) In cases where the common law instruction was used, the plaintiff nevertheless won verdicts 40 percent of the time. (2) There was a marked difference turning on how negligent the plaintiff was. When he was the less negligent party, he recovered in 58 percent of the cases, but when he was the dominantly negligent party he recovered in only 22 percent of the cases. (3) Finally as to damages, the "jury price" for

25. The method was developed by Professor Fred Strodbeck and is exemplified in R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967).

26. That is, we were able to borrow the damage facts from a prior experiment and give exactly the same injuries and the same medical evidence to the plaintiff here.



the injuries had been set by the prior experiment at \$40,000. The average jury verdicts for the cases under the common law instruction where the jury nevertheless found for the plaintiff was \$30,000; however, the average verdict for the same injuries when the jury was instructed under comparative negligence dropped to \$20,000.

The impression left by these data is complex. To some degree they do support the popular impression. But they also show that reports of the jury revolt against the common law rule are much like the reports of Mark Twain's death, and that the jury behavior is a slender reed on which to rest the case for reform of the rule.

#### IV.

To convey a final set of reactions to the *Maki* case, let me shift attention for a moment to matters of strict liability. We have been told that the victim's negligence was a relevant fact under a fault system and that the error of the common law approach was to have made it decisive.<sup>27</sup> The question is whether under proposals for strict liability the victim's fault remains in any sense relevant.

A small point first. It appears logically very difficult, if not impossible, to attempt to use comparative negligence adjustments when we are dealing with strict liability. As a matter of wording, none of the current statutes would appear to allow for this. And as a matter of theory it is not apparent how they could be rewritten for the purpose.

How do matters stand if we move now to auto compensation plans? The usual response, as for example under the Keeton-O'Connell plan, has been to disregard fault on both sides. And in the Keeton-O'Connell plan the logic has been carried to the point of including within the coverage the single-car accident.

For the moment, what is of interest is whether, when we confront the matter head-on, we are willing to treat as altogether irrelevant the contribution of the victim to his own accident. At times, critics of the fault system appear to have found some place for victim fault. Some years ago Professor Ehrenzweig in his original and important proposal of a plan of "full-aid" insurance<sup>28</sup> devised a system of fines to be levied against the contributorily negligent. He observed on behalf of his proposal:

Safety would finally be promoted by allowing tort fine recovery not only against the criminally negligent injurer, but also against the criminally negligent victim. At present, even an ordinarily negligent victim is automatically deprived of his entire claim, although this penalty may be

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27. James, *Contributory Negligence*, 62 *YALE L.J.* 691 (1953).

28. A. EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM (1954).

entirely out of proportion with the degree of his fault and the consequences of this sanction. Having eliminated the obsolete and generally rejected defense of contributory negligence, its policy could be more effectively served by the tort fine which again could more properly be adjusted to degrees of fault and financial circumstances.<sup>29</sup>

And recently Professor Marc Franklin after noting that "recovery by very careless victims has posed a psychological obstacle to all plans since the Columbia Report," put forward his own proposal of a plan to replace "the negligence lottery."<sup>30</sup> In deference to the community sense of justice, he would:

provide that the eighty-five per cent lost income payment be further reduced but to not less than seventy-five per cent for the victim whose "serious misconduct" contributed to his injury. To permit the recovery of seventy-five per cent would still leave the victim reasonably well protected. Though one may feel sympathy for the innocent family of the careless victim, if some deterrence is thought necessary the diminution seems appropriate.<sup>31</sup>

In the comments of Professors Ehrenzweig and Franklin, one can detect the outlines of a development in the law from contributory negligence as a 100 percent defense, to comparative negligence, to something beyond comparative negligence. The ultimate resting place of the law's concern with victim fault is, thus, not easy to predict at the moment.

This would be an appropriate remark with which to close these reflections, but a final query presses, and I add it as a postscript. What is likely to be the role of comparative negligence with respect to the momentum toward automobile compensation plans? Is it likely to slow the momentum or accelerate it? On the one hand, if coupled with compulsory liability insurance it may enable the common law to go a long step toward meeting the social objectives of the proponents of plans by vastly increasing coverage. And this might appear to be the best strategy for a bar and insurance industry committed to keeping the common law. On the other hand, it may be just the modest change which then makes the larger change irresistible. It would be hard to think of a more expensive and diseconomical insurable event than the measuring of proportional fault.

In *Maki* the Illinois Appellate Court, as said at the outset, really made news. And although its daring has been curbed by the decision of the Illinois Supreme Court, the very fact of its decision has altered permanently the subtle equilibrium of forces which sets the pace of common law change.

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29. *Id.* at 33-34.

30. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 789 (1967).

31. *Id.* at 801.