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Comparative Negligence---Louisiana's Forgotten Heritage

WEX S. MALONE*

Contributory Negligence and Nineteenth Century Individualism

One of the most notable points of difference between the civil law and the common law is the highly individualistic character of the latter system. Although this trait colors all phases of Anglo-American law, it is particularly noticeable with reference to tort liability, and to it can be attributed most of the arbitrary denials of protection in that field. Because of individualism the common law still clings stubbornly to the notion that a defendant cannot be made answerable for the injuries which he has caused another unless he either set in motion an active force whose effect he will not or cannot control, or he has made an affirmative undertaking toward another which involves the latter's safety or welfare.

Neither the idea of the good neighbor¹ nor the moral precept that liability should be commensurate with the capacity to foresee injury² has succeeded in dominating the common law mind. No flexible principle such as the broad civilian concept of fault has been welcomed into the gentry of common law ideas, although in recent years substantial progress has been made in that direction.

Tort defenses particularly savor of the individualistic trait. The doctrine of assumption of risk, for example, stems from the idea that an individual is free to expose his interests to risk and in so doing to place himself beyond the pale of the law's protection.³ But the epitome of individualism in the common law is found in the defense of contributory negligence. Behind this

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¹ Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability (1908) 56 U. of Pa. L. Rev. 217, 316; Ames, Law and Morals (1908) 22 Harv. L. Rev. 87.
doctrine is the notion that the primary burden of protection lies upon the plaintiff himself, and only when all efforts of self help have failed is he permitted to call upon the courts for assistance.\textsuperscript{4} The plaintiff whose fault has contributed in any appreciable measure to his own injury is denied all right to recover irrespective of the merit his case may otherwise possess. Thus, in order to assure that only the blameless shall find refuge in the law, the courts are willing to forgive wholly the transgressions of the defendant, who may be far more at fault than his adversary. None but the pure in heart shall triumph, and the wicked do laugh exceedingly therefor!

Needless to say, the doctrine has met with severe criticism everywhere.\textsuperscript{5} It has been abrogated for many types of injuries,\textsuperscript{6} and completely abolished by statute in several jurisdictions.\textsuperscript{7} Where it remains it has been bridled through the use of countervailing doctrines such as the spurious rules of the last clear chance,\textsuperscript{8} or has been freely passed by courts to juries, whose lack of sympathy with contributory negligence is well known.\textsuperscript{9} Nevertheless, it is still the law for most purposes at most places in England and the United States.

The idea of contributing fault as a bar to recovery is exclusively a product of the common law attitude of the Nineteenth Century. It was first suggested as recently as 1809 in the case of \textit{Butterfield v. Forrester}.\textsuperscript{10} Although in that case the court discussed the problem with a glibness suggesting that it felt that it was on familiar territory, it cited no authority, and legal scholarship has found none to support the decision. Even in \textit{Butterfield}'s case it is doubtful that the court intended to do more than to hold that the loss must fall on the shoulders of him who had the best opportunity of avoiding the mischance.\textsuperscript{11} But the following decades witnessed the triumph of a philosophy of

\textsuperscript{4} Prosser, Handbook of the Law of Torts (1941) 394; Schofield, Davis v. Mann: Theory of Contributory Negligence (1890) 3 Harv. L. Rev. 270; Bohlen, Contributory Negligence (1908) 21 Harv. L. Rev. 223.
\textsuperscript{6} See p. 145, notes 72-74, infra.
\textsuperscript{7} See note 71, infra.
\textsuperscript{8} James, supra note 5.
\textsuperscript{9} Ulman, A Judge Takes the Stand (1933) 31; Malone, Contributory Negligence and the Landowner Cases (1945) 29 Minn. L. Rev. 61, 62-66; James, supra note 5, at 717; Lowndes, supra note 5. See also Gregory, Legislative Loss Distribution in Negligence Actions (1938) 3.
\textsuperscript{10} (1809) 11 East. 60, 103 Eng. Reprints 928.
\textsuperscript{11} Green, Illinois Negligence Law (1944) 39 Ill. L. Rev. 36, 40.
individualism in the common law. This was the age of expanding economy and the development of new industrial and transportation enterprises. In such a climate it is not to be hoped that ethical notions which tend to hamper or embarrass the new developing economy and commerce would meet with favor in the courts. Thus, Butterfield's case soon came to be regarded as indisputable authority for the proposition that the negligent plaintiff cannot recover.

Before this notion became thoroughly entrenched in the Anglo-American mind in the middle years of the last century there were made, or in the making, other ideas on a higher ethical plane for the disposition of the case of the delinquent plaintiff. Courts of admiralty had long held that where both parties to a collision were at fault the loss should be divided between them—although the exact method of apportionment was in doubt. On the continent a similar notion was germinating. Commentators on the new French Civil Code were disputing whether or not the provisions of Articles 1382 and 1383 envisaged the apportionment of loss in terms of the faults of the respective parties. It is common knowledge that this idea eventually prevailed, and that faute commune has become an integral part of French jurisprudence. This commitment to comparative negligence in France, however, was not complete until near the close of the century. In 1844 we find the Court of Cassation administering the doctrine of contributory negligence.

The reasons why appropriate doctrines for the negligent plaintiff were so late in developing are fairly clear. The entire network of negligence rules is an outgrowth of industrialism, congestion and fast transportation. In a simple agricultural

12. The codes of maritime law, some of which are said to date from the thirteen century, generally provided for sharing loss to ships and cargoes arising from collision. The best known is the Code of Wisby, which was first printed in 1505. For a full discussion, see Marsden, Collisions at Sea (9 ed. 1934) 149; Mole and Wilson, A Study of Comparative Negligence (1932) 17 Cornell L.Q. 333, 339.

13. Article 1382 of the Code Napoleon is the same as the introductory sentence of Article 2315 of the Louisiana Civil Code: "Every act whatever of man, that causes damage to another, obliges him by whose fault it happened, to repair it." Article 1383 is substantially the same as Article 2316 of the Louisiana Civil Code: "Every person is responsible not only for the damage which he has caused by his act, but even for that caused by his negligence or imprudence."

14. See the excellent comment by Hillyer, Comparative Negligence in Louisiana (1936) 11 Tulane L. Rev. 112, 114.

15. Id. at 114, n. 17, 18.

civilization whose rudimentary needs came from the fields or the fireside workshop, where living was devoid of congestion and dangerous machinery, and travel was by horse or ox cart, intricate questions of relative fault did not arise. A search for satisfactory precedent in the early law of any legal system will bring only disappointment and confusion.

There is little in the Roman law to support either contributory or comparative negligence. Most of the instances commonly cited from the Digests and Institutes to support the common law notion that contributory fault is a bar are situations where the problem is lost in a tangle of causal relationship, or where no fault on the defendant's part was discoverable, or where the plaintiff deliberately exposed himself to the risk. Certainly no body of generalized doctrine one way or the other is to be found. The problem simply did not exist for the Romans any more than for the pre-industrial English or French.

Comparative Negligence and the Louisiana Civil Code of 1825

In the year 1824 the House of Lords consented to the use by admiralty courts of the rule of equal division of loss in the event of a collision at sea where both parties were to blame (which is nearly always the case in maritime collisions). However, it expressly refused an apportionment of loss in terms of the respective degrees of the faults involved. Even equal division was refused if the action was brought in the common law courts instead of the tribunals of admiralty, despite the fact that the accident arose from a collision of vessels. The same rules prevailed in the United States.

17. D.9.2.30.4, where a cause for the wrongful death of a slave was refused the master who had so carelessly tended the slave that it died. The person who wrongfully injured the slave was held liable only for the wound. See also I.4.3.5.
18. D.9.2.28.
19. D.9.2.31; I.4.3.3; I.4.3.4; I.15.3.
20. The statement most frequently relied on by those who contend that the Roman law and common law are in accord is a passage quoted from the last title of the Digest: "A Collection of Ancient Maxims," from Pomponius, On Quintus Mucius, Book VIII: "He who sustains any damage through his own fault is not considered to have been injured" (D.50.17.203). This statement, however, appears to be only a recognition of the rule prevailing everywhere, that the plaintiff must show that his injury resulted from some act or omission of the defendant. This same idea finds expression in the familiar principle, damnum absque injuria.
21. It is noteworthy that none of the situations referred to in the Digests or Institutes involved injuries in either traffic or industry. See also Radin, Roman Law (1927) 148.
23. Mole and Wilson, supra note 12, at 346.
Apart from the poorly formulated and disputed rules of admiralty outside the Anglo-American world and the codal provisions of Germany and Austria, the idea of distribution of loss in proportion to the respective faults of the parties was not recognized anywhere at the time of the adoption of the Louisiana Civil Code of 1825. In fact, it cannot be safely assumed that at this time a definite policy of any kind on the matter had become entrenched in any legal system.

The history of the Code of 1825 is beyond the province of the present writing. It is sufficient to point out that confusion resulting from innumerable conflicts between the Louisiana Civil Code of 1808, which was based on the then new Code Napoleon, and the prevailing Spanish law impelled the legislature in 1822 to appoint a commission to prepare a projet of a new civil code. This commission, consisting of Edward Livingston, L. Moreau Lislet and Pierre Derbigny, submitted the result of its work, which was adopted by the legislature as the Code of 1825.

Although the Civil Code of 1825 was in large part a reproduction of the Code Napoleon, the members of the Louisiana commission were free to make such changes and enlargements as they saw fit. Consequently, advantage was taken of the experience of the French under their new code and of writings of the best scholarship of that country. Thus the genius of the Louisiana jurisconsults produced a unique and advanced document superior in many ways to any prior attempt at codification. In this Code of 1825 appears one of the first mandates in legal history establishing for general use what is now known throughout the world as the doctrine of comparative negligence.

Article 2303 of the Civil Code of 1825 persists unmodified today as Article 2323 of the present Code. It has no counterpart in the Code Napoleon or in the earlier Louisiana Civil Code of 1808. It reads as follows:

"The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently." (Italics supplied.)

In passing it should be noted that the idea of comparative fault expressed in this Article is completely compatible with civil law notions generally in the field of delicts. It is not sur-

24. See note 31, infra.
prising to learn that after nearly a century of labor pains the French evolved the same principle of faute commune as a logical corollary of the parent notion of liability based on fault expressed in Article 1382 of the Code Napoleon (Article 2315 of the present Louisiana Civil Code). Quebec followed suit shortly after the turn of the century, and Porto Rico and the Philippine Islands finally evolved the same idea from the corresponding provisions of their codes modeled after that of modern Spain. Other civilian states have since adopted express codal provisions which put the principle of comparative negligence or faute commune into operation.

Why Article 2323 Fell into Oblivion

It is to be expected that Louisiana's initial leadership in comparative negligence would be pressed forward by an orderly and courageous development of the doctrine by the courts. This, however, has not followed. In 1841 the supreme court committed this state to the common law theory, and, paradoxically, today Louisiana is the only civilian jurisdiction which adheres to the

30. Civil Code of Spain, § 1902: "A person who by an act or omission causes damage to another where there is fault or negligence shall be obliged to repair the damage so done." It is not clear, however, that Spain has interpreted this article as an establishment of comparative negligence. (Decision of Dec. 14, 1894, 76 Jurisprudencia Civil, No. 134). The state of the Spanish authorities is discussed in Rakes v. Atlantic, Gulf & Pacific Co., 7 Philippine Rep. 358, 366 et seq.
31. German Civil Code of 1896, Art. 254: "If any fault of the injured party has contributed in causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused chiefly by the one or the other party." This article is a reproduction of a provision in the earlier code of Prussia.
Civil Code of Portugal, Art. 2398, § 2: "If in the case of damages there was fault or negligence on the part of the person injured or on the part of someone else, the indemnification shall be reduced in the first case, and in the second case it shall be apportioned to such fault or negligence as provided in paragraphs 1 and 2 of Section 2372."
Civil Code of Japan (1898) Art. 722: "If the injured party was negligent a Court may take such fact into consideration in determining the amount of damages."
The following are representative of other similar code provisions: Civil Codes, Austria, Art. 1304; Switzerland Code of Obligations (1911) Art. 51; Persian Code, Arts. 2199, 2202. The provision of the Austrian Code appeared in the earlier Code of 1811.
tenets of contributory negligence. How did this strange turn of events come about?

It is noteworthy that the Louisiana courts have never asserted that Article 2323 does not offer a controlling principle for the disposition of the negligent plaintiff. Neither have they taken occasion to observe that this article generates notions which are wholly inconsistent with the imported contributory negligence doctrine. The pertinency of Article 2323 has not been contradicted; it has been ignored. Therefore any claim that the article has no general application must rest entirely on conjecture.

At first glance the language of Article 2323 may appear to restrict its sphere of usefulness by excluding all but property damage. The article purports to bring the comparative negligence principle into play only with respect to an owner who has imprudently exposed a thing to the negligence of the defendant. However, “thing” is the only available English equivalent of chose, which appears throughout in the French text. The inflexibility of the word, thing, is attested by the fact that common law courts long ago borrowed and have retained the more facile chose, to which they have ascribed all its original connotations—thing, right, case, or cause. To make more vivid to the English mind the shades of meaning attributable to chose the common law has maintained two species—chose in possession and chose in action. The former designates tangible property—movable or immovable, while the latter term, chose in action, remains merely a cluster of legal relationships with no corporal embodiment, including contract rights, debts, law suits, and even patents and copyrights. This corresponds to the French distinction between biens corporels and biens incorporels. It is noteworthy, however, that the French have adhered to the term, biens, when referring to property. They have preferred to avoid chose as a legal concept relating to ownership because of its failure to afford expression of the distinction between the corporal thing owned and the rights of ownership. Instead they have capitalized on free usage and have placed the term chose to a variety of non-technical purposes, such as the denotation of a

33. The situation under the Spanish decisions is not clear. The Supreme Court of the Philippine Islands has, however, assumed that comparative negligence probably prevails in Spain. See note 30, supra.
34. 1 Planiol, Traité Élémentaire de Droit Civil (12 ed. 1939) 734, no 2174.
35. Id. at 734, no 2176, 2177.
tangible object (whether or not susceptible of ownership) or to indicate a "matter" or cause (as in chose jugee).

In the light of the several shades of meaning of which the term chose is susceptible both in English and French usage, there is no compelling reason why it should be restricted arbitrarily to corporal objects. Even from the legal lexicographer's standpoint, the terms right, interest, or cause seem to be equally appropriate equivalents of chose unless some sound reason of policy requires a more restrictive and literal interpretation.

Every consideration of policy demands a construction of Article 2323 that will include all cases where the plaintiff is guilty of negligence, irrespective of whether the injury is to his person or his property. It should make no difference whether the "thing" exposed to the defendant's negligence is the plaintiff's interest in his property or in his person. The absurdity of a more rigid interpretation is apparent upon brief reflection. Let it be supposed that a careless pedestrian is knocked down in the street by a negligently driven motor vehicle. Unless Article 2323 is regarded as applicable to all the damage inflicted, the plaintiff will recover for his injured clothing and personal effects after suffering an appropriate reduction for his own carelessness, but he will recover nothing for the more serious injuries to his person. Such a distinction places property at a higher premium than human safety and is not commendable either in theory or in common sense. Even the common law, with its inordinately high regard for property rights, has not gone so far. Furthermore, the administrative difficulties that would be involved in an attempt to apply two conflicting theories simultaneously to a single situation indicates that no such restrictive interpretation was anticipated by the redactors of 1825.

The only other conceivable argument against a general application of Article 2323 rests on the fact that this article follows in sequence a codal provision that deals exclusively with the liability of an owner of a structure for its dangerous condition. A possible contention is that by reason of that sequence Article 2323 is restricted to the narrow fact-type situation covered by the preceding Article 2322.86 This argument hardly deserves serious consideration. Mention of the matter is made here only because of the fact that the sole instance in which the

86. This article is as follows: "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by a neglect to repair it, or when it is the result of a vice in its original construction." The article is substantially the same as Article 1386 of the Code Napoleon.
court has even tangentially recognized the existence of the comparative negligence article is a case which grew out of an injury by a falling structure, and the decision was based largely on Article 2322. There is nothing in that decision, however, that suggests that the court regarded Article 2323 as being limited to any particular situation.

Both Articles 2322 and 2323 are parts of modest Chapter 2 of Title V of the Civil Code. This chapter, which is the foundation of the torts law of Louisiana, contains only nine articles. These vary, from the broad declarations of general principle set forth in Article 2315 and 2316 to such restricted matters as the responsibility of parents, tutors and employers, or the liability of landowners or the keepers of animals. There is nothing to indicate that the authors of the Code had in mind any sequence other than the natural desire to put first things first. Apart from this the articles appear to be arranged indiscriminately, and no idea of interdependency is manifest anywhere throughout the chapter.

It appears safe to assume that the reasons for the non-use of the controlling principle of Article 2323 are not to be attributed to any conviction on the part of the courts that the article is not reasonably applicable to the average situation of the negligent plaintiff. If such were the prevailing attitude it is to be expected that the court's sentiment would have found an expression in at least some of the hundreds of appropriate instances that have been litigated. Perhaps even more indicative is the fact that the article has been ignored consistently, even in the many cases where it would be clearly applicable under the most restrictive interpretation.

The persistent disregard of the comparative negligence principle of Article 2323 is probably best accounted for by reference to the economic life of Louisiana during the last century and to the dilemma in which the courts found themselves during the middle of that period, when complex negligence situations were suddenly interjected upon the juridical stage. These factors are several and deserve brief separate mention.

The first decision that clearly committed the Louisiana court to contributory negligence was *Fleytas v. Pontchartrain Railroad*

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This was in 1841. The doctrine was seized without question by a court which relied entirely on common law precedent. Ironically enough, the facts in this case were indistinguishable from the situation that confronted the English court the next year in the well known case of Davies v. Mann which gave first expression to the last clear chance doctrine. Had this doctrine been available to the Louisiana courts, Fleytas would probably have recovered even under common law precedent.

We must discountenance the idea that there was a choice of doctrine available to the court as it pondered the Fleytas controversy. Judge Martin, who prepared the opinion, was born in France and his devotion to the civil law is hardly open to doubt. In truth, at that time there was no organized body of civilian doctrine on the question. Such authorities as existed were conflicting, and three years later the Court of Cassation applied the same rule of contributory negligence in Sequin c. Brossier. Article 2323 had no counterpart in the Code Napoleon and therefore was not expounded by the French commentators. Moreover in this article the problem is elliptically couched in terms of damages rather than substantive principle. This phraseology doubtless prevented a sharp and arresting focus from being brought to bear on the article.

In contrast to the absence of definitive French authority to uphold the notion of comparative fault there was available a fairly comprehensive body of Anglo-American cases and textbooks supporting the contributory negligence doctrine, which by the time of the Fleytas decision in 1811 had become accepted without question throughout this country. During the fifty years that followed the Fleytas decision an imposing array of common law texts upholding contributory negligence came to hand, and these were frequently resorted to. Kent's Commentaries, Abbot on Shipping, and later Shearman and Redfield on Negligence.

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41. 18 La. 339 (1841).
45. It is also noteworthy that the United States Supreme Court had observed that contributory negligence was the prevailing rule both at civil law and common law. This observation was made in Railroad Company v. Jones [95 U.S. 439, 442, 24 L.Ed. 506 (1877)], a decision frequently cited by the Louisiana courts (see note 55, infra).
Thompson on Negligence,\textsuperscript{49} Field on Damages,\textsuperscript{50} Pierce on Railways,\textsuperscript{51} Redfield on Railways,\textsuperscript{52} and Wood on Railway Law\textsuperscript{53}—all these, and more, were copiously cited by the Louisiana court. It may be noted that many of these texts dealt, not merely with abstract principles of liability, but with concrete situations which bore close analogies to the specific fact pictures confronting the Louisiana judges. This afforded warm reassurance to a court which faced with some discomfort the new and complex problems which had closely followed the intrusion of the iron horse and the new-fangled street car.

The early decisions of the United States Supreme Court in which that august tribunal adopted contributory negligence played a considerable part in solidifying the opinion of the Louisiana court behind the doctrine. \textit{Railroad Company v. Houston}\textsuperscript{54} and \textit{Railroad Company v. Jones}\textsuperscript{55} were referred to repeatedly. The influence of these decisions can be attributed in large measure to the nation-wide urge toward uniformity on railroad matters. Although Louisiana jurists were by no means prepared to surrender their civilian heritage as they understood it, yet there began to exist a keen appreciation of the need for a substantial unanimity among the courts in cases where the same carrier defendant was faced with litigation in a variety of states on a single recurrent set of facts. The following statement adequately illustrates this attitude:

"Believing that in a question of such vast importance, on matters of litigation likely to arise in all parts of the Ameri-


It is interesting to note that the Supreme Court took occasion in this case to remark that contributory negligence was the controlling principle "of the civil and of the common law." (95 U.S. at 442).
can Union, this Court should seek to place its rulings and jurisprudence in line and in harmony with those of the Supreme Court of the United States and of the courts of last resort of our sister States, wherever those decisions do not militate against the principles of our special and exceptional system of laws, we deem it our duty, without hesitation, to adopt the conclusions which so clearly flow from the highly respectable authorities to which we have just referred. . . .

Although false starts, the absence of contradictory authority and the desire for uniformity played their part in securing the original commitment of Louisiana to the doctrine of contributory negligence, these alone could hardly account for the persistent although taciturn refusal of the court to recognize its own codal article which is plainly declaratory of this state's civilian tradition. Particularly is this true in view of the fact that faute commune is no longer an obscure theory and is openly acknowledged as the universal attitude in civil law jurisdictions.

It appears that the adherence of Louisiana's courts to the individualistic notion of contributory negligence has deeper roots than we have heretofore suggested. They spring from the insecurity of feeling which judges everywhere experience when faced with the modern type of negligence controversies which arise from traffic and congestion. In these cases the awareness of a responsibility for judicial lawmaking cannot easily be escaped. Each decision is a venturesome declaration of social or economic policy, made without the comfort of any predesigned rule of thumb. Split second adjustments on the part of both the plaintiff and defendant must be evaluated by the courts, and traffic practices must be defined and charted. Here the standard of reasonable care often demands that a judgment on morals be pronounced in cases where in truth there is no graspable problem of morality. It follows that the passing of judgment in such instances is accompanied by a feeling of unsureness on the part of the judge, who is aware that whatever decision he makes is a leap in the dark. The fear of uncharted seas tends to induce the court to let the risk lie where it has fallen, to avoid the blazing of new and uncertain trails. Always there is the urge to find and fall back upon some established rule which will explain a refusal of relief in reassuring impersonal lan-

guage. The doctrine of contributory negligence affords precisely this refuge. It enables the court to escape the painful process of judicial lawmaking or at least to hide it from the litigants and from itself.

This search for restrictive rules during the last century was urged on by the courts' conversion to the notion that growing industry and transportation should not be too heavily saddled with responsibility for the sudden increase of accidents attributable to the evolution and development of these newcomers who augured so much good for the welfare and convenience of the community. It is interesting to note that of the twenty-one contributory negligence cases decided during the formative period from 1854 until 1888,


The steamboat collision cases were frequent prior to the period begin-
origin in facts not involving mass transportation. These cases, then, were strictly the product of the new age. Furthermore the era of privately operated motor vehicles had not yet arrived. Thus the position to be accorded the newly emerging enterprise of mass transportation was pressed to the courts' attention undiluted by other considerations.

Although the public transportation system of New Orleans originated in 1833 with the chartering of the old New Orleans and Carrollton Railroad, its period of prodigious growth did not arrive until the middle 1850's. By 1868 the New Orleans City Railway, the Saint Charles Street Railway Company and the Canal and Claiborne Railroad Company had been established and were enjoying a prosperous business through the operation of mule drawn street cars. These companies, together with the Carrollton line which in 1860 had abandoned its steam driven cars in favor of mule power, transported an aggregate of more than twenty-two million passengers per year and maintained 266 cars in regular daily operation.\textsuperscript{62}

The courts, as would be expected, understood the great utility and convenience which this new and growing enterprise afforded for the citizenry of New Orleans. Likewise they were not unmindful of the capital investment of over three million dollars which was required to establish and maintain the elaborate transportation system. At the same time it soon became apparent that the operation of street railways was to give rise to a very substantial increase in traffic hazards which up to that time had been a matter of only negligible concern. Thus the courts faced for perhaps the first time a new type of problem that was to recur with increasing frequency from that day forward: shall the new industry be required to make strict reparation for the peculiar hazards to the public safety which it has created? The old concept of reasonable care, which was formerly a simple process of passing a homespun moral judgment on an isolated dispute, now took on a strange and comprehensive

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  \item[\textsuperscript{61}] Mailhot v. Pugh, 30 La. Ann. 1359 (1878). Even in this case it is clear that recovery was unlikely irrespective of the plaintiff's contributory negligence, and resort to that doctrine was largely incidental.
  \item[\textsuperscript{62}] New Orleans Daily Picayune, July 26, 1873, p. 8,
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aspect. The courts could not escape observing that each contro-
versy was invested with implications that extended to the
welfare of the entire local economy. This called for caution lest
the valuable new service be crippled and lest public life which
was now adjusted to mass transportation find itself seriously
out of joint.

The court’s reaction to this sharp conflict of interests between
the public safety and the economic welfare of the new trans-
portation enterprise is clearly expressed in the opinions of this
period. It was felt that the public, as well as the companies,
must adjust its conduct so as to minimize the likelihood of
accident. The courts were willing to go even further. The fran-
chises bestowed upon the companies were regarded as rights
of way to be enjoyed without obstruction, and pedestrians were
enjoined against so conducting themselves as to interfere with
the free and rapid passage of the cars. The following statement
is typical:

“It is true, as contended for by plaintiff, that he has the
right in common with all other citizens, to use the public
streets of the city, and that the city railroad companies,
under their charters, have not acquired the ownership or
exclusive use of the ground or of that part of the streets on
which their tracks are laid.

“But it is equally true that the public, acting through the
city authorities, have agreed to give these roads the use of
certain streets for the purpose of laying their rails and of
running thereon their numerous cars, from the rapidity and
safety of which, as common carriers, the convenience of the
public is so greatly enhanced, that all citizens have cheerfully
agreed to allow to these railroad companies the paramount
right of way over these streets, such as the public convenience
requires.

“Hence, it is that all foot travelers and vehicles move out
of the way of the city cars, and that the public service and
public necessity will not allow the free and unobstructed
passage of these cars to be in any way impeded.”63

It is this same climate of the economy that has nourished
the growth of individualistic rules and doctrines throughout
this country and in England during the past century. When

these notions are prevalent among the courts there is not likely to be much tolerance for the jury, whose sentimental predisposition toward the injured plaintiff is well known. Hence the search for restrictive rules that will subordinate the fact-finding function of the jury to the law-declaring mission of the court. This was probably accentuated in Louisiana by the natural aversion to the jury system which has characterized this state throughout its history.

The ten street car cases which were mentioned above all originated in jury trials (which at that time were prevalent) and in each instance the injured victim had received a substantial verdict. Likewise, it may be noted that in all instances except one the defendant was successful in his effort to secure a reversal by pressing the contributory negligence doctrine to the attention of the appellate court. Seven out of nine of these successful appeals resulted in a reversal and annulment of the judgment below, while in the remaining two instances the case was remanded with instructions which would reduce the jury's function to the mere mechanics of fact finding and thus virtually insure a defendant verdict.

From the foregoing account it appears that contributory negligence was introduced into the jurisprudence of Louisiana largely because of the absence of any countervailing notion and the ever presence of persuasive authority from neighboring jurisdictions. It has been nourished, preserved and perpetuated because it has made the judging process seem simpler and more impersonal and at one time it afforded a ready means for control of the generous tendencies of juries. At the same time it has enabled the court to assume the role of a conservative policy declaring body without betraying even to itself the judicial lawmaking in which it has been engaged. In the meanwhile Louisiana's true legal heritage of comparative negligence and the higher ethical notions upon which it rests have been forgotten.

Unsuccessful Attempts to Limit Contributory Negligence

The advent of the private automobile has greatly complicated the situation and given rise to considerable dissatisfaction with the contributory negligence doctrine. Controversies be-

64. Summers v. Crescent City R.R., 34 La. Ann. 139 (1882). It is noteworthy that in this case the defendant's negligence consisted in the defective design of its tracks as well as in the active conduct of its operations.
tween private motorists or between pedestrians and motorists present a different economic picture from the situation where an infant industry or enterprise pleads for judicial help against the ravages of an oversympathetic jury or trial judge. Here the litigants are likely to be in the same economic sphere and the problem of apportioning the risk of loss tends to become both personal and ethical. Hence, considerations of fair play are more clearly pressed to the courts' attention than in the situations previously described. Furthermore the sheer quantity of the new litigation and the infinite variety of fact patterns confronting the courts have supplied the experience which must inevitably lead to doubts as to the propriety of the harsh rules of contributory negligence.

But the growing feeling that the doctrine had failed to produce desirable consequences resulted, not in its forthright abolition, but in the creation of restrictions and exceptions to its use. These are usually poorly formulated and are arbitrary in operation. The so-called last clear chance doctrine is incapable of being intelligently applied to the average situation and has become virtually meaningless because of the many confusing variations in which it is presented even in a single jurisdiction.66 At times the plaintiff's contributory negligence is excused although there was in fact no last clear chance for anyone to avoid the accident. Some courts have even abandoned the term and refer to the exception as the "humanitarian doctrine."66 All this has produced nothing but consternation among courts, writers, and lawyers.

The notion that contributory negligence is not a defense where the defendant was guilty of "gross" negligence or wilful and wanton misconduct is only another doubtful device to avoid the full implications of contributory negligence or to bridle its use. Here again bad law has engendered more bad law, for the distinction between arbitrary degrees of negligence is not one that can be successfully administered by courts or juries. The same may be said of the use of causation rules to avert the consequences of the plaintiff's negligence.

Louisiana, more than perhaps any other jurisdiction, has been afflicted with this doubtful practice of rule making by the courts in their frantic effort to limit the contributory negligence...

65. James, supra note 5; Prosser, op. cit. supra note 4, at 410, 411.
The reasons for this are clear. Those states in which trial by jury is the normal procedure have in the jury a ready and convenient device for the disposal of the negligent plaintiff situation. Juries simply ignore the complainant's carelessness if the case is otherwise appropriate for recovery. Thus the courts are free to accept the juries' verdicts as faits accomplis; and the chief objection to contributory negligence in these jurisdictions is the unrealistic and cumbersome nature of the procedure. Trial judges, without aid of jury, on the other hand, are not free to deal so lightly with established law. Unlike jurymen they are encumbered with a professional tradition and a feeling of personal responsibility for a faithful administration of rules and doctrines. For this reason, the only available cure for the ills of contributory negligence, where there is no jury, is either the abolition of the doctrine or the creation of an elaborate countervailing structure of legal exceptions. This latter course was adopted in Louisiana.

The arguments in favor of a retention of the doctrine of contributory negligence are neither many in number nor convincing in nature. They may be summarized briefly:

1. Contributory negligence, although it is not commendable from an ethical point of view, is nevertheless the most expedi-

67. The development of the confusing ramifications of the last clear chance doctrine in Louisiana is an interesting study. At one time the court held that the doctrine does not apply where the negligence of the plaintiff continues actively up to the time of the accident. Harrison v. Louisiana Western Ry., 132 La. 761, 61 So. 782 (1913). But the court later retreated from this position and stated that even though the plaintiff's negligence continued he could recover if the defendant was consciously aware of the former's peril in time to avoid the accident. Rottman v. Beverly, 183 La. 947, 165 So. 153 (1935). The attempt to break down contributory negligence through further and tenuous extensions of the last clear chance rules reached its high water mark in Jackson v. Cook, 187 La. 860, 181 So. 195 (1938) where the court held that actual discovery of the peril is not necessary if the defendant should have discovered it in the exercise of reasonable care—even though all during the period when discovery was reasonably available to the defendant it was likewise available to the plaintiff, whose negligence was "continuing."

Under such a confused state of the law, artful phrase making enables the appellate courts to throw the decision either way. For example, what is "continuing negligence"? Can the plaintiff's negligence "continue," although the plaintiff is rendered helpless by reason of his carelessness? When, under a given state of facts should the defendant have discovered the plaintiff's peril? Could the defendant, had he been reasonable, have seen the situation and also have appreciated its perilous implications? Would the situation, if appreciated, have called for action on the defendant's part at a time when action by him would have prevented the occurrence? Such questions merely call for more rule making, which in turn further detracts attention away from the merits of the controversy and towards bloodless judge-made distinctions which never really accomplish their purpose.

68. See note 9, supra.
ent and easily administered method of disposing of the case of
the delinquent plaintiff.

2. Adherence to the doctrine will preserve a uniformity of
decision between Louisiana and its neighboring states.

**The Argument that Comparative Negligence
Is Too Difficult to Administer**

There is no substitute for the passing of a personal intelli-
gent judgment in torts controversies. This is the sensible
hypothesis from which the civil law proceeds and which led to
the erection of a structure of delictual law upon the simple
notion of fault. The trial judge, unencumbered by the whims
and caprices of jurymen, is vested with authority to individualize
the fact situations before him, and upon him is cast the
responsibility of administering the law without the embarrass-
ment of a confusing plethora of judge-made rules.

The multiplying of doctrines for the purpose of subordinat-
ing the discretionary element in trials is a product of fear on
the part of the appellate courts. A complicated system of rules
is created to serve as a redoubt against the portentous shadow
of the jury and its personalized judgments. Thus confusion is
heaped upon confusion and law becomes intolerably vague and
susceptible to juristic caprice; until, as in the case of the last
clear chance, it is the despair of attorneys and judges every-
where. The spectre of uncertainty, the fear of which incited
judges to rule making, has, as the result of too much rule
making, been greatly magnified. Difficulties have not been
avoided; they have merely been transferred to the appellate
court, which has become the focal point of attention for the
trial judges, the attorneys and the litigants. Meanwhile the
trial has tended to become a mere preliminary skirmish, a breed-
ing place for reversible error and excuses for more judicial law-
making on the appeal.

Comparative negligence stands for precisely the antithesis
of all this confusion. Its use requires an apportionment of dam-
ages according to the respective faults of the parties as deter-
mined by the trial judge in the exercise of a sound discretion.
Concededly it may be difficult to determine whether the plaintiff
who ran a traffic light was more at fault than the defendant
who violated a speed ordinance; and even more precarious is

69. See note 67, supra.
the task of deciding that the plaintiff's misconduct amounted to thirty, or sixty, per cent of the fault aggregate. But is this more difficult than the problem of determining that Mrs. Brown's pain and suffering is worth twenty-five, or three thousand, dollars? What is the price of fright or embarrassment, or the value of a reputation? The administration of intangible values and the assessment of damages in terms of moral considerations are not new processes for the courts. There is no reason to believe that comparative negligence imposes anything more formidable than is already being encountered daily in the administration of justice. The experience in those states that have already adopted the doctrine amply disproves any contention that the process is too difficult for successful use.

We have observed that where there is no jury to absorb the shock of contributory negligence the courts' urge for more and more restrictive rule making becomes increasingly aggravated. On the other hand, the absence of a jury simplifies the administrative task under principles of comparative negligence. The weighing of the respective faults of plaintiff and defendant in terms of dollars and cents is a function which the court, rather than the jury, is equipped to perform. It is here that the tendency of the juryman to ignore all obstacles in the way of a full recovery can work considerable mischief. The likely outcome of unrestrained jury operations in this sphere is an increased number of plaintiff verdicts without the desirable reductions in the amounts recovered. There are ample indications that this practice has become all too prevalent in Mississippi, which adopted comparative negligence twenty years ago.

No such danger exists in a jurisdiction such as Louisiana where jury trials are now infrequent and where even the occasional verdict is subject to a comprehensive review. For this reason the administrative set-up in this state is peculiarly adaptable to a simple and intelligent administration of comparative negligence.

The Argument that Adherence to Contributory Negligence Will Promote Uniformity with Other Jurisdictions

Uniformity of torts rules among the several states is not something to be achieved at the expense of sacrificing substantial justice to the litigants. A uniform law is desirable chiefly

70. See p. 142, supra.
because it permits a nationwide planning and conduct of activities on the assumption that court actions can be predicted with some degree of certainty. But even assuming that the generalities which parade as tort rules are the same everywhere, it does not follow that a uniform outcome of litigation can be anticipated as a consequence. Furthermore, conduct is not planned in advance with reference to an assumed state of torts law, as would be true with the law of contracts or mortgages. Hence the need for uniformity here is not a commanding consideration, although all else being equal it may be desirable.

Even if uniformity were of paramount importance, it does not prevail today with respect to contributory negligence. In three American states, including our neighbor, Mississippi, the doctrine has been completely abrogated by statute. \(^{71}\) Comparative negligence is in regular use under the Federal Employers' Liability Act \(^{72}\) and the same is true under the corresponding acts of many states, \(^{73}\) including Texas. \(^{74}\) In Arkansas, another neighboring state, contributory negligence has been abolished for all injuries arising out of the running of trains. \(^{75}\) Similarly, railroad crossing accidents have been excluded from the operation of the doctrine in several jurisdictions. \(^{76}\) A complete list of these exceptions is not possible here. \(^{77}\) They are, however, numerous and they embrace a wide variety of activities. In fact, Louisiana is one of the very few remaining jurisdictions in which the legislature has not sniped at contributory negligence


General comparative negligence acts have been adopted in all the Canadian provinces. These are discussed in Gregory, Legislative Loss Distribution in Negligence Actions (1936) 67-72. The latest of these is the Alberta Act. Laws of Alberta, 1937, c. 18. Smith, The Change in the Common Law Effected by the Contributory Negligence Act of Alberta (1940) 3 Alberta L.Q. 189.


\(^{75}\) Ark. Dig. Stat. (Crawford & Moses, 1921) §§ 1004, 8575.

Also California, Michigan, Nebraska, Nevada, North Dakota and Ohio. See statutes collected, Mole and Wilson, supra note 12, at 608.


\(^{77}\) An exhaustive survey will be found in Mole and Wilson, supra note 12. Also see Gregory, Legislative Loss Distribution in Negligence Actions (1926) c. VIII.
in one or more instances. Even here the defense has been abolished under the Workmen's Compensation Act.78

The trend toward the general abolition of contributory negligence is of comparatively recent origin and is gaining momentum. The Eighth Report of the Law Revision Committee of the English Parliament,79 which was submitted in 1938, recommended the legislative adoption of comparative negligence for general usage in England. Although the pressing needs of the war have prevented the consideration of this measure, it appears likely that action may be taken as a part of the postwar program of law improvement. Such a step would be certain to accelerate the breakdown of contributory negligence throughout this country.

The Remedy

The restoration of Louisiana's civilian heritage of comparative negligence could be accomplished, of course, merely through a recognition by our supreme court that Article 2323 of the Civil Code affords the general controlling principle for all negligence cases where both parties were at fault. So simple a solution, however, is hardly to be hoped for in the light of the repeated adherence of the state's jurisprudence to the contributory negligence doctrine. Under notions both of stare decisis and jurisprudence constant the courts are probably bound irretrievably by their past commitments. Furthermore, a ponderous body of corollary law growing out of the doctrine has been created, and this is not to be easily disposed of. Much clarification and the tearing away of false structure will be necessary before we can again be upon the right track.

The proper remedy appears to be a comprehensive and well thought out loss distribution statute. Those states which already have such statutes have profited immeasurably by the experience which has been gained through several years of administration. Many problems must be faced by the legislature that contemplates such a measure: Should the comparative principle be universally applicable, or should it come into operation only if the plaintiff's fault is slight when compared with that of the defendant? Should an equal division of the loss be directed in

78. La. Act 20 of 1914 [Dart's Stats. (1932) §§ 4391-4432].
doubtful cases? What of the last clear chance doctrine—should it be retained in whole or in part? This suggests a final problem. This state recognizes the equal division of loss between joint negligent tortfeasors who are liable in solido. If comparative negligence is to prevail it may be desirable in the interest of uniformity and fair play that the distribution of loss between joint tortfeasors be placed on a similar comparative basis.

These and many other related problems have been variously met in those states which have taken over the comparative negligence principle. Their experience is available for our use, and our courts should not be expected to blaze the new trail unaided.

81. Gregory, Legislative Loss Distribution in Negligence Actions (1936). See particularly the model statute at p. 156 et seq.