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COMMENT: CONTRIBUTORY NEGLIGENCE AND STATUTORY DAMAGE LIMITS-AN OLD ALTERNATIVE TO A CONTEMPORARY MOVEMENT?

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SUMMARY:
... For the past few decades, inspired by a perceived increase in civil litigation, many citizens and political groups have been lobbying for state governments to implement "tort reform" measures, which for the most part are aimed at regulating damage awards to successful plaintiffs. ... Given the public's concern over well-publicized cases involving negligent plaintiffs, the support and success of proposals to limit punitive and non-economic damages, and the potential problems with such damage limits, a question arises: is there a solution which directly targets the negligent plaintiff problem while avoiding the problems inherent in statutory damage caps? This article will attempt to answer this question by focusing on the steps taken by the common law and various statutory schemes in order to address this issue (contributory negligence and the different versions of comparative fault), and identifying the various policies behind them. ... In analyzing these issues, this article will focus primarily on Idaho's experience with contributory negligence, comparative fault, and damage limits. ... Such measures include: limiting punitive damages in cases of contributory negligence, an increasing standard of proof of egregious conduct for certain amounts, or attaching the punitive damage limit to a percentage of the defendant's gross income. ...

TEXT:
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I. INTRODUCTION

For the past few decades, inspired by a perceived increase in civil litigation, many citizens and political groups have been lobbying for state governments to implement "tort reform" measures, which for the most part are aimed at regulating damage awards to successful plaintiffs. Spurred on by horror stories of exorbitant awards to often less than sympathetic plaintiffs, advocates urge, among other measures, limits on non-economic and punitive damages, the idea being to reduce litigation by removing the incentive to sue.

In presenting their case to the court of public opinion, advocates of such statutory limits often point to the infamous "McDonald's Hot Coffee Case," [n1] in which an elderly New Mexico woman filed suit against the McDonald's fast food chain after she was severely burned when she spilled a cup of coffee in her lap while attempting to add cream and sugar. She claimed that the coffee was "defectively" hot, and, as a matter of fact, a law student hired by counsel for McDonald's found that the defendant's coffee was much hotter than that served by its competitors. [n2] The jury agreed with her contention, duly awarded her $ 200,000 in compensatory damages, and, in what would cause much public outcry, an additional $ 2,700,000 in punitive damages. [n3] However, due to the plaintiff's own negligence, she was determined to be twenty percent at fault, and under New Mexico's comparative fault scheme her damages were reduced proportionately (by $ 40,000). [n4] Thus, the total award amounted to $ 2,860,000.

This twenty percent negligence on the part of the plaintiff is, perhaps, what bothers most people about this case. After all, everyone knows that coffee is hot; therefore, why should McDonald's pay nearly three million dollars to a woman who could have avoided the mishap had she not been negligent herself in handling the coffee cup? This view is perhaps best summarized in a rather harshly worded editorial which appeared in the Chicago Tribune shortly after the verdict was handed down: "You don't have to be a nuclear physicist to know coffee **[*271]** is served hot and requires extra care . . . ." [n5] Had the employee dropped the coffee cup in Mrs. Liebeck's lap, it would be highly unlikely that this case would be characterized as the "rallying cry of the tort reform movement," [n6] nor would it likely be included in a discussion criticizing "frivolous" lawsuits. [n7] Thus, while the size of the verdict certainly raised eyebrows, it seems that the public outrage stemmed more from the fact that the plaintiff was generously compensated for injuries resulting from her own negligent conduct.

In addition to this well-known case, the leading tort reform advocacy group, the American Tort Reform Association, has included on its website a section entitled "Looney Lawsuits," which allows visitors to submit reports of lawsuits which they view as "frivolous." [n8] Although the website is frequently updated, at any given time a sizable proportion of the reports involve plaintiffs who were either negligent or reckless when it came to their own safety. While many of these suits, at least as presented there, would almost certainly fail under a variety of legal principles, this serves to show the tort reform movement's concern over the negligent plaintiff, who is often presented as undeserving of an award of damages.

However, despite the concerns over the negligent plaintiff problem, the Association's proposed solutions mainly focus on damages. On its website, the Association includes a link to what it dubs the "Tort Reform Record," its semi-annual summary of the various states which have adopted its proposed reforms. [n9] Of the ten reforms listed (punitive damages, joint and several liability, **[*272]** pre-judgment interest, collateral sources, non-economic damages, product liability, class action reform, attorney retention sunshine, appeal bond, and jury service reform), the first five relate directly to damages, either as to the type and amount (punitive and non-economic damages, pre-judgment interest), or from whom they are collected (joint and several liability, collateral sources). [n10] According to the first page of the Record, reforms relating to damages have been the most successful: punitive damage reform has been adopted by thirty-one states, joint and several liability reform by thirty-nine, collateral source rule reform by twenty- three, and non-economic damage reform by eighteen. [n11] Since punitive and non-economic damage limits are among the most common tort reform proposals, such measures are what often come to mind to the general public when the term "tort reform" is discussed. [n12]

However, the idea of capping punitive and non-economic damages can also be somewhat troubling. Essentially, the state legislature (or possibly in the near future, Congress [n13]) is making an ex ante determination that under no circumstances will an award of punitive or non-economic damages above a certain statutory limit ever be appropriate in any given case. While legislators do receive substantial input in the course of the legislative process, as any legal practitioner or law student knows from experience, they cannot predict what may happen in every given case. In one

case, the statutory limit may be grossly inadequate (for example, an intentional tort involving torture and mayhem), whereas in another, it may be grossly excessive (for example, a sprained toe resulting from a slip on a wet floor). Therefore, as many may argue, perhaps the issue of appropriate damages in a given case is best left to the province of judges who may make an ex post determination based upon their review and observation of the actual cases and evidence before them.

Given the public's concern over well-publicized cases involving negligent plaintiffs, the support and success of proposals to limit punitive and non-economic damages, and the potential problems with such damage limits, a question arises: is there a solution which directly targets the negligent plaintiff problem while avoiding the problems inherent in statutory damage caps? This article will attempt to answer this question by focusing on the steps taken by the common **[*273]** law and various statutory schemes in order to address this issue (contributory negligence and the different versions of comparative fault), and identifying the various policies behind them. It will then discuss in greater detail the policy motivations, problems, and effects associated with damage limits, identifying the common goals behind each of the foregoing, and suggesting a solution that will best serve these goals while minimizing the inherent problems behind each scheme.

In analyzing these issues, this article will focus primarily on Idaho's experience with contributory negligence, comparative fault, and damage limits. The general structure of each section will begin with a discussion of the origins and policies of the measure, followed by a general analysis, a discussion of Idaho's specific experience with the measure, and an overview of some various criticisms and problems found in case law and the academic literature. The article will then conclude with a comparison and discussion of each of the various measures, and present that which appears best to minimize the problems inherent in the various schemes, while addressing the negligent plaintiff problem." Finally, it will proffer some alternatives to the common comparative fault systems and statutory damage provisions currently in place that may better achieve these goals. The main goal of this article is to introduce a new side to the on-going public debate over tort reform and present a viable alternative to the damage-based measures currently under discussion. [n14] However, is also important to mention that this article does not take any formal position as to whether or not the perceived litigation crisis is grounded in actual fact. It is merely intended to discuss possible alternatives to the manner in which various jurisdictions have responded to this perceived crisis. Therefore, this comment assumes, arguendo, that such an increase in litigation has taken place. Otherwise, of course, measures intended to respond to the problem would be wholly unnecessary and the entire issue could be disposed of immediately.

II. CONTRIBUTORY NEGLIGENCE

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A. Origins and Policy

One fateful day in England, nearly two centuries ago, Mr. **Butterfield** was rushing home from the local pub on horseback while Mr. **Forrester** was completing some repairs to his home. To complete these repairs, **Forrester** had set up a pole across the road, unbeknownst to **Butterfield.** Upon encountering the obstruction while riding at a high rate of speed, **Butterfield's** horse struck **Forrester's** pole, injuring the former, and resulting in a lawsuit. [n15] However, the court decided to apply a new legal doctrine (albeit in a nonchalant way) holding that there are now two requirements the plaintiff must meet in order to sustain his case: "an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." [n16] Since **Butterfield** was, himself, negligent, he failed to meet the second element, thus resulting in a ruling for the defendant. [n17]

Thirty-three years later, an important exception to the "contributory negligence" doctrine was created when Mr.

Davies's donkey, which he had left tied in the road in a negligent manner, was struck and killed by a wagon driven by an employee of Mr. Mann. Although Davies was negligent in leaving the donkey tied in the road, the court held that despite the plaintiff's negligence, "the defendant might, by proper care, have avoided injuring the animal, and did not, [therefore,] he is liable for the consequences of his negligence, though the animal may have been improperly there." [n18] In other words, the defendant had the "last clear chance" to avoid the accident, and would not be excused by the plaintiff's negligence in tying his donkey in the road. In a nutshell, if the plaintiff's negligence followed the defendant's negligence, the plaintiff would lose, and if the defendant's negligence followed the plaintiff's negligence, the defendant would lose. The question of what would happen in the case of simultaneous negligence on the part of both the plaintiff and the defendant had been answered ten years prior, when Mr. Garner failed to make way for Mr. Vennall's ship and was sued for his failure to do so. The court agreed with the rule invoked by the defendant, that "if the mischief be the result of the combined negligence of the two, they must both remain in statu quo, and neither party can recover against the other." [n19] However, on the facts of the case, the court determined that the **[*275]** plaintiff (Vennall) was in the right and held the defendant (Garner) negligent.

Thus, on the dangerous streets of early nineteenth-century England, fraught with such hazards as poles, donkeys, men sleeping, [n20] and carriages going the wrong way, [n21] an important doctrine in tort law had developed and was duly imported into the United States where it would remain well into the twentieth century.

Since the purpose of this article is to look to alternatives to damage caps in serving the policies of tort reform, it is important first to examine the policies behind the adoption of contributory negligence before it may be placed forth as such an alternative. Unfortunately, the cases discussed above are not of much assistance. **Butterfield** merely applies the rule while Davies and Vennall merely clarify its application. The British judges were not so considerate as to state anything to the effect of "we are now holding that plaintiff is barred from suit, and here is why." Therefore, it is necessary to examine the secondary literature.

Perhaps the most comprehensive discussion of the policies behind contributory negligence is that put forth by eminent torts scholar and long-time University of Pennsylvania law professor Francis H. Bohlen, in his 1908 Harvard Law Review article entitled, appropriately enough, Contributory Negligence. [n22] In his article, Professor Bohlen posits three common explanations for the doctrine: proximate causation, indemnity or contribution between defendants, and similarities to the defense of assumption of the risk. [n23] The first explanation he examines is the proximate cause argument. While this certainly explains the rulings in successive cases of negligence, and follows the rule set forth in an earlier slander case which recognized the wrongful act of another as an intervening cause, breaking the chain of causation, [n24] Bohlen points out that this proximate cause ex- **[*276]** planation fails to explain the application of contributory negligence in cases of simultaneous negligence, as it was explained in the Vennall case. [n25] He also disposes of the argument that it is an extension of the policy of the courts of that time to deny contribution and indemnity between co-defendants, pointing out a variety of differences in the application of the two rules. [n26] Professor Bohlen also refutes explanations analogizing contributory negligence to assumption of the risk, explaining, in essence, that the assumption of the risk analysis occurs prior to a contributory negligence analysis and that the two are actually distinct, though overlapping, legal doctrines. [n27] Ultimately, Bohlen concludes that the central reasoning behind the adoption of contributory negligence is a strong policy in the courts of the time emphasizing personal responsibility: "The courts are the last resort of him who not merely does not, but cannot, protect himself," [n28] and, later in the same article, "the law will not aid a plaintiff who having the power and consequent duty to protect himself has failed to do so . . . ." [n29] Policy arguments which many may find appealing today.

Fowler Vincent Harper, another well-respected torts scholar from the early half of the twentieth century, in his 1933 treatise, simply explains contributory negligence as a function of the "policy of the law not to interfere to adjust loss as between wrongdoers." [n30] This seems to be related to the contribution/indemnity argument dismissed by Bohlen.

However, since Harper's main objective was to provide a concise explanation of the various rules of tort, not to delve deeply into the justifications behind a particular rule, and since the rules of joint and several liability are also being targeted by tort reform advocates, Bohlen's personal responsibility justification seems to hold the most relevance in today's world. Thus, it is the argument most likely to resonate among modern tort reform advocates and the public in general if a return to the contributory negligence regime is to be proposed and discussed in the public realm.

Adding further support to the idea of a possible re-introduction of the doctrine of contributory negligence, Anthony Sebok, in a Brooklyn Law Review article, identifies the replacement of contributory negligence as one of the many pro-plaintiff developments from around the period of the 1960s allowing for a possible increase in litigation. [n31] Thus, contributory negligence, and its attendant exception of last **[*277]** clear chance, may be considered as a possible alternative to damage limits in dealing with the problem of the negligent plaintiff. Applying the doctrine to the Liebeck case, the finding of twenty percent negligence on the part of the plaintiff [n32] would have mandated the result which many in the media and the general public would have preferred: judgment for the defendant. However, as will be discussed later, contributory negligence is not free from its own inherent problems, nor is it either immune from criticism or the only possible alternative in handling negligent plaintiffs.

B. Idaho's Experience

As in its appearance in England in 1809, contributory negligence slipped in under the radar into Idaho's jurisprudence, again to be applied as though it were always the settled rule. In one of the earliest cases, the plaintiff's wagon was destroyed when it was struck at a railroad crossing by the defendant railroad's train. [n33] The railroad, of course, claimed contributory negligence on the part of the plaintiff's servant who was driving the wagon, while the plaintiff claimed that the engineer failed to sound the whistle, a contention which the jury accepted in awarding the plaintiff $ 225. On appeal on an evidentiary issue and a disputed jury instruction, once again, like the British court in **Butterfield,** the Idaho court fails to explain its rationale behind the adoption of contributory negligence, and rules for the plaintiff on the issues presented. [n34]

However, although the Idaho court cites no statute or case binding itself to the doctrine laid down by the British court, it could be argued that the court had no choice in the matter. Neatly tucked away in the back of the Idaho Code is an 1864 statute, which declares that "[t]he common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state." [n35] Being a part of the "common law of England," it is possible that this statute absorbs the rule of contributory negligence into Idaho law. However, since the rule was not announced until 1809, its binding nature would depend upon as of **[*278]** which year the English common law applies. Several possibilities include 1776 (the year the United States declared its independence from Britain), 1805 (the year of the discovery of what is now Idaho by Lewis and Clark), [n36] 1812 (the founding of Fort Astoria, the first permanent American settlement in the territory of which a portion would become Idaho), [n37] 1846 (the year of the treaty which awarded the territory in which present-day Idaho is located to the United States), [n38] 1860 (the founding of Franklin, first permanent settlement in what is now Idaho), [n39] 1863 (the establishment of Idaho territory), and 1864 (the date of the adoption of the statute). [n40] The first two possibilities would have rendered **Butterfield** to be merely persuasive authority, whereas the last five would render the cases binding upon Idaho courts under section 73-116. However, the issue has never been raised in a reported Idaho case, and the closest the state courts have come to making a pronouncement on the issue was in a 2001 case on the doctrine of treasure trove, which seems to lend credence to the possibility that the common law of England was absorbed into Idaho law as of the date of American Independence: "[T]he 'finders keepers' rule [of treasure trove] was not a part of the common law of England at the time the colonies gained their independence," and therefore was held not to be a part of Idaho law. [n41] Since it is highly unlikely that an issue of English common law first announced in the time period between 1776 and 1864 will be claimed to be binding upon the Idaho courts by virtue of this statute any time

soon, an authoritative decision directly on point may not be forthcoming in the near future. However, there is still the possibility that the Idaho courts were not, in fact, free to reject contributory negligence until the legislature passed a statute doing so. [n42]

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Whatever its origins in Idaho, the state courts continued to develop the doctrine of contributory negligence throughout the early years of statehood. In one case, the court held that a custom of crawling under trains blocking a street could not defeat a claim of contributory negligence. [n43] In another, it held that a case could be taken away from a jury if there was not evidence of both a lack of contributory negligence, as well as negligence on the part of defendant, and that the negligence of a child's parents leading to the injury of the child would also bar a claim under contributory negligence. [n44] Thus, by the end of the nineteenth century, Idaho had fully embraced the doctrine of contributory negligence.

C. Under Fire: Criticism of Contributory Negligence

Despite the admirable goals of personal responsibility behind the doctrine of contributory negligence, as discussed earlier, the doctrine was far from perfect, and was subject to criticism for its harsh results, most evident in the line of railroad crossing cases in which the plaintiff was generally barred from recovery. Perhaps the most infamous example was the case of Baltimore & Ohio Railroad v. Goodman, [n45] where the plaintiff's decedent was struck and killed at a railroad crossing. His widow claimed in her suit that his view was blocked by a section house. However, the Court ruled that "if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle . . . ." [n46] Therefore, his contributory negligence served to bar the suit. Were it not for the tragic result (the man's death) the Court's characterization of the duty on the part of the plaintiff would almost be comical. Few people could seriously expect drivers to stop, get out, and look up and down the tracks before crossing, however limited the visibility at the crossing. Moreover, such a practice could wreak havoc on a busy highway and perhaps cause more accidents than it would prevent. This is a prime example of the potential harshness of the old contributory negligence rule.

The series of railroad crossing cases such as Goodman is what began to bring the contributory negligence doctrine into disrepute. In **[*280]** 1946, Professor Wex S. Malone of Louisiana State University published an article denouncing contributory negligence as a tool for railroads to keep sympathetic plaintiffs away from the jury. [n47] According to Malone, "[i]n America, the idea of contributory negligence lay virtually dormant until about the middle of the last [nineteenth] century; then suddenly it sprang to life and found its way into virtually every piece of litigation over a negligent injury to person or property." [n48] He then goes on to give various examples of cases in order to support his thesis and arrives at the conclusion that it was the influence of the railroads which was responsible for the widespread acceptance of contributory negligence onto the American legal scene. Lawrence Friedman, in his book A History of American Law, characterizes the rise of contributory negligence in the same manner as Professor Malone (actually citing Malone's article), as a tool of big business to prevent recovery on the part of sympathetic plaintiffs. [n49] Therefore, it is evident that contributory negligence is far from perfect. One can also imagine other cases in which contributory negligence may have unfair results, such as a driver or passenger in a car who is not wearing a seatbelt possibly being denied relief, despite the negligence of the other driver. The manner in which states have addressed this potential unfairness will be discussed in the following section.

III. COMPARATIVE FAULT

A. Origins and Policy

Tennessee, a fairly recent convert to the now predominant "comparative fault" regime (which weighs the relative negligence between plaintiff and defendant) adopted the new doctrine judicially. [n50] In a 1992 case, the defendant claimed that the plaintiff's intoxication at the time of the accident barred his suit based upon contributory negligence. Denouncing the rule as "outmoded and unjust," the court decided to adopt the "forty-nine percent rule" (which will be explained later). [n51] California, in its earlier judicial adoption of comparative fault, also stated that it was adopting the new rule because the old rule was "harsh" and "inequitable." [n52]

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However, what is often credited as resulting in the widespread adoption of comparative fault is the no-fault car insurance movement of the mid-1960s, using the denial of claims based upon contributory negligence as one of the central justifications behind its agenda. [n53] Professor John W. Wade's article praising the adoption of comparative fault by Louisiana ties these two concepts (unfairness and no-fault) together, stating that the reason why the contributory negligence rule crumbled under the pressure of the no-fault insurance movement was because "[t]here was no way to defend its obvious unfairness and the legal profession knew it." [n54] And so, it appears that the contributory negligence doctrine was knocked out by a one-two punch: the apparent unfairness of the railroad crossing cases, such as Goodman, and the no-fault car insurance movement. However, in replacing the rule, states came up with a variety of methods of what would be termed "comparative fault" in order to ameliorate the harshness of the old rule, while still preserving the fault system long-established in the field of tort law.

B. Different Comparative Fault Schemes

1. The "Slight-Gross" Rule

One of the older comparative negligence systems, the slight-gross system, simply put, allows a plaintiff to recover if his negligence was slight and the negligence of the defendant was gross in comparison. [n55] As of 1980, the time of Professor Wade's article, only two states, Nebraska and South Dakota, employed this system of comparative fault. [n56] In 1992, Nebraska "grandfathered back" its slight-gross rule to actions accruing prior to that date, [n57] and replaced it with a "forty-nine percent" rule, barring recovery only if his negligence meets or exceeds that of the defendant. [n58] Consequently, today, only the State of South Dakota retains the slight-gross system.

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2. The "Forty-Nine Percent" or "Not as Great as" Rule

This is the version of comparative fault adopted by Idaho in 1971, which declares, as its nicknames imply, that the plaintiff may recover so long as his negligence is not as great as that of the defendant. [n59] However, the plaintiff's damages are reduced proportionately by the amount of negligence appropriated to him by the trier of fact. [n60] The main policy rationale behind this version of "modified comparative fault" was expressed by the Tennessee Supreme Court in its judicial adoption of this model: "[T]he '49 percent rule' ameliorates the harshness of the common law rule while remaining compatible with a fault-based tort system." [n61] In other words, if the plaintiff is as negligent or more negligent than the defendant, it can no longer be said that the defendant was "at fault" for the accident, and the Tennessee court did not wish to go that far. However, the new rule lacks the potential for the degree of unfairness possible under the contributory negligence regime. Since the Idaho State Legislature is less than meticulous in the manner in which it keeps records of its legislative sessions (lacking anything akin to the Congressional Record), it is necessary to draw assumptions as to its rationale in adopting a statute in any given instance. Here, as the Tennessee court gives a reasonable and plausible explanation for its decision, it is a fair assumption that the Idaho Legislature made its decision based upon a similar rationale.

3. The "Fifty Percent" or "No Greater Than" Rule

This rule has also been dubbed the "New Hampshire Rule," after one of the states to adopt such a modified comparative fault scheme. Here, the plaintiff may recover when both parties are equally negligent, again, usually with reduced damages. [n62] A fair assumption of the rationale of this rule would be that the plaintiff may only be considered to be "at fault" if he is more negligent than the defendant, but not when the plaintiff and defendant are equally negligent.

4. "Pure" Comparative Fault

This is the comparative fault scheme supported by the National Conference of Commissioners on Uniform State Laws in its Uniform **[*283]** Comparative Fault Act. [n63] Under this system, a plaintiff may recover no matter the extent of his negligence. Plaintiff negligence will reduce damages in proportion to such negligence. For example, a plaintiff who is eighty percent negligent may recover twenty percent of his damages. Many states which adopted comparative fault by judicial action have chosen this method, such as California [n64] and New Mexico (the state in which the Liebeck case was decided). [n65] Also, this was the method chosen by the state of Mississippi in its passage of the nation's first comparative fault statute applying to all negligence actions in 1910. [n66]

Fortunately, the rationale behind the adoption of pure comparative fault can be readily found in the Prefatory Note to the Uniform Comparative Fault Act, which points out several problems of the modified forms, including the precision by which a jury must balance the negligence between the parties to within one percentage point. For example, if the plaintiff is forty-nine (or fifty) percent negligent, he wins, but if he is fifty (or fifty-one) percent negligent, he loses. [n67] Also, in the Li case, the California high court criticizes modified comparative fault as "simply shift[ing] the lottery aspect of the contributory negligence rule to a different ground." [n68] Thus, rather than focusing on fault, [n69] proponents of pure comparative negligence focus more on fairness and compensation.

C. Idaho's Experience

1. Pre-Statutory Judicial Reluctance

As stated above in Part III.B.2, Idaho currently follows the forty-nine percent rule of comparative fault. [n70] However, prior to the adoption of the statute, the Idaho Supreme Court had the opportunity to adopt comparative negligence judicially in the case of Clark v. Foster. [n71] In that case, the jury arrived at its verdict through an unusual **[*284]** method, where each member wrote down what his or her opinion was as to the percentage of the defendant's negligence, then allowed the foreman to add up the estimates, and arrive at an average. [n72] Through this mathematical method, the jury determined the defendant to be only forty-seven percent negligent, and returned a verdict in his favor. [n73] The court refused to allow this "quotient verdict" and disposed of the comparative negligence issue in eight words: "We do not recognize comparative negligence in Idaho." [n74] It gives no reason for its refusal to do so, and Idaho would retain contributory negligence until the passage of section 6-801 in 1971.

2. Statutory Interpretation: Expanding Comparative Fault

Although contributory negligence itself as a defense was abrogated, the question would later arise as to whether or not the statute also eliminated the other defenses relating to plaintiff negligence: assumption of the risk and the "open and obvious danger" rule. The question of assumption of the risk arose when Mr. Salinas, a dairy employee, was struck

with a bale of hay when he and another employee, Mr. Gardener, worked out a system in which Gardener would toss the bales from the stacks on a trailer while Salinas would straighten them out on the ground. [n75] One of the bales thrown from the trailer struck Salinas, leading to his injuries and the resultant lawsuit. The employer tried to raise assumption of the risk as a defense; however, the Idaho Supreme Court held that section 6-801 eliminated assumption of the risk as well, stating that "to hold otherwise, would be to perpetuate a gross legal inconsistency by prohibiting the use of contributory negligence as an absolute bar yet allow its effect to continue under the guise of assumption of risk." [n76] However, the court would continue to allow "express" or "contractual" assumption of the risk to continue in the realm of contract law under the name of "consent." [n77] In a later case, the court, in dicta, expressed an interest in limiting its holding in Salinas to secondary assumption of the risk (assumption of the risk of somebody else's negligence) and allowing primary assumption of the risk (knowingly entering into a dangerous situation) to continue as a defense. [n78] However, it has yet to **[*285]** make a definitive ruling as to whether it will hold, as a matter of law, that section 6-801 only eliminates assumption of the risk in the secondary sense, or whether, as it appears from the face of the Salinas case, that the statute eliminates implied assumption of the risk in its entirety. Perhaps it may behoove the Legislature to follow the lead of the State of Nebraska, which, in its replacement of the slight- gross system with a forty-nine percent system, removed this uncertainty by providing directly for an assumption of the risk defense by statute. [n79] Otherwise, only time will tell.

The question of the open and obvious danger rule, denying recovery to plaintiffs who are injured by dangers which are open and obvious, arose when Mrs. Harrison tripped and fell on a hole in a sidewalk in front of a florist's shop. [n80] She soon filed suit, and the owners of the shop and the building in which it was located raised as a defense that the hole was "open and obvious." [n81] The court, after noting the similarities between the open and obvious danger rule and the defense of assumption of the risk, ruled that section 6-801 also superseded this doctrine of law, using reasoning much along the lines of that used in the Salinas case. [n82] Therefore, Idaho's comparative negligence statute has been expanded beyond simply eliminating contributory negligence itself, but also the related defenses of assumption of the risk and open and obvious dangers. Whether this goes beyond the intent of the legislature, however, is unclear. On the one hand, it can be argued that had the legislature intended to eliminate these defenses as well, it would have provided for them in the statute. However, in the sixteen years since Harrison, and in the twenty years since Salinas, the legislature's failure to amend the statute to allow for these defenses in the wake of the court's interpretation when it has had ample opportunity to do so, could be characterized as tacit approval of the manner in which the statute has been applied. Therefore, as of this date, Idaho only allows express assumption of the risk, and, maybe, primary implied assumption of the risk. Of course, a tort defendant may still use a plaintiff's choice to encounter an open and obvious danger or to assume the risk as going beyond the forty-nine **[*286]** percent negligence he is allowed in order to bring a successful claim and the defendant may also use these choices to limit damages in the event that they do not exceed forty-nine percent negligence.

3. Going Too Far? A Narrower Interpretation of Comparative Fault

Four years after Harrison, the Wisconsin Court of Appeals was faced with a case in which the plaintiff was injured while helping his father cut down a tree near some power lines. [n83] In the process, the tree fell into the lines and caught on fire. Despite the danger and warnings from a bystander, the plaintiff and his father tied a rope around the base of the tree and attempted to pull it free. The wires then broke, killing the father and injuring the plaintiff, who filed suit against his father's insurance company. The insurer raised the open and obvious danger defense. [n84] Although Wisconsin follows the fifty percent rule of comparative negligence, [n85] thus allowing an additional "one percent" negligence on the part of a plaintiff above Idaho's rule, the Wisconsin court examined and ultimately rejected the conclusion reached by the Idaho court in Harrison: "While [the Harrison] approach seems to correctly analyze the open and obvious danger doctrine within the strictures of comparative negligence, it has not found the approval of [the Wisconsin] [S]upreme [C]ourt." [n86] Rather than analogizing to assumption of the risk, the Wisconsin court states that if a plaintiff encounters an open and obvious danger, he is more negligent than the defendant as a matter of law. [n87] To place it into civil

procedure terms as used in the Wisconsin Code and both the Idaho and Federal Rules of Civil Procedure, if the plaintiff has encountered an open and obvious danger, there is "no genuine issue as to any material fact and . . . the [defendant] is entitled to a judgment as a matter of law," thus allowing for summary judgment. [n88] Or, to put it another way, as the summary judgment standard is often stated, if the plaintiff is injured by an open and obvious danger, "reasonable minds cannot differ" as to the fact that he was more negligent than the defendant. Wisconsin's approach reveals a viable alternative to the Idaho court's approach to the open and obvious danger rule in a comparative fault regime.

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D. Holdouts and Criticisms of Comparative Fault

While comparative fault, in one form or another, has been adopted by the vast majority of American jurisdictions, there are a few states in the South which choose to retain the contributory negligence rule. However, like Idaho in the Clark [n89] case, the courts in those states do not really explain their reasons for refusing to adopt the doctrine judicially. Most likely, they choose to retain the rule out of a greater adherence to the idea of stare decisis and perhaps a more restrained view of the role of the judiciary. These last holdouts of contributory negligence are: Alabama, [n90] Maryland, [n91] North Carolina, [n92] Virginia, [n93] and the District of Columbia. [n94] Therefore, despite its criticisms, the contributory negligence rule and its exceptions continue in those jurisdictions as they have since the early part of the nineteenth century.

However, comparative fault, like contributory negligence, is not immune from criticism. University of Arizona law professor Ellen M. Bublick, in a Vanderbilt Law Review article, points out a number of cases in which comparative fault defenses have been raised in cases of intentional torts and discusses how it should be limited in a number of ways. [n95] While this article is mainly centered around negligence, the Bublick article serves to illustrate how comparative fault can also be taken to extremes which many may find to be unfair, much in the same manner as its common law predecessor.

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Another problem inherent in comparative fault is its application in cases of sequential negligence, such as **Butterfield** [n96] (defendant negligent first in placing the poles in the road, plaintiff then negligent in riding into the poles), and Davies [n97] (plaintiff negligent first in tying the donkey in the street, defendant's employee then negligent in running the wagon into the donkey). Although one could argue that in each of those cases both parties were equally at fault, perhaps a trier of fact may apportion a few percentage points of fault toward the last negligent party due to his failure to avoid the accident. Since each of those cases involved two discrete negligent acts occurring at different points in time, comparative fault does not seem to be well suited for such cases. Where comparative fault does seem to be well suited, however, is in cases of simultaneous negligence; for example, if two drivers both collide after running a four-way stop, or where a pedestrian steps out into the street, having failed to "look both ways," and is struck by a driver who is not paying attention to the road. In those cases, the accident is caused not by one party's failure to use reasonable care in avoiding an instrumentality already put in place by the other negligent party, but a nexus of two negligent acts coming together at the same time. In such cases, it becomes somewhat easier to weigh the relative negligence between the parties, as both acts occurred at the same time and both resulted in the accident. Therefore, each act can be compared with the other in the relative weight it carried in causing the accident and injury. Thus, perhaps comparative fault is not appropriate as an "across-the- board" replacement for contributory negligence in all negligence cases involving a lack of ordinary care on the part of both parties to the action.

IV. TORT REFORM

A. Origins and Policy

Since the 1960s and 1970s, there has been a perception that tort litigation has been on the rise. Professor Gary T. Schwartz in his article, The Beginning and the Possible End of the Rise of Modern American Tort Law, discusses "the huge growth in tort liability that [has] occurred since about 1960." n98 Throughout the article, he identifies several pro-plaintiff developments throughout this period, including the replacement of contributory negligence with comparative fault, n99 **[*289]** in addition to developments in products liability, changes in land entrant liability, etc. n100 Also, Schwartz believes that the increase in tort litigation and the move in the pro-plaintiff direction began to level off throughout the 1980s, due in part to changes in public and academic opinion toward tort liability, as well as a more conservative judicial trend. n101

Walter K. Olson, in his book The Litigation Explosion, also believes that there has been a sharp increase in litigation in the past forty years (hence the title of the book). n102 He identifies a number of factors behind this increase, including lawyer advertising, changes in legal philosophy, contingency fees, large damage awards, as well as changes in the rules of evidence, pleading requirements, and discovery. n103 However, the American Tort Reform Association, which is the leading tort reform lobbying group, focuses mainly on limits on punitive and non-economic damages and does not address most of the other factors identified in the book. n104

Jeffrey W. Stempel also identifies some of the policies behind tort reform in his article, Not-So-Peaceful Coexistence: Inherent Tensions in Addressing Tort Reform. n105 Essentially, he takes a sort of "middle ground," acknowledging that, while each side makes valid points, both sides tend to exaggerate their positions; the tort reformers trumpeting a full-fledged litigation crisis and the plaintiffs' advocates spotlighting egregious incidents of gross negligence and callous behavior on the part of defendants. n106

Thus, surveying this literature as a whole, the tort reform movement is largely a result of the "pendulum swinging back" in response to the increase in tort litigation resulting from the earlier pro-plaintiff developments. However, rather than going back and re-evaluating the earlier innovations and, perhaps, keeping certain types of claims out of the courtroom or providing for a greater likelihood of a defense verdict, the predominant response has been to deal **[*290]** with the after-effects, namely, limiting the amount awarded in damages after the case has proceeded through trial. n107

B. Effects of Tort Reform

Given that damage caps have been the most successful of the American Tort Reform Association's proposed reforms in terms of adoption by various states, the question arises as to their success in terms of what they were intended to accomplish, which is to limit tort claims and large plaintiffs' verdicts. The Congressional Budget Office recently prepared a report, surveying several studies on the effect of tort reform measures showing mixed results. n108 Page viii of the report summarizes the findings of the different studies relating to caps on non-economic and punitive damages. Most of the studies found that the limits on non-economic damages reduced overall recoveries and benefited the insurance companies, and one study found that the limits actually resulted in the filing of fewer lawsuits. n109 The studies also found that the limits on punitive damages were also successful in reducing recoveries overall. Although, one study, while finding that the limits did reduce the number of lawsuits filed, also found that limits on punitive damages actually caused a slight increase in the amount in economic claims. n110 This suggests that where the remedy of punitive damages was limited, (or, in a few states, unavailable), plaintiffs had exhibited a tendency to inflate their economic claims to make up for this loss. Thus, the limits on damages have, by and large, met some success in achieving their goals.

The tendency to inflate economic damages and other techniques employed by plaintiffs' counsel in the wake of tort reform are discussed in a 1995 article in the American Bar Association Journal entitled Learning Curve: Lawyers Must Confront Impact of Changes on Litigation Strategies. [n111] Discussing the manner in which attorneys have handled damage limits, Ms. Franklin, the author of the article, states that "[i]n the current reform climate, the plaintiff's bar is refocusing on economic and other damage categories to which no caps apply." [n112] This is confirmed by a quote from a civil defense attorney: "You can argue that the damages all fall into the categories that are **[*291]** not capped, . . . [plaintiffs' attorneys] can go more for the compensatory damages and ensure the win if they can, because the upside on the punitives is not as substantial as it used to be," [n113] thus confirming the finding of the study in the Congressional Budget Office report. The article also discusses a number of other methods, such as forum shopping and the use of the class action device to circumvent or minimize the effects of tort reform measures enacted by the various states. [n114] Therefore, while tort reform statutes have certainly created some inconvenience to plaintiffs' lawyers, according to the article, such lawyers have managed to take these statutes in stride, discovering manners in which to adapt to the changes in the system.

C. Idaho's Experience

During the wave of tort reform in the mid-1980s, the State of Idaho made the decision to limit non-economic [n115] and punitive [n116] damages in 1987. The limit on non-economic damages was recently set at $ 250,000, with a provision allowing for adjustment for inflation, [n117] and contains exceptions for "willful or reckless conduct" and torts amounting to felonies under the criminal law. [n118] The limit on punitive damages was also recently set to the greater of $ 250,000 or three times the amount of compensatory damages. [n119] Also, the standard of proof required for an award of punitive damages is "clear and convincing" evidence of "oppressive, fraudulent, malicious or outrageous" conduct. [n120] Furthermore, if tried before a jury, the jury is not to be told of either limitation. [n121] While the Idaho statutes are still ex ante determinations by the legislature as to what the maximum appropriate damages will be in any given case, the allowance for a **[*292]** maximum of triple the compensatory damages in the case of punitive damages, the exceptions for certain intentional and reckless torts in the case of non-economic damages, as well as the provision for adjustments to the latter according to the average annual wage, provide some flexibility, and ameliorate, though not eliminate, the possibility of a grossly inadequate judgment in the case of some heinous intentional tort (where the non-economic damage provision is not applicable). Thus, to use a recent example from Idaho which captured much media attention, [n122] should the Nampa girl who was recently scalped by another person choose to sue the alleged perpetrator, since the act fits the statutory elements of the criminal felony of aggravated battery, [n123] the non- economic damage limitation would not apply. Also, since such an act would likely qualify as being "malicious or outrageous," she would be entitled to seek up to $ 250,000 in punitive damages, or three times the actual economic damage award (which is likely to be high given the injury), whichever is greater. However, there are potential situations in which these exceptions would, nevertheless, remain inadequate. Such situations, and the other many possible criticisms of statutory damage limits will be discussed more fully in the next section.

D. Criticisms of Tort Reform

Given the modest success of damage caps in reducing tort claims and judgments discussed above in Part IV.B, one may ask whether or not this end justifies the means. Many of the problems inherent in statutory damage caps as a tort reform measure are facially apparent. First of all, as discussed in the introduction and in the previous section, the legislature is attempting to make an ex ante judgment of the maximum appropriate non-economic or punitive damage award in any given case. Although legislators receive substantial input during the legislative process, the boundaries of human rationality prevent even the most intelligent and well-informed person from accurately predicting what may be appropriate in any given situation. Much of the practice of law is centered around persuading judges to apply even the most carefully drafted statutes and constitutional provisions to situations which their drafters could never have

anticipated. Attempting to make a legislative judgment of something as fact-dependent as the non-economic or punitive damages to which a plaintiff is entitled is particularly troublesome. Although $ 250,000 is a substantial sum of money to most people and non-economic damages **[*293]** for such things as emotional distress or pain and suffering are difficult to quantify, it is not impossible to imagine a case in which a plaintiff may be rendered permanently disabled, in constant excruciating pain, or psychologically traumatized to the point of near insanity from the negligent, though not willful, reckless, or felonious conduct of another. Therefore, the trier of fact would seem to be in the best position to determine this matter, along with the trial judge and the appellate courts who are empowered to review such awards and reduce them if they are grossly excessive.

Another problem with damage limits is the manner in which states determine exactly what this maximum appropriate amount should be. According to a 2004 article from the North Carolina Law Review, which focuses primarily on non-economic damage limits in the medical malpractice context, the methodology ranges from arbitrarily choosing a number which seems to be fair to adopting a figure enacted by another state which seems to have succeeded in lowering insurance premiums. [n124] The article also proposes an interesting solution to this problem, tying the size of the award to the severity of the injury, [n125] which will be discussed in further detail in Part V.C of this article along with other possible solutions and alternatives to the current system of statutory damage caps.

Another common criticism of statutory damage caps is that they are unconstitutional. Although such an argument has been accepted by a few state courts on state constitutional grounds, [n126] the federal courts have upheld such provisions under federal constitutional challenge. [n127] The Idaho Supreme Court also rejected a claim that section 6-1603 of the Idaho Code, the limitation on non-economic damages, violated state constitutional provisions. [n128] However, some authors claim that damage caps, specifically those on non-economic damages, may violate the Seventh Amendment's jury provisions if it were in- **[*294]** corporated to apply to the states. [n129] Although this argument is somewhat interesting, given the federal courts' acceptance of state damage limits under other constitutional provisions, it is unlikely that a federal court will strike such measures under the Seventh Amendment. Though, recent federal legislation introduced in the House of Representatives aimed at limiting non-economic and punitive damages in the area of medical malpractice, [n130] if passed into law, may give the federal courts the opportunity to decide the question of Seventh Amendment validity absent the issue of incorporation. If the damage caps are held to be constitutional under the Seventh Amendment at the federal level, then the arguments that they would violate the Seventh Amendment as incorporated to the states would most certainly fail.

Thus, damage caps, for the most part, being held constitutional under both the federal and the various state constitutions, the criticisms of such tort reform proposals which seem to carry the most weight are those which center around the many problems surrounding a (more or less) flat, ex ante judgment as to what the maximum appropriate punitive or non-economic award will be in any given case. Given these problems, the next section will now analyze whether or not, outside the medical malpractice context, a return to the old rule of contributory negligence or a variation of the different comparative fault schemes would achieve the policy goals sought by tort reform advocates in their promotion of damage caps while avoiding the problems inherent in such proposals.

V. Contributory Negligence v. Damage Limits: A HISTORICAL SOLUTION TO THE PROBLEM OF THE NEGLIGENT PLAINTIFF?

A. Common Policies

In order to determine whether or not a return to contributory negligence or a variation of comparative fault would best serve as a viable alternative to statutory damage caps, it is important first to compare the policy goals sought by

each of these important movements in the history of tort law and then determine whether or not these goals possess enough in common in order for one to be proffered as a reasonable alternative for the other. Beginning with the oldest of **[*295]** the three movements, contributory negligence, Professor Bohlen perhaps put it best nearly a century ago in his comprehensive article on the subject: "The courts are the last resort of him who not merely does not, but cannot, protect himself." [n131] In other words, personal responsibility was the primary policy goal behind denying recovery to the negligent plaintiff. Also, placing aside for the moment the denial of recovery to a plaintiff when both parties are simultaneously negligent, if one examines the sort of contributory negligence at issue in the **Butterfield** case, [n132] and its corollary, last clear chance, another policy justification begins to emerge, related to the proximate cause justification: he who was in the best position to avoid the accident is under a duty to do so. In Mr. **Butterfield's** case, he was in the best position to avoid the accident, as he had the "last clear chance" to avert injury as a plaintiff. Had he been riding his horse in a reasonable manner, he would not have been injured; whereas the defendant's employee in Davies could have prevented the donkey's untimely demise by driving his wagon in a reasonable manner.

Reversing the roles in each of these cases, if **Butterfield's** horse had injured **Forrester** and the case enduring for posterity in the dusty volumes of English Reports were entitled **Forrester** v. **Butterfield,** it is likely that **Forrester** would have been entitled to recovery, since **Butterfield** held the last clear chance to avoid the accident; while a Mann v. Davies case, in which a wagon was damaged by a donkey left negligently tied in the road, would deny recovery to plaintiff under the rule of contributory negligence. Therefore, in cases of sequential negligence, the denial of recovery to the last negligent party, who, one may argue, is ultimately "at fault," is not entirely unreasonable.

Perhaps the unfairness which doomed the rule of contributory negligence arose in the situation where the plaintiff was denied recovery when both the defendant and plaintiff were negligent at the same time. For example, most honest drivers will admit that, at one point or another, they are negligent when they are driving down the road and anyone who has had a driver's license for any amount of time could probably testify to a number of occasions on which he had a "close call" or a "near miss," avoiding an accident solely through either luck or possible divine intervention. In a society with a large number of people operating heavy machines at high speeds, often **[*296]** negligently, it is inevitable that two or more of these machines will collide due to the negligence of both parties. Under contributory negligence, the plaintiff will be denied his claim, and the defendant will be denied his counterclaim. As discussed earlier in this article, this is the primary reason why the rule of contributory negligence collapsed like a house of cards under the pressure of no-fault auto insurance and the new comparative fault doctrines were readily accepted by a public already soured on the old rule by the line of railroad cases placing a nearly absurd burden on the plaintiff. [n133]

Policy makers' replacement for Contributory negligence, comparative fault, has arisen in several different forms, each attempting to deal with the problem of the negligent plaintiff while ameliorating the potential unfairness of the older rule and preserving the notion of one party ultimately being "at fault." [n134] "Pure" comparative fault simply denies damages to the plaintiff to the degree that he was at fault, for example, a plaintiff ninety percent at fault may still recover ten percent of his damages; while forty-nine and fifty percent "modified" comparative fault deny the plaintiff recovery once his negligence reaches a certain level, based upon a policy that to allow a plaintiff who is more negligent than the defendant to recover would be to downplay the notion of fault. [n135] Also, as discussed above in Part III.B.1., there is another form of comparative fault currently only in use by the State of South Dakota, and that is the "slight-gross" rule. The advantage of this rule is that it is stated in qualitative, rather than quantitative terms.

However, in response to a perception that litigation has been on the rise in the past few years, and in response to the publicity paid to cases in which negligent or otherwise unsympathetic plaintiffs have received large damage awards, legislatures, under pressure from "tort reformers," have enacted measures setting statutory limits upon punitive and non-economic damages. As discussed in Part IV.C. of this article, Idaho has followed this trend. The main purpose of such measures seems to be to reduce litigation by removing the incentive, as well as to reduce liability insurance

premiums. Although many laypeople may declare that they support such measures in order to "reduce 'frivolous' claims," and will invariably cite the "McDonald's hot coffee case," it should be noted that, legally speaking, Mrs. Liebeck's claim was far from "frivolous." To put it in simplistic terms, McDonald's was under a duty to make its coffee safe, it breached this **[*297]** duty by making its coffee too hot, and the heat of the coffee caused Mrs. Liebeck's burns. The elimination of the rule of contributory negligence as a bar to recovery renders her negligence, placed at twenty percent by the trier of fact, as merely a diminution of her damages. The question, then, is not whether or not this was a "frivolous" claim to be discouraged through "tort reform," but whether or not it should be a frivolous claim. As was stated toward the beginning of this article, had the McDonald's employee dropped the coffee cup on Mrs. Liebeck, her lawsuit would not have created the public furor that it did, despite the large punitive damage award. The fact that she received such a large award in spite of her own negligence is what created the public outcry. Thus, proponents of tort reform who wish to weed out claims such as Mrs. Liebeck's share the same policy goals as the original proponents of contributory negligence: a plaintiff who had the opportunity to avoid the accident, yet failed to do so, should not be entitled to recovery. Although New Mexico follows the "pure" comparative negligence approach, [n136] since the plaintiff's negligence was placed at twenty percent by the jury, she would have recovered in both a forty-nine and a fifty percent jurisdiction. Had she brought her claim in South Dakota, under its "slight-gross" regime, the result is less clear, as the jury in the actual case engaged in a quantitative analysis to assign a numerical percentage, rather than a qualitative analysis as to whether her negligence was "slight" in comparison to that of McDonald's. The only jurisdictions where there would have been a certain verdict for McDonald's, accepting the finding of twenty percent negligence on Mrs. Liebeck's part, would have been Alabama, Virginia, Maryland, North Carolina, and Washington, D.C., the remaining contributory negligence holdouts. Therefore, perhaps proponents of damage caps may wish to discuss a possible revival of the doctrine of contributory negligence as a possible alternative in limiting such claims, given these common goals of personal responsibility and the desire to discourage claims by negligent plaintiffs.

B. Common Problems

In addition to the beneficial policies served by the foregoing movements in tort law, it is also important to re-cap the problems with these various rules, as discussed throughout the article. After all, there are reasons why contributory negligence was abrogated by **[*298]** nearly all of states except for a handful in the South and the District of Columbia, as the previous sections of this article have indicated. Also, there are reasons why there are four different forms of comparative fault, and the problems with statutory damage limits are facially apparent. Therefore, a brief recounting of the various problems with these rules is necessary in order to determine whether or not these means devised by courts and legislators over the past two centuries are appropriate manners in which to achieve the ends discussed in the prior section.

Beginning with contributory negligence, the primary problem was its harshness in denying recovery to plaintiffs who were even slightly negligent and the manner in which it was applied in many of the railroad cases such as Goodman. [n137] Also, its application in cases where both parties are simultaneously negligent, and could thus be deemed equally "at fault," such as the typical automobile accident, led to increased criticism, calls for no-fault auto insurance laws, and the rule's ultimate collapse.

The various comparative fault schemes are also not immune from criticism. On the one hand, the precision with which a trier of fact under the common "modified" comparative systems is somewhat troublesome in that a plaintiff who is forty-nine (or fifty) percent negligent may recover a portion of his damages, whereas a plaintiff who is fifty (or fifty-one) percent recovers nothing. On the other hand, under the "pure" system, to allow a portion of recovery to a plaintiff who is up to ninety-nine percent at fault seems to diminish the role of fault in the tort system in general. Also, as is evident from the Liebeck case, comparative fault also allows for recovery by plaintiffs who many members of the lay public feel should not be entitled to recover. Furthermore, as is evident from the Wisconsin [n138] and Idaho [n139]

experiences in applying modified comparative fault to other "negligent plaintiff" doctrines, it is unclear exactly how far comparative fault was intended to reach. The remaining system, the "slight-gross" system, seems to be advantageous in that it states its standards in qualitative, rather than quantitative terms. However, there has been little scholarly study and discussion of its effects, and its repealer in Nebraska was effected with little fanfare. [n140] Thus, the replacement for contributory negligence has brought with it several problems of its own.

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The predominant manner in which legislatures have handled the perceived increase in tort litigation, often spurred on by accounts of negligent, or otherwise unsympathetic plaintiffs receiving large damage recoveries, (for example, limits upon punitive and non-economic damages), has also been problematic. As discussed in Part IV.D. above, it is impossible for a legislature to determine, ex ante, what the maximum appropriate amount may be in any given case, and traditional ex post remittur by a judge is a better alternative in handling excessive damage awards. Thus, "tort reform" is also perhaps not the best method in which to prevent claims brought by such plaintiffs as Mrs. Liebeck, especially if one considers the fact that the elimination of contributory negligence, in many cases, by the very same legislatures enacting damage limits, is what allows such plaintiffs to bring successful claims in the first place. [n141]

Given the fact that, not surprisingly, each of these methods of limiting claims and recoveries by negligent plaintiffs carries with it several inherent problems, the next question which arises is, if these methods are unsatisfactory, how should the matter be handled? This is what will be analyzed in the following section.

C. Possible Solutions

Having discussed the various policies, advantages, and problems behind contributory negligence, comparative fault, and damage limits, it is now the time to posit possible alternatives and solutions to the problem of negligent plaintiff recovery. Taking into account these policies and problems as discussed in Parts V.A. and B., perhaps a "hybrid" system of contributory negligence and comparative fault may be a possible solution. As stated earlier, the central policies behind contributory negligence are personal responsibility and the nineteenth century notion that the courts will not protect those who fail to protect themselves. Also, taking into account the doctrine's corollary, last clear chance, setting aside the issue of simultaneous negligence, a policy emerges that the last negligent party, the one who has the last opportunity to avoid the accident, should not prevail in the claim. As a layman would put it, "it was his fault." Therefore, in cases of "sequential" negligence, contributory negligence is a perfectly defensible doctrine. The main problem in applying the doctrine in our con- **[*300]** temporary society, indeed the problem which led to the doctrine's demise, is in the context of automobile accidents. Again, as any honest driver will admit, no one operates a motor vehicle with reasonable care every single second while one is driving. Taking into account the millions of drivers, many driving distances of hundreds of miles, it does not take a doctorate in advanced statistics to determine that there are going to be large numbers of traffic accidents occurring in which both parties are negligent. Therefore, to solve this problem, one possible solution would be to resurrect the doctrines of contributory negligence and last clear chance when the trier of fact determines that either party had the last opportunity to avoid the accident. However, should the trier of fact determine that both parties were negligent at the same time, then the next step would be to proceed to comparative fault and apportion the damages accordingly. In other words, preserve the **Butterfield** [n142] and Davies [n143] rules, but eliminate the Vennall [n144] rule. To prevent the parties from attempting to dissect the final opportunity to avoid the accident into nanoseconds, a statute creating such a regime should include language emphasizing that this should be the last clear opportunity. Thus, such a hypothetical statute (using, for illustrative purposes, Idaho's forty-nine percent comparative fault language) would read as follows:

Effect of contributory negligence-In an action by any person, or his legal representative, to recover damages for negligence resulting in death or in injury to person or property, if the trier of fact determines that either party to the

action had the last clear opportunity to avoid the incident causing the death or injury to person or property for which recovery is sought, then the trier of fact shall render judgment against said party. If the trier of fact determines that neither party had the last clear opportunity to avoid the incident, contributory negligence or comparative responsibility shall not bar recovery, if such negligence or comparative responsibility was not as great as the negligence or comparative responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence or comparative responsibility attributable to the person recovering.

Such a system has several advantages over comparative fault. First of all, it is much easier in cases of sequential negligence for the trier of fact to determine who had the last chance to avoid the acci- **[*301]** dent than it would be to weigh and apportion percentage of fault. For example, taking the facts of **Butterfield,** it is clear that Mr. **Butterfield** had the last chance to avoid the accident-Mr. **Forrester,** presumably, had placed the obstructions in the road some time earlier, and, had **Butterfield** been watching where he was going, he could have avoided injury. However, in a comparative fault system, this becomes a more difficult case. The parties were both negligent. However, would a juror find that they were equally negligent? This is possible, since one could argue that **Forrester** had no more business blocking the road than **Butterfield** had riding home at break-neck speed from the pub. Or, perhaps, the jury may give another point or two to **Butterfield,** since he did have the last chance to avoid the collision. In a modified system, this could make the difference between recovery and a defendant's verdict, and in a pure system, depending upon the amount sought, it could make a difference of thousands of dollars to **Forrester.** In a case in which both parties are negligent at the same time, such as in a car accident, it makes much more sense to weigh the relative negligence of the parties. The nexus of the parties' negligence both coming together to cause the accident, a trier of fact is in a better position to parse out the facts, and compare the relative fault of each party in its causation. Therefore, such a "hybrid" system would preserve the valid policies of contributory negligence, while ameliorating the harshness which led to its downfall, as well as employing each method of dealing with plaintiff negligence in the area to which it is best suited. n145

However, should a legislature fail to adopt such a radical solution, there are other alternatives available which may also serve to address the negligent plaintiff problem, while avoiding the inherent problems of damage caps. The first would be to tackle the Liebeck problem directly-limit or disallow punitive damages in cases involving contributory negligence. After all, one of the running themes throughout this article has been that the public outrage was over both the plaintiff's negligence and the large damage award. Perhaps **[*302]** if punitive damages were limited in cases involving contributory negligence, this would satisfy the public's desire of denying large awards to plaintiffs which they view as "undeserving," while avoiding the chilling effect of limiting recovery on the part of truly sympathetic plaintiffs injured, through no fault of their own, by the egregious conduct of the defendant.

If legislators reject that solution, another reasonable alternative would be to limit punitive damages in terms of a percentage of the defendant's gross income. Since punitive damages are, by their very terms, intended to punish certain classes of conduct by the defendant, a flat statutory amount has less of a punitive effect upon large corporations or wealthy individuals than it would on an average individual. For example, Idaho's $ 250,000 figure could effectively stamp out a small business or cause financial ruin to an average, middle-class individual, while an entity such as the Microsoft Corporation or an individual such as its chairman, Bill Gates, would hardly feel the pinch. A limit based upon the gross income of the defendant would allow sufficient flexibility such that high-income defendants would be subject to the same punitive effect as middle to low-income defendants. Other reasonable alternatives would be to limit punitive damages in cases of negligence, but not in cases of intentional torts (such as trespass to land, where actual damages may only be nominal) or create an increasing scale of standards of proof for egregious conduct. For example, a preponderance of the evidence standard for the first $ 250,000, clear and convincing evidence between $ 250,000 and $ 500,000, and the criminal standard of beyond a reasonable doubt for punitive damages sought exceeding $ 500,000. This scheme preserves a higher burden upon the plaintiff, which may serve to discourage more dubious damage awards, while allowing for greater flexibility in allowing at least the possibility that a plaintiff determined to be entitled to

greater than a fixed amount may receive that amount.

As for the other area in which damages have been limited, non-economic damages, the difficulty in quantifying such things as "pain and suffering" or "mental anguish" does create some concern in that an award for such damages may be arbitrary or punitive. However, again, there are problems with fixing a static figure ex ante. In a recent comment in the North Carolina Law Review, the author suggests relating the damage limit to the severity of the injury. [n146] Thus, to use Idaho as an example, in addition to the exceptions for willful, reckless, or felonious conduct, [n147] another exception under subsection (4) of Idaho Code 6-1603 could be added, which would read:

[*303]

(c) Causes of action arising from conduct resulting in permanent paralysis, loss of limb, blindness, deafness, muteness, impotence, permanent and substantial physical disfigurement, or permanent and substantial loss of cognitive ability.

In order to avoid common law extensions of this possible exception to the $ 250,000 limit, this hypothetical amendment to section 6-1603(4) includes a short list of some of the more debilitating injuries for which the statutory limit may be grossly inadequate, in lieu of more open-ended language such as "disability" or "handicap." This allows for a subjective case-by-case examination by the trier of fact, subject to judicial review and remitter of damages, where such a subjective ex post review is most appropriate, while leaving the current limit intact for other causes of action.

Retired Arizona Superior Court Judge Michael Dann, in an article published in the Chicago-Kent Law Review, suggests that the problem with excessive or apparently arbitrary or punitive non-economic damage awards follows from uncertainty on the part of the jury as to how to determine such awards. [n148] To address this problem, he proposes that jurors be given the amounts awarded in prior similar cases as a starting point. [n149] While this may help alleviate the uncertainty and difficulty involved in the attachment of a dollar amount to something which is next to impossible to quantify, the other awards may also be products of jury uncertainty as to a fair compensatory award, resulting in the "blind leading the blind." However, this proposal avoids the potential problem of a flat limitation, while shedding some light, however dim it may be, on how a jury may award non- economic damages. Therefore, recognizing the problems in determining non-economic damage awards, while also recognizing the inherent problems of damage caps for such awards, Judge Dann's suggestion, while imperfect, may be the best alternative. However, if a legislature determines that a monetary limitation is absolutely necessary, an exception such as the hypothetical "section 6-1603(4)(c)," perhaps in conjunction with Judge Dann's suggestion in such cases where the limit does not apply, could be the next best solution.

VI. CONCLUSION

[*304]

And so, while a total return to contributory negligence would not be a suitable alternative to damage caps in limiting claims which many in the lay public feel should not prevail, a hybrid system of contributory negligence and comparative fault, applying each where each is best suited, may address the negligent plaintiff problem, remove the difficulties the trier of fact currently faces in applying comparative fault to two (or more) distinct, sequential negligent acts, while ameliorating the old rule's harshness when it comes to an accident resulting from the nexus of simultaneous negligent acts, such as a typical car accident. In the absence of an adoption of such a large-scale reform, some of the problems inherent in damage limits may be lessened by the use of other measures short of a static dollar amount. Such measures include: limiting punitive damages in cases of contributory negligence, an increasing standard of proof of egregious conduct for certain amounts, or attaching the punitive damage limit to a percentage of the defendant's gross income. The inherent difficulty in determining non-economic damages may be addressed by following Judge Dann's

suggestion of giving jurors examples of a range of awards in similar cases. However, should the legislature determine that a dollar limitation truly be necessary, then an exception for some of the more severe injuries listed above in Part V.C. should be adopted to reduce the harshness of such a limitation. In such cases, the court may limit the award should it be deemed excessive in an ex post determination, after hearing and reviewing the case itself. [n150] At the very minimum, should the Idaho legislature choose not to enact any of the above proposals, it should at least take the Nebraska approach, and remove the uncertainty in the area of implied assumption of the risk through codification of the defense by statute. [n151]

[*305]

But, as Judge Andrews wrote in his oft-quoted dissenting opinion in the famous case of Palsgraf v. Long Island Railroad, [n152] "[i]t is all a question of expediency." [n153] When Mr. **Butterfield** rode his horse into Mr. **Forrester's** pole, the English court felt that society would be best served by requiring those who were careless to pay the costs of their own damages-the legal system was not about to intervene and compensate a man who could have avoided injury, yet failed to do so. More than a century later, people like Mr. Goodman, not to mention countless motorists, would press courts and legislatures to reconsider this decision, and allow some negligent plaintiffs a chance to recover at least a portion of their damages. However, Mrs. Liebeck's careless handling of her coffee cup, and a perceived "litigation explosion" (to use Mr. Olson's term), has caused public opinion to shift the other direction, and advocates of "tort reform" now believe limiting damages will remove the incentive of such plaintiffs (and their attorneys) to file suit-a "cure" which may be "worse than the disease." Perhaps the hybrid system or one of the other above solutions may address these concerns effectively while minimizing the problems that have arisen from the past attempts at a solution, perhaps they may not. The purpose of this article is simply to place them into the sphere of public discourse, and attempt to offer assistance to our policy makers in crafting a solution based upon the lessons which history has taught us as a society. As the old saying goes, we should "not tear down the fence until we find out why it was put up in the first place."

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceCommon Law ConceptsAssumption of RiskTortsNegligenceDefensesComparative NegligenceTypesTortsNegligenceDefensesContributory NegligenceGeneral Overview

FOOTNOTES:

n1 Liebeck v. McDonald's Rests., Inc., No. CV-93- 02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994). The facts of the case are discussed in Andrea Gerlin, A Matter of Degree: How a Jury Decided That One Coffee Spill is Worth $ 2.9 Million, Wall St. J. Eur., Sept. 2, 1994, available at 1994 WL-WSJE 2037634.

n2 Gerlin, supra note 1, at 1.

n3 Liebeck, 1995 WL 360309, at *1.

n4 Id.

n5 Editorial, McDonald's Takes a Hit on a Hot Issue, Chi. Trib., Aug. 21, 1994, at C2.

n6 Tyler Bridges, New Law School Opens with a Burning Issue, Times-Picayune (New Orleans), Nov. 17, 1995, at B1.

n7 McDonald's Takes a Hit on a Hot Issue, supra note 5, at C2 (opening with the line "[p]roponents of tort reform charge that America's courts are clogged with frivolous suits," followed by a discussion of the Liebeck case).

n8 Am. Tort Reform Assoc., Looney Lawsuits, http://www.atra.org/display/ 13 (last visited Sept. 8, 2005).

n9 Am. Tort Reform Assoc., Tort Reform Record, (Dec. 3 1 , 2 0 0 4) , a v a i l a b l e a t http://www.atra.org/files.cgi/7802 Record12-04.pdf.

n10 Id. at 1.

n11 Id.

n12 See, e.g., William Lamb, Pro-Lawsuit Group Wants President's Ear, St. Louis Post-Dispatch, Jan. 5, 2005, at B01 ("A primary solution . . . is to cap non-economic and punitive damage awards."); Shannon L. Goessling, Is Tort Reform Necessary? Civil Justice System Needs Dose of Fairness, Atlanta J.-Const., Jan. 14, 2005, at 13A ("Most Georgians associate tort reform with medical malpractice and caps on punitive damages awarded by juries."); Collin Levey, Easing the Pain and Suffering of Medical-Malpractice Lawsuits, Seattle Times, Jan. 14, 2005, at B7 (citing s poll in which "63 percent said they would support a law to limit plaintiffs' nonmedical compensation" in the medical malpractice context).

n13 See, e.g., Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2005, H.R. 534, 109th Cong. §§ 4, 7 (2005) (a federal measure recently introduced in the House of Representatives aimed at limiting non-economic damages in the medical malpractice context).

n14 This comment is focused primarily on damage limits in "common" negligence cases. Other major issues in tort reform, such as reforms in the area of medical malpractice, are largely beyond the scope of this article and will only be discussed briefly as they relate to comparative fault and contributory negligence (i.e., "failing to follow doctor's orders.").

n15 **Butterfield** v. **Forrester,** 103 Eng. Rep. 926, 926-27 (K.B. 1809).

n16 Id. at 927 (emphasis added).

n17 Id.

n18 Davies v. Mann, 152 Eng. Rep. 588, 589 (Exch. Div. 1842).

n19 Vennall v. Garner, 149 Eng. Rep. 298 (Exch. Div. 1832).

n20 Davies, 152 Eng. Rep. at 589.

n21 Id. If one were so inclined as to drive his carriage down the wrong side of the road, the case would be governed by Pluckwell v. Wilson, 172 Eng. Rep. 1016, 1017 (C.P.D. 1832), holding that: [A] person was not bound to keep on the ordinary side of the road; but that, if he did not do so, he was bound to use more care and diligence, and keep a better look-out, that he might avoid any concussion, than would be requisite if he were to confine himself to his proper side of the road.

n22 Francis H. Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233 (1908).

n23 Id. at 234.

n24 Vicars v. Wilcocks, 103 Eng. Rep. 244 (K.B. 1806).

n25 Bohlen, supra note 22, at 239.

n26 Id. at 242.

n27 Id. at 245-51.

n28 Id. at 253.

n29 Id. at 256.

n30 Fowler Vincent Harper, A Treatise on the Law of Torts 296 (1933).

n31 Anthony J. Sebok, The Fall and Rise of Blame in American Tort Law, 68 Brook. L. Rev. 1031 (2003).

n32 Liebeck v. McDonald's Rests., Inc., No. CV-93- 02419, 1995 WL 360309, at *1 (N.M. Dist. Aug. 18, 1994).

n33 Hopkins v. Utah N. Ry., 2 Idaho 277, 2 Hasb. 300, 13 P. 343 (1887).

n34 Id. at 281, 2 Hasb. at 304, 13 P. at 346.

n35 Idaho Code Ann. § 73-116 (1999).

n36 See 1 Leonard J. Arrington, History of Idaho 67- 68 (1994) ("It was the first time the eyes of a white man had beheld any part of the state of Idaho . . . . It was also an event that the United States could use in claiming the right of discovery to the 'lower' part of the Oregon Country . . . ."). For the possible legal significance of this discovery, see Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), which recognizes the claim to certain lands by the United States government based upon discovery.

n37 Arrington, supra note 36, at 91.

n38 Id. at 151 ("1846, when the southern part of the great Oregon Country officially became part of the United States . . . .").

n39 Id. at 260.

n40 Id. at 213.

n41 Corliss v. Wenner, 136 Idaho 417, 422, 34 P.3d 1100, 1105 (Ct. App. 2001) (emphasis added).

n42 In Florida's judicial adoption of comparative fault, the court was faced with a similar statute, and held that it did not bind the court to the common law rule of contributory negligence. Hoffman v. Jones, 280 So.2d 431, 435 (Fla. 1973). However, unlike the Idaho statute, the Florida statute sets July 4th, 1776 as the date as of which the English common law ceases to apply. Fla. Stat. Ann. § 2.01 (West 2004). Since contributory negligence was first "pronounced" in 1809, the statute did not apply. Hoffman, 280 So.2d at 435.

n43 Rumpel v. Or. Short Line & Utah N. Ry., 4 Idaho 13, 35 P. 700 (1894).

n44 Spokane & Palouse Ry. v. Holt, 4 Idaho 443, 40 P. 56 (1895).

n45 Balt. & Ohio R.R. v. Goodman, 275 U.S. 66 (1927).

n46 Id. at 70.

n47 Wex S. Malone, The Formative Era of Contributory Negligence, 41 Ill. L. Rev. 151 (1946).

n48 Id. at 151.

n49 Lawrence M. Friedman, A History of American Law 470, 471 (2d ed. 1985).

n50 McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).

n51 Id. at 56-57.

n52 Li v. Yellow Cab Co. of California, 532 P.2d. 1226, 1230 (Cal. 1975).

n53 John W. Wade, Comparative Negligement in the United States and its Present Status in Louisiana, 40 La. L. Rev 299, 303 (1980); Marc A. Franklin & Robert L. Rabin, Tort Law and Alternatives 440 (7th ed. 2001).

n54 Wade, supra note 53, at 303.

n55 E.g., Neb. Rev. Stat. § 25-21, 185 (1995).

n56 Wade, supra note 53, at 305; Neb. Rev. Stat. § 25-21, 185; S.D. Codified Laws § 20-9-2 (1995).

n57 Neb. Rev. Stat. § 25-21, 185.

n58 Id. § 25-21, 185.09.

n59 Idaho Code Ann. § 6-801 (2004).

n60 Id.

n61 McIntyre v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992).

n62 E.g., N.H. Rev. Stat. Ann. § 507:7-d (1997); Wis. Stat. Ann. § 895.045 (West 1996).

n63 Unif. Comparative Fault Act § 1(a) (1977).

n64 Li v. Yellow Cab Co. of California, 532 P.2d 1226 (Cal. 1975).

n65 Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981).

n66 Miss. Code Ann. § 11-7-15 (West 2004).

n67 Unif. Comparative Fault Act prefatory note (1977).

n68 Li, 532 P.2d at 1242 (footnote omitted).

n69 Id.

n70 Idaho Code Ann. § 6-801 (2004).

n71 Clark v. Foster, 87 Idaho 134, 139, 391 P.2d 853, 855 (1964).

n72 Id.

n73 Id.

n74 Id.

n75 Salinas v. Vierstra, 107 Idaho 984, 986, 695 P.2d 369, 371 (1985).

n76 Id. at 989, 695 P.2d at 374. But see Bohlen, supra note 22, at 244-52 (explaining the various differences between contributory negligence and assumption of the risk).

n77 Salinas, 107 Idaho at 990, 695 P.2d at 375.

n78 Winn v. Frasher, 116 Idaho 500, 503, 777 P.2d 722, 725 (1989).

n79 Neb. Rev. Stat. § 25-21, 185.12 (1996).

n80 Harrison v. Taylor, 115 Idaho 588, 589, 768 P.2d 1321, 1322 (1989).

n81 Id.

n82 Id. at 592, 768 P.2d at 1325 ("Where Salinas has cut the heart out of assumption of risk, the same rationale and reasoning mandates an identical operation upon the open and obvious danger defense."). Justice Bistline wrote the majority opinion in both cases.

n83 Hertelendy v. Agway Ins. Co., 501 N.W.2d 903, 904-05 (Wis. Ct. App. 1993).

n84 Id.

n85 Wis. Stat. Ann. § 895.045 (West 1996).

n86 Hertelendy, 501 N.W.2d at 907.

n87 Id.

n88 Wis. Stat. Ann. § 802.08(2); Idaho R. Civ. P. 56(c); Fed. R. Civ. P. 56(c).

n89 Clark v. Foster, 87 Idaho 134, 139, 391 P.2d 853, 855 (1964).

n90 Williams v. Delta Int'l. Mach. Corp., 619 So.2d 1330, 1333 (Ala. 1993) ("After . . . exhaustive study and . . . lengthy deliberations, the majority of this Court, for various reasons, has decided that we should not abandon the doctrine of contributory negligence, which has been the law in Alabama for approximately 162 years."). Unfortunately, the court does not tell us what these "various reasons" are.

n91 Franklin v. Morrison, 711 A.2d 177, 189 (Md. 1998) ("Maryland law does not recognize comparative negligence.").

n92 Corns v. Hall, 435 S.E.2d 88, 91 (N.C. Ct. App. 1993) ("The doctrine of contributory negligence is part of the law of this State and will remain so until the General Assembly or the Supreme Court decides otherwise.").

n93 Litchford v. Hancock, 352 S.E.2d 335, 337 (Va. 1987) ("Negligence of the parties may not be compared, and any negligence of a plaintiff which is a proximate cause of the accident will bar a recovery.").

n94 Nat'l Health Labs., Inc. v. Ahmadi, 596 A.2d 555, 561 (D.C. 1991) ("[C]omparative negligence . . . has never been the law in the District.").

n95 Ellen M. Bublick, Comparative Fault to the Limits, 56 Vand. L. Rev. 977 (2003).

n96 **Butterfield** v. **Forrester,** 103 Eng. Rep. 926 (K.B. 1809)

n97 Davies v. Mann, 152 Eng. Rep. 588 (Exch. Div. 1842).

n98 Gary T. Schwartz, The Beginning and the Possible End of the Rise of Modern American Tort Law, 26 Ga. L. Rev 601, 601 (1992).

n99 Id. at 606.

n100 Id.

n101 Id. at 701.

n102 Walter K. Olson, The Litigation Explosion: What Happened when America Unleashed the Lawsuit (1991).

n103 See generally id.

n104 Am. Tort Reform Assoc., supra note 9.

n105 Jeffrey W. Stempel, Not-So-Peaceful Coexistence: Inherent Tensions in Addressing Tort Reform, 4 Nev. L.J. 337 (2004).

n106 See generally id.

n107 Am. Tort Reform Assoc., supra note 9 (stating that the damage-related reforms have been the most successful).

n108 Cong. Budget Office, The Effects of Tort Reform: Evidence from the States (2004).

n109 Id. at viii.

n110 Id.

n111 Barbara Franklin, Learning Curve: Lawyers Must Confront Impact of Changes on Litigation Strategies, 81 A.B.A. J. 62 (Aug. 1995).

n112 Id. at 64.

n113 Id.

n114 Id. at 63.

n115 Idaho Code Ann. § 6-1603 (2004).

n116 Id. § 6-1604.

n117 Id. § 6-1603(1). Apparently, the $ 250,000 figure is common among the various states adopting such measures and is based upon the California provision. Elizabeth Stewart Poisson, Addressing the Impropriety of Statutory Caps on Pain and Suffering Awards in the Medical Liability System, 82 N.C. L. Rev. 759, 773 (2004); Cal. Civ. Code § 3333.2(b) (West 1997).

n118 Idaho Code Ann. § 6-1603(4).

n119 Id. § 6-1604(3).

n120 Id. § 6-1604(1).

n121 Id. §§ 6-1603(3), 6-1604(3). For an explanation of the possible advantages of such a provision, see generally Michael S. Kang, Don't Tell Juries About Statutory Damage Caps: The Merits of Nondisclosure, 66 U. Chi. L. Rev. 469 (1999).

n122 Patrick Orr, Caldwell Woman Sought in Scalping of Teenage Girl, Idaho Statesman (Boise), Feb. 9, 2005, at Main 1.

n123 Idaho Code Ann. § 18-907 (2004).

n124 Poisson, supra note 117.

n125 Id. at 784 ("A more acceptable cap might work on a sliding scale to provide an amount for pain and suffering that varies in proportion to the severity of the injury and the length of time that the victim must live with that injury.").

n126 E.g., Carson v. Maurer, 424 A.2d 825, 838 (N.H. 1980) (holding that New Hampshire's limit on non-economic damages in medical malpractice cases was in violation of that state's constitution); Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997) (striking the Illinois provision under that state's constitution in a case arising in the infamous Madison County).

n127 See, e.g., Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) (upholding California's limit on non- economic damages using "rational basis" analysis).

n128 Kirkland v. Blaine County Med. Ctr, 134 Idaho 464, 4 P.3d 1115 (2000).

n129 See, e.g., James L. Wright & M. Matthew Williams, Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards, 45 S. Tex. L. Rev. 449 (2004); U.S. Const. amend. VII.

n130 Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2005, H.R. 534, 109th Cong. §§ 4, 7 (2005).

n131 Bohlen, supra note 22, at 253 (emphasis added).

n132 **Butterfield** v. **Forrester,** 103 Eng. Rep. 926, 927 (K.B. 1809) (where the plaintiff negligently injured himself on an instrumentality negligently left in place by the defendant).

n133 See, e.g., Balt. & Ohio R.R. v. Goodman, 275 U.S. 66 (1927) (denying recovery on the grounds that Plaintiff's decedent failed to stop, get out of his car, walk up the tracks, and look both ways prior to proceeding at the crossing).

n134 See McIntyre v. Balentine, 833 S.W.2d 52, 56 (Tenn. 1992).

n135 Id.

n136 See Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981).

n137 Balt. & Ohio R.R. v. Goodman, 275 U.S. 66 (1927).

n138 Hertelendy v. Agway Ins. Co., 501 N.W.2d 903, 904-05 (Wis. Ct. App. 1993).

n139 Harrison v. Taylor, 115 Idaho 588, 589, 768 P.2d 1321, 1322 (1989).

n140 A LEXIS search of major Nebraska newspapers reveals no articles announcing or discussing the repeal of the slight-gross system.

n141 Although the state in which Liebeck was brought, New Mexico, adopted comparative fault judicially, its legislature, of course, was at all times free to reverse the decision legislatively.

n142 **Butterfield** v. **Forrester,** 103 Eng. Rep. 926 (K.B. 1809)

n143 Davies v. Mann, 152 Eng. Rep. 588 (Exch. Div. 1842).

n144 Vennall v. Garner, 149 Eng. Rep. 298 (Exch. Div. 1832).

n145 Although this solution does not address the Goodman problem, given the reduction of the influence of the railroad corporations, as well as the greater familiarity of the public and courts with automobiles, today such a case may be viewed as somewhat of an anachronism. The extraordinary duty placed upon the driver to exit the car and look for oncoming rail traffic, goes beyond the normal tort duty of ordinary and reasonable care, is perhaps a product of a society in which automobiles were a relatively recent innovation, and perhaps also a mistake in judgment on the part of the court. Of course, with any legal doctrine there is a risk that judges, being human, may err in their judgment, and, to use tort language, we "assume the risk" of such mistakes with any adoption of a legal rule.

n146 Poisson, supra note 117, at 784.

n147 Idaho Code Ann. § 6-1603(4) (2004).

n148 B. Michael Dann, Jurors and the Future of "Tort Reform," 78 Chi.-Kent L. Rev. 1127, 1134 (2003).

n149 Id. at 1135.

n150 Since the current discussion of tort reform is mainly in the medical malpractice context, one may ask whether or not contributory negligence or the hybrid system may be applied in that context. Although this article is focused mainly upon cases of ordinary negligence outside the medical malpractice context, as the physician will, in most cases, have the last clear chance (or, in terms of the hypothetical "hybrid" statute, the "last clear opportunity") to avoid injury, there are a few conceivable applications of contributory negligence/comparative fault in this context, such as the negligent failure to follow medical advice. For more possible applications of contributory negligence/comparative fault in medical malpractice cases, including use of tobacco, alcohol, or drugs, aggravation of the injury by the patient, etc., see generally Kurtis A. Kemper, Annotation, Contributory Negligence, Comparative Negligence, or Assumption of the Risk, Other Than Failing to Reveal Medical History or Follow Instructions, as Defense in Action Against Physician or Surgeon for Medical Malpractice, 108 A.L.R.5th 385 (2004). However, assumption of the risk would be most applicable in medical malpractice cases, as the doctor may claim that the patient was informed of the dangers of the procedure, and knowingly agreed to participate.

n151 Neb. Rev. Stat. § 25-21, 185.12 (1996).

n152 Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

n153 Id. at 104 (Andrews, J., dissenting).