# THE DYNAMICS OF TORT LAW: COURT OR LEGISLATURE?

Ralph F. Bischoff*

## I. INTRODUCTION

From Aristotle to Montesquieu to the present, it has been pointed out that legislatures make policy, executives administer policy, and judiciaries adjudicate disputes. We know and recognize that democratic government is not so divided into apparent airtight compartments. True, the legislative function is almost exclusively one of policymaking but this is not an assertion that the legislature alone makes policy. I believe it was Woodrow Wilson who said that the power of government lies in its administration.

To understand the function of the judiciary in social engineering, it is necessary to underline the hue and cry over the Supreme Court's activism in the United States. The Court's critics maintain that it has too often acted as a social engineer rather than as the highest judicial authority deciding disputes between adversaries. Its enthusiastic admirers have been as vocal as its vitriolic detractors, often, perhaps, because "the end justifies the means."

But what of the ordinary courts, the common-law courts of our states in our type of federalism? These are the courts which affect the average person in day-by-day activity. Can it be said that the sole function of the common law is to decide disputes between parties and that the ordinary judiciary has no dynamic role to play in establishing and changing policy?

The very nature of the common law in this country and in England is that it is created by the judiciary in contrast to the law produced by the legislature. It is a common law which is both static and dynamic. In property law, for example, security demands that there be little change from the status quo. Tort law, on the other hand, is much more dynamic in adjusting to the changing needs and mores of society, as illustrated by the very current development of strict liability for manufacturers.

* Professor of Law, Vermont Law School; Denison Professor of Law, Emeritus, New York University.

It is my thesis that social policy in the law of torts has in general been changed and developed through a healthy interaction between the common-law courts and the legislatures, as will be evidenced by current examples. It also appears that certain courts have taken a definite lead in adapting precedent to the requirements of contemporary society. A premise for them is that if the courts created it, they can modify or change it. Nevertheless, even they recognize that legislatures have also contributed to the modern law of torts, for example through workmen's compensation statutes.

This article concentrates on those areas of tort law in which there has been evidence of a recent demand for change. In each, the common-law basis for the present status of the law will become apparent, as will the interaction between courts and legislature. When the state performed few functions in an age of laissez-faire, the hoary negative that the "king can do no wrong" was of little importance. In today's quasi-socialist society with its "protective" government, the ability to sue the state becomes almost a necessity. Negligence law, child of the common law, has reached a new importance in an age dominated by the automobile and giant industry. Does the court-created doctrine of contributory negligence with its corollary of last-clear-chance suffice to solve modern disputes equitably? Should negligence law disappear as a primary standard of behavior in a world influenced by insurance and large manufacturing concerns? Once again, the legislatures appear to dominate the change from contributory negligence to comparative negligence. In our complex society, where multiple defendants often contribute to one injury, should the traditional refusal to apportion liability continue? Are the policies underlying guest statutes consistent with contemporary society? If change is warranted, who should act, the court or legislature? And finally, in the areas of strict liability, skiing injuries and medical malpractice, characterized by large damage awards, courts and legislatures have cooperated to impose limits on the common law.

## II. A Comparison of Judicial Activism in Public Law and in Tort Law

Although this is not the place to review the controversy on the activist role of the Supreme Court of the United States, the nature

of the relation between court and legislature in the law of torts can be better understood by reviewing some of the elements in the activist-passivist dispute surrounding that Court. Similarities to and differences from the functions of the Supreme Court compared with those of the state common-law courts soon become apparent. These differences lend force to my thesis that in tort law the judiciary should take the lead when reform of the law appears to be necessary.

Judicial activism in public law is an age-old issue. From *Marbury v. Madison*[1] to the Warren and Burger Courts, lawyers and laypersons have debated the question of judicial review as practiced by the Supreme Court of the United States, with its undemocratic implications and political overtones. In that very early case, the Court assumed its final power over legislative acts; for even though the Jeffersonians won the particular issue, the Federalist-minded Supreme Court gained its long-term power. Legions of books and articles have been written concerning whether judicial activism of this type is within or without the meaning of the Federal Constitution, and whether it has proved itself to be a primary and needed means of accomplishing social reform.[2] The argument surrounding judicial activism, however, has so concentrated on the function of the Supreme Court, particularly in the area of civil rights and due process, that little attention has been paid to any activist role of the common-law courts' attempting to "modernize" the law of torts in the face of lethargy, politics, or what-you-will on the part of legislatures.

The power of the Supreme Court to call laws of Congress or of the state legislatures unconstitutional looms particularly important in any analysis of judicial activism. Most criticism of the Supreme

1. 5 U.S. (1 Cranch) 137 (1803).

2. For example, A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); P. FREUND, ON UNDERSTANDING THE SUPREME COURT (1949); R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955); E. CAHN, SUPREME COURT AND SUPREME LAW (1955); Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Oakes, *"A Plague of Lawyers"?: Law and the Public Interest*, 2 VT. L. REV. 1, 13 (1977); Riesman, *New Critics of the Court*, 137 THE NEW REPUBLIC, July 29, 1957, at 9; *Symposium, Policy-Making in a Democracy: The Role of the United States Supreme Court*, 6 J. PUB. L. 275-508 (1958).

Court's policymaking in recent decades has been a result of constitutional decisions which affect federalism, state's rights, and civil liberties. When the Court decides that school prayers are unconstitutional,[3] or that state criminal procedure violates due process,[4] or that a school district is discriminating against minorities,[5] there is a finality to the decisions which is not present in tort law, with a very few exceptions. Where judicial activism of the Supreme Court has been at issue, the emphasis has been on the subject matter of the decisions and, short of a revolution, their final effect.

In contrast, tort law lies primarily in the domain of the states; seldom are there federalist or constitutional issues present. The obvious exceptions in recent times are *New York Times Co. v. Sullivan*,[6] and progeny,[7] which radically changed the law of defamation and of privacy. Similarly, tort law seldom involves any conflict with a state constitution. If comparative negligence is to replace contributory negligence, either the judiciary or the legislature can legally accomplish the result. Neither governmental institution in this area is usually superior to the other. In place of judicial finality, courts can goad the legislature into action, and legislatures can react to unpopular changes established by judicial decisions. The question is one of practicality, politics, or convenience and not one of constitutional power. Nevertheless, we shall see an exception to this when we analyze judicial reaction to so-called guest statutes. For here, some state courts have used constitutional power to outlaw the legislative acts. Generally, however, with respect to torts and the common-law courts, the issue is "what-ought-to-be" without reference to the dictates of a constitution.

In a superficial way, the Supreme Court in its constitutional

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3. Engle v. Vitale, 370 U.S. 421 (1962).

4. These cases dominated the so-called Warren period, for example: Benton v. Maryland, 395 U.S. 784 (1969); Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Griffin v. Illinois, 351 U.S. 12 (1956).

5. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968); Brown v. Board of Educ., 349 U.S. 294 (1955); Brown v. Board of Educ., 347 U.S. 483 (1954).

6. 376 U.S. 254 (1964).

7. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Time, Inc. v. Hill, 385 U.S. 374 (1967); Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967).

decisions and the common-law courts in the area of torts appear to face a common question. Should a court avoid a decision which will change law on the assumption, often merely a hope, that the legislature, Congress or state, will accomplish the needed reform and is perhaps better able to do so? All students of the Supreme Court will recognize that it has often taken advantage of an opportunity to make a fundamental decision when it could have been avoided. At the same time, the Court has also delayed a decision or avoided one or decided on a very narrow basis when it could have immediately decreed a drastic change in the law. One of the best examples of true activism is *Mapp v. Ohio*[8] which dominated 1961. *Mapp* reversed a long-time constitutional doctrine in holding that evidence obtained by state officials through an unreasonable search under the fourth and fourteenth amendments could not be introduced in a state criminal proceeding. As emphasized by the dissent, the Court "reached out" to make this decision since the pivotal issue on appeal from the Ohio Supreme Court was whether Ohio's obscenity law was an invasion of free speech.[9] Justice Harlan asked whether such activism promoted respect for the Supreme Court.[10] Yet it can be argued that the opportunity to make a needed change was present, a majority vote was obtainable, and it was useless to await action by all the states.

In the area of educational discrimination, on the other hand, delay and gradualism were the order of the day, beginning with the 1948 case of *Sipuel v. Board of Regents,*[11] which held only that a state must provide an in-state legal education for Negroes, to the 1954 *Brown v. Board of Education*[12] opinion which postponed any specific decree of enforcement until reargument. It can hardly be argued, however, that the Court's gradualism in this field was due to a deference to the legislative function. Many of the states, particularly in the South, could not be expected to accomplish the same

8. 367 U.S. 643 (1961).

9. The Supreme Court of Ohio had held that, under Ohio's constitution, the illegally obtained evidence was admissible, and upheld the obscenity conviction against a free speech challenge. State v. Mapp, 170 Ohio St. 427, 166 N.E.2d 387 (1960).

10. *See* Bischoff, 1961 ANN. SURVEY AM. L. 82.

11. 332 U.S. 631 (1948). *See also* Sweatt v. Painter, 339 U.S. 629 (1950), and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), which held that segregated higher education was not equal. *See* Bischoff, 1954 ANN. SURVEY AM. L. 53.

12. 347 U.S. 483 (1954).

result. Any delay by the Court in the years before 1954 was undoubtedly caused by a desire to await the development of more receptive public opinion or possibly because of existing divisiveness within the Court. By 1954 the decision was no longer a surprise, even in its unanimity.

This characteristic in the public law field whereby the Supreme Court has delayed using its "legislative" power, even in the face of clear impotence on the part of state legislatures to remedy an evil until public opinion would give support, is even better illustrated by *Baker v. Carr.*[13] Here was the first step toward the constitutional requirement of one-man-one-vote. The lower court was in error for dismissing a complaint that plaintiffs were denied equal protection because the state legislature had not reapportioned the state into equal districts on the basis of population. Gradualism and a deference to states and state legislatures required only that the dismissal be reversed with no immediate answer on the merits. The issue of numerical equality among voters proved to be even more sensitive than discrimination in education. Added to other arguments against activism was the fact that representation had been thought to be a political question, beyond the jurisdiction of the courts.[14] Even the Court divided between those who felt it to be the Court's function to protect all constitutional rights including that of voting, no matter what the effect on state legislative majorities,[15] and a dissent which emphasized that the role of the Court was debased when it injected itself into the clash of political forces. Mr. Justice Frankfurter predicted that legislatures would "play ducks and drakes with the judiciary."[16] For Mr. Justice Clark, the decision was "in the greatest tradition of this Court."[17] Could it be expected that state legislatures, via constitutional amendment, would redistrict and effectually change the traditional balance in the legislature from rural to urban domination?

In summary, the activism of the Supreme Court as illustrated

13. 369 U.S. 186 (1962).

14. A majority of six expressed itself in six opinions. The majority and minority even differed on whether previous decisions were overruled. *See* Bischoff, 1962 ANN. SURVEY AM. L. 114.

15. *See* Bischoff, 1962 ANN. SURVEY AM. L. 115.

16. 369 U.S. at 268.

17. *Id.* at 262.

by *Mapp* and *Brown* and *Baker* was aimed at forcing the states to reform their law with respect to civil rights in the broadest sense of the term. The finality of Supreme Court decisions, the nature of their subject matter and the futility of waiting were influential in motivating that Court to action. Although the problem of whether the state common-law court should make or avoid a decision changing social policy is also present in the examples we shall discuss in tort law, judicial activism in tort law would hardly result in the extreme criticism that followed the *Brown* decision.[18] With torts, it is a question of whether the court or legislature should act. In some instances, perhaps, a court majority cannot be obtained in favor of a drastic change; in others, the legislature, subject to political pressures, may find it more convenient to avoid the problem or to negative any change. Either the court or the legislature, by action or inaction, may influence the other. Action by the court may result in reaction by the legislature and, finally, a synthesis.

## III. On Tort Law in General

Before one can understand how the aims of the law of torts can best be achieved, one must first understand the basics of the subject matter. A tort is a private or civil wrong, a wrong independent of contract. It is imposed by the law rather than by the parties and is often described as an unjustifiable interference with another. But what is unjustifiable at any given moment of history will depend to a large extent on tradition, legal precedent, and gradual adaptation to new situations. The field of torts offers the ideal opportunity to see the common law at work, evolving from case to case, fitting the new situation into the old major premise and into precedent.

An examination of the early cases in torts often presents a confusing picture because the reliance on procedure, forms of ac-

18. *Dixie Rejoins the United States*, The Economist, Sept. 24, 1955, at 51:

> That inept fraternity of politicians and professors known as the United States Supreme Court chose to throw away the established law. These nine men repudiated the Constitution, spat upon the tenth amendment, and rewrote the fundamental law of this land to suit their own gauzy concepts of sociology. If it be said now that the South is flouting the law, let it be said to the high court: you taught us how.

tion, and precedent often prevented adaptation to new situations.[19] It is clear, however, that in more modern times, without the severe restrictions of the forms of action, the common law has more easily adapted old principles and precedent to new situations. There is a continual process of redefinition of what is a justifiable interference with another. Social policy changes are accomplished in this manner, without much fanfare, without any clash with the legislative function and without the dramatic effect of new legislation. Examples are legion because this is the essence of common law development. A few will suffice. The standard for self-defense is that of a reasonable person even if a mistake is made.[20] The standard has been modified for a parent going to the aid of a minor daughter whom the parent believed was being attacked.[21] For children, the adult standard of contributory negligence was changed to that of a reasonable child of that age and experience,[22] but when the minor was driving an automobile, the standard became that of the adult driver.[23] Where the old law for the benefit of landowners stated that

19. *See* F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 361 (1909). The early case of Scott v. Shepherd, 96 Eng. Rep. 525 (K.B. 1773)—the passing of the squibs—is a good example of the importance of deciding whether to bring trespass or trespass on the case. *See also* S. MELSON, HISTORICAL FOUNDATION OF THE COMMON LAW (1969). To get relief, a plaintiff had to fit his complaint into the old trespass writ. This, however, was limited to direct and immediate harm because of its origin as trespass *contra pacem regis*. The original social policy reinforcing the criminal law is clear. In one of the famous fifteenth century cases, *The Thorns*, Y.B. Mich. 6 Edw. 4, f.7, pl. 18 (1466), much of the argument of the defense was that no tort liability should lie unless the act was also a felony. One example of growth and adaptability even with the rigidity of the forms of action was the fifteenth century creation of the tort of assault as an addition to battery. To the defendant's answer that he did not do any harm to the plaintiff because he did not actually hit her, the court replied that it was harm (and against the King's peace) in that the plaintiff had a reasonable apprehension of immediate bodily harm. I de S et ux. v. W de S, Y.B. Lib. Assoc. f.99, pl. 60 (1348). Only later, however, did trespass on the case develop to take care of indirect harm. Woe to the plaintiff's solicitor and to the desired social result if the wrong form was used. Noteworthy is the fact that as late as 1959 the English court in Fowler v. Lanning, [1959] 1 All E.R. 290 (Q.B.), was faced with the related problem of whether the burden of proof differed in the two writs. The whole business of the forms of action and their long influence has caused many young students of the law who are often desirous of quick changes in social policy to rely on legislation.

20. Courvoisier v. Raymond, 23 Colo. 113, 47 P. 284 (1896); Boston v. Muncy, 204 Okla. 603, 233 P.2d 300 (1951).

21. *See* State v. Borwick, 193 Iowa 639, 187 N.W. 460 (1922); Patterson v. Kuntz, 28 So. 2d 278 (La. Ct. App. 1946). *See generally* RESTATEMENT (SECOND) OF TORTS § 76 (1965).

22. Ackerman v. Advance Petroleum Transport, 304 Mich. 96, 7 N.W.2d 235 (1942); Charbonneau v. MacRury, 84 N.H. 501, 153 A. 457 (1931).

23. Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961); Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1966).

there was no duty to foresee a trespasser, attractive nuisance was created to effectively make an exception for children.[24] In an age when strict liability did not dominate, *res ipsa loquitur* came to the aid of many a plaintiff.[25] Implicit in all of these situations is a recognition, not a denial, of a traditional tort principle and of its adaptation to new social demands and new limitations.

Familiar examples also abound in which existing principles have been more drastically limited or redefined. In others, completely new principles have been created.[26] The concepts of negligence and duty and proximate causation demonstrate the common law's ability to sharply restrict a principle as it is applied in one direction and at the same time expand it in an almost revolutionary way in another. The richness of the common law of torts, its power to limit and to create, is illustrated by *Palsgraf v. Long Island Railroad Co.*[27] In *Palsgraf,* Judge Cardozo dramatically limited the existing principle of causation by requiring that injury to the specific plaintiff must be reasonably foreseen. This was a policy change, a new limitation of liability, as was frankly admitted by the dissent through Judge Andrews.[28] Similarly, an extension of liability, a radical change in an historical principle, was achieved by Judge Cardozo in *MacPherson v. Buick Motor Co.*[29] in 1916. The 1842 English decision in *Winterbottom v. Wright*[30] had held that if *A* contracts with *B* to keep a vehicle in repair, and *C,* the driver, is injured due to lack of repair, *C* had no action against *A* because of lack of privity. But in *MacPherson,* seventy-four years later, where

24. Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1873); Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 A. 858 (1911).

25. Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944); George Foltis, Inc. v. City of N.Y., 278 N.Y. 160, 38 N.E.2d 455 (1941); Kearney v. London, B. & S.C. Ry., [1870] 5 Q.B. 411. *Ybarra* and Bardessono v. Michels, 3 Cal. 3d 780, 478 P.2d 480, 91 Cal. Rptr. 760 (1970), are illustrations of the law's coming to the aid of plaintiffs who had to meet the "conspiracy of silence" from the medical profession.

26. The common-law courts created negligence and, in turn, the defenses of contributory negligence and assumption of risk. When the injury became easier to prove, the new tort of protection against harm from the result of shock was created and gradually extended from intentional to negligent invasion. Although legislatures have contributed, most of the modern basic protection of the tort right of privacy has been judicially created.

27. 248 N.Y. 339, 162 N.E. 99 (1928).

28. *Id.* at 347, 162 N.E. at 101.

29. 217 N.Y. 382, 111 N.E. 1050 (1916).

30. 152 Eng. Rep. 402 (Ex. 1842).

the wheel of a Buick was reasonably certain "to place life and limb in peril if negligently made,"[31] there was a duty of care to a foreseeable user. Within the short period of twelve years, the New York Court of Appeals was both extending and curtailing liability by redefining the tort doctrine of duty. Typical of the common-law approach to new situations, *MacPherson* limited liability to a product which might place life and limb in danger due to negligence.[32]

The question of what constitutes an unjustifiable interference with another leads directly into the problem of defining the goals or objectives of tort law.[33] In contrast to the early common law of torts dominated by the rigidity of the forms of action, both courts and legislatures are now more conscious of the purpose to be achieved by a judicial decision or a legislative act. One goal of both intentional and negligent torts is to punish or sanction a defendant because of his moral shortcoming. Tort decisions are also related to another goal, prevention, although the extent to which the payment of damages in a civil case acts in a preventive way is questionable. Tort social policy can also differentiate between the protection of a useful activity as opposed to the nonuseful. For example, quick compensation is clearly the goal of compensation laws and no-fault insurance. The present decisions on products liability combine compensation and distribution of the risk as objectives. The law has come a long way from the doctrines of assumption of risk or fellow-servant,[34] which protected industry, to compensation laws in favor or labor. The so-called Learned Hand formula balanced the probability of an injury with the gravity of an injury and the economic

31. 217 N.Y. at 389, 111 N.E. at 1053.

32. An earlier New York decision spoke in terms of articles that were of an "inherently dangerous nature." Statler v. George A. Ray Mfg. Co., 195 N.Y. 478, 480, 88 N.E. 1063, 1064 (1909).

33. Almost a century ago, in his famous THE COMMON LAW, Oliver Wendell Holmes questioned whether there was any common ground at the bottom of all liability in tort. As he pointed out, the law of contract differed because the parties consented to both rights and duties. In tort the law was imposing liability but not for every violation of the person or privacy. Any discernible goal was lost sight of with the rigidity of forms of action and procedure. As Holmes pointed out, however, two basic theories have often explained the dividing line between justifiable and unjustifiable interferences. The one asks whether the defendant is morally in the wrong; the other, based on strict liability, whether the plaintiff was damaged by the act of the defendant. O. HOLMES, THE COMMON LAW 63 (M. Howe ed. 1963).

34. Rylands v. Fletcher, L.R. 3 H.L. 330 (1868), *aff'g* Fletcher v. Rylands, L.R. 1 Ex. 265 (1866); *see also* Brown v. Collins, 53 N.H. 442 (1873).

burden of precautions.[35]

The traditional legislative input into the law of torts must not be lost sight of in view of the present problem of the respective functions of court and legislature. Here the change in social policy is often more obvious since the gradualism of the common-law approach is absent. In addition, legislative "interference" with the common law has often been a reaction to the courts' apparent inability to reform the law. Obvious examples are guest statutes, liability laws, and compensation laws. The sudden rush to guest statutes, which demanded gross negligence or the equivalent for liability of the driver to an automobile guest, was based on the need to counteract possible fraud. Liability laws, such as the Federal Employer's Liability Act,[36] removed the common-law defenses of the fellow-servant rule and assumption of risk, clearly anachronisms in modern society. Workmen's Compensation statutes expressed the needs of a society more attuned to the needs of labor. In view of the current problem of interactions between courts and legislatures, it should be recognized that the courts could have accomplished the same result in at least two of these examples. The intricacies of workmen's compensation more clearly required legislative action.

Today in the law of torts there is an increased consciousness of social responsibility, of social engineering. Our modern awareness of social responsibility currently expresses itself in many revolutionary ways: comparative negligence replaces contributory negligence and assumption of risk; contribution among tort feasors is more prevalent; doubts are raised about the justice of guest statutes; products liability takes the place of negligence in the law of suppliers; the traditional immunities of government and charities are being knocked down. In an age in which we have become more litigant-minded, the courts are having difficulty with malpractice, and skiing accidents. Although in all of these contemporary problems, the function of the courts vis-a-vis the legislatures is a central issue, little question has been raised as to whether the legislatures or the courts should have assumed responsibility for bringing about social change. The answer to this question is the focus of this article.

35. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).
36. 45 U.S.C. § 54 (1972).

## IV. "THE KING CAN DO NO WRONG"

The common law has for centuries accepted the doctrine of sovereign immunity: the citizen may not sue the government without consent of the latter.[37] As students of the common law are well aware, such traditional dogma die with difficulty.

In the last two decades, changes in the doctrine of governmental immunity from suit in torts have resulted in dramatic interaction between courts and legislatures. Because the changes involve fundamental policy in as sensitive an area as sovereignty, these changes best exemplify action, reaction, and synthesis between the two governmental institutions.

That the legislature could grant the sovereign's consent to be sued was axiomatic in earlier decades. This consent took various forms, one of which is the private bill such as a "Bill for the relief of Jesse James." Other forms are the Court of Claims[38] statutes which covered contract responsibility and, the Federal Tort Claims Act[39] which did the same for torts.

In the case of municipal corporations, the courts, themselves, created a large exception to immunity from suit which was based on a distinction between the dual functions of these corporations: governmental and proprietary. First established by the New York Court of Appeals in 1842,[40] the exception provided that a city could

37. In its origin, sovereign immunity is undoubtedly feudal and steeped in the doctrine of the divine right of kings. How is it possible that those roots were nurtured by the democratic soil of this country, particularly in view of the eighteenth century attitude toward George III? As usual, the "bogey man" loomed large: one successful suit would yield many. Should the governmental unit, acting solely through persons, really be responsible in the usual *respondeat superior* sense? In particular, towns and counties had their duties foisted on them by the state, so why should they now be responsible? The doctrine, originally the child of the king's court protecting the king, even became constitutionalized in the eleventh amendment. Whether the reason for the doctrine's existence in the United States be historical, legal, or political, at least there was forewarning in No. 81 of THE FEDERALIST:

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without [the Sovereign's] consent. This is the general sense and the practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

THE FEDERALIST No. 81, 487 (A. Hamilton) (New American Library ed. 1961).

38. 28 U.S.C. § 1491 (1972).

39. 28 U.S.C. §§ 2671, 2672, 2675, 2677-2679 (1966).

40. Bailey v. City of New York, 3 Hill 531 (N.Y. 1842).

be sued if the function contributing to an injury was proprietary, *i.e.*, often engaged in by private corporations as well. Despite early court involvement in this area, until the last two decades changes in the principle of state immunity were effected by the legislature. Only recently have the courts assumed a large, positive role in this area either by restricting or eliminating the immunity or by forcing the legislatures to act.

A leading case is that of *Ayala v. Philadelphia Board of Public Education,*[41] decided by the Pennsylvania Supreme Court in 1973. As indicated below, it is not the earliest decision to outlaw the traditional immunity against the state and lesser units of government. Nevertheless, it not only provides a summary of the extensive judicial activism in the short period between 1970 and 1973, but it is also the most cited case on the issue in the years after 1973. In *Ayala* the plaintiff's arm had to be amputated as a result of the defendant teacher's negligence. The defense of governmental immunity, which prevailed in the lower courts, was rejected in an exhaustive opinion by Chief Justice Roberts of the Pennsylvania Supreme Court. After noting that the instant case involved only a school board, the opinion, nevertheless, made it clear that the current trend was to eliminate or restrict governmental immunity as a defense. Listed were dozens of cases between 1970 and 1973 which limited or abrogated the doctrine. Justice Roberts also quoted at length from the *Restatement of Torts* which listed judicial abrogation in eighteen states and legislative action in seven.[42] An additional fifteen states limited the doctrine via the insurance-waiver theory.[43] Only in seven states was the doctrine retained in its entirety as of the time of the opinion.[44] Quite aside from this list of cases and statutes *Ayala* also gathered together an extensive list of articles, some even arguing that the immunity was contrary to due process of law.[45] Thus, after a long history of limited consent-to-be-sued statutes, private bills, and some judicial decisions differentiating governmental and proprietary functions, *Ayala* represents the complete judicial annihilation of the traditional doctrine.

41. 453 Pa. 584, 305 A.2d 877 (1973).
42. *Id.* at 608, 305 A.2d at 889.
43. *Id.*
44. *Id.*
45. *Id.* at 594-97, 305 A.2d at 882-83.

On the other hand, some states in their common-law decisions exemplify a process of gradualism and only a partial retreat from complete immunity. New Hampshire presents a most interesting example of this because it includes an interaction between the courts and the legislature. Rumblings in opposition to the doctrine of governmental immunity were heard in 1966. Although the court consistently upheld the doctrine, it clearly expressed a desire to have the legislature do something about the inequities the doctrine created.[46] In 1967 Senate Bill 171[47] provided for a limited waiver of governmental immunity, but this bill failed to be enacted. Similar proposed bills in 1969 and 1973 failed to be approved.[48] On November 29, 1974, the court changed this absolute doctrine of governmental immunity, at least as it applied to cities or towns. *Merrill v. Manchester*[49] was a consolidation of two cases. In the first, the plaintiff was injured as a result of a defective sidewalk in the city of Manchester. In the second case, plaintiff was a passenger in a car that hit a pothole, causing the plaintiff to be thrown about the car. The question before the court was whether the doctrine of governmental immunity was applicable. The court held that the doctrine as applied to cities and towns was abolished, and that the new rule would not apply to any torts (except the present two cases) occurring before July 1, 1975.

The court justified overruling the doctrine on the grounds that it was court-made. Further, the court stated, "The fact that bills pertaining to municipal and related immunities have been introduced in the legislature and failed to be adopted does not militate against action by this court. . . . The legislature expresses its will by enacting law, not by failing to do so."[50] The court was not acting arbitrarily in selecting July 1, 1975 as the effective date. It clearly wished to give the legislature time to respond. Thus, six months later in *Sousa v. State,*[51] the court refused to abolish the doctrine of

46. *See* Gossler v. Manchester, 107 N.H. 310, 221 A.2d 242 (1966); *see also* Opinion of the Justices, 113 N.H. 205, 304 A.2d 881 (1973).

47. S. 171, New Hampshire Senate, 1967 Sess.

48. H.177, New Hampshire Legislature, 1969 Sess.; H.191 New Hampshire Legislature, 1973 Sess.

49. 114 N.H. 722, 332 A.2d 378 (1974).

50. *Id.* at 728, 332 A.2d at 382 (citations omitted).

51. 115 N.H. 340, 341 A.2d 282 (1975).

governmental immunity as applied to the State Highway Department, whose negligent maintenance of a bridge caused plaintiff's truck to crash. In *Sousa* we are confronted with a strange paradox. The court, which just six months before had argued that it could overturn the court-made doctrine of governmental immunity, now stated that it was an issue best left to the legislature as it concerned public money, public policy, and governmental administration. In case the legislature failed to enact appropriate legislation, the court issued this implied threat:

> We are aware that other measures are under consideration to regulate this field of liability which could lead to additional legislation. For these reasons we are of the opinion that *at this time* it would be inappropriate for the court to abrogate by judicial action the existing rules of state immunity.[52]

In summary, we have a classic illustration of the court's pushing and prodding the legislature to produce adequate legislation in an area beset by injustices. In *Merrill,* it declared that sovereign immunity is a court-made doctrine controlled by the court; then in *Sousa* the court found that changes to the doctrine would be left to the legislature unless the legislature failed to act. The result of this judicial prodding was a statute effective July 1, 1975.[53] Especially noteworthy is the fact that the legislature did little more than affirm *Merrill.* Immunity was removed from governmental units[54] other than "the state or any department or agency thereof."[55]

This same history of gradualism is illustrated in the decisions of two other states: Indiana and Louisiana. In the 1969 decision of *Perkins v. State,*[56] Indiana retained the immunity of the state for governmental, but not proprietary, functions and abolished immunity for municipal corporations or counties. *Campbell v. State*[57] later completed the burial of immunity. Louisiana, in the 1973 decision of *Board of Commissioners v. Splendour Shipping & Enterprises Co. Inc.,*[58] abolished immunity for state agencies and municipalities,

52. *Id.* at 345, 341 A.2d at 286 (emphasis added).
53. N.H. REV. STAT. ANN. § 507-B (1977).
54. *Id.* § 507-B:2.
55. *Id.* § 507-B:1(I).
56. 252 Ind. 558, 251 N.E.2d 30 (1969).
57. 259 Ind. 55, 284 N.E.2d 733 (1972).
58. 273 So. 2d 19 (La. 1973).

but, as in New Hampshire, suggested the legislature handle the problem of immunity of the state itself. In addition, the Louisiana opinion agreed with the *Ayala* court that municipalities and state agencies need not fear bankruptcy due to the elimination of their immunity:

> It is clear that fears of those who believed the doctrine necessary to existence of government were unfounded. No agency that we know of his [sic] been bankrupted by the torts of its employees nor submerged in litigation.
>
> . . . .
>
> Governmental responsibility is needed more today than ever. There is hardly any sector of private life and activity free from governmental intervention.[59]

A face-to-face confrontation between legislature and courts has occurred in at least four other situations. Arkansas removed the immunity judicially,[60] only to have the legislature reinstate it.[61] More famous was the interplay between court and legislature in California, Illinois, and Minnesota.

Prior to 1961 in California, the common-law doctrine of governmental immunity was followed by the California court. Typically, this doctrine was riddled with exceptions made by both courts and the legislature. In 1961 two key cases held that the doctrine of governmental immunity was no longer available to protect public entities from liability. The first was *Muskopf v. Corning Hospital District*,[62] which overturned a lower court ruling that denied plaintiff a right to recovery for injuries sustained by the alleged negligence of a public hospital in which plaintiff was a patient. "The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia."[63] The court complained about the lack of a consistent and logical pattern to the doctrine as applied, finding instead "a series of sporadic statutes, each operating on a separate area of governmental immunity where

59. *Id.* at 25-26.
60. Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968).
61. ARK. STAT. ANN. § 12-2901 (Supp. 1971).
62. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).
63. *Id.* at 216, 359 P.2d at 460, 11 Cal. Rptr. at 92.

its evil was felt most."[64] The dissenting opinion of Justice Schauer in *Muskopf* opined that the majority view resulted from impatience "with the legislature's failure to act as speedily and comprehensively as they believe it should."[65] Yet, he said, this is no reason to "usurp the legislative function, refuse reasonable respect for the doctrine of stare decisis," and sweepingly announce that it is to be abolished.[66] The second key case, *Lipman v. Brisbane Elementary School District*,[67] went even further than *Muskopf* and stated in strong dictum that public entities could be held liable for employees' acts even when the doctrine of discretionary immunity protects the latter.[68]

In response to these two cases, the California legislature enacted what was in effect a two-year moratorium to enable itself to legislate comprehensively. A detailed and comprehensive five-hundred page study was prepared by Professor Arvo Van Alstyne for the California Law Revision Commission entitled *A Study Relating to Sovereign Immunity*.[69] This report was the essential basis for the legislature's 1963 California Tort Claims Act.[70] Professor Van Alstyne regarded the *Muskopf* decision "as a stimulus to detailed appraisal of the problem by the legislature, with consequent statutory formulation of a new body of law to replace the chaotic and inconsistent rules . . . previously in effect."[71] Since the enactment of the Tort Claims Act, the court has followed the wording of the statute. This has not, however, precluded a biased interpretation so as to find governmental liability wherever possible.

Although not as well known nationally, the interplay between legislature and court in Minnesota is particularly worthy of note because of the court's specific reference to the legislature and the technique of "prospective overruling."[72] *Spanel v. Mounds View*

64. *Id.* at 218, 359 P.2d at 461, 11 Cal. Rptr. at 93.

65. *Id.* at 222, 359 P.2d at 463, 11 Cal. Rptr. at 95.

66. *Id.*

67. *Id.* at 224, 359 P.2d at 465, 11 Cal. Rptr. at 97.

68. *Id.* at 229-30, 359 P.2d at 467, 11 Cal. Rptr. at 99.

69. CALIFORNIA LAW REVISION COMM'N, A STUDY RELATING TO SOVEREIGN IMMUNITY (1963) [hereinafter cited as Van Alstyne].

70. CAL. GOV'T CODE §§ 810-996 (West 1966).

71. Van Alstyne, *supra* note 69.

72. Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 293, 118 N.W.2d 795, 804 (1962).

*School District No. 621*[73] involved a small child injured inside a classroom by a defective slide. Actions against school district, teacher, and principal were dismissed for failure to state a claim upon which relief could be granted. Although the state supreme court affirmed the dismissal, it stated that the doctrine of sovereign immunity would no longer be available with respect to torts committed after the adjournment of the next session of the state legislature, subject, of course, to any legislative enactments during that next session.[74] Due to the nature of the instant case, the decision and this "prospective overruling" applied only to local governmental units. As if in reply to the court in *Spanel,* the legislature enacted a law "affirming" the removal of immunity from local governments.[75] *Nieting v. Blondell*[76] followed in 1975 wherein the court abolished the tort immunity of the state itself, again subject to any action taken by the legislature. The quick reaction of the legislature in 1976 was to provide for tort claims against the state.[77]

As early as 1959, *Molitor v. Kaneland Community Unit District No. 302*[78] abolished the common-law doctrine of governmental immunity in Illinois and held that the defendant school district was liable for the negligence of its bus drivers or other employees. Following the *Molitor* decision, there resulted "a disjointed, discordant rush of legislative activity and judicial decisions concerning the subject of governmental immunity, a flurry which finally culminated six years later in the enactment by the legislature of the Local Government and Governmental Employees Tort Immunity Act of 1965."[79] The Tort Immunity Act of 1965,[80] modeled after the California Tort Claims Act of 1963, was enacted to comply with the consti-

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73. 264 Minn. 279, 118 N.W.2d 795 (1962).

74. *Id.* at 292, 118 N.W.2d at 803.

75. MINN. STAT. ANN. § 466 (West 1977).

76. 306 Minn. 122, 235 N.W.2d 597 (1975).

77. MINN. STAT. ANN. § 3.736 (West 1977).

78. 181 Ill. 2d 11, 163 N.E.2d 89 (1959).

79. Kerwin, *Tort Liability for Illinois Schools Under Section 9-103 of the Illinois Tort Immunity Act,* 25 DEPAUL L. REV. 441, 455 (1976).

After *Molitor,* the Illinois Legislature passed the 1959 School Tort Liability act which applied the traditional proprietary/governmental distinction to schools. ILL. REV. STAT. ch. 122, §§ 821-831 (1973). Further, the legislature passed several bills exempting the park district from any liability whatsoever, but these bills were found constitutionally defective by the court in Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 203 N.E.2d 573 (1964).

80. ILL. REV. STAT. ch. 85, §§ 1-101 to 10-101 (1973).

tutional requirements spelled out in *Harvey v. Clyde Park Dist.*[81] Again, as in the case of California, the Illinois Court has endowed the act with a liberal interpretation, finding liability whenever possible. It has even held, in *Housewright v. City of LaHarpe,*[82] that the acquisition of insurance by governmental entities to protect themselves from negligence suits waives the defenses of immunity under the act.

An example of an additional type of response toward governmental immunity is that of the Massachusetts legislature. Effective July 20, 1978, and retroactive to August 16, 1977, personal injury and property damage suits can be brought against the state, county, and municipality.[83] In contrast to Minnesota, Illinois, and California, the Massachusetts Supreme Judicial Court only indirectly contributed to the result. On the basis of traditional immunity, after a lower court had reluctantly dismissed a case, brought by a six-year-old allegedly blinded by school negligence, the higher court remanded in view of the legislative action.[84]

In summary, the doctrine of sovereign immunity from suit has been one dominated by judicial activism, particularly in recent years. Deference to the legislature could have been easily understood in this sensitive area where private bills were long in order and where legislatures early took a lead in "court-of-claims" statutes or tort liability acts. Undoubtedly for this reason, the judicial activism has taken a variety of forms. Thus, as in *Ayala,* the judicial decision was sudden and complete. New Hampshire and other states illustrate gradualism and often only a partial removal of the doctrine by court action. Confrontation with the legislature, as in California and three other states, exemplifies complete interaction between legislature and court, usually with a total demise of the doctrine. Finally, as in Massachusetts, a few courts have bowed to the legislature.

## V. On Comparative Negligence and Multiple Defendants

"There is at present a stampede toward comparative negli-

81. 32 Ill. 2d 60, 203 N.E.2d 573 (1964).
82. 51 Ill. 2d 357, 282 N.E.2d 437 (1972).
83. 1978 Mass. Adv. Legis. Serv., ch. 512.
84. Whitney v. City of Worcester, ___ Mass. ___, 366 N.E.2d 1210 (1977).

gence."[85] The stampede, however, has come overwhelmingly from the legislatures and only recently from judicial decision.[86] On the surface, the reluctance of the courts is difficult to understand, particularly in light of the dynamic attitude shown by courts in removing governmental immunity. If the objective of the common law is the welfare of society, why is it that in this dynamic area of negligence law, affecting almost all persons, the courts have relied so much on tradition and stare decisis? It would seem that the courts should be able to change what they originally created. The best explanation for judicial timidity is the infiltration of contributory negligence throughout other legislation, admittedly a complicating factor, but certainly not a decisive one.[87] A second reason given by apologists for the judiciary's reluctance is the close relationship between the doctrine of comparative negligence as it affects plaintiffs in relation to defendants and the traditional judicial refusal to allocate damages among contributing defendants. Can a jury really figure out percentages of negligence? In addition, what should become of last-clear-chance and assumption-of-risk, both created by the courts? How is wilful misconduct to be treated? As we will see, the relationship between these doctrines is well illustrated by recent cases in New York and Illinois.

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85. Schwartz, *Comparative Negligence: Oiling the System*, TRIAL, July-Aug. 1975, at 58.

86. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974 & Supp. 1978); James, *Connecticut's Comparative Negligence Statute: An Analysis of Some Problems*, 6 CONN. L. REV. 207 (1973-74); Lambert, *The Common Law is Never Finished (Comparative Negligence on the March)*, 32 AM. TRIAL LAW. J. 741, 743-46 (1968); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Woods, *Trial of a Personal Injury Case in a Comparative Negligence Jurisdiction*, 21 AM. JUR. TRIALS, 715-800 (1974).

87. This factor has not deterred the state legislatures from acting, beginning with Mississippi in 1910. MISS. CODE ANN. § 1454 (1942). This continued via comparative negligence statutes of the "pure" type, N.Y. CIV. PRAC. LAW §§ 1411-1413 (McKinney 1976), or more often through laws restricting the doctrine to instances where the plaintiff was not equally at fault (usually known as the "Wisconsin type," WIS. STAT. ANN. § 895.045 (West 1966)). In addition, a few statutes covering a narrow class of cases, such as railroad accidents, adopted the comparative scheme. FLA. STAT. ANN. § 768.06 (West 1964); IOWA R. CIV. P. 97 (1946); 45 U.S.C.A. §§ 51-59 (West 1972).

An example of the "pure" form is set out below:

> In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976).

In spite of this background of domination by legislatures, a few courts have nevertheless recently asserted their responsibility for reform in this area. As this section demonstrates, the range of response is great. Two state courts have taken the attitude that they can destroy what they created, Florida in 1974[88] and California in 1975.[89] New York is the best example of a dialogue between judiciary and legislature in that a court decision[90] in the closely related field of multiple defendants indirectly pressured the legislature into adopting a comparative negligence statute.[91]

By a five-to-two vote in *Li v. Yellow Cab Co. of California,*[92] the majority of the supreme court found no justification in logic or policy for the continuation of the contributory negligence rules and adopted the "pure" form of comparative negligence. The facts in *Li* lent themselves to judicial activism. The plaintiff was driving northbound on the inside lane of a Los Angeles boulevard and made a left turn at an intersection, across all three southbound lanes. The defendant's cab traveling south hit the plaintiff's car. On precedent, the trial court found that both parties were negligent and accordingly held for the defendant. The California Supreme Court, however, adopted the "pure" form of comparative negligence. The court rejected the argument that because contributory negligence was part of California's statutory scheme, it could be attacked only on a constitutional ground.[93] Instead, the court found that the legislature had simply codified the common law of the time. Although this sudden creation of new law and discard of the traditional would inevitably raise problems, the court recognized these problems could be resolved by future judicial and legislative action. "Our decision in this case is to be viewed as a first step in what we deem to be a proper and just direction, not as a compendium containing the answers to all questions that may be expected to arise."[94]

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88. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

89. Li v. Yellow Cab Co. of Cal., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

90. Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

91. N.Y. Civ. Prac. Law §§ 1411-1413 (McKinney 1976). For complete text of § 1411, see note 87, *supra.*

92. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

93. *Id.* at 812-13, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

94. *Id.* at 826, 532 P.2d at 1242, 119 Cal. Rptr. at 874.

Although the 1973 Florida decision in *Hoffman v. Jones*[95] preceded *Li*, it did not receive the publicity of the California case. *Hoffman* is noteworthy, however, for the extent of the decision. Comparative negligence was to apply to trials which had begun, or even where verdict and judgment had been rendered, provided the issue of comparative negligence had been raised during the trial. The *Li* opinion did not venture quite so far but held that comparative negligence should apply to all cases where the actual trial had not yet begun.[96]

In contrast with California, New York is an excellent example of a dialogue between judiciary and legislature with the court's decision on multiple defendants resulting in a comparative negligence statute. The famous 1972 decision, *Dole v. Dow Chemical Co.*[97] revolutionized the procedural and substantive law applicable to tort cases involving multiple defendants by allowing apportionment of liability and damages based on relative fault between tortfeasors, each of whom contributed to the plaintiff's injury.[98]

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95. 280 So. 2d 431 (Fla. 1973). A third state, Alaska, also adopted pure comparative negligence by judicial decision in 1975, after the *Li* decision in California. Kaatz v. State, 540 P.2d 1037 (Alaska 1975). The extent of application of the decision was similar to that in *Hoffman*.

96. Another example is provided by the state of Washington. Although Washington adopted comparative negligence via the more typical legislative method, its supreme court did contribute by interpreting it to apply retroactively. Godfrey v. State, 84 Wash. 2d 959, 530 P.2d 630 (1975). As long as the trial in a case had not begun before the effective date of the statute, the new comparative negligence should apply. As a defendant has no vested right in contributory negligence, no constitutional issue is involved. However logical or illogical this may be, at least the Washington Supreme Court recognized implicitly the drastic need for this legal reform.

97. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

98. An analysis of the revolutionary nature of the decision is a necessary preface to an understanding of the result. To begin with, the concept of joint and several liability in all cases of multiple defendants, with no contribution over, is deeply ingrained in the history and tradition of the common law. It is tempting to say that no area of the law has been more archaic than that of refusal to allocate damages among several defendants. Originally, joinder of defendants in one action was not allowed except in cases of a joint tort, such as a conspiracy or a concert of action among two or more tortfeasors. In these instances each was both principal and agent; and if one paid the total judgment, no contribution or indemnity was allowed. Quite illogically, this result caused the courts to confuse the procedural question of joint suits with the substantive issue of liability for all damages. If joinder were allowed in order to settle the entire case, where defendants independently contributed to a result, total liability for each would follow. Hence, at first, the courts did not allow joint suits except in concert cases or actions against principal and agent. Gradually, procedure was modified to

The plaintiff sued Dow for the death of her husband who had been ordered by his employer, Urban Milling, to clean out a storage bin which had just been fumigated with a poisonous chemical manufactured by Dow and which it was alleged had not been properly labeled. To this, Dow brought a third-party complaint against Urban on the ground that the latter had been warned and had not followed instructions. Quite typical of the imperfections in the statutes that have evolved, the New York law on contributions did not apply because the plaintiff had not herself sued both defendants and obtained a joint judgment. In addition New York also still continued the outdated distinction between "active" and "passive" defendants. Only a "passive" defendant could get complete indemnity from an "active" defendant. The intermediate court dismissed Dow's cross-complaint on the ground that Dow was the "active" contributor. This dismissal was reversed by the Court of Appeals. In the name of justice and equity, said the court, the right to apportionment of liability, or full indemnity, among parties who negligently contribute to an injury, depends on relative responsibility and that must be determined on the facts.

Had the many statutes on contribution been more uniform and less replete with technicalities - as witness the New York statute - had the courts not been so passive for centuries in administering a

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permit a plaintiff to issue a dragnet against all who may have contributed to the injury, however independent their actions may have been. *See* Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944). But any logical right of contribution over based on relative culpability did not follow. Some jurisdictions did adopt the all-or-nothing rule of indemnity where an "active" negligent defendant paid the total damages and a "passive" negligent defendant nothing. *See* Comment, *Indemnity Among Joint Tort-Feasors in New York: Active and Passive Negligence and Impleader,* 28 FORDHAM L. REV. 782 (1960); 30 MO. L. REV. 624 (1965). As of 1971, Professor Prosser estimated that only nine states had allowed contribution by judicial decision, itself a commentary on the static quality of the common law of torts. Over twenty state legislatures had passed statutes but with no unanimity as to what should be included and how far to go. W. PROSSER, THE LAW OF TORTS 306-07 (4th ed. 1971). In New York this bit of judicial activism raised many problems and produced judicial adaptations, as well as some legislative reactions. The NEW YORK LAW JOURNAL ran a series of articles on *Dole v. Dow.* Dachs, *Seider v. Roth Upstaged by Dole v. Dow Chemical,* N.Y.L.J., Jan. 31, 1973, Feb. 7, 1974 [hereinafter Dachs]; Shapiro, *Dole v. Dow and Problems It Created,* N.Y.L.J., Feb. 6, 1974, at 1, col. 1, Feb. 7, 1974, at ____, col. ____ [hereinafter Shapiro]. The problems created by *Dole* were its collision with the theory of the Workmen's Compensation Law, its conflict with insurance and domestic relations law with reference to interspousal suits and intrafamily suits, and the effective impracticality of applying *Dole* in cases where the object of a counterclaim or third-party plaintiff claim is a municipality or county.

rule misadopted from concert-of-action cases, possibly *Dole* would not have been thought of as a revolution. It was a revolution, well past its time, particularly when it is recognized that both in contribution among joint tortfeasors and in contributory negligence the courts had generally abstained from needed reform.

At issue here is the effect *Dole* had on contributory negligence in New York. Predictions were made that New York was about to become the first state to judicially adopt comparative negligence.[99] In the relatively short period before the New York Court of Appeals answered the question, intermediate courts deferred on the effect of *Dole* on contributory negligence.[100]

To the surprise of many, New York's Court of Appeals in the 1973 case of *Codling v. Paglia*[101] refused to follow a logical progression from *Dole* and held that contributory negligence was still the law. *Codling* was technically not a negligence case, but rather one of strict products liability. Paglia's action against Chrysler Corporation, based on a defect in the car's steering mechanism, was clear but was remanded for a new trial because no instruction had been given on Paglia's possible contributory negligence. Theoretically, contributory negligence can be a defense to strict liability even though comparative negligence is the rule in ordinary negligence cases. Nevertheless, the facts and opinion of *Codling* made it clear that the issue of contributory negligence was quite independent of the products liability background. Contributory negligence as a defense to strict liability was not in issue because the court was not concerned with the plaintiff's failure to discover the defect in the steering mechanism or his misuse of it. The remaining question, one also found in ordinary negligence cases, was whether Paglia used reasonable care once the mechanism failed.[102]

The reaction of the legislature to the court's retention of the doctrine of contributory negligence, seemingly unnecessary in view of *Dole*, was the 1975 New York statute on comparative negli-

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99. *See* Dachs and Shapiro, *supra* note 98.

100. *Compare* Long v. Zientowski, 73 Misc. 2d 719, 340 N.Y.S.2d 652 (1973), declaring contributory negligence passé, *with* Carhart v. Albright, Jr., 72 Misc. 2d 23, 338 N.Y.S.2d 274 (1972).

101. 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

102. *Id.* at 343-44, 298 N.E.2d at 629, 345 N.Y.S.2d at 470-71.

gence.[103] Culpable conduct on the part of the plaintiff was no longer to bar recovery for injury; damages were to be diminished in accordance with the relative culpability of plaintiff and defendant. *Dole v. Dow Chemical* is, thus, a perfect example of judicial activism, followed, however, by a retreat. It was left to the legislature to complete the necessary change in social policy.

It is also possible to regard the *Dole* case as a gadfly to stimulate the legislature into action. At this point it is impossible to separate the reaction of the legislature in passing the comparative law statute from its response in the area of multiple defendants. Not only did the legislature codify *Dole;* it also expanded it logically.[104] Perhaps the court of appeals was convinced that the legislative reactions to new common law on multiple defendants made judicial adoption of comparative negligence unnecessary and inadvisable.

No analysis of judicial activism in the area of comparative law and multiple defendants would be complete without a reference to a series of cases in Illinois. As early as 1968 in the well-known case of *Maki v. Frelk,*[105] the Illinois Supreme Court had refused to adopt comparative negligence. A series of recent Illinois cases, however, has resulted in apportioning liability among defendants. At issue here is the effect, if any, of these last cases on the judicial attitudes toward comparative negligence expressed in *Maki.*

The *Maki* case placed the issue of possible court action squarely

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103. *See* note 91 *supra.*

104. Any drastic change in the traditionally confused area of multiple defendants, particularly a change with important side effects on other law, was bound to bring about legislative reaction. In this case, the reaction was not only to affirm the new principle and procedure established by the judiciary but also to complement it. *Dole* was not only codified, so to speak, but it was also expanded logically. N.Y. CIV. PRAC. LAW §§ 1401-1404 (McKinney 1976). To the degree that any statute can answer fundamental questions evolving from *Dole,* this was accomplished. Thus, proportional negligence liability of several defendants became liability "for damages for the same personal injury, injury to property or wrongful death." *Id.* § 1401. "The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution." *Id.* § 1402. The new law applied to "persons subject to liability for the same harm," *id.* § 1401:3, rather than contribution "by one joint tortfeasor against another." *Id.* Nothing in the statute requires that the liability of the defendants arise from tort; it could be based on contract, breach of warranty, etc. *Id.*

105. 40 Ill. 2d 193, 239 N.E.2d 445 (1968). *See,* Symposium, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?,* 21 VAND. L. REV. 889 (1968).

before the Illinois courts, with a curious result. The plaintiff sued as administratix for the death of her husband in a car collision. Instead of claiming her husband was free from contributory negligence, she instead alleged the negligence of the deceased was less than that of the defendant. Following precedent, the trial court dismissed this count. On appeal, the Supreme Court of Illinois held no constitutional issue was inherent in contributory negligence but on its own motion returned the case to the intermediate court to determine whether justice and policy mandated a change in the rule. The appellate court held in favor of the modified doctrine of comparative negligence known as the "Wisconsin rule."[106] The court referred to the many other statutes of Illinois which called for a division of damages and very specifically pointed out that the doctrine of contributory negligence was a creature of the courts and the courts could now abolish it in the name of justice and public policy. "The doctrine of contributory negligence was created by the Courts, not by the legislature. If we have created it, and if it does not meet the needs of present-day life, then we are duty bound to abolish it."[107]

Although *Maki* presented the Illinois Supreme Court with the golden opportunity to be the first court to create comparative negligence, the court, with two dissents, refused to accept the invitation.[108] It found no serious detriment to the public interest in maintaining the doctrine of contributory negligence. Mentioned also was the fact that the existing doctrine was an integral part of statutes on particular subjects. Apparently for the time being, no majority could be obtained to meet the needs of present-day life.

In contrast with this definitive decision against judicial adoption of comparative negligence as background are the 1978 Illinois decisions concerning relative culpability of multiple defendants. An analysis of one of the cases, *Skinner v. Reed-Prentice Division Package Machinery Co.*,[109] suggests that *Maki* may be overruled in the future. The plaintiff, a minor, claimed personal injury due to the malfunctioning of an injection molding machine manufactured by

106. Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967).
107. *Id.* at 452, 229 N.E.2d at 291.
108. Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).
109. 70 Ill. 2d 1, 374 N.E.2d 437 (1978).

the defendant. On the basis of precedent, the lower courts dismissed the defendant's third-party complaint seeking contribution from the employer. The Supreme Court of Illinois reversed. The majority, like the court in *Dole,* allowed the third-party complaint and held that damages could be allocated on the basis of relative culpability between unintentional tortfeasors who contribute to one injury. In contrast to *Dole,* however, the suit here against the manufacturer was on the basis of strict products liability. Although both of the *Dole* defendants were charged with ordinary negligence, *Skinner* involved one strictly liable defendant and one negligently liable. To extend relative culpability in this type of situation was obviously more difficult. Much was made of this in the dissenting opinions.[110]

As demonstrated by the *Dole* and *Codling* cases in New York, a decision on contribution among multiple defendants does not necessarily portend judicial adoption of comparative negligence. Nevertheless, a great deal of the language in the majority opinion in *Skinner* implies a major premise of relative culpability which could easily encompass comparative negligence between plaintiff and defendant. The *Skinner* court also expressed its willingness to use its inherent power to change existing tort law doctrine.

> The employer argues that the abolition of the no-contribution rule would produce substantial change in the fabric of tort law and substantial changes are best left to the General Assembly. Where this court has created a rule or doctrine which, under

110. The dissents posed several questions illustrative of the problems created by the majority decision. Does not the public policy inherent in strict liability require that the manufacturer be considered the "active" tortfeasor? How can one make a quantitative or qualitative comparison of strict liability and negligence where fault is irrelevant to the manufacturer's liability? Also, if possible misuse of the product by the employer precludes any liability of the manufacturer to the injured employee in products liability law, what calls for contribution? How can there be a comparison of the manufacturer's fault and that of the employer where fault is not the question? *Id.* at ____, 374 N.E.2d at 447-50. In addition, asks the dissent, how can the employer be a joint tortfeasor since his sole liability to the employee is under the Workmen's Compensation Act? *Id.* at ____, 374 N.E.2d at 449-50.

For Justice Underwood, in dissent, the Illinois law on products liability was completely changed. *Id.* at ____, 374 N.E.2d at 446. Justice Dooley listed cases which, in his opinion, were overruled. *Id.* at ____, 374 N.E.2d at 446-47. The differences in this particular case between majority and minority can, of course, be due to different premises about the meaning of strict products liability. Clearly they differ on views of judicial activism and legislative prerogative. The decision is undoubtedly a preview of what is to come, both from the court and from the legislature.

> present conditions, we consider unsound and unjust, we have not only the power, but the duty, to modify or abolish it.[111]

Although the majority opinion does not refer to *Maki,* that of dissenting Chief Justice Ward does. To be noted is the fact that he and Justice Schaefer were dissenters in *Maki,* i.e., they favored judicial adoption of comparative negligence. They dissented in *Skinner* not because they opposed judicial intervention but because they believed the doctrine of apportionment among tortfeasors should not be applied to defendants held to different standards of liability, in this case negligence and strict liability.[112] In his *Skinner* dissent, Chief Justice Ward states that he does not recede from that earlier dissent and that he believes *Skinner* overrules *sub silentio* the holding in the earlier case that any change in the law of contributory negligence should be left to the legislature.[113] A second dissenter, Justice Underwood, agrees that the majority opinion "is obviously the forerunner of other and equally substantial innovations in the tort law of Illinois."[114] Whether this court is going to go all the way with comparative negligence is pure speculation but the nature of the facts together with the general tenor of the various opinions indicate a possible broad result.[115]

Contrary to the judicial activism in California, New York, and Illinois, Vermont is a recent example of "let the legislature do it." This is particularly evident from an analysis of the 1970 statute adopting both comparative negligence and proportional recovery

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111. *Id.* at ___, 374 N.E.2d at 442.

112. Chief Justice Ward said that determining the relative culpability of two persons held to the same standard of liability, such as negligence, is not the same as determining relative culpability of two persons held to different standards such as negligence and strict liability. *Id.* at ___, 374 N.E.2d at 445.

113. *Id.* at ___, 374 N.E.2d at 445.

114. *Id.* at ___, 374 N.E.2d at 446.

115. Another example of a court's asserting the responsibility for reform may be found in Wisconsin. Under Wisconsin's rule of comparative negligence, the courts in that state have been bothered by appeals on the question of whether plaintiff's negligence is more than fifty percent. A collection of these cases is to be found in Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 137, 177 N.W.2d 513, 520 (1970). The Wisconsin Supreme Court in that case considered the question of whether the court itself should not now adopt the pure form of comparative negligence. The majority held that the legislature had already occupied the field; four judges declared that they would favor this change by the court if the legislature did not act with dispatch.

among negligent defendants[116] and cases since that date. The statute itself is an example of simplicity which would seem to allow the court to fit new cases into it as they arise without further action by the legislature.

*Howard v. Spafford,*[117] decided in 1974 by the Vermont Supreme Court, clearly indicates that the problem of adapting the statute to new facts and situations, except for those that fall obviously under the act, is not for the court. The plaintiff, a passenger in a car involved in a two-car collision, sued the defendant-driver of the other car. At the trial level, defendant was refused a third-party action against the plaintiff's driver. In upholding this dismissal, the supreme court reemphasized Vermont's traditional law precluding contribution between joint tortfeasors.

The 1970 statute allows recovery against more than one defendant on the basis of the proportional negligence of each contributing to the injury. But according to the court, this assumes that the plaintiff has sued more than one defendant.[118] The statute established a comparative negligence between plaintiff and defendant and a similar relative negligence between multiple defendants whom the plaintiff has *actually* sued. It did not affect the rule of noncontribution among joint tortfeasors.[119]

To back up this refusal to reform the law, the court underlined the lack of unanimity among the fifty states, emphasized that a large plurality have left the entire matter to the legislatures, and

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116. VT. STAT. ANN. tit. 12, § 1036 (1973).

> Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury or property damage, if the negligence was not greater than the causal negligence of the defendant, but the damage shall be diminished by general verdict in proportion to the amount of negligence attributed to the plaintiff. Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.

117. 132 Vt. 434, 321 A.2d 74 (1974).

118. *Id.* at 437, 321 A.2d at 76.

119. *See* Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 110 (1975). *Spafford* was cited and reaffirmed. *Id.* at 158, 333 A.2d at 115.

cited practical difficulties which the change would make.[120] The court was concerned that in granting the third-party complaint in this case, it would take from the plaintiff the right not to sue a particular defendant.[121] It also considered the fact that because the Vermont comparative negligence statute bars recovery if the plaintiff's contributory negligence exceeds fifty percent of the total causal negligence, it would be inconsistent to exact contribution from a tortfeasor whose negligence is less than that of the plaintiff.[122] For the court this result would effectively overrule the comparative law feature in the legislation.[123] Aside from these and other so-called practical difficulties, the opinion emphasized the prevalent opinion that the legislature can make changes more easily than the courts once it is convinced that a change is socially desirable. In summary, the Supreme Court of Vermont appears to take as its major premise that "change and progress are not necessarily equated."[124] To quarrel with this is impossible, except as it may unreasonably dominate judicial thinking.

In theory we would have expected the courts to dominate in displacing contributory negligence with comparative negligence for two reasons: 1) traditional doctrine was the creature of the common-law courts; 2) the courts have been willing to act in the related area of contribution among joint tortfeasors. Nevertheless, with the exception of California, Alaska and Florida, we see that legislatures have been largely responsible for the introduction of comparative negligence. In this area at least, the courts have been unnecessarily hesitant both to bring about the change themselves and, in the case of Vermont, to extend the doctrines established by statute.

## VI. Automobile Guests

The controversy over guest statutes continues. Almost twenty state courts have recently considered the question of whether guest statutes violate state and federal standards for equal protection of

120. Howard v. Spafford, 132 Vt. 434, 435-36, 321 A.2d 74, 75 (1974).
121. *Id.* at 437-38, 321 A.2d at 76.
122. *Id.* at 438, 321 A.2d at 76-77.
123. *Id.*
124. *Id.* at 437, 321 A.2d at 76.

the laws, with a marked division of opinion.[125] Involved is not the admitted judicial power to declare legislative acts unconstitutional, but whether this power should be applied in a social and economic area where deference to the legislature has been traditionally shown and where constitutionality has up to now been assumed. Thus, the recent deluge of cases presents the problem of possible usurpation of legislative power by over-activist courts. In this area of tort law the common-law courts are, therefore, subject to the same type of criticism that has been directed at the activist United States Supreme Court as a result of decisions such as *Brown v. Board of Education,*[126] *Baker v. Carr,*[127] and *Mapp v. Ohio.*[128]

Forty and fifty years ago more than one-half of the state legislatures outdid each other in adopting automobile guest statutes.[129] The gratuitous guest could recover from the host-driver only if the latter had been guilty of some form of aggravated misconduct such as gross negligence or a wilful or reckless act. Two rationales underlie the adoption of these statutes. One is that a host driver who has extended hospitality to a gratuitous guest should be judged by a standard greater than ordinary care. The second is that of discouraging collusive suits between driver and passenger.

In the last decade there has been a reexamination of guest statutes by both courts and legislatures. In the short period since 1973, many state courts have refused to be passive and have held guest statutes unconstitutional.[130] Others, however, have refused to

125. These decisions are the result of many years of controversy. *See* Lascher, *Hard Laws Make Bad Cases—Lots of Them (The California Guest Statute),* 9 SANTA CLARA LAWYER 1 (1968); White, *The Liability of an Automobile Driver to a Non-Paying Passenger,* 20 VA. L. REV. 326 (1934); Note, *The Present Status of Automobile Guest Statutes,* 59 CORNELL L. REV. 659 (1974) [hereinafter cited as *Guest Statutes*]. *See generally* W. PROSSER, THE LAW OF TORTS (4th ed. 1971) [hereinafter cited as PROSSER].

126. 349 U.S. 294 (1955); 347 U.S. 483 (1954).

127. 369 U.S. 186 (1962).

128. 367 U.S. 643 (1961).

129. *Guest Statutes, supra* note 125, at 659, n.2. Connecticut and Iowa were the first to enact guest statutes (1927). *Id.* at 663.

130. Cases in which guest statutes have been held unconstitutional are: Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (unconstitutional under both state and federal law); Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974) (both state and federal); Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975) (unconstitutional under state law only); Laakonen v. Eighth Judicial Dist. Court, 91 Nev. 506, 538 P.2d 574 (1975) (both federal and state law); McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238

call guest statutes unconstitutional in view of the usual judicial deference to the legislature, particularly in cases involving the more traditional definition of equal protection of the laws.[131] A few state legislatures have either repealed or amended their host-guest statutes. For example, Connecticut, one of the first states to enact such a law, was also the first to repeal it.[132] Vermont repealed its law in 1970[133] shortly after the *Clark v. Clark*[134] decision in which the New Hampshire Supreme Court refused to apply Vermont law to an accident in Vermont. Illinois limited its law in 1971 to hitchhikers.[135] In Texas, the state legislature limited its application to relatives in the second degree of consanguinity or affinity.[136] Thus, particularly in the last decade, the area is well described as one in constant ferment and characterized by judicial activism. This judicial activism has been all the more remarkable because it has taken place in the face of a general legislative refusal to repeal or amend the laws.

Once again, it is not surprising to find the California Supreme Court in a leading activist role. The plaintiff in *Brown v. Merlo*[137] was denied recovery in the lower court because the driver was neither grossly nor wilfully negligent. Additionally, the trial court rejected plaintiff's claim that the California guest statute was unconstitutional.

In reversing on the constitutional ground, the unanimous Supreme Court of California analyzed the original reasons for the guest laws as well as the various meanings of federal and state equal protection of the laws. Neither the so-called hospitality basis nor the

(1975) (unconstitutional under both federal and state law); Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975) (both state and federal).

131. Cases in which guest statutes have been held constitutional are: White v. Hughes, 257 Ark. 627, 519 S.W.2d 70 (1975), *appeal dismissed*, 423 U.S. 805 (1975); Richardson v. Hansen, 186 Colo. 346, 527 P.2d 536 (1974); Justice v. Gatchell, 325 A.2d 97 (Del. 1974); Delany v. Badame, 49 Ill. 2d 168, 274 N.E.2d 353 (1971); Sidle v. Majors, 264 Ind. 206, 341 N.E.2d 763 (1976); Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974); Duerst v. Limbocker, 269 Or. 252, 525 P.2d 99 (1974); Cannon v. Oviatt, 520 P.2d 883 (Utah 1974).

132. CONN. GEN. STAT. § 277 (1939).

133. VT. STAT. ANN. tit. 23, § 1491 (1978), *repealed*, 1969 Vt. Acts, No. 194 § 1 (Adj. Sess.).

134. 107 N.H. 351, 222 A.2d 205 (1966).

135. ILL. ANN. STAT. ch. 95 ½, § 10-201 (Smith-Hurd 1971).

136. TEX. CIV. STAT. ANN. tit. 116, § 6701b (Vernon 1977).

137. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

fear of collusion was sufficient to show a legitimate state interest. The court thus rested its decision on the traditional interpretation of equal protection analysis, namely, the rational relationship test. Use of the rational relationship test to strike down the statute is an obvious example of judicial activism because in the social and economic spheres the legislature is usually given great latitude.[138]

A survey of other judicial decisions reaching the same result as *Merlo* simply reinforces the reasoning by Justice Tobriner in that case. In the year following *Merlo,* 1974, the Kansas Supreme Court in *Henry v. Bauder*[139] specifically applauded the sound reasoning of the California decision. The statutory classifications "do not bear a substantial and rational relation to the statute's purposes of protecting the hospitality of the host driver and of preventing collusive law suits."[140] The Ohio Court in *Primes v. Tyler*[141] emphasized that the growth of liability insurance undercut the need for protecting hospitality. In the very detailed opinion in *Laakonen v. Eighth Judicial District Court*[142] the Supreme Court of Nevada issued a mandamus directing the district court to, in effect, declare the Nevada statute unconstitutional. Once again, *Merlo* was cited, as well as the fact that a guest statute contrasts with the current duties owed other similar groups, such as visitors and invitees.[143] Although all of the decisions following the *Merlo* reasoning declared the statutes unconstitutional on both state and federal grounds, the most exhaustive analysis of due process and equal protection of the laws as applied to guest statutes is found in the 1975 Michigan case,

138. It should also be noted that the result in *Merlo* is consistent with changes occurring in other areas of tort law. California, as well as other states, had recently held against the traditional lesser duty owed a social visitor compared to a business visitor, Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). It had also voided the historical immunity from tort liability for charities in spite of the gratuitous element involved, Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1957). One difference, however, should be noted between these changes and the instant one. Charitable immunities and the varied duties of possessors of real estate toward trespassers, social visitors, and business visitors have been largely the product of judicial decisions. On the other hand, the lower duty of a host-driver to a gratuitous passenger is the result of statutes.

139. 213 Kan. 751, 518 P.2d 362 (1974).

140. *Id.* at 762, 518 P.2d at 371.

141. 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

142. 91 Nev. 506, 538 P.2d 574 (1975).

143. *Id.* at 509, 538 P.2d at 576.

*Manistee Bank and Trust Co. v. McGowan.*[144] Like the court in *Merlo,* the Michigan Supreme Court used the rational relationship test to strike down the statute. The court found that a guest statute may have been more rational in a period of experimentation, as in the 1920's and 1930's, than in 1975. Once the court chose its test in this fashion, it was relatively easy to come to the conclusion that the means used by the legislature were no longer reasonably related to the declared objectives. The following is a devastating quote from a 1959 case:

> The friends of the driver, his family . . . must suffer injury at his hands without recompense, solaced only by the thought that, after all, the skull was cracked by a friendly hand. . . . Why? Because the relationship between them was one of trust and friendship. No money had changed hands. If, however, not the neighbor himself is carried to town, but rather his livestock to the slaughterhouse, many modern courts will permit full recovery for injury to the unfortunate animal through failure to use reasonable care for its safety. Is this one answer of an enlightened people to the hallowed question: "How much then is a man better than a sheep?"[145]

As already stated, courts[146] have not been unanimous in following *Merlo* or *McGowan.* Although these courts have also applied the rationality standard used in *Merlo,* the difference in result seems to be based on these courts' unwillingness to assume an activist role. The major premise of these cases is that a statute is "clothed in a presumption of constitutionality,"[147] and that the legislature is not acting in an arbitrary manner. In the words of the dissent in *McGowan,* "We find the prevailing opinion to do violence to the Separation of Powers doctrine and to place too much power in the judiciary."[148]

It should be noted that in one instance the highest state court itself adopted the equivalent of a guest statute and it was the legis-

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144. 394 Mich. 655, 232 N.W.2d 636 (1975).

145. Stevens v. Stevens, 355 Mich. 363, 370-71, 94 N.W.2d 858, 862 (1959) (citation omitted).

146. *Compare* cases cited note 131 *supra with* cases cited note 130 *supra.*

147. Manistee Bank and Trust Co. v. McGowan, 394 Mich. 655, 684, 232 N.W.2d 636, 648 (1975) (Coleman, J., dissenting).

148. *Id.* at 695, 232 N.W.2d at 654.

lature which established the principle of ordinary negligence. The General Court or legislature of Massachusetts never passed a guest statute. The Supreme Judicial Court, however, early in the life of motorized travel, adopted the position that gross negligence must be proven against one who undertakes to give the plaintiff a free ride.[149] This decision was consistently followed until 1971.[150] In that year, the Massachusetts legislature passed a law requiring that a guest passenger need prove only ordinary negligence on the part of the host driver.[151]

Since the diverse state opinions are based on both state and federal equal protection, the position of the United States Supreme Court on the latter as it affects state guest statutes should be decisive. For the reasons outlined in the following cases, a decision is unlikely to come.

*Sidle v. Majors,*[152] a 1976 diversity case in the Court of Appeals for the Seventh Circuit, faced the issue of the federal constitutionality of guest statutes. After finding that the classification was neither inherently suspect, nor involved a fundamental right, the court of appeals analyzed the decisions in various states, particularly the reasoning in *Merlo.* In rather unequivocal language, the majority opinion indicated that the reasons originally advanced for the classification were not currently persuasive and that no rational relation to a state objective existed. In dictum it stated that guest statutes would be clearly unconstitutional if judged by federal standards. Nevertheless, it held itself bound to follow *Cannon v. Oviatt.*[153] In *Cannon,* the Utah Supreme Court upheld the constitutionality of its guest statute.[154] The United States Supreme Court, however, dismissed the appeal for want of a substantial federal question.[155] As the Supreme Court apparently considers the dismissal of an appeal

149. Mossaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917).

150. O'Mara v. H.P. Hood & Sons, Inc., 359 Mass. 235, 268 N.E.2d 685 (1971).

151. MASS. ANN. LAWS ch. 231, § 85 L (Michie/Law Co-op 1974).

152. 536 F.2d 1156 (1976). Involved was a one-car accident in Indiana. Because the state supreme court had not yet passed on the constitutionality of the usual guest statute under the state constitution, the federal court first certified that question to the Indiana Supreme Court. In reply, the latter indicated the statute was constitutional.

153. 419 U.S. 810 (1974).

154. 520 P.2d 883 (Utah 1974).

155. 419 U.S. 810 (1974).

"the equivalent of an adjudication on the merits,"[156] the procedural effect of *Cannon*, therefore, is a Supreme Court holding that guest statutes are not per se unconstitutional. From a substantive standpoint, the resolution of the matter is apparently left to the state courts and the state legislature.

In summary, the state constitutional decisions on guest statutes present excellent examples of the contrast between the activist and passivist roles of the judiciary, with the result dependent on the connection between the court's definition of equal protection of the laws and its beliefs in the function of the judiciary. Between courts and legislatures there has been dialogue to the extent that the courts have recognized the general refusal of the legislature to repeal the statutes. In this area of torts, the constitutionality of guest statutes is an issue. Therefore, the judiciary occupies a position superior to that of the legislature. Because of this superiority, state court decisions declaring guest statutes unconstitutional are similar to Supreme Court opinions holding legislative acts contrary to the Federal Constitution. Apparently, however, there has been little reaction by the legislatures to alleged usurpation of its role by the courts.

## VII. Damages: Strict Liability, Skiing, Medical Malpractice

### *Introduction*

Damages are often the forgotten chapter in torts. Certainly many law school teachers of torts tend to gloss over them. It is a jury question on which the power of the judge is ordinarily almost nil. Familiar is the standard that a jury verdict on damages should not be upset by the trial judge or appellate tribunal unless the award is

156. Hicks v. Miranda, 422 U.S. 332, 344-45 (1975). The effect of the Supreme Court's dismissal in *Cannon* is best explained by Mr. Justice Brennan in his dissent in the November 1976 refusal of the Court to grant certiorari in Sidle v. Majors. After the dismissal of *Cannon* on appeal, the Supreme Court decided Hicks v. Miranda in 1975. Under the doctrine in that case, a dismissal on appeal is considered the equivalent of adjudication on the merits. State and lower courts are as bound by such a summary disposition on appeal as by primary dispositions. Mr. Justice Brennan's dissent in the Court's refusal to grant certiorari also points out that the legal effect of decisions on important constitutional subjects should not be based on the technical difference between certiorari and appeal.

157. Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 507, 364 P.2d 337, 342, 15 Cal. Rptr. 161, 166 (1961).

so excessive as to indicate that it was prompted by passion, prejudice, whim or caprice[157] and "shocks the conscience."[158] Recently we have become a very litigious society with a great emphasis on rights rather than responsibilities. When this litigousness is combined with the knowledge that the defendant is insured, the result has been enormous jury awards with little control by the courts. Yet, this is an area in which the courts theoretically could practice an activism which would not severely limit the traditional jury function, would not interfere with the legislative role and which would still give the plaintiff the benefit of doubt. In place of a standard of "passion and prejudice," could be one similar to that used on the issue of liability. Is the damage award justified by the evidence?[159]

Damage awards in three fields—strict liability, skiing injuries, and medical malpractice—combined with reactions from the insurance companies, have resulted in a few dynamic interchanges between courts and legislatures. The interaction has been confined to attempts to limit excessive awards, in contrast with areas already analyzed where the interaction has been concerned with substantive policy.

### A. *Products Liability*

Undoubtedly, strict liability of the manufacturer or other suppliers of goods for injuries caused by original defects is the most important example in modern times of judicial social engineering.[160]

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158. *Id.*

159. For a discussion of damages in tort law, see: 2 HARPER & JAMES, THE LAW OF TORTS 1299 (1956); Miller, *Assessment of Damages in Personal Injury Actions*, 14 MINN. L. REV. 216 (1929); *Symposium, Damages for Personal Injuries*, 19 OHIO ST. L.J. 155 (1958); *Developments in the Law—Damages—1935-1947*, 61 HARV. L. REV. 113 (1947). For a view that the law of damages is essentially an instance of jury law, see Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958).

160. A necessary preface to proper understanding of this development of strict liability is a summary reminder of the earlier judicial activism which removed privity of contract as a *sine qua non* for duty of due care owed by a manufacturer of goods to an injured user. Rightly or wrongly, Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842), was interpreted to mean that no duty of care under negligence law was owed by a supplier of a mail coach to the driver because the contract for repair was not with the driver. Although a few early exceptions were made where an article was imminently dangerous to human life, *e.g.*, Statler v. Ray, 195 N.Y. 478, 88 N.E. 1063 (1909) (coffee urn explodes); Devlin v. Smith, 89 N.Y. 470 (1882) (scaffold as a dangerous trap); Thomas v. Winchester, 6 N.Y. 397 (1852) (poison falsely labeled), the real breakthrough against the requirement of privity was Judge Cardozo's

The development of the doctrine, whether based on strict liability in tort as represented by *Greenman v. Yuba Power Products, Inc.*[161] in 1963, or on implied warranty as in *Henningsen v. Bloomfield Motors, Inc.*[162] in 1960, has been primarily in the last two decades.[163] Generally, it can be said that the courts have tended to expand the doctrine, whether based on strict tort liability or implied warranty. From the immediate user of an article, tort liability has been extended to protect almost any foreseeable plaintiff, including a bystander.[164] Such judicial activism could easily have brought reaction from legislatures which are more susceptible than the courts to pressure from manufacturers and insurance companies.

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familiar opinion in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). Although the court paid lip service to the "inherently dangerous" exception, the manufacturer of the automobile was found to be liable in negligence to the ultimate purchaser for injuries received from the collapse of a wheel. Gradually, over the next fifty years, the "inherently" or "imminently" dangerous requirement was removed; the basic question was simply one of negligence. A duty of due care was owed by the manufacturer or supplier to a foreseeable plaintiff, regardless of contract.

Coincident with this development in negligence law was the extension of the principles of warranty, express or implied. These parallel developments led directly to strict liability in which a contract between the plaintiff and the manufacturer was not necessary for recovery. The early cases on defective food, *e.g.*, Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913), became the preface to decisions finding an implied warranty where the question of safety was involved. All of this gradual development led to the 1960 decision in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). *See also* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter cited as *The Assault*].

161. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

162. 32 N.J. 358, 161 A.2d 69 (1960).

163. The development of strict products liability in recent common law has taken two routes: strict liability in tort or an implied warranty sounding in contract. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 677 (1962), which established strict product liability in California, was preceded in the tort area by Justice Traynor's famous concurring opinion in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), an example of the manner in which an ultimate change of policy by the judiciary can be borrowed from an earlier concurring or dissenting opinion.

With *Greenman* and *Henningsen*, strict products liability became of age and the question of how far it should extend became one for both courts and legislatures. Between the two methods, tort or implied warranty, the former was eventually adopted by a majority of jurisdictions. Even in implied warranty, originally a tort concept, the usual defenses of reasonable notice of a defect to the seller or a disclaimer by the latter have generally disappeared. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); La Hue v. Coca-Cola Bottling, Inc., 50 Wash. 2d 645, 314 P.2d 421 (1957); *see also The Assault, supra* note 160, at 1132.

164. Benton v. Sloss, 38 Cal. 2d 399, 240 P.2d 575 (1952); Gall v. Union Ice Co., 108 Cal. App. 2d 303, 239 P.2d 48 (1951).

The initial reaction of state legislatures was one of support for the developing concept of strict liability, particularly in the area of warranty.[165] To limit liability to the immediate contracting party was unjust and inequitable. Where a product was sold to a wholesaler, then to a retailer and finally to a consumer, traditional warranty required an unnecessary multiplicity of suits *in seriatim*.

The Virginia response to products liability provides an excellent focus for analyzing a judicial-legislative interaction. Prior to the adoption of a statute, the Virginia Supreme Court had decided three cases involving warranty and lack of privity. In only one, a food case,[166] did it hold that privity was not required; in the other two cases, the traditional privity requirement was upheld.[167] In 1962 the erosion of the doctrine of privity began to take place in the legislative arena. A 1962 law[168] resolved the problem and eliminated the privity requirement for both food and non-food cases alike.

The legislative response to the doctrine of privity also arose in the context of the Uniform Sales Act and later the Uniform Commercial Code. The Uniform Sales Act had included the traditional privity requirements. The U.C.C., however, ultimately offered three alternatives whereby warranty was extended to various third parties.[169] For example, in adopting the U.C.C., New York initially selected Alternative A whereby warranty was extended only to household members and guests.[170]

In 1975, however, the New York legislature replaced this with Alternative B, i.e., a warranty to any natural person reasonably foreseen to be affected by the product.[171] At a time when Alternative A was the only one offered, California refused to adopt it since it was more limiting than California case law.[172]

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165. *See* Emroch, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 VA. L. REV. 982, 984 (1962) [hereinafter cited as Emroch].

166. Swift & Co. v. Wells, 201 Va. 213, 110 S.E.2d 203 (1959).

167. Harris v. Hampton Roads Tractor & Equip. Co., 202 Va. 958, 121 S.E.2d 471 (1961); General Bronze Corp. v. Kostopulos, 203 Va. 66, 122 S.E.2d 548 (1961).

168. VA. CODE § 802-318 (1965).

169. U.C.C. § 2-318 (1966 version).

170. N.Y.U.C.C. § 2-318 (McKinney 1964).

171. *Id.* (McKinney Cum. Supp. 1978).

172. CAL. COM. CODE § 2318 (West 1964).

Only very recently, a few state legislatures have sought to limit this judicially created doctrine. As a result of a hue and cry raised by some manufacturers and the insurance industry, studies have been conducted by the government and private agencies to determine the effect of current tort law and large damage judgments on industry and on insurance costs.[173] Although opinion differs on whether a crisis exists, definite proposals have been made for legislative reforms in the common law of torts.[174]

A particular focus of the legislatures has been on statutes of limitation and statutes of repose. In tort, a statute of limitation begins to run only at the time of injury. It is perfectly possible to have an injury occur due to an original defect, many years after the product leaves the manufacturer.[175] In contrast with a statute of limitations, a statute of repose starts to run at the time of manufacture or sale of the item. Used in combination with the usual two- or three-year tort statute of limitations, a repose statute could be used to bar suits in strict liability too distant from the creation of the original defect or the time of the sale. The plaintiff barred by a strict liability statute of repose would, however, still have available the

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173. U.S. DEPT. OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, 5 FINAL REPORT OF THE LEGAL STUDY 1 (1977); U.S. DEPT. OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, BRIEFING REPORT 1 (1977); Comment, *State Legislative Restrictions on Product Liability Actions*, 29 MERCER L. REV. 619 (1978) [hereinafter cited as *State Restrictions*]; *No Manufacturer is Immune from Product Liability Threat*, Vermont Business World, Oct. 1977, at 8B, col. 1; *Product Liability: Business Nightmare*, Times-Argus, (Barre, Vt.), Nov. 6, 1977, § IV, at 1; *Too Liberal Settlements Blamed for Soaring Product Liability Costs*, Valley News, (Lebanon, N.H.), Aug. 15, 1977, at 6, col. 1.

174. For a good summary of the proposals, *see State Restrictions*, *supra* note 173, at 621.

175. Problems have arisen because of the difference between the statutory period in torts, usually two or three years, and the typical six-year period in contracts. The problems are illustrated by a series of cases in New York beginning with Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953). The plaintiff was given the benefit of the longer contract period although the liability rested upon a tortious lack of due care. Ten years later, in Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), the New York Court of Appeals appeared to be basing a strict liability suit on tort principles and not on warranty. Nevertheless, in Mendel v. Pittsburg Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 990 (1969), where more than six years had passed since glass doors were installed, but the action was brought less than three years from the injury, the contract statute was applied in dismissing the complaint. Thus, in *Blessington* the contract statute was applied to allow the action and in *Mendel*, to bar it. In the *Mendel* majority, emphasis was placed on the need to prevent "unfounded actions that would be brought many years after a product is manufactured." *Id.* at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 494.

ordinary negligence action brought within the torts statute of limitations.

Other modifications of tort law have also been suggested.[176] The standard of liability should be the prevailing standard at the time of manufacture rather than at the time the suit is brought. Suggestions have been made to abolish the collateral sources rule, to regulate contingent fees of plaintiff's lawyers and to eliminate the usual *ad damnum* request for a specific amount of damages.[177]

Perhaps because the reaction against awards in strict liability cases is very recent, few state legislatures have taken concrete action. In 1977, Utah passed a Product Liability Act[178] in response to the increased claims, the high awards, and the effect of insurance and other costs on suppliers. Included were: a six-year statute of repose from the date of purchase and ten years from the date of manufacture; the elimination of the *ad damnum* clause; and a presumption that a product is free of defects if made in accordance with governmental standards. Colorado in 1978 established various presumptions in favor of the supplier and imposed a three-year statute of limitations unless the action is brought under warranty law.[179] Similarly Oregon's law on Products Liability Actions,[180] effective January 1, 1978, set up an eight-year repose period, a two-year statute of limitations, a rebuttable presumption that a product is not unreasonably dangerous for its intended use and defenses of alteration and modification.

In sum, legislatures have generally supported the judicially created doctrine of strict products liability. Recently, however, some have sought to limit the costs of the doctrine by introducing various procedural and substantive restrictions.

### B. *Skiing*

Until recently, most accidents in ski areas for which recovery was allowed have been connected with the operation of the lifts.

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176. *See State Restrictions, supra* note 173.

177. *Id.* at 629. The collateral sources rule enabled a plaintiff to collect both from his own insurance company and from damages awarded in a lawsuit.

178. UTAH CODE ANN. §§ 78-15-1 to 78-15-6 (1977).

179. COLO. REV. STAT. §§ 13-80-127.5, 13-21-401 to 13-21-405 (Supp. 1978).

180. OR. REV. STAT. §§ 30.900-30.915 (1977).

Consequently, legislatures have been active in establishing specific safety standards beyond the common law and in providing for supervision and inspection of the machinery.[181] Operators of ski lifts have been declared common carriers.[182] In five states, however, the legislature has specifically excluded the common carrier status in favor of the ordinary care owed to a business invitee.[183] For example, in New York and Colorado such legislation erased the common carrier status declared by the courts.[184] Curiously enough, in New York the common carrier category was created in a 1953 decision, *Vogel v. State*,[185] and it was not until 1971 that the legislature in effect overruled it.[186] In sum, there has been little interaction between legislature and courts in chair-lift accidents; rather, the legislature has applied a common-law category with its greater common-law duty.

The judicial-legislative dynamic in the skiing area is, so far, largely the result of the famous Vermont case of *Sunday v. Stratton Mountain, Inc.*[187] In 1975 the plaintiff fell when his ski caught a piece of brush close to the trail. In falling, his head struck a rock, resulting in quadraplegic paralysis. At common law the defense of assumption of risk would have been available but in view of Vermont's comparative negligence statute effective since 1970, the trial court charged the jury that assumption of risk per se was not available. On the comparative negligence standard the jury held for the plaintiff and awarded $1,500,000.

Before *Sunday*, downhill accidents had received little attention. Under the traditional common law of contributory negligence and assumption of risk, the potential for liability was not great, particularly in the period before skiing became a sport for the mas-

181. For a discussion and listing of state statutes on chair lifts, *see* Lisman, *Ski Injury Liability*, 43 U. COLO. L. REV. 307, 308 nn. 15 & 16, 309 n. 17 (1972).

182. Fisher v. Mt. Mansfield Lift Co., 283 F.2d 533 (2d Cir. 1960).

183. *See* COLO. REV. STAT. § 25-5-718 (1973); N.H. REV. STAT. ANN. § 225-A:2(III) (1977); N.Y. TRANSP. LAW § 2(7) (McKinney 1975); UTAH CODE ANN. § 63-11-51 (1978); WASH. REV. CODE ANN. § 70.88.010 (1975).

184. Colorado statute overruled Summit County Development Corp. v. Bagnoli, 166 Colo. 27, 441 P.2d 658 (1968); New York statute overruled Vogel v. State, 204 Misc. 614, 124 N.Y.S.2d 563 (Ct. Cl. 1953).

185. 204 Misc. 614, 124 N.Y.S.2d 563 (Ct. Cl. 1953).

186. N.Y. TRANSP. LAW § 2(7) (McKinney 1975).

187. ___ Vt. ___, 390 A.2d 398 (1978).

ses. The cases are few, but two which are well known were decided by the Vermont Federal District Court. In 1951 that court held in *Wright v. Mt. Mansfield Lift, Inc.*,[188] that the plaintiff could not recover for a broken leg when her ski struck a stump because by skiing she assumed such a risk. This result was affirmed as recently as 1976 in *Leopold v. Okemo Mountain, Inc.*[189] where the plaintiff was killed when he struck an unpadded lift tower in the trail.

This is not the occasion to discuss the historical meaning of assumption of risk.[190] Suffice it to say that it has been under attack since its origin when it was successfully used by employers to defend against employee actions.[191] It has been argued that in its primary sense it is simply one way of negativing any duty owed by the defendant and in its secondary sense it is one element in contributory negligence. Thus, even before the advent of comparative negligence, some case law denied assumption of risk was a separate doctrine.[192] Under comparative negligence it is easy to argue as did the court in *Sunday* that assumption of risk no longer exists as a separate doctrine. Clearly, when assumption of risk is only a part of the balance of the plaintiff's and defendant's negligence, it is easier for a jury to find for the plaintiff as in *Sunday* than where a court instructs that assumption of risk is a total defense.

In response to the spectre of high damage awards, the Vermont legislature passed a statute which reintroduces assumption of risk as a separate doctrine but limits its application to liability in sports. The statute provides that, notwithstanding the comparative negligence statute, "a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary."[193] Since the facts of *Sunday* occurred prior

188. 96 F. Supp. 786 (D. Vt. 1951).

189. 420 F. Supp. 781 (D. Vt. 1976).

190. For an interesting discussion of the assumption of risk doctrine, see Note, *Assumption of Risk After Sunday v. Stratton Corporation: The Vermont Sports Injury Liability Statute and Injured Skiers*, 3 VT. L. REV. 129 (1978).

191. *See* Ehrenberger v. Chicago, R.I. & P. Ry., 182 Iowa 1339, 166 N.W. 735 (1918); Conway v. Furst, 57 N.J.L. 645, 32 A. 380 (1895); 47 VA. L. REV. 1444 (1961).

192. *See* Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 48, 155 A.2d 90, 93 (1959); 2 HARPER & JAMES, THE LAW OF TORTS 1162-63 (1956).

193. VT. STAT. ANN. tit. 12, § 1037 (Cum. Supp. 1978).

to the statute, the Vermont Supreme Court affirmed the verdict and award in that case.

In two other states, Washington and New Hampshire, legislatures have passed acts defining the duty and responsibility of skiers in traditional assumption of risk terms.[194] The New Hampshire statute, which focuses on "Passenger Tramway Safety," contains a two-year statute of limitations,[195] requires that the operator be notified of the injury within 90 days[196] and that the operator carry a minimum amount of liability insurance.[197] The broad terms of the New Hampshire statute apparently place the responsibility for accidents on the downhill skier.[198] Under the 1977 Washington law the responsibility is in much more concrete terms. The statute provides that "Because of the inherent risk in the sport of skiing all persons using the ski hill shall exercise reasonable care for their own safety. However, the primary duty shall be on the person skiing downhill to avoid any collision with any person or object below him or her."[199] There is no evidence that these two statutes were legislative reactions to case law as was true in Vermont. Nor is there any attempt in the Vermont, New Hampshire or Washington laws to limit the amount of awards. Nevertheless, lobbying pressures from the ski operators and insurance companies are evident. The Washington statute is detailed on duties and risks, whereas the Vermont legislature resisted the desire of the Vermont Ski Area Association and the insurance companies for a list of risks assumed by the skier.[200]

194. WASH. REV. CODE § 020 (Supp. 1977); N.H. REV. STAT. ANN. § 225-A:25(V) (1977).

195. N.H. REV. STAT. ANN. § 225-A:26(II) (Supp. 1978).

196. *Id.*

197. *Id.* § 225-A:26(I).

198. *Id.* § 225-A:25.

199. WASH. REV. CODE § 020 (Supp. 1977).

200. The Vermont Ski Area Association argued for the inclusion of explicit language that would have enumerated certain risks to be assumed by skiers, presumably to make the outcome of ski injury litigation more predictable. The Barre-Montpelier Times-Argus, Jan. 25, 1978, at col. 1. *See also* Rutland Herald, Dec. 14, 1977, at 1, col. 1, for a critique of an early draft of a ski injury liability bill.

201. For a bibliography of current medical malpractice literature, *see* J. BLUM, P. GERTMAN & J. RABINOW, PSRO'S AND THE LAW 163-200 (1977); Berkman, *Alternatives to Medical Malpractice Litigation*, 12 FORUM 479 (1977); Goldsmith, *The Mediation of Malpractice Cases: A Lawyer's View of the New York System*, J. LEGAL MED., June 1976, at 30; Heintz, *Arbitration of Medical Malpractice Claims: Is it Cost Effective?*, 36 MD. L. REV. 533 (1977); Kiel, *Medical Malpractice Claims Against the Army*, 75 MILITARY L. REV. 1 (1977); Siedel,

In sum, legislative and judicial responses to large damage awards with respect to ski accidents have taken two forms. For chair lift accidents, operators of ski lifts are now generally held to the common carrier duty to use the highest care possible and to come to the aid of the user of the facilities. For downhill accidents, the trend has been to reintroduce assumption of risk as a separate defense which would absolve the defendant from liability.

### C. *Medical Malpractice*

In the last five years, the problems inherent in the crescendo of malpractice suits have probably been the subject of more studies, more articles[201] and legislation[202] than any other area of tort liability.

The severity of the problem is obvious. Both the number of malpractice claims filed and the number of very large awards have increased dramatically. In 1969, the legal department of the American Medical Association (AMA) estimated that eight to ten thousand malpractice suits are filed yearly against the 250,000 practicing physicians in the United States.[203] Insurance rates have skyrocketed. The average insurance premium paid by physicians more than quadrupled in the six-year period between 1966 and 1972.[204] Malpractice insurance became more difficult to obtain. Where once patients assumed that doctors were infallible or that maybe the Almighty willed an imperfect recovery, there is now an adverse response to "imperfect" medical treatment. Our litigious society has focused its attention on this area. As a result of the high awards,

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*Malpractice Reform in Michigan*, 1976 DET. C.L. REV. 235; Note, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process As Remedies for Meritless Medical Malpractice Suits*, 45 U. CIN. L. REV. 604 (1976); Note, *Medical Malpractice Statute—Medical Malpractice Statute Declared Unconstitutional*, 1977 WIS. L. REV. 203, 205 n.20; *Medical Malpractice in Alabama*, 28 ALA. L. REV. 185 (1976); *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655 (1976); *The "Claims Made" Dilemma in Professional Liability Insurance*, 22 U.C.L.A. L. REV. 925 (1975); *Testing the Constitutionality of Medical Malpractice Legislation: The Wisconsin Medical Malpractice Act of 1975*, 1977 WIS. L. REV. 838.

202. The medical malpractice crisis has reached such a focal point in law as to have provoked some form of legislative response in every state of the Union. *See* White & McKenna, *Constitutionality of Recent Malpractice Legislation*, 13 FORUM 312 (1977).

203. WORLD MEDICAL J., No. 3 (May-June 1969). *See also* NEWSWEEK, Jan. 19, 1970, at 93, estimating the figure at six to nine thousand suits.

204. DEPT. OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SECRETARY 13 (Jan. 16, 1973).

a vituperative and often bitter argument has taken place between trial lawyers, insurance executives, and physicians. Trial lawyers are blamed for requesting enormous damages in order to increase their fee. Insurance companies have been accused of wanting to get out from under the burden of malpractice insurance. Physicians and the AMA are chastized for low standards and lack of real expertise.[205]

Beginning in 1975, this so-called medical malpractice crisis spawned hundreds of bills in state legislatures.[206] Often the premise underlying proposed legislation has been that the common law has not only proved itself partially responsible for creating the problem but also incapable of solving it. The analogy to Workmen's Compensation Acts comes to mind, but with the recognition that the latter replaced liability with compensation whereas the malpractice statutes continue to rely on negligence. Different approaches to the problem have resulted from the varying intensity of the emergency created by the actions and threats of the insurance companies. Some of the laws have been omnibus in nature while others aim at specific problems. For the purpose of characterizing the legislative reaction to high awards and the insurance "crisis," the following general summary suffices. Most legislative activity has concentrated on three remedies: (1) additional regulations of the insurance industry;[207] (2) changes in substantive law and common-law procedure as they affect malpractice,[208] as well as alternative methods for

205. For discussion of the controversy between health care providers, their insurers, and trial lawyers, see J. CZERWINSKI, A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE, WISCONSIN'S MEDICAL MALPRACTICE CRISIS 49, 53 (1976) (published by Health Policy Center, Georgetown Univ. & Nat'l Conf. of State Legis.); Sheehan, *The Medical Malpractice Crisis in Insurance: How it Happened and Some Proposed Solutions*, 11 FORUM 80, 86-87 (1975); Comment, *The Medical Malpractice Mediation Panel in the First Judicial Department of New York: An Alternative to Litigation*, 2 HOFSTRA L. REV. 261, 263 (1974).

206. *See* S. GROSSMAN, A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE, AN ANALYSIS OF 1975 LEGISLATION RELATING TO MEDICAL MALPRACTICE (1976) (published by Health Policy Center, Georgetown Univ. & Nat'l Conf. of State Legis.).

207. *See, e.g.*, ILL. ANN. STAT. ch. 73, § 1013a (Smith-Hurd Supp. 1977).

208. The collateral source rule, for example, which allows a plaintiff to collect twice, once from his insurance and once from the defendant in a medical malpractice suit, has been eliminated or modified by statute. *See, e.g.*, FLA. STAT. ANN. § 768.50 (Supp. 1979); IDAHO CODE § 39-4210 (1977); IOWA CODE ANN. § 147.136 (West Supp. 1978); and PA. STAT. ANN. tit. 40, § 1301.602 (Purdon Supp. 1978).

solving malpractice suits;[209] and (3) closely connected with the latter, limitations on amounts recoverable.[210] The last two of these directly affect the common law and the courts.

Since most of the state laws which have been passed are complex and saturated with minutiae which do not directly contribute to our subject of judicial-legislative interaction, the statutes in two states, Wisconsin and Illinois, will serve as typical examples of legislative reaction. In addition, the judicial decisions in these same two states on the constitutionality of very similar legislative reforms illustrate diverse judicial answers to attempted modifications of the common law.

In many respects the Wisconsin law is typical of those in other states.[211] With reference to insurance, the statute established maximum limits of financial responsibility for all "health care providers."[212] Judgments over a certain limit were to be paid out of a general "patients compensation fund," a pool provided by the various health care units.[213] The common law, as the traditional method for solving the disputes, was changed or supplemented in several aspects. Two kinds of compensation panels, formal and informal, were created for the purpose of holding mandatory hearings, but with the opportunity for a trial de novo in a regular court after the panel procedure.[214] In addition, the statute established a ceiling on recovery for nonmedical expenses[215] and regulated contingent fees of attorneys.[216]

The reaction of the Supreme Court of Wisconsin is found in

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209. See text accompanying notes 211-16 *infra*.

210. Statutes limiting recoveries, in all but one case for economic loss, in medical malpractice actions include: CAL. CIV. CODE § 3333.2 (West Supp. 1978); FLA. STAT. ANN. § 768.54 (West Supp. 1979), repealed by 1976 Fla. Laws c.76-168, § 3 (effective July 1, 1982); IDAHO CODE §§ 39-4204, 39-4205 (1977); IND. CODE ANN. § 16-9.5-2-2 (Burns Supp. 1978); LA. REV. STAT. ANN. § 40:1299.42 (West 1977); N.D. CENT. CODE § 26-40-11 (1978); OHIO REV. CODE ANN. § 2307.43 (Baldwin 1975); and WIS. STAT. ANN. § 655.27(6) (West Supp. 1978).

211. *See Testing the Constitutionality of Medical Malpractice Legislation: The Wisconsin Medical Malpractice Act of 1975*, 1977 WIS. L. REV. 838, 840.

212. WIS. STAT. ANN. § 655.23(4)-(5) (West Supp. 1978).

213. *Id.* §§ 655.23(1)-.23(2).

214. *Id.* § 655.009.

215. *Id.* § 655.27(6).

216. *Id.* § 655.013.

*State ex rel. Strykowski v. Wilkie.*[217] With three dissents, the court upheld the constitutionality of the various sections of the law. On the petitioner's argument that equal protection of the laws required a strict scrutiny because a suspect category or fundamental rights were at issue, the court held in the negative. The court framed the issue in terms of whether there was a rational basis for treating tort claims involving medical malpractice differently from other torts.[218] Based on Wisconsin precedent,[219] the answer was affirmative. The court found that the requirement that administrative relief must first be sought through compensation panels was not a denial of due process in view of a later opportunity to be heard de novo in court. Nor was it an invasion of the judicial function for the panels to initially decide legal questions such as negligence, causation and damages. At issue in the case was the fact that the panel included a physician and lay members and that the panel's findings could be introduced in evidence in which the parties have no vested right. Altering some of the forms of pleading and procedure did not violate due process as long as the defendant had adequate notice of plaintiff's claims. In response to the argument that the constitutional right to jury trial was violated because of procedures connected with the panel's findings, the majority stated "the legislature may modify old procedures, or create new ones, if the substantive right to jury trial is preserved."[220] Underlying this Wisconsin decision is the major premise that a legislative act must be upheld, if possible. The court showed no antagonism toward the legislative reformation of the common-law approach.

The three dissenters in *Strykowski* very clearly took the attitude that the majority had, in effect, rewritten the statute in order to make it constitutional and were thus acting as a legislature. Justice Abrahamson, speaking for himself and Justice Heffernan, said, "I believe the majority has written a new statute and has written it as if all the modifications were constitutionally mandated."[221] Much was made of the make-up of the panels and of the

217. 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

218. *Id.* at 508, 261 N.W.2d at 442.

219. Borgnis v. Falk Co., 147 Wis. 327, 133 N.W. 209 (1911), was cited as controlling precedent by the *Strykowski* court. 81 Wis. 2d at 509, 261 N.W.2d at 443.

220. 81 Wis. 2d at 523, 261 N.W.2d at 449.

221. *Id.* at 533, 261 N.W.2d at 454.

procedure whereby the panel's findings are submitted to the jury without possibility of challenge. "This court has improperly made legislative policy decisions in constitutional terms without telling the legislature specifically where it went wrong in the statute it wrote."[222]

Although the state constitutions of Wisconsin and Illinois differ, the Illinois Supreme Court's decision in *Wright v. Central DuPage Hospital Ass'n*[223] is, nonetheless, a perfect example of the court's striking down as unconstitutional, a statute similar to the one upheld in Wisconsin. The Illinois statute provides for an initial referral to a "Medical Review Panel," consisting in this case of a doctor, a lawyer, and a circuit court judge.[224] Even though the panel's findings are not admissable as evidence in a subsequent trial—contrary to the Wisconsin procedure— the Illinois Supreme Court was not willing to uphold the statute. The court found that the procedure " 'vests essentially judicial functions in nonjudicial personnel' "[225] and " 'it impair[s] and violate[s] . . . constitutionally protected interests in trial by jury.' "[226] Although in *Strykowski* the Wisconsin Supreme Court was able to avoid the sensitive issue of a top limit on malpractice claims, in *Wright* the Illinois Supreme Court met the issue head-on. The court declared the $500,000 limitation unconstitutional because it was arbitrary and a special law in violation of a constitutional provision.[227] The court also found the new insurance regulations, whereby no cancellation of insurance or increase of rates above a June 10, 1975, level was allowed without approval of the Illinois Director of Insurance, to be unconstitutional special legislation.[228] In 1976, the legislature of Illinois replied, with an act which emphasized arbitration but did not compare in substance and impact with the statute invalidated in *Wright*.[229] Certain substantive and procedural features of the common law, however,

222. *Id.*

223. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

224. ILL. ANN. STAT. ch. 110, §§ 58.2-.10 (Smith-Hurd Supp. 1977).

225. 63 Ill. 2d at 321, 347 N.E.2d at 739 (quoting from the circuit court's order).

226. *Id.*

227. *Id.* at 330, 347 N.E.2d at 743.

228. *Id.* at 331, 347 N.E.2d at 744.

229. The new legislation created additions or amendments in several separate areas: ILL. STAT. ANN. ch. 51, §§ 71, 73, 101 (Smith-Hurd Supp. 1977) (access to medical reports); *id.* ch. 73, §§ 767.18-.21 (gives insurance director power over rates); *id.* ch. 91, §§ 26, 166.

were directly affected. Thus, under the new statute of limitations, a malpractice suit can be instituted only within two years of discovery of the injury and within four years of the date of the injurious act.[230] "*Ad damnum*" clauses are eliminated with certain exceptions.[231] The collateral benefits rule of the common law has been drastically curtailed.[232]

In summary, it appears that the Illinois legislature and the Illinois Supreme Court differ substantially on the proper means to deal effectively with the medical malpractice problem. Although the legislature in this area has equal power with the judiciary and can "overrule" the common law, the court maintains its power to declare laws unconstitutional. Whether or not the Illinois court was justified in declaring the bulk of the 1975 statute unconstitutional is debatable in view of the fact that similar statutes have been adopted and upheld in jurisdictions such as Wisconsin. These representative approaches to the medical malpractice issue, found in Illinois and Wisconsin, underline the respective powers of the two governmental institutions and the interaction between them in a critical situation.

## VIII. Conclusion

Recent changes in the law of torts reflect an increased awareness of social responsibility. Comparative negligence has replaced contributory negligence and assumption of risk. Contribution among tortfeasors has become more widely accepted. Guest statutes have been declared unconstitutional. Strict liability of manufacturers has replaced negligence and sovereign immunity is on the wane. In addition, statutes have been enacted to curtail the current trend of increasingly large damage awards in the areas of medical malpractice, strict liability and ski injuries.

Our analysis of these developments in the law of torts shows in many instances an interaction between the courts and legislatures.

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230. *Id.* ch. 83, § 22.1.

231. *Id.* ch. 110, § 34.

232. *Id.* ch. 110, § 68.4. The statute of limitations was also reduced. *Id.* ch. 83, § 22.1. For damage provisions, *see id.* ch. 110, §§ 34, 41, 58.2, 65.1, 68.4.

The judicial change in New York's law on multiple defendants and its influence on the statutory implementation of comparative negligence is an excellent example of this phenomenon.

This interaction may be contrasted with other situations in which the courts have assumed an activist role in initiating changes. Courts have asserted leadership in the removal of governmental immunity and in changes in guest statutes. The California Supreme Court, for example, led the attack on the doctrine of sovereign immunity. Ordinarily the activist state courts have not used their power to declare tort legislation unconstitutional. But even in the single instance where they have struck down guest statutes as unconstitutional, no hue and cry has been raised against the judiciary. Thus the acrimonious disputes surrounding the judicial activism practiced by the United States Supreme Court find no parallel here.

In other instances the legislatures have assumed responsibility for bringing about the change. In the areas of strict liability, medical malpractice and ski injuries, legislatures have sought to control large damage awards. For example, special review boards have been created to hear malpractice cases. Legislatures have responded to the expansion of strict liability by introducing statutes of repose. They have also tried to limit awards resulting from skiing injuries by reviving tort doctrines such as assumption of risk.

As we have seen, tort law is characterized by an interaction between courts and legislature to bring about needed change, each branch exercising its prerogatives as it sees them, and neither having a clear monopoly on the position of social engineer. Recently, as the need for change has become more visible, and arguably more frequent, tort law has been a particularly appropriate arena for the observation of the dynamics of the relationships between the judiciary and the legislature on a state level. Although a traditional inclination to caution still exists in many state courts, the common law continues to be able to accommodate the legal reasoning of the more innovative courts and judges as the law is allowed to grow and respond to a changing world.