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S.B. 165: Comparative Negligence in Ohio

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INTRODUCTION

On March 4, 1980, the Ohio General Assembly finally concurred on an amended form of Senate Bill 165, and when the Governor added his signature, Ohio had a comparative negligence statute. The law represents the culmination of long and arduous efforts at compromise in the legislature and follows more than seven years of fierce opposition by insurance companies and the insurance lobby. When the opposition finally withdrew and the last wrinkles were ironed out, the lawmakers devised a mathematical damages apportionment system for negligence cases where contributory negligence is asserted.[1] However,

1. OHIO REV. CODE ANN. § 2315.19 (Page 1981) reads as follows:

(A) (1) In negligence actions, the contributory negligence of a person does not bar the person or his legal representative from recovering damages that have directly and proximately resulted from the negligence of one or more other persons, if the contributory negligence of the person bringing the action was no greater than the combined negligence of all other persons from whom recovery is sought. However, any damages recoverable by the person bringing the action shall be diminished by an amount that is proportionately equal to his percentage of negligence, which percentage is determined pursuant to division (B) of this section. This section does not apply to actions described in section 4113.03 of the Revised Code.

(2) If recovery for damages determined to be directly and proximately caused by the negligence of more than one person is allowed under division (A)(1) of this section, each person against whom recovery is allowed is liable to the person bringing the action for a portion of the total damages allowed under that division. The portion of damages for which each person is liabile is calculated by multiplying the total damages allowed by a fraction in which the numerator is the person's percentage of negligence, which percentage is determined pursuant to division (B) of this section, and the denominator is the total of the percentages of negligence, which percentages are determined pursuant to division (B) of this section to be attributable to all persons from whom recovery is allowed. Any percentage of negligence attributable to the person bringing the action shall not be included in the total of percentages of negligence that is the denominator in the fraction.

(B) In any negligence action in which contributory negligence is asserted as a defense, the court in a nonjury trial shall make findings of fact, and the jury in a jury trial shall return a general verdict accompanied by answers to interrogatories, that shall specify:

(1) the total amount of damages that would have been recoverable by the complainant but for his negligence;

(2) the percentage of negligence that directly and proximately caused the injury, in relation to one hundred per cent, that is attributable to each party to the action.

(C) After the court makes its findings of fact or after the jury returns its general verdict accompanied by answers to interrogatories, the court shall diminish the total amount of damages recoverable by an amount that is proportionately equal to the percentage of negligence of the person bringing the action,

the Act leaves important questions unanswered, and problems which are certain to arise are not even approached in Ohio Revised Code section 2315.19. The bench and the bar of Ohio have been left with the task of supplying solutions to such problems, with little help from any legislative history. This note will explore selected areas of Ohio law which will be affected by the Act, and analyze expected impacts and possible consequences of the Act.

The first issue likely to be raised under section 2315.19 is whether it will apply retroactively or prospectively, from the date of the injury or the date the claim is filed; therefore this area is examined first. This note will include analysis of last clear chance and assumption of risk because an earlier version of S.B. 165 was expressly inapplicable to these doctrines, whereas section 2315.19 does not mention them. Strict products liability is a growing area of tort law and it has a particularly interesting background in Ohio law. Since it overlaps substantially into negligence law, products liability raises rather unique problems. Finally, a section on multi-party litigation is included because it is the most complicated area of law addressed in section 2315.19, and is likely to be the most troublesome in the courts.

OVERVIEW

A. Historical Perspective

In order to understand the impact of comparative negligence, the former role of contributory negligence in Ohio must be examined. Contributory negligence means that a plaintiff, who himself contributed to his own injury, should not be allowed to collect damages from another regardless of the degree to which the other person was responsible for plaintiff's injury.[2] It was first[3] accepted in Ohio in *Ker-*

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which percentage is determined pursuant division (B) of this section. If the percentage of the negligence of the person bringing the action is greater than the total of the percentages of the negligence of all other persons from whom recovery is sought, which percentages are determined pursuant to division (B) of this section, the court shall enter a judgment for the persons against whom recovery is sought.

2. *E.g.*, Johnson v. Citizens Nat'l Bank of Norwalk, 152 Ohio St. 477 (1950). "Ohio follows the fundamental common law rule that in an ordinary tort action the injured plaintiff may not recover from the defendant, even though negligent, if the plaintiff, too, was guilty of negligence proximately contributing to cause his own injury." *Id.* at 478.

Cowan v. Dean, 81 S.D. 486, 137 N.W.2d 337 (1965) (contributory negligence is a breach of duty on plaintiff's part to protect himself from injury, thus contributing as part of the proximate cause of the injury). For a more complete listing, see 39 OHIO JUR. 2d *Negligence* § 84 n.15 (1959).

3. The contributory negligence doctrine extends back as far as the JUSTINIAN

whacker v. Cleveland C.&C.R.R.[4] Since the time of *Kerwhacker,* contributory negligence has prevented injured parties from recovering damages in Ohio no matter how slight their negligence was in comparison to the defendant's.[5] This has placed a great burden on the injured party. He must maintain himself according to very high standards of care in the face of the defendant's negligence. Comparative negligence mitigates some of the inequities of contributory negligence since it allows for parties to share in the liability according to their fault.[6]

There are several forms of comparative negligence,[7] the most prevalent types being pure, forty-nine percent and fifty percent.[8] The pure form of comparative negligence is in greatest contrast to contributory negligence. It apportions fault so that each person is liable only up to the extent of his own fault.[9] This would, at its extreme, allow a plaintiff who is ninety-nine percent negligent to recover the percent of any allocated damages.[10] Eleven states currently make use of this type of comparative negligence, with those adopting comparative negligence by judicial decision tending to favor this approach.[11]

CODE OF ROMAN LAW. *See* Mole & Wilson, *A Study of Comparative Negligence,* 17 CORNELL L.Q. 333 (1932). It was first recognized under the English common law in Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809) (plaintiff not permitted to recover for injuries received when his horse ran into an obstruction in the highway, throwing him. He was found negligent for riding at violent speeds, not allowing him to keep a proper watch). *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE, § 1.2 at 3 (1974) [hereinafter cited as V. SCHWARTZ].

4. 3 Ohio St. 172 (1854) (dealing with the liability between the railroad and livestock owner whose hogs were destroyed by the railroad's locomotive).

5. *E.g.,* Geiselman v. Scott, 25 Ohio St. 86 (1874). This assumes, of course, that a plaintiff's negligence is adjudged a proximate cause of the injury.

6. V. SCHWARTZ, *supra* note 3, §2.1 at 31.

7. *Id.* at 32, 33. The slight-gross type allows the plaintiff to collect when his negligence was slight compared to that of the defendant, whose negligence was gross. Bezdek v. Patrick, 167 Neb. 754, 94 N.W.2d 482 (1959) *rev'd on other grounds,* 170 Neb. 522, 103 N.W.2d 318 (1960). The court there was applying Nebraska's slight-gross statute, NEB. REV. STAT. §25.1151 (Reissue 1964). *See* H. WOODS, THE NEGLIGENCE CASE, COMPARATIVE FAULT 85 (1978) [hereinafter cited as H. WOODS].

8. H. WOODS, *supra* note 7, at 85, 86.

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

10. *See, e.g.,* Lamborn v. Phillips Pacific Chemical Co., 89 Wash.2d 701, 575 P.2d 215 (1978) (plaintiff having been found 99% negligent still collected 1% of damage award).

11. Those adopting pure comparative negligence by statute have been:
Louisiana, LA. CIV. CODE ANN. art. 2323 (West Supp. 1961); Mississippi, MISS. CODE ANN. §11-7-15 (1972); New York, N.Y. CIV. PRAC. LAW §1411 (1975); Rhode Island, R.I. GEN. LAWS ANN. §9-20-4 (1974); Washington, WASH. REV.

Under the forty-nine percent type, the plaintiff is allowed to recover only if his negligence is less than that of the defendant.[12] Criticism has been leveled against this form because one percent can mean the difference between recovery and a bar to recovery.[13] Eleven states presently employ this form.[14] Several states have abandoned this form and adopted the fifty percent type.[15]

The "no greater than" or fifty percent type allows a plaintiff who is fifty percent negligent to recover since his negligence was no greater than the defendants.[16] Currently, fourteen states, including Ohio, have adopted this form.[17] As is true with the forty-nine percent model, one percent can mean the difference between recovery and a bar to recovery. This form of comparative negligence is based upon a modified contributory negligence rationale; a plaintiff whose negligence is greater than the defendant's should not be allowed to recover. Both the forty-nine percent form and the fifty percent form

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CODE ANN. §4.22.010 (1973).

Courts have adopted the pure form in the following states:

Alaska, Kaatz v. State, 540 P.2d 1037 (1975); California, Nga Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Florida, Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Illinois, Alvis. v. Ribar, ____ Ill. ____, 421 N.E.2d 886 (1981); Michigan, Placek v. Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); New Mexico, Claymore v. City of Albuquerque, 20 N.M. St. B. Bull. 75 (Ct. App. Dec. 9, 1980).

12. H. WOODS, *supra* note 7, at 82.

13. Prosser, *Comparative Negligence,* 41 CALIF. L. REV. 1, 25 (1953). Dean Prosser says that the only justification for the rule is political compromise.

14. Arkansas, ARK. STAT. ANN. §27-1765 (1979); Colorado, COLO. REV. STAT. §13-21-111 (1973); Georgia, Elk Cotton Mills v. Grant, 140 Ga. 727, 79 S.E. 836 (1913) (this case combined GA. CODE ANN. §§94-703 [formerly under §66-402 and dealing with railroad actions] and 105-605 [dealing with diligence of the plaintiff] forming a comparative negligence theory applicable to all tort cases); Idaho, IDAHO CODE § 6-801 (1979); Kansas, KAN. STAT. ANN. §60-258a (1976); Maine, ME. REV. STAT. ANN. tit. 14 §156 (1980); Minnesota, MINN. STAT. ANN. §604.01 (West Supp. 1981); North Dakota, N.D. CENT. CODE §9-10-7 (1975); Utah, UTAH CODE ANN. §78-27-37 (1953 Replacement); West Virginia, Bradley v. Appalachian Power Co., ____ W. Va. ____, 256 S.E.2d 879 (1979); Wyoming, WYO. STAT. §1-1-09 (1977).

15. Hawaii, HAWAII REV. STAT. §663-31 (1976 Replacement); Massachusetts, MASS. GEN. LAWS ANN. ch. 231 § 85 (West Supp. 1981); Oklahoma, OKLA. STAT. ANN. tit. 23 § 13 (West Supp. 1980); Oregon, OR. REV. STAT. §18.470 (1979); Wisconsin, WIS. STAT. ANN. §895.045 (West Supp. 1981).

16. *See* H. WOODS, *supra* note 7, at 84, 85.

17. Connecticut, CONN. GEN. STAT. ANN. §52-572h (West Supp. 1980); Hawaii, HAWAII REV. STAT. §663-31 (1976 Replacement); Massachusetts, MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1981); Montana, MONT. REV. CODE ANN. § 27-1-702 (1979); Nevada, NEV. REV. STAT. §41.141 (1979); New Hampshire, N.H. REV. STAT. ANN. §507:7a (Supp. 1979); New Jersey, N.J. STAT. ANN. §2A:15-5.1 (West Supp. 1980); Ohio, OHIO REV. CODE ANN. §2315.19 (Page 1981); Oklahoma, OKLA. STAT. ANN. tit. 23. §13 (West Supp. 1980); Oregon, OR. REV. STAT. §18.470 (1979); Penn-

draw lines barring recovery if those lines are crossed. It could be argued that this line drawing is unreasonable.[18] The pure form does not concern itself with such lines but simply allocates fault by comparison. For this reason, the forty-nine and fifty percent forms are referred to as modified forms of comparative negligence.

B. The Mechanics of Comparative Negligence in Ohio

In adopting the "no greater than" form, Ohio has developed a modified formula for the distribution of fault. The statute is only applicable in negligence cases where contributory negligence is raised as a defense,[19] with certain employer/employee actions specifically excluded from the statute's coverage.[20] Under the statute, the trier of fact is required to make two specific findings along with its verdict.[21] In jury trials, a general verdict with interrogatories is employed.[22] The specific findings required include the total amount of damages that would be allowable had the plaintiff not been negligent as well as the percent of negligence of each party which directly and proximately caused the injury.[23] The court then uses these findings to reduce plaintiff's recoverable damages in proportion to his own negligence.[24] If the jury finds the negligence to have been greater than that of defendants, the court will find for the defendants.[25] In cases involving multiple defendants, the statute provides the following formula for determining the recovery allowable from each:

$$A\ (B \div C) = L$$

A = Damages allowable, i.e. after they are diminished by an amount proportionately equal to plaintiff's percentage of negligence which contributes to the injury.

B = Individual defendant's percentage of negligence contributing to the injury.

C = Total percentage of all defendants' negligence contributing to the injury.

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sylvania, 42 PA. CONS. STAT. ANN. §7102 (Purdon Supp. 1981); Texas, TEX. CIV. CODE ANN. tit. 42 §2212a (Vernon Supp. 1980); Vermont, VT. STAT. ANN. tit. 12 §1036 (1973); Wisconsin, Wis. Stat. Ann. §895.045 (West Supp. 1981).

18. *See* note 13 supra.
19. OHIO REV. CODE ANN. §2315.19(B) (Page 1981).
20. *Id.* at (A)(1).
21. *Id.* at (B).
22. *Id.*
23. *Id.*
24. *Id.* at (C).
25. *Id.*

L = Individual defendant's liability in dollars.[26]

C. *Legislative History of S.B. 165*

The system finally enacted is the result of legislative history stretching back a decade. About eleven years ago, the Ohio Bar Association began studying the doctrine of comparative negligence to determine the viability of its application in Ohio.[27] The General Assembly has been grappling with general comparative negligence bills since 1973.[28] This slow development was finally brought to fruition on March 21, 1980, when Governor Rhodes signed S.B. 165 into law.[29]

The bills which preceded S.B. 165 are interesting in comparison with the final bill. H.B. 174 in the 111th session and S.B. 258 in the 112th session were the bill's major predecessors.[30]

H.B. 174 differed from S.B. 165 in several ways. It utilized the forty-nine percent form as compared with the fifty percent type adopted in S.B. 165.[31] While the present statute compares the plaintiff's negligence to the combined negligence of the defendants as a whole to determine if the contributory negligence bar would apply, H.B. 174 compared the plaintiff's negligence to the negligence of each

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26. *Id.* at (A)(2). A few examples may be helpful in explaining the application of the statute:

a) P = 30% negligent; D′ = 50%; D″ = 20%
P's damages = $1000
$1000 × 70% = $700 damages recoverable by P
For D′, [50/70] × $700 = $500 liability to P
For D″, [20/70] × $700 = $200 liability to P
P will therefore be able to recover $700. D″ will not be dismissed, even though he was less negligent than P, since the causal negligence of both D's is aggregated before being compared with P's.

b) P = 60% negligent; D′ = 20%; D″ = 20%
P's damages = $7000
P will be barred from recovery since 60% is greater than 40%.

c) P = 50% negligent; D = 50%
P's damages = $7000
$7000 × 50% = $3500 damages recoverable by P.
P's damages are reduced by the proportion of his negligence and he can recover $3500. D is liable for the same amount, since P's per cent of causal negligence is not greater than D's.

27. Interview with William K. Weisenberg, Director of Government Affairs of the Ohio State Bar Association (Oct. 30, 1980).

28. H.B. 174, 110th General Assembly Reg. Sess. (1973).

29. Bull., 113th General Assembly at 598 (1979-80).

30. H.B. 174, *supra* note 28; S.B. 258, 112th General Assembly Reg. Sess. (1977).

31. *See generally* Am. H.B. 174 Status Report (as reported by House Judiciary), Legislative Service Commission, 110th General Assembly Reg. Sess. (1973) and Am. S.B. 165 Status Report, Legislative Service Commission, 113th General Assembly Reg. Sess. (1979).

defendant.[32] Special verdicts were required of juries under the amended form of the bill, a feature which was criticized as contrary to Ohio Rule of Civil Procedure 49(c).[33] This bill specified that it was not applicable to the doctrines of last clear chance or assumption of the risk,[34] matters which S.B. 165 does not directly address. The only similarity between the two bills is in the formula employed in calculating damage recovery for those found liable.[35]

S.B. 258 appears to have been the prime building block in the development of S.B. 165. Both bills were sponsored by Senator Roberto.[36] There are no substantial differences between S.B. 258 and S.B. 165 as introduced.[37]

According to both legislative and industry sources, the predecessor bills were defeated primarily by the insurance lobby.[38] Contributory negligence had proven favorable to insurance companies, since in defending suits through subrogation, the insurance company could set up the doctrine as a bar to recovery and thus a bar to the insurance company liability. Insurance companies have claimed that the imposition of comparative negligence would increase their costs of doing business and thus the cost of insurance.[39]

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32. *See* Am. H.B. 174 Status Report and Am. S.B. 165, *supra* note 31. This would have the effect of reducing the number of eligible defendants from whom a plaintiff may recover. For example, P = 30% causal negligence; D′ = 40%; D″ = 10%; D‴ = 20%. Under the H.B.174 version P would be able to seek recovery against D′ only. P's negligence was less than that of D′, but not less than that of D″ or D‴. The statute as passed would allow P to recover against all three Ds, according to their fault, since 30% is less than 40% + 10% + 20%.

33. H.B. 174, *supra* note 28; S.B. 258, *supra* note 30. OHIO R. CIV. P. 49 is divided into three sections. Section (A) specifies the use of general verdicts, section (B) allows for the use of general verdicts accompanied by answers to interrogatories when appropriate, and section (C) specifically prohibits the use of special verdicts.

34. *See* H.B. 174 Status Report (as introduced), Legislative Service Commission 110th General Assembly Reg. Sess. (1973) at 2.

35. *Compare id. with* S.B. 165, 113th General Assembly Reg. Sess. (1979).

36. *See* H.B. 174 Status Report (as introduced), Legislative Service Commission 112th General Assembly Reg. Sess. (1977) at 1, and S.B. 165 Status Report, *supra* note 31. Marcus A. Roberto (D), 18th District.

37. *Compare* S.B. 258, 112th General Assembly Reg. Sess. (1977) *with* S.B. 165, 113th General Assembly Reg. Sess. (1977). Note also those status reports cited in note 36.

38. Interviews with: Senator Marcus A. Roberto (D), 18th District (Sept. 14, 1980); Mr. William K. Weisenberg, Director of Government Affairs of the Ohio State Bar Association (Oct. 30, 1980); Mr. Herb Knox, lobbyist for the Nationwide Insurance Co. (Oct. 30, 1980).

39. Interview with Mr. Herb Knox, *supra* note 38. According to Mr. Knox, recent studies, while incomplete, have shown that the cost of insurance has not increased drastically in those states which use comparative negligence. Further, since a majority of states do use comparative negligence, the national insurance firms have altered their

S.B. 165 was introduced as an amended form of S.B. 258.[40] The forty-nine percent form was still retained and less negligent defendants were relieved from liability since the negligence of the plaintiff was still compared to that of each separate defendant instead of against the aggregate of all defendant negligence.[41] On the floor of the House, the bill was changed to a "no-greater-than" type.[42] Similarly, the wording of the statute was changed so that plaintiff negligence would be compared to aggregate defendant negligence, thus excluding fewer tortfeasors.[43]

There seems to be no single factor which assured the Act's passage. The insurance lobby presented no clear opposition to the bill,[44] although that had been the major roadblock to the bill's passage.[45] The trend toward comparative negligence in the law of other states may have helped in obtaining the bill's passage. According to the chief sponsor of the bill, Senator Roberto, the time was right for the bill's passage considering judicial inroads made into contributory negligence in Ohio as well as the trend toward accepting comparative negligence in other states.[46] Others do not believe that the judicial inroads were significant and credit the bill's passage to quick legislative action at a time when the insurance lobby was preoccupied with other projects.[47]

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overall procedures so as to comport with comparative negligence. Since national insurance companies in Ohio had already made this change, the perceived threat of a shift to comparative negligence was reduced.

40. In reviewing the files of the Legislative Service Commission, it appears that the bill's draftsmen used S.B. 258 as a guide in preparing S.B. 165 as introduced.

41. *See* S.B. 165 Status Report (as introduced), *supra* note 31.

42. Interview with Carol Pierce, Legislative Assistant to Senator Marcus A. Roberto (Nov. 6, 1980). With strong support from the bills many cosponsors, the bill made it through the legislative process with relatively few problems.

43. *Id.* Individual defendants would not be completely reduced simply because their negligence was less than that of the plaintiff. *See* note 32 *supra.*

44. *See* note 38 *supra.* These three men all agree that the insurance lobby has been very involved with this legislation and its predecessors. According to Mr. Knox, the insurance companies felt, based upon the experience of other states, that comparative negligence was not the threat which they had originally perceived.

45. Interview with Senator Marcus A. Roberto (Sept. 1980) and with Mr. William Weisenberg (Oct. 1980). The insurance lobby is apparently very strong in this state and its opinions seem to carry great influence in the General Assembly. No matter what the source of this bill's opposition, however, legislators were determined to see this bill through. Eight sponsors brought the bill to the Senate as well as the House. Am. S.B. 165 Status Report (as reported by House Judiciary), Legislative Service Commission, 113th General Assembly Reg. Sess. (1979). Senator Roberto pressed hard for its passage and Senator Valiquette apparently used her authority as Judiciary Committee chairperson to discourage testimony against the bill and pull the committee's majority behind it. Interview with Mr. Knox, lobbyist for the Nationwide Insurance Co. (Oct. 30, 1980).

46. Interview with Senator Marcus A. Roberto (Sept. 14, 1980).

47. Interview with Mr. Gordon Arnold, trial attorney with the firm of Young &

The Ohio Supreme Court has made no clear statement on its preference regarding comparative negligence.[48] However, the insurance lobby was apparently concerned that if they continued to take action against legislative proposals, the judiciary would eventually adopt comparative negligence.[49]

Most attorney groups supported the bill. The Ohio State Bar Association advised the Assembly in its drafting of the bill,[50] and members of the Ohio Academy of Trial Lawyers, judges and attorneys testified in its favor.[51] The only attorney group to oppose the legislation was the Insurance Defense Bar.[52]

The combined support of various groups, non-interference by other groups, and the experience of other states with comparative negligence appear to have influenced the passage of S.B. 165, giving Ohio a comparative negligence statute.

PROSPECTIVE OR RETROSPECTIVE APPLICATION?

A primary question which the statute poses but does not answer is whether it should be applied retroactively or prospectively. Retroactive legislation was best defined by Justice Story when he said, "upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty,

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Alexander in Dayton, Ohio (Nov. 14, 1980). In an interview with the Hon. Arthur D. Jackson, Jr., Presiding Judge of the Dayton Municipal Court (Nov. 12, 1980), the judge stated that he had heard much the same report from friends of his in Columbus. Mr. Knox, the Nationwide Insurance Co. lobbyist did admit that the insurance companies were working on other projects but said that the insurance lobby had made an affirmative decision not to oppose the bill. See notes 39 & 44 and accompanying text *supra*. Mr. William Haisey of the Legislative Service Commission stated in a November 17, 1980 interview that he has seen steam rolling before and that this bill was no example of it.

48. In the case of Baab v. Shockling, 61 Ohio St. 2d 55, 58, 399 N.E.2d 87, 88 (1980), the Court stated, "[t]his Court does not deem it necessary at this time to discuss the positive and negative aspects of the doctrine of comparative negligence, as it is our considered opinion that such a change in this area of the law should emanate from the General Assembly."

49. While this fear seems unsubstantiated by the above quote, this concern was apparently in the minds of the insurance industry. By allowing legislative adoption to go unhindered, the lobby felt it would be able to exercise greater control over the final product than if the matter had been left for the judicary. Interview with Mr. Herb Knox, lobbyist for the Nationwide Insurance Co. (Oct. 30, 1980).

50. Interview with Mr. William K. Weisenberg, Director of Government Affairs of the Ohio State Bar Association (Oct. 30, 1980).

51. Legislative files of Senator Valiquette, Chairperson of the Senate Judiciary Committee of the Ohio General Assembly (1979-80). These groups apparently pushed the purifying amendments adopted in the House. Interview with Mr. Herb Knox, lobbyist for the Nationwide Insurance Co. (Oct. 30, 1980).

52. Interview with Mr. Herb Knox, *supra* note 51.

or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."[53] The statute set June 20, 1980, as its effective date.[54] Proponents and opponents of retroactive application have very different conceptions of how this date should be applied. Those favoring prospective application have much stronger legal support. They are armed with a constitutional prohibition[55] and a legislative presumption,[56] as well as being supported by past case law in Ohio[57] and in the majority of states.[58] Proponents of retroactive application present policy arguments and the support of courts in the State of Washington.[59]

The time to which the effective date of the statute is referenced becomes very important in an argument on retroactive application.[60] Opponents of retroactive application contend that the date of injury is determinative, allowing comparative negligence actions only for injuries occurring on or after June 20, 1980.[61] However, proponents of retroactive application would argue that the controlling date is the date

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53. Society for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (applying the New Hampshire Constitution to a statute allowing the value of improvements to tenants on recoveries taken against them).

54. OHIO REV. CODE ANN. §2315.19 (Page 1981).

55. *See* note 66 and accompanying text *infra.*

56. *See* note 73 and accompanying text *infra.*

57. *See* note 78 and accompanying text *infra.*

58. *See* note 81 and accompanying text *infra.*

59. *See* note 82 and accompanying text *infra.*

60. The effect of applying the statute or not applying it would mean the difference between possible recovery by the contributorily negligent plaintiff or a bar to recovery under the doctrine of contributory negligence. As an example, D's vehicle hits P's vehicle on June 17, 1980. D was 90% causally negligent in the accident, and P was 10% causally negligent. P files suit against D for injuries and property damage on July 1, 1980. If the date of injury controls, P is barred from recovery under the contributory negligence rule. If the date of filing controls, P may recover 90% of his damages under Ohio Rev. Code § 2315.19 ("effective" June 20, 1980).

61. *See* Teague v. Backs, Case No. 80-CVE-2742 (Mun. Ct. Dayton, Ohio, 1980) (Defendant's Memorandum Opposing Application of Ohio Rev. Code § 2315.19 in an auto accident liability case). The memorandum sets forth a very complete and well reasoned presentation against retroactive application of the Act. *See also* Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979). The Chief Justice, concurring in part and dissenting in part, stated, "considerations of convenience, of utility, and of the deepest sentiments of justice militate against the retroactive application of a new rule. . . ." *Id.* at 686, 275 N.W.2d at 531, quoting from CARDOZA, THE NATURE OF THE JUDICIAL PROCESS, 149 (1921). While the Chief Justice in the dissenting portion of his opinion was speaking of adoption of comparative negligence by court rule, the reasoning would be the same in retroactive application of the statute. In effect, the argument made by this group is that a substantial period of changing from one doctrine to the other is needed to provide justice for those who have relied on the law as it was for a long period of time.

of trial or at least the date of filing.[62] This would allow comparative negligence actions for injuries which occurred prior to the effective date. Obviously, the plaintiff's attorneys will be in favor of retroactive application of the statute, thus avoiding the bar of contributory negligence, and defense attorneys will oppose retroactive application to take advantage of that bar.

The statute affords little help in determining which date is controlling. The only reference made in the statute is the effective date.[63] This term is not defined with reference to any event in a possible negligence action.

Relevant to the application of the date is the issue of when a cause of action accrues. A cause of action in fact accrues when the injury has occurred.[64] This is the date which is fixed by events and not by the parties. For this reason, it seems to be the date which rationally must be applied with the effective date. Otherwise, the parties could unreasonably control the course of the litigation to the detriment of other parties. This is in accord with the decisions of other jurisdictions which have applied new comparative negligence statutes using the date of injury as controlling for this purpose.[65]

The strongest argument against retroactive application is the fact that retroactive laws are generally unconstitutional in Ohio.[66] Ohio

62. Interview with the Hon. Arthur D. Jackson, Jr., Presiding Judge of the Dayton Municipal Court (Nov. 12, 1980). The judge pointed out that prospective application of the statute would cause a dual standard to be applied by the courts until the statute of limitations had run on all cases prior to the effective date. This was seen as a burden on the courts. Judge Jackson also expressed the opinion that he could not believe the legislature intended to pass this statute and not leave it effective in all cases for a two year period until the statute had run on possible contributory actions. There is logic to this approach. The legislature has in effect found modified comparative negligence to be superior to contributory negligence. It would seem counter productive, then, to still be applying the contributory negligence approach two years later. When the one has been recognized as more in tune with public policy, why afford such a long period of conversion? Note though, that upon full consideration of the legal and policy considerations involved, the judge decided for prospective application of the statute. Teague v. Backs, Case No. 80-CVE-2742 (Mun. Ct. Dayton, Ohio, 1980).

63. OHIO REV. CODE ANN. § 2315.19 (Page 1981).

64. Squire v. Guardian Trust Co., 79 Ohio App. 371, 72 N.E.2d 137 (1947) (dealing with the time an action accrued against bank officers for violation of their fiduciary duty to the bank). For a more indepth analysis; *see* 34 OHIO JUR. 2d *Limitations on Actions* §§ 8-86 (1958); 1 OHIO JUR. 3d *Actions* § 76 (1977).

65. *E.g.*, Peters v. Milwaukee Elec. Ry. & Light Co., 217 Wis. 481, 259 N.W. 724 (1935). *But see* Denicola v. Providence Hosp., 57 Ohio St. 2d 115, 387 N.E.2d 231 (1979) (date of trial held controlling in applying witness competency statute). This decision presents a procedural question for judicial administration and not a change in substantive rights for the parties.

66. OHIO CONST. art. II, § 28.

courts have made use of Justice Story's definition to determine whether the statute falls within the constitutional prohibition.[67] The new comparative negligence statute would come within the definition since contributory negligence has been defined as a vested right in Ohio.[68]

Among several exceptions to the constitutional bar to retroactive legislation, one deals with remedial statutes. "Section 28, Article II of the Ohio Constitution . . . has no reference to laws of a remedial nature providing rules of practice, courses of procedure, or methods of review."[69] It has been held that statutes adjusting the enforcement of a current legal right by affording a new remedy come within the exception.[70] The comparative negligence statute would seem to afford a new

67. Rairden v. Holden, 15 Ohio St. 207 (1864) (suit concerning statute regulating actions on the bond of administrators and executors); State ex rel. Outcalt v. Guckenberger, 134 Ohio St. 457, 17 N.E.2d 743 (1938) (involving a statute which provided a grace period during which tax penalties could be remitted upon proper payment of the tax due); *see*, 10 OHIO JUR. 2d *Constitutional Law* § 568 (1954).

68. Hill v. Pere Marquette R.R., 31 Ohio C.C. Dec. 282 (1912), *aff'd*, 88 Ohio St. 599, 106 N.E. 1061 (1913) [hereinafter cited as *Hill*]. The Court stated, "[i]f the railroad company immediately after the injury had a good defense under the then existing law by reason of the negligence of Hill having contributed to his death, the right to that defense was a vested right which could not thereafter be taken away by statute." 31 Ohio C.C. Dec. 282 at 285. The exception establishes a distinction between legislation which is procedural and that which is substantive. Procedural legislation, which also encompasses remedial legislation, may be applied retrospectively while substantive legislation must be applied prospectively. An interesting case involving this exception is Cassaro v. Cassaro, 50 Ohio App. 2d 368, 363 N.E.2d 753 (1976) (the statute involved in effect allowed a no fault divorce when a couple has been separated for two years. The court applied the statute retroactively based mainly on the legislative intent reasoning expressed by Judge Jackson in note 62 *supra*, that is, the legislature could not have meant the establishment of a dual standard and must have intended swift implementation). It has been argued that the statute was strictly procedural. Teague v. Backs, Case No. 80-CVE-2742 (Mun. Ct. Dayton, Ohio, 1980) (Defendant's Memorandum Opposing Application of Ohio Rev. Code § 2315.19). A good argument could be made, however, that this was a substantive change. The court may well have conveniently side-stepped the constitutional prohibition in applying the statute retrospectively.

69. In re Nevius, 174 Ohio St. 560, 564, 191 N.E.2d 166, 169 (1963) the issue here was whether to apply the procedure for reinstatement of a disbarred attorney in effect at the time of disbarment or at the time of the reinstatement application. The court applied the rule to disciplinary orders issued prior to its adoption.

70. *E.g.*, Cincinnatti v. Backmann, 51 Ohio App. 108, 199 N.E. 853 (1935). The court here refused to apply the statute retroactively since it created a new right in certain additional beneficairies who gained that status under the act. Based upon the reasoning used in this decision it is doubtful that this court would have considered the comparative negligence statute remedial in nature. A classification of remedial or substantive is at times difficult to make but it would seem that error must be made in the direction of holding the statute substantive and thus not applying it retroactively. For a more complete list of cases, see 17 OHIO JUR. 3d *Constitutional Law* § 557 (1980).

remedy by doing away with the contributory negligence bar to recovery, thus surmounting the constitutional prohibition. However, the Ohio Supreme Court has said that, "[But] where vested rights are divested or destoryed, although the statute professes or purports to affect remedies only, it is unconstitutional."[71] That contributory negligence was a vested right in Ohio has already been established.[72] Thus, the retroactive application of the comparative negligence statute does not seem to fall within an exception to the constitutional bar.

Coexistent with the constitutional prohibition of retroactivity is a statutory presumption that laws will be applied prospectively unless expressly made retrospective by the legislature.[73] The comparative negligence statute was not made expressly retroactive. This presumption should be considered along with the assumption that the legislature knew of the constitutional prohibition to retroactive legislation and how the courts had applied this prohibition. In the unlikely event that the statute is found to be remedial and not substantive, it could be argued that the statutory presumption does not apply. However, the constitutional prohibition as applied in *Magruder v. Esmay*[74] would still apply as a bar to retroactive application, since the statute would divest a vested right. Proponents of retroactive application may argue that there is a logical presumption that the legislature did not intend the creation of a dual standard to carry through the running of the statute of limitations.[75] They may argue that the dual application would be contrary to the public interest and the smooth operation of the judiciary.[76] While this presumption may have logical support, it has no legal support and it would seem to be outweighed by the constitutional prohibition as well as the legislative presumption.[77] The legislature was aware of, but did nothing to overcome, its own countervailing legislative presumption.

To some degree, the Ohio courts have already dealt with the issue of retroactive application of comparative negligence. This issue was first presented in connection with the slight-gross comparative negligence system created by a 1908 railroad employer/employee liability statute.[78] The court held that the statute was not applicable to

71. Magruder v. Esmay, 35 Ohio St. 221, 238 (1878) (an act establishing what constituted proof of prossession in favor of the buyer at a tax sale was considered to be substantive and not simply to a law regulating evidence).
72. *See* note 68 and accompanying text *supra*.
73. OHIO REV. CODE ANN. § 1.48 (Page 1978).
74. 35 Ohio St. 221 (1878).
75. *See* note 62 *supra*.
76. *See* note 62 and accompanying text *supra*.
77. *Id.*
78. OHIO REV. CODE ANN. §§ 4973.08, 4973.09 (Page 1977).

causes of action accruing before passage of the statute, which by its terms was also its effective date.[79] More importantly, the statute here in question has been held to apply prospectively by several Ohio trial courts.[80] This is in keeping with the decisions of a majority of states which have applied their comparative negligence statutes prospectively, using the date of injury as controlling when the statute did not specifically address the problem.[81] Washington has been the only state to apply its comparative negligence retrospectively where the statute was not specific.[82]

Based upon the constitutional and statutory impediments to retrospective legislation, the lack of intent by the legislature to create a retroactive statute, case law in other states, and decisions already made in this state, it seems clear that the statute will be applied prospectively by Ohio courts, using the date of injury as controlling.

LAST CLEAR CHANCE

The doctrine of last clear chance was generally accepted throughout the states as a modification to the rule of contributory negligence.[83] A provision abolishing last clear chance was included in a bill which preceded S.B. 165, but excluded from the Act as passed;[84] clearly the General Assembly has left the fate of this doctrine to the

79. OHIO REV. CODE ANN. § 4113.07 (Page Supp. 1980); Hill v. Pere Marquette R.R., 31 Ohio C.C. Dec. 282 (1912), *aff'd*, 88 Ohio St. 599, 106 N.E. 1061 (1913). *See* note 65 and accompanying text *supra*.

80. Teague v. Backs, Case No. 80-CVE-2742 (Mun. Ct. Dayton, Ohio 1980); McLeron v. Seitz, Case No. 79-1799 (C.P. Montgomery County, Ohio 1980); B & O. R.R. v. Maxwell Co., 18 Ohio Op. 3d 247 (C.P. Hamilton County, Ohio 1980) (prospective and applies only to claims arising after June 20, 1980).

81. *E.g.*, Peters v. Milwaukee Electric Ry. & Light Co., 217 Wis. 481, 259 N.W. 724 (1935) (injury to prospective passenger of street railroad hit by street car). *See also* Annot., 37 A.L.R.3d 1438 (1971). V. SCHWARTZ, *supra* note 3; The Ohio Legal Center Institute Reference Manual For Continuing Legal Education, 118 Comparative Negligence 1.08 & 1.09 (1980).

82. Godfrey v. State, 84 Wash. 2d 959, 530 P.2d 630 (1975). In this case, however, the Washington Court does not consider contributory negligence a vested right as Ohio courts have.

83. The doctrine's origin is the English case of Davies v. Mann, 152 Eng. Rep. 588 (1842) (plaintiff negligently left his ass in the roadway, and defendant's agent negligently drove over the animal, killing it. Held that, although plaintiff's negligence contributed to the injury, the driver could have avoided it had he exercised proper care, and therefore plaintiff was allowed full recovery of damages). This doctrine was accepted generally, until comparative negligence arrived. *See* note 95 *infra*. Professor Schwartz has criticized, "the doctrine has been in search of a lucid rational ever since [the decision in *Davies*]." V. SCHWARTZ, *supra* note 3, at 129. Yet it took a mere twelve years for the Ohio Supreme Court to adopt last clear chance. Kerwhacker v. Cleveland C.& C.R.R., 3 Ohio St. 172 (1854).

84. *See* note 34 and accompanying text *supra*.

judiciary. In order to resolve the issue of whether to retain last clear chance under comparative negligence, it is necessary to understand the doctrine's application under contributory negligence.

As adopted in Ohio, the doctrine is where a plaintiff has caused himself or his property to be placed in a perilous situation, he may recover notwithstanding his negligence if, after becoming aware of the plaintiff's situation, the defendant fails to exercise ordinary care to avoid injuring him.[85] The Ohio Supreme Court has required a chronological standard for the doctrine, in that "it applies only where there is negligence of the defendant subsequent to, and not contemporaneous with, negligence by the plaintiff. . . ."[86] The court concluded that the plaintiff's negligence did not directly contribute to the injury, and therefore it is not a proximate but merely a remote cause of the injury.[87] If this chronological standard is included in the Ohio courts' theory of proximate cause, it is a fair assumption that the words "proximately caused" in section 2315.19 carry the same meaning.[88] Thus, last clear chance would be retained in the words of the Act.

The conclusion that a defendant's subsequent negligence renders the plaintiff's negligence a remote cause cannot withstand analysis in spite of its frequent incantation by the Supreme Court.[89] It cannot be reconciled with the contributory negligence rule itself as stated by the court in *Kerwhacker*:

> But where the injury arises neither from the malice, design nor wanton and gross neglect, but simply the neglect of ordinary care and caution, and the parties are mutually at fault, the negligence of both being the *immediate* or *proximate* cause of the injury, it would seem that a recovery is fairly denied, upon the ground, that the injured party must be taken to have brought the injury upon himself.[90]

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85. *E.g.*, Drown v. Northern Ohio Traction Co., 76 Ohio St. 234, 81 N.E. 326 (1907); Cleveland Ry. v. Masterson, 126 Ohio St. 42, 183 N.E. 873 (1932).

86. Drown v. Northern Ohio Traction Co., 76 Ohio St. 234, 81 N.E. 326 (1907) (from the syllabus by the court).

87. *Id.* at 248, 81 N.E. at 328.

88. OHIO REV CODE ANN. § 2315.19(B) (Page 1981).

89. In nearly every case which involves the issue of last clear chance, the Ohio Supreme Court will state the chronological formulation of the doctrine, followed by the proximate cause fomulation. *E.g.*, Cleveland Ry. v. Masterson, 126 Ohio St. 42, 183 N.E. 873 (1932).

90. Kerwhacker v. Cleveland C.&C.R.R., 3 Ohio St. 172, 188 (1854) (emphasis in original). Although this case was decided more than a century ago, the requirement that plaintiff's negligence be a proximate cause of the injury for contributory negligence to apply is still the law in Ohio. OHIO REV. CODE ANN. § 2315.19(A)(1) (Page 1981).

If a plaintiff's negligence is not a proximate, but merely a remote cause of his injury, it is not a proper case to apply the last clear chance doctrine. Instead, the decision should show that the plaintiff was not contributorily negligent in the first instance. Apparently when the court uses this "proximate-remote" phrase, it merely concludes that defendant is liable, not that subsequent negligence is an element in proximate cause.

Those who favor retaining last clear chance through the language of section 2315.19 may look to other Ohio Supreme Court opinions for support. The court has stated that, under the contributory negligence rule, a plaintiff's negligence must be a proximate cause of his injury in the same sense in which the defendant's negligence must be a proximate cause in order to allow the plaintiff a right of action initially.[91] Yet when Ohio courts speak of proximate cause in the sense of a defendant's negligence giving rise to a cause of action, the courts do not consider the time element so crucial to proximate cause which overcomes contributory negligence on the plaintiff's part.[92] In other words, in a negligence action where a defendant claims contributory negligence as a defense, the fact that the plaintiff had an opportunity to avoid the accident subsequent to the defendant's negligence would not resolve the issue of liability. The fact that the defendant had such an opportunity, however, does resolve the issue of liability. Thus, proximate cause which attaches liability to a defendant's negligence is different in spite of the fact that the courts say they are to be applied in the same manner.

In Ohio, the last clear chance doctrine is not merely proximate

91. Schweinfurth v. Cleveland, C.C.& St. L.R.R., 60 Ohio St. 215, 54 N.E. 89 (1899). For many years the Ohio courts modified this standard by instructing juries that contributory negligence applied when a plaintiff's negligence directly and proximately contributed to his injury "in the slightest degree." Chesrown v. Bevier, 101 Ohio St. 282, 284, 128 N.E. 94, 94 (1920). Such a modified instruction has been held to constitute prejudicial error, however, in a decision which reaffirmed the holding in *Schweinfurth, supra*. Bahm v. Pittsburgh & L.E.R.R., 6 Ohio St. 2d 192, 217 N.E.2d 217 (1966).

92. The many elements of proximate cause which attach liability to a defendant's negligence include: That cause which in a natural and continued sequence contributes to produce the results. Wymer-Harris Construction Co. v. Glass, 122 Ohio St. 398, 171 N.E. 857 (1930); that cause which, unbroken by any efficient, intervening cause, produces the injury. Conor v. Flick, 64 Ohio App. 259, 28 N.E.2d 657 (1940); that cause, without which the result would not have occurred. Piqua v. Morris, 98 Ohio St. 42, 120 N.E. 300 (1918); the first direct cause producing the injury. Mancuso v. Cleveland Ry., 23 Ohio App. 493, 155 N.E. 243 (1926). It would be impossible to list all elements of proximate cause. It is clear that the Ohio courts look to the directness of the cause in many different terms, but the element of time is rarely, if ever, mentioned as on of them. It is not a substantial consideration for the courts unless the span of time is substantial.

cause extended to a plaintiff's conduct, as is suggested by the Ohio Supreme Court.[93] Nothing in the Ohio courts' opinions of ordinary proximate cause would suggest that liability is decided by the negligence which occurred last. Thus, it cannot be said that the notion of proximate cause is the basis of the last clear chance doctrine. This is important, because if the chronological formulation of last clear chance was an element of proximate cause, it would apply to actions under section 2315.19 since the Act itself only requires liability when the party's negligence is a proximate cause of the injury.[94] Since this time element is a substantial factor in an analysis of proximate cause only when last clear chance is an issue, it cannot be assumed that proximate cause under section 2315.19 includes such a time element. The fact that the time element of last clear chance does not fit into an ordinary analysis of proximate cause speaks against retaining the doctrine under section 2315.19.

The argument against retaining last clear chance under a comparative negligence scheme is very strong and should outweigh any argument favoring retention in the Ohio courts. Two reasons often cited by courts and legal commentators are given by the Supreme Court of Alaska (footnote by the Court omitted):

> It is recognized by nearly all who have reflected on the subject that the last clear chance doctrine is, in the final anaylsis, merely a means of ameliorating the harshness of the contributory negligence rule. Without the contributory negligence rule there would be no need for the palliative doctrine of last clear chance. To give continued life to that principle would defeat the very purpose of the comparative negligence rule-the apportionment of damages according to the degree of mutual fault.[95]

An overwhelming majority of the comparative negligence states which have considered the issue have abolished the doctrine for one or both of the above reasons.[96] Finally, the National Conference of Commis-

93. *See* note 86 and accompanying text *supra*.

94. OHIO REV. CODE ANN. § 2315.19(B)(2) (Page 1981).

95. Kaatz v. State, 540 P.2d at 1050 (Alaska 1975). *See generally* Cushman v. Perkins, 245 A.2d 846 (Maine 1968); Nga li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P2d 1226, 119 Cal. Rptr. 858 (1975); W. PROSSER, TORTS 428, 433 (4th ed. 1971); V. SCHWARTZ, *supra* note 3.

96. *See* H. WOODS, *supra* note 7. Out of nineteen states under the comparative fault rule which have clearly spoken to the issue, sixteen abolished last clear chance outright. Fifteen states have adopted comparative negligence but have as yet to consider the issue. It is not clear whether Tennessee can be termed a comparative negligence state, *see* Bejach v. Colby, 141 Tenn. 686, 214 S.W. 869 (1919), but it has retained last clear chance. Smith v. Craig, 484 S.W.2d 549 (App., Western Section, 1972). Finally, Nebraska and South Dakota both have slight-gross comparative negligence statutes, and both have clearly retained last clear chance. Bush v. James,

sioners on Uniform Laws, in approving a comparative fault act, suggests apportionment based on fault regardless of last clear chance.[97]

Those states which have retained the doctrine under a comparative negligence system have done so with a minimum of analysis.[98] Only the Georgia court opinions have mentioned any reason for retention of the doctrine, saying that last clear chance is merely the doctrine of proximate cause under another name.[99] This reasoning is not valid in Ohio, as earlier discussed.[100] If there is a sound reason for retaining last clear chance under a comparative negligence rule, it continues to escape both courts and commentators alike.

It is true that the last clear chance doctrine has existed in Ohio for more than a century, and that section 2315.19 does not specifically abolish the doctrine. However, the Ohio courts can modify or abolish the doctrine since the courts originally adopted it.[101] The need for last clear chance as ameliorating the harshness of contributory negligence disappears under comparative negligence, and if the rationale disappears, so should the rule. Finally, allowing a plaintiff full recovery where his negligence contributes to his injuries defeats the purpose of section 2315.19, namely apportionment of damages when the negligence of both parties contributes to the injuries. For these reasons, Ohio should judicially abolish the last clear chance doctrine. The result would be a uniform application of proximate cause under section 2315.19 to all parties, and the proximate cause standard would be that which has been traditionally applied in ordinary negligence actions.

ASSUMPTION OF RISK

In Ohio, assumption of risk is a defense which applies only where a plaintiff had full knowledge of a condition which is patently dangerous to him, and he voluntarily exposed himself to the hazard created by the risk.[102] Under common law, this rule acts as a bar to a plaintiff's

152 Neb. 189, 40 N.W.2d 667 (1950); Nielsen v. Richman, 68 S.D. 104, 299 N.W. 74 (1941).

97. UNIFORM COMPARATIVE FAULT ACT § 1(A) (1977).

98. Excluding the slight-gross states, Georgia, Mississippi and West Virginia are the only comparative negligence states to retain last clear chance outright. Mississippi and West Virginia have done so by stating that the doctrine still applies, without stating any reason therefore. *See* Young v. Columbus & G.R.R., 165 Miss: 287, 147 So. 342 (1933); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979).

99. *E.g.*, Russell v. Pitts, 105 Ga. App. 147, 123 S.E.2d 708 (1961); Wright v. Concrete Co., 107 Ga. App. 190, 129 S.E.2d 351 (1960).

100. *See* note 92 and accompanying text *supra*.

101. Kerwhacker v. Cleveland, C.&C.R.R., 3 Ohio St. 172 (1854).

102. *E.g.*, Briere v. Lathrop Co., 22 Ohio St. 2d 166, 258 N.E.2d 597 (1970); Justice v. Shelby Ice & Fuel Co., 18 Ohio App. 2d 197, 248 N.E.2d 195 (1969).

recovery notwithstanding negligence on the part of the defendant.[103] Therefore, as under last clear chance, to retain the rule under comparative negligence presents the inconsistent result of a bar to recovery where the statute may demand apportionment of damages according to fault. Unlike last clear chance, assumption of risk originated independtly of the contributory negligence rule. It has been distinguished from, although it overlaps with, contributory negligence.[104] This indicates that the state courts cannot completely reject the assumption of risk defense merely because the legislature has modified the contributory negligence rule. It is necessary to analyze the nature of assumption of risk in order to grasp the impact section 2315.19 will have on the defense.

Initially, assumption of risk must be put into two categories, express and implied. Parties may expressly agree that A is relieved of any duty of reasonable care to B, and therefore A shall not be liable for any resulting injury to B although A's conduct is otherwise negligent and caused B's injury. In these circumstances, A has no duty of care in regard to B where the agreement is applicable, and therefore cannot be guilty of negligence in regard to B. It is generally agreed among tort scholars[105] and state courts[106] that such an agreement should bar plaintiff's recovery, in spite of the fact that both would abolish or modify implied assumption of risk.[107] Therefore, Ohio will likely retain express assumption of risk as a bar to a plaintiff's recovery.

Implied assumption of risk,[108] on the other hand, will cause controversy under section 2315.19. Because there was no practical reason to distinguish between assumption of risk and contributory negligence before the advent of comparative negligence, the two defenses began to overlap.[109] Since assumption of risk is not affected by the language of section 2315.19, Ohio courts may bar recovery where a plaintiff knew of a risk and voluntarily exposed himself to it. Yet when this plaintiff's conduct is unreasonable, he has been contributorily

103. *E.g.*, Masters v. New York Cent. R.R., 147 Ohio St. 293, 70 N.E.2d 898 (1947); Palmer v. Holthaus, 20 Ohio App. 2d 78, 251 N.E.2d 701 (1969).

104. 39 OHIO JUR. 2d, *Negligence* §83 (1959).

105. W. PROSSER, *supra* note 95, *Assumption of Risk* §68; V. SCHWARTZ, *supra* note 3, § 9.2; F. HARPER & F. JAMES, THE LAW OF TORTS, 191 (1956); UNIFORM COMPARATIVE FAULT ACT, 1(B) (1977).

106. *See, e.g.*, Wilson v. Gordon, 354 A.2d 398 (Me. 1976); Lyons v. Redding Constr. Co., 83 Wash. 2d 86, 515 P.2d 821 (1973).

107. *See* notes 116, 117 and accompanying text *infra*.

108. Hereinafter "assumption of risk" will mean implied assumption of risk only.

109. An example of a court's indifference as to distinguishing between the two defenses can be found in Packard v. Quesnel, 112 Vt. 175, 22 A.2d 167 (1941).

negligent, and the case proceeds according to section 2315.19. To cope with this overlap problem, Ohio courts are certain to consider how assumption of risk has been handled in other states.

The approach taken by Harper and James has greatly influenced a majority of states which have considered assumption of risk under comparative negligence.[110] Harper and James divide assumption of risk into its primary and secondary sense.[111] In its primary sense, the defense is in fact an assertion that the defendant owed no duty of care to the plaintiff.[112] In such a case, a lack of duty indicates no liability on the part of the defendant regardless of whether plaintiff's conduct was reasonable.[113] In its secondary sense, where a plaintiff deliberately encounters a risk created by the defendant's breach of duty, the plaintiff's recovery is barred where his conduct was unreasonable. This amounts to a form of contributory negligence.[114] Thus the authors conclude that assumption of risk simply duplicates the concepts of defendant's duty and contributory negligence.[115] Therefore, it adds nothing to the law except confusion, and should be abolished.[116]

Sixteen comparative negligence states have followed the rationale of Harper and James and of these, six have adopted the primary-secondary approach precisely as described.[117] In these states the language of assumption of risk does not exist, and if a plaintiff's conduct is unreasonable then comparative negligence applies.[118] Where a plaintiff's conduct is reasonable contributory negligence is not an issue but the plaintiff still bears the burden of proving a duty of care between himself and the defendant.[119] The other ten states have not adopted the primary-secondary approach but, convinced that the assumption of risk defense is merely duplicative and confusing, the states have abolished the defense by stating that only comparative

110. F. HARPER & F. JAMES, *supra* note 105, § 21.1. Several states have adopted comparative negligence but have not spoken conclusively to this issue as of this writing. Included here are Colorado, Idaho, Michigan, Montana, Nevada, Pennsylvania and West Virginia.

111. F. HARPER & F. JAMES, *supra* note 105, § 21.1.

112. *Id.*

113. *Id.*

114. *Id.*

115. F. HARPER & F. JAMES, *supra* note 105, § 21.8.

116. *Id.*

117. Leavitt v. Gillaspie, 443 P.2d 61 (Alaska 1968); Nga li v. Yellow Cab Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977); Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971); Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959); Renner v. Kinney, 231 Or. 553, 373 P.2d 668 (1962).

118. *Id.*

119. *See Id.*

negligence shall apply.[120] Of course, it only applies where a plaintiff's conduct was unreasonable and the plaintiff still bears the burden of showing an existing duty of care. Thus, the practical effect is the same in these states as the six mentioned above, although it is often not stated in such terms.[121]

A group of five states[122] follow the rationale stated by Prosser,[123] who does not share the extreme distaste for assumption of risk shown by Harper and James. Prosser also divides the defense into reasonable and unreasonable, and agrees that the latter is no more than a form of contributory negligence.[124] Prosser believes, however, that when the defense is abolished and the issue is shifted to one of duty under the primary sense, plaintiffs will suffer an uncalled-for procedural disadvantage.[125] Here a plaintiff must show he has not relieved the defendant of his duty of care.[126] Under assumption of risk, once the duty is shown, the defendant bears the burden of proving the plaintiff relieved him of his duty.[127] Therefore Prosser favors retaining the assumption of risk as a defense, at least in its primary sense.[128]

Under the approaches of Harper & James and Prosser, then, assumption of risk is either abolished completely or divided into that which overlaps contributory negligence and that which does not overlap. As a third approach, seven states retain assumption of risk as a complete defense without dividing it.[129] These states distinguish

120. Bulatao v. Kauai Motors, Ltd., 49 Haw. 1, 406 P.2d 887 (1965), *reh. den.*, 49 Haw. 42, 408 P.2d 396 (1965); Smith v. Blakely, 213 Kan. 91, 515 P.2d 1062 (1973), *reh. den.*, Nov. 10, 1973 (abolished in all except master-servant situations); Wilson v. Gordon, 354 A.2d 398 (Me. 1976); Bolduc v. Crain, 104 N.H. 163, 181 A.2d 641 (1962); Wentz v. Deseth, 221 N.W.2d 101 (N.D. 1974); Farley v. M.M. Cattle Co., 529 S.W.2d 751 (Texas 1975); Lyons v. Redding Constr. Co., 83 Wash. 2d 86, 515 P.2d 821 (1973); McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962); Ford Motor Co. v. Arguello, 382 P.2d 886 (Wyo. 1963); Connecticut has effected the same result by statute, *see* CONN. GEN. STAT. ANN. § 52-572(h) (West Supp. 1977).

121. *Id.*

122. Braswell v. Economy Supply Co., 281 So. 2d 669 (Miss. 1973), *reh. den.*, Sept. 11, 1973; Sunday v. Stratton Corp., 136 Vt. 293, 390 A.2d 398 (1978). Arkansas has effected the same result by adopting a statute similar to the Uniform Comparative Fault Act. ARK. STAT. ANN. §27-1763 (amended 1975); two other states have effected this result by statute, N.Y. CIV. PRAC. LAW § 1411 (McKinney, 1976); UTAH CODE ANN. §78-27-37 (1977).

123. *See* W. PROSSER, *supra* note 95, § 68.

124. *Id.* at 441.

125. *Id.* at 455.

126. *Id.*

127. *Id.*

128. *Id.*

129. Wright v. Concrete Co., 107 Ga. App. 190, 129 S.E.2d 351 (1962); Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133 (1971); Landrum v. Roddy, 143

assumption of risk entirely from contributory negligence.[130] Assumption of risk is distinguishable from contributory negligence in that the former is determined by inquiry as to the plaintiff's knowledge or subjective awareness, whereas the latter is determined by the objective reasonable man standard.[131] There is, therefore, no overlap of the two defenses.

It is likely that the Ohio courts will follow either the second or third approach, rather than the first approach, in spite of its majority status. The states which follow the first approach reject assumption of risk because it merely duplicates other concepts already existing in tort law, and it only adds confusion to the law. Ohio courts have shown no such distaste for assumption of risk and little confusion. Prosser's argument that the defense is not merely duplicative of duty is convincing.[132] The result is likely to be procedural hardship for the plaintiff when he attempts to show duty on the part of the defendant.

Regarding the second and third approaches, assumption of risk in Ohio gives a basis to apply either approach. The Supreme Court of Ohio has recognized that there are times when the two defenses are indistinguishable and are both present in the same case.[133] The Supreme Court may now sense the need to divide assumption of risk because where a plaintiff is unreasonable, the claim is contributory negligence and section 2315.19(B) applies. On the other hand, Ohio has recognized that the defenses are not identical and are distinguishable in most cases.[134] The Supreme Court may decide to follow this basis for distinguishing the defenses and keep them entirely separate. Neither approach seems to have any substantial advantage over the other. It may be argued that the language of section 2315.19 requires adoption

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Neb. 934, 12 N.W.2d 82 (1943); Miller v. Baken Park, Inc., 84 S.D. 624, 175 N.W.2d 605 (1970); Kennedy v. Providence Hockey Club, Inc., ____R.I.____, 376 A.2d 329 (1977). It is not clear whether Tennessee can be classified as a comparative negligence state, but it has retained assumption of risk, O'Brien v. Smith Bros. Engine Rebuilders, Inc., ____Tenn. App.____, 494 S.W.2d 787 (1973). Finally, Oklahoma has retained the defense by statute, OKLA. STAT. tit. 23 §12 (Supp. 1975).

130. *Id.*

131. Langlois v. Allied Chem. Co., 258 La. 1067, 249 So. 2d 133 (1971); RESTATEMENT (SECOND) OF TORTS 496D (1965).

132. *See* W. PROSSER, *supra* note 95, at 455.

133. Centrello v. Basky, 164 Ohio St. 41, 128 N.E.2d 80 (1955).

134. Porter v. Toledo Terminal R.R., 152 Ohio St. 463, 90 N.E.2d 142 (1950). Contributory negligence is applied under an objective standard, while assumption of risk is under a subjective standard. *See* note 102 and accompanying text *supra*. This requirement of subjective awareness has been rarely relaxed, and only to the extent where a risk is so readily apparent to the plaintiff himself that he will not be believed if he claims not to have known of it. Justice v. Shelby Ice & Fuel Co., 18 Ohio App. 2d 197, 248 N.E.2d 195 (1969).

of the second approach as opposed to the third. The Act states "the contributory negligence of a person does not bar the person or his legal representative from recovering damages. . . ."[135] Under the third approach, distinguishing the two defenses may prove difficult in practice. If this approach is adopted, and a court bars recovery based on assumption of risk which is in fact a form of contributory negligence, the court may breach the terms of section 2315.19. This argument suggests that Ohio courts should follow the second approach for the sake of avoiding potential conflict.

STRICT PRODUCTS LIABILITY

Another area of the law certain to be affected by section 2315.19 is products liability. In recent years, increased litigation in the products liability field has caused a similar surge in the number and complexity of issues raised in this field. For purposes of this note, however, only a general background on products liability law in Ohio will be reviewed to gain insight into the effects section 2315.19 may have in this area.[136]

Products liability is defined as "the liability of a seller or manufacturer of a product for personal injuries, death, or property damage resulting from the use, storage or consumption of a product."[137] Traditionally, Ohio courts recongized two distinct causes of action for injuries caused by products; negligence[138] and breach of warranty.[139] The former is rooted solidly in tort law and is based upon the right not to be injured through the fault of another.[140] The latter comes from the law of sales and is applied under the provisions of the Uniform Commercial Code as adopted in Ohio.[141] These were the only two causes of action against the producer or seller available in Ohio to a

135. OHIO REV. CODE ANN. § 2315.19(A)(1) (Page 1981).

136. The insight will have to be gained without the benefit of the General Assembly's assistance, since the state legislature did not consider the effect this Act might have on products liability. A representative of the Act's principle authors, the Ohio Bar Association, has stated that this was done purposely, because legislation on products liability and comparative negligence is pending. Interview with William K. Weisenberg, Director of Government Affairs of the Ohio State Bar Association (Oct. 30, 1980). *See* note 158 and accompanying text *infra*.

137. 48 OHIO JUR. 2d *Sales* §149, at 307 (1966).

138. *E.g.*, Landon v. Lee Motors, Inc., 161 Ohio St. 82, 118 N.E.2d 147 (1954); Sicard v. Kremer, 133 Ohio St. 291, 13 N.E.2d 250 (1938).

139. Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958). It must be noted that Ohio law recognises a distinction between breach of an express warranty and of an implied warranty. However, this distinction is not pertinent to this article.

140. Sicard v. Kremer, 133 Ohio St. 291, 13 N.E.2d 250 (1938).

141. Compton v. M. O'Neil Co., 101 Ohio App. 378, 139 N.E.2d 635 (1955).

person injured by a product until the Ohio Supreme Court decided *Lonzrick v. Republic Steel Corp.*[142]

In *Lonzrick,* the Ohio Supreme Court recognized breach of warranty in tort as a third cause of action under products liability.[143] This placed Ohio law on a course parallel to strict products liability as adopted by the American Law Institute[144] and other states.[145] This is because the decision essentially based the breach of warranty action in tort law, thereby avoiding the privity requirement in breach of warranty actions under contract law.[146] The cause of action created by the *Lonzrick* court, however, was not defined as thoroughly as that of the Restatement (Second) of Torts.[147] The *Lonzrick* decision, therefore, led to ten years of confused attempts to fill in the gaps by applying contract and negligence principles to this new cause of action.[148]

These problems were resolved by the Ohio Supreme Court in *Tem-*

142. 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

143. *Id.*

144. RESTATEMENT (SECOND) OF TORTS §402A (1965).

145. *See* Strict Liability Comes of Age in Ohio: Almost, 11 Akron L. Rev. 679 (1978) (citing the Chart of Strict Liability, Products Liability Reporter (CCH) ¶ 4060 (1977)).

146. Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

147. According to the *Lonzrick* court, in a breach of warranty in tort action plaintiffs must show that there was a defect in the product manufactured or sold by the defendant, that the defect existed at the time defendant sold the product, that the defect was the direct and proximate cause of plaintiff's injuries, and that plaintiff at the time he was injured was in a place where his presence was reasonably to be acticipated by the defendant. RESTATEMENT (SECOND) OF TORTS §402A further requires that the defendant be engaged in the business of selling such a product, and that the product reaches the user or consumer without substantial change in the condition in which it is sold. This section of the Restatement also includes extensive comments which facilitate analysis under the section, a feature lacking under Ohio's breach of warranty in tort cause of action.

148. An example is the statute of limitations applicable to the new cause of action. This issue appeared to be settled when the Ohio Supreme Court applied OHIO REV. CODE §2305.10 (limiting the period to two years in actions for bodily or personal property injuries) to breach of warranty in tort actions. United States Fidelity & Guaranty Co. v. Truck & Concrete Equip. Co., 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970). This forced Ohio courts to rule on whether a case before it was an action in tort or contract, not a simple task when the two are virtually indistinguishable under such a cause of action. The issue continued to be litigated in Federal Courts applying Ohio law. Mahalsky v. Salem Tool Co., 461 F.2d 581 (6th Cir. 1972). *See also* Ohio Casualty Ins. Co. v. Ford Motor Co., 502 F.2d 138 (6th Cir. 1974) (held in the lower court that the real purpose of the action was for personal injury and property damage, and therefore applied a two year statutory limit. On appeal, the circuit court reversed, holding the action arose under an implied indemnity contract, and so a six year limit applied). Had the Supreme Court of Ohio adopted § 402A in the first instance, distinguishing an action under that section and an action under breach of warranty in contract would have been a simple matter.

ple v. Wean United, Inc.[149] The Court recognized that there were vitually no distinctions between the breach of warranty in tort cause of action created by the *Lonzrick* court and strict liability according to the Restatement (Second) of Torts section 402A, and therefore the court explicitly adopted the latter.[150] Since *Temple* was decided, three separate causes of action under products liability exist in Ohio: 1) breach of warranty in contract; 2) strict liability as per the Restatement (Second) of Torts, section 402A; and 3) negligence. Because section 2315.19 affects these theories of liability differently, if at all, each cause of action will be analyzed in light of the statute.

A. Breach of Warranty

Breach of warranty in contract is a statutory claim in Ohio, based upon provisions of the Uniform Commercial Code as adopted in this state.[151] Section 2315.19, on the other hand, is explicitly limited to negligence actions.[152] Since section 2315.19 only applies to negligence actions, its apportionment of damages scheme should not be applied to actions under contract law. A party seeking to apply this statute in a breach of warranty in contract action would face severe difficulty in convincing a court to ignore such clear statutory language.

B. Strict Liability

Strict products liability in Ohio is presently applied according to the Restatement (Second) of Torts section 402A.[153] This cause of action is also distinguishable from a negligence claims, as the language of section 402A makes clear: "The rule stated in subsection (1) [of section 402A] applies although the seller has exercised all possible care in the preparation and sale of his product. . . ."[154] Since negligence is defined in Ohio as a failure to exercise ordinary care,[155] the distinction is more than evident.

Nevertheless, a party seeking to apply apportionment of damages may have a valid argument when certain types of strict product liability

149. 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

150. *Id.* Other reasons given by the court for adopting §402A are that the *Lonzrick* court cited §402A as well as Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897 (1963), in which California became the first state to adopt the Restatement's formulation; that since *Greenman* was decided, a vast majority of the states had adopted §402A; and that the Restatement version of strict liability, together with the comments thereunder, greatly facilitate analysis in the area of products liability.

151. OHIO REV. CODE ANN. §1302.26 et.seq. (Page 1979).

152. OHIO REV. CODE ANN. §2315.19 (Page 1981).

153. Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

154. RESTATEMENT (SECOND) OF TORTS §402A(2)(a).

155. Davison v. Flowers, 123 Ohio St. 89, 174 N.E. 137 (1930).

actions are involved. Section 402A is generally recognized as creating three distinct causes of action: 1) defect in manufacture; 2) defect in design; and 3) failure to warn of dangerousness inherent in the product.[156] In Ohio, the latter two are applied under essentially negligence standards.[157] Thus, courts may consider arguments that these areas are amenable to, if not ripe for, an application of the apportionment scheme under section 2315.19.

This argument may not succeed, however, because the Ohio General Assembly is currently deliberating Senate Bill 67. That bill is a proposal to provide for specific defenses to strict liability claims as well as a system of damages apportionment (substantially the same as section 2315.19) when those defenses are asserted.[158] If the Ohio Supreme Court were to apply section 2315.19 to defect in design and failure to warn actions and the General Assembly subsequently adopted S.B. 67,[159] the statute would supersede the case law and the court would spin its wheels unnecessarily. Furthermore, the court consistently deferred judgment on the comparative negligence issue to the General Assembly while deliberations on S.B. 165 (now section 2315.19) proceeded.[160] Judicial adoption of damages apportionment in strict product liability actions, therefore, is unlikely in Ohio.

This is not to say that the Ohio Supreme Court should completely defer this issue to the judgment of the General Assembly, because there may be a demand for application of section 2315.19 to strict liability actions before the legislature can act. In a much cited article on strict tort liability,[161] Professor Wade mentions a problem which will occur in any state where the contributory negligence doctrine is applied differently in negligence actions and in strict liability actions:

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156. *See, e.g.*, Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977) (where the court, having approved §402A goes on to analyze the case in terms of defect in manufacture in section II of the opinion, and failure to warn and defect is design in section III thereof).

157. *Id.* (*see* section III of the court's opinion, citing W. PROSSER, TORTS §96).

158. Originally introduced in the House of the 112th General Assembly as House Bill 319 (Feb. 24, 1977), the bill was introduced in the 113th General Assembly as Senate Bill 67 (Feb. 15, 1979). *See* S.B. 67 Status Report, Legislative Service Commission, 113th General Assembly Reg. Sess. (1980).

159. Adoption of Senate Bill 67 is not unlikely, since it was passed by the Senate on Sept. 25, 1979, and reported out of the House ad hoc Committee on Product Liability on April 22, 1980. 1980 Ohio Legis. Service (Baldwin).

160. Every litigant who requested the Ohio Supreme Court to adopt comparative negligence was told that any change in this area should emanate from the legislature. *See* note 48 and accompanying text *supra*.

161. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

> If the plaintiff sues in negligence and the defendant proves contributory negligence, the plaintiff can recover nothing. If on exactly the same facts he merely changes his language and sues on the basis of strict liability, he recovers the full amount of his damages. Both results may be unjust, and there is no justice in saying that they balance each other out. A fair and consistent solution is urgently needed.[162]

In Ohio, the problem is somewhat reversed. Since Ohio now applies comparative negligence to negligence actions, a plaintiff found contributorily negligent to a degree of fifty percent or less will recover at least half of his damages in a negligence claim. If Ohio courts recognize contributory negligence as a defense in strict liability actions, the same plaintiff under the same facts recovers nothing in a strict liability claim.[163] If, on the other hand, Ohio courts do not apply the contributory negligence defense to strict liability actions, the plaintiff recovers the entire claim.

A few observations on products liability practice will demonstrate the need for a judicial resolution of this problem, should the General Assembly delay passage of S.B. 67. A person injured by a manufactured product will often bring claims based on negligence as well as strict liability in tort, and finding a defendant liable under both theories is not uncommon.[164] In such actions every defendant who proves contributory negligence will cause the presiding court to confront this problem. No court can avoid an inconsistent result unless it applies comparative negligence principles to the strict liability claim.[165] Furthermore, the longer the legislature delays in passing S.B. 67, the longer the problem lingers. More cases which give rise to the problem are certain to come before the courts and a solution will be demanded. If the legislature fails to act in this area, inaction by the courts as well would be intolerable. The Ohio courts may therefore be sympathetic to requests that they bring consistency to this area, at least temporarily. The courts can reach the goal by applying the comparative negligence

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162. *Id.* at 850.

163. The Court of Appeals for Erie County applied a limited form of the contributory negligence defense to strict liability actions, and held that when a defendant proves such a defense, he is relieved from liability. Jones v. White Motor Corp., 61 Ohio App. 2d 162, 401 N.E.2d 223 (1978).

164. As mentioned in note 157 and the accompanying text *supra*, the standard in Ohio for holding a defendant liable in "design defect" and "failure to warn" strict liability actions is essentially a negligence standard. In such actions it would be uncommon to find a defendant liable on one cause and not the other. Therefore, if a defendant in such an action proves contributory negligence, it will present this problem in its most acute form.

165. This is precisely the solution suggested by Professor Wade. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

scheme of section 2315.19 to strict liability actions in lieu of S.B. 67, until the General Assembly acts. If and when S.B. 67 is enacted, the courts could then abandon section 2315.19 in strict liability actions, in favor of the newer statute. It is hoped that the Ohio courts will not allow the present situation to continue until passage of S.B. 67 or a similar proposal.

C. *Negligence*

Lastly, Ohio recognizes a cause of action in negligence for injuries caused by products.[166] A products liability action based on negligence falls within the scope of section 2315.19 when contributory negligence is pleaded. This statute was enacted to apply apportionment of damages to all negligence actions.

Thus, product liability actions run the full gamut of possible treatment under section 2315.19; breach of warranty actions do not come under the statute, negligence actions do and strict liability in tort is somewhere in between warranty and negligence. Regarding strict liability, the 114th General Assembly may enact S.B. 67 or a similar bill and clear up any doubts.

MULTI-PARTY LITIGATION

In cases involving multiple parties, additional uncertainties are encountered under section 2315.19. The language of section 2315.19 is often ambiguous and affords no clear approach for the courts to use in properly applying the law. The topics with which this section will deal are: negligence comparison; apportionment of damages; settlement; and joint and several liability.[167]

A. *Negligence Comparison*

One of the first multiple party problems in applying the statute involves the comparison of plaintiff negligence to the aggregate negligence of, "all other persons from whom recovery is sought"[168] in order to determine whether the plaintiff may recover any damages at

166. *See, e.g.*, Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

167. For presentations on vicarious liability, see V. BRANT, The Ohio Legal Center Institute Reference Manual For Continuing Legal Education, 118 Comparative Negligence 7.09 & 7.10 (1980); H. WOODS, *supra* note 7, §13.15 (dealing with the problem of negligent entrustment); Brant, *A Practitioner's Guide to Comparative Negligence in Ohio*, 41 OHIO STATE L.J. 585 (1980). Brant also discusses indemnity and set-off in his article. Counterclaims and set-offs are also discussed in H. WOODS, *supra* note 7, and V. SCHWARTZ, *supra* note 3.

168. OHIO REV. CODE ANN. §2315.19(A)(1) (Page 1981).

all.[169] The language seems to refer to parties in the action.[170] However, the Supreme Court of Wisconsin, intepreting similar statutory language,[171] held that the negligence of a non-party defendant who could not be joined as a party was to be considered for the purpose of determining the aggregate negligence of those against whom recovery was sought.[172]

California, a state that judicially adopted a pure form of comparative negligence,[173] came to the same conclusion as Wisconsin in the case of *American Motorcycle Association v. Superior Court.*[174]

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169. Remember that the plaintiff under this form of comparative negligence can only recover if his negligence was no greater than all defendants' negligence. *Id.* at division (C).

170. The situation is further confused since the statute later refers to "all persons from whom recovery is allowed," *Id.* at (A)(2), and still later to "each party to the action," *Id.* at (B)(2). If the legislature had meant the language referred to in the text to mean only parties to the action, why wasn't that language used? After all, that exact language was used later in the statute. *Id.*

171. Compare OHIO REV. CODE ANN. §2315.19(A)(1) (Page 1981) with WIS. STAT. ANN. §895.045 (West 1976). The Ohio statute uses the following language, ". . . no greater than the combined negligence of all other persons from whom recovery is sought." Wisconsin uses this wording, ". . . if such negligence was not as great as the negligence of the person against whom recovery is sought. . . ."

172. Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 254 N.W.721 (1934) (this case dealt with an accident in dense fog between a truck which was disabled and left in the roadway and an automobile traveling at an unsafe speed and with insufficient lookout which ran into the back of the truck. In refering to the comparision proportion used in determining whether the plaintiff could recover the court said, "[t]hat clause as quoted is, in a measure, incomplete in that, while it specifically mentions 'the amount of negligence attributable to the person recovering,' as one of the terms of the proportion, it does not state what constitutes the other term of the proportion." *Id.* at ____, 252 N.W. at 727. In finding the vague part of the proportion to be all the other participants to the transaction the court compared the rational for its decision with the common law rule of joint and serverable liability. In the case of joint tortfeasors, one of whom cannot be joined, the plaintiff is not prevented from collecting from the party tortfeasor for the full amount of the damage. Thus what rationale would prevent the plaintiff under the comparative negligence Act from being able to collect for all the damages even when a tortfeasor can't be joined? The court sees the next logical step from this as the comparison of the plaintiff's negligence to the negligence of all other participants to the transaction). The rationale used by the court seems strained and is unclear to say the least.

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

174. 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978). There the court, quoting the California BAJI Committee, stated, "the contributory negligence of the plaintiff must be proportioned to the combined negligence of the plaintiff and of all the tortfeasors, whether or not joined as parties . . . whose negligence proximately caused or contirbuted to plaintiff's injury." *Id.* at n. 2. The court continued, ". . . it is logically essential that the plaintiff's negligence be weighed against the combined total of all other causative negligence. . . ." *Id.*

Oregon, however, which has as a statute similar to Ohio's section 2315.19[175] has found differently than California and Wisconsin. In the case of *Conner v. Mertz,*[176] the Oregon Supreme Court held that it was not error to exclude the name of a non-party tortfeasor from the verdict forms.[177] Since the names were not on the verdict forms, the assumption is that the jury did not consider the negligence of the non-party. Oregon's interrogatories require the jury to find the negligence of, ". . . all parties represented in the action."[178] Thus, no interrogatory attempts to supply the aggregate negligence of all the tortfeasors, only that of party tortfeasors.

The problem of deciding who is to be included in the group against whom the plaintiff's negligence is compared will undoubtedly arise in the application of section 2315.19.[179] As in Oregon, none of the Ohio jury interrogatories focus on the negligence of a non-party.[180] In fact, the interrogatories refer specifically to each party to the action.[181] From reading the statute in its entirety, it seems clear that "persons from whom recovery is sought" is equal to "parties to the action," thus excluding non-parties from consideration. Such a reading would seem to be the only logical approach to section 2315.19 considering the permissible interrogatories set out by the statute.[182]

B. Apportionment of Damages

An area related to the apportionment of fault among tortfeasors is that of apportionment of damages. The issue is whether the negligence of non-parties should be used to reduce the total amount of damages for which the party defendants will be liable.

Courts which have allowed non-parties to be considered have not always allowed damages to be reduced thereby. In *Walker v. Kroger*

175. Compare OHIO REV. CODE ANN. §2315.19 (Page 1981) with OR. REV. STAT. §18.470 (1979). The Oregon statute uses the following language, ". . . not greater than the combined fault of the person or persons against whom recovery is sought,. . . ." *Id.* For the language of the Ohio statute, see note 171 *supra.*

176. 274 Or. 657, 548 P.2d 975 (1976) (one tortfeasor had settled with the plaintiff and as a result was not made a defendant in the action).

177. *Id.* It must be noted that part of the court's decision was based on the fact that plaintiff has not objected to the proffered jury instruction.

178. OR. REV. STAT. §18.480(b) (1979).

179. The first determination under the statute is whether the negligence of the plaintiff exceeds that of, ". . . the combined negligence of all persons from whom recovery is sought." OHIO REV. CODE ANN §2315.19(A)(1) (Page 1981). Only if this requirement is met can the recovery formula be applied. *Id.* at (C).

180. Compare *Id.* at (B) with OR. REV. STAT. §18.480 (1979).

181. OHIO REV. CODE ANN. §2315.19(B)(2) (Page 1981).

182. If persons from whom recovery is sought does include non-parties, no one in a jury trial will be able to decide the amount of the negligence of the non-parties. The interrogatories do not call for the jury to make such a finding. *Id.*

Grocery & Baking Co.,[183] the Wisconsin court decided that non-party negligence could be considered for determining the proportionate negligence of the plaintiff.[184] The court also held, however, that the amount of damages could not be reduced by such a consideration.[185] Generally, the Supreme Court of Wisconsin has held that failure to consider the negligence of a third party is an issue which only the plaintiff may raise.[186]

The Oregon, Florida, Arkansas and South Dakota courts have agreed that the jury should not consider the negligence of non-parties in apportioning fault among the defendants.[187]

Idaho, which employs the forty-nine percent type of comparative negligence statute,[188] has considered the negligence of non-parties in apportioning fault.[189] The dissent in the case of *Pedigo v. Rowley* stated:

> [e]ven though an actor in the controversy may be immune from liability, his comparative causative negligence should nonetheless be included in the jury's apportionment. The party defendant will then have the opportunity to place the blame on the non-party actor. Only by including the non-party in the apportionment will the jury's special verdict represent a

183. 214 Wis. 519, 252 N.W. 721 (1934). *See* note 172 and accompanying text *supra*.

184. *Id.*

185. *Id.*

186. *E.g.*, Hardware Mut. Cas. Co. v. Harry Crow & Son, Inc., 6 Wis. 2d 396, ____, 94 N.W.2d 577, 583 (1959) (the court felt that not including the negligence of the third party would not be prejudicial to the defendant since it could have only led to holding the defendants liable for a higher percentage of total negligence). *See* H. WOODS, *supra* note 7, at §13.3. The author states there, "[t]he upshot of the Wisconsin decisions seems to be that . . . negligence of unsued participants should be considered. . . ." *Id.* at 224. In the case of non-parties who have settled, however, the damages against the party defendants must be reduced to reflect that settlement. Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

187. Conner v. Mertz, 274 Or. 657, 548 P.2d 975 (1976) (one participant dismissed due to settlement); Kapchuck v. Orlan, 332 So. 2d 671 (Fla. Dist. Ct. App. 1976) (knowledge by the jury of subsequent impacts not necessary); Travelers Ins. Co. v. Ballinger, 312 So. 2d 249 (Fla. Dist. Ct. App. 1975) (chain reaction automobile accident, no apportionment between defendant and a non-party torteasor); *see* Beck v. Wessel, 90 S.D. 107, 237 N.W.2d 905 (1976) (negligence of plaintiff's wife who was driver properly not considered, no application of comparative negligence instruction since plaintiff was not shown to be negligent). *See generally* V. BRANT, The Ohio Legal Center Institute Reference Manual For Continuing Legal Education, 118 Comparative Negligence 1.08 & 1.09 (1980); H. WOODS, *supra* note 7, at §13.3. Woods points out that in not considering non-party negligence at all, the Arkansas courts have avoided many of the problems faced by the Wisconsin courts which have made exceptions to their consideration rule. *Id.* at 224.

188. *See* note 14 and accompanying text, *supra*.

189. *See* Jensen v. Shank, 99 Idaho 565, 585 P.2d 1276 (1978) (trial court jury found unknown persons who had removed a stop sign sixty percent negligent).

> true and accurate picture of the relative fault of all the actors contributing to the injury.[190]

If the non-party is not considered, he or she, in effect, receives a windfall; thus the plaintiff may end up sharing that windfall, and the party defendant would be held responsible for more than his or her fair share.

The Ohio statute states that "each person against whom recovery is allowed is liable to the person bringing the action for a portion of the total damages allowed. . . ."[191] One could argue that the first interrogatory, in requiring the jury to find the total damage sustained by the plaintiff and not considering his own fault,[192] naturally intended that the total damage amount be considered solely in relation to the sued tortfeasors who were still parties when the case reached the jury.[193] In this way, the damages would naturally be reduced according to the negligence of the non-parties who were also causally responsible for the injury. This would appear to further the principle behind comparative negligence and is supported by the reasoning of the dissent in *Pedigo v. Rowley.* The ultimate decision on which course to follow will be up to the courts. Sound arguments can be made for both sides in this issue.

C. *Settlement*

Settlement is another problem which arises along with apportionment of damages. The statute is not clear in the situation where the plaintiff settles with one or more of the joint tortfeasors because it does not specify whether the party defendants receive credit for the settlement amount against the total damages. However, both case law[194] and statutory law[195] in Ohio afford the party defendants the advantage

190. Pedigo v. Rowley, 101 Idaho 201, 610 P.2d 560 (1980) (Bakes, J. dissenting) (the majority opinion deals with the question of intrafamily immunities).

191. OHIO REV. CODE ANN. §2315.19 (Page 1981).

192. *Id.* at (B).

193. Recall that the interrogatories do not provide for the jury to find the negligence of a non-party. *See* note 182 and accompanying text *supra.*

194. The case law rule in Ohio reduces total damages by the amount of any settlement by the plaintiff, both in the case of joint tortfeasors and concurrent tortfeasors. *E.g.*, Petri v. Pennsylvania R.R., 41 Ohio App. 105, 179 N.E. 817 (1932) (one joint tortfeasor was ultimately found to have been completely released by the terms of a settlement aggreement entered into with the plaintiff); Davis v. Buckeye Light & Power Co., 145 Ohio St. 172, 61 N.E.2d 90 (1945) (expressing the same principle as *Petri* applied to concurrent tortfeasors).

195. OHIO REV. CODE ANN. § 2307.32(F) (Page 1981). This statute codifies the reduction of overall damages chargeable against the other tortfeasor according to the amount of the settlement. *Id.* at (F)(1). A release also discharges the releasor from liability for contribution. *Id.* at (F)(2).

of the plaintiff's arrangement and there seems to be no reason why section 2315.19 should affect this advantage.

D. Joint and Several Liability

Ohio follows the general rule of joint and several liability allowing the plaintiff to collect the full amount of the recoverable damages from any one or more of the parties found to be liable.[196] The doctrine is based on the principle that each liable tortfeasor is responsible for the whole wrong as an agent of the other tortfeasors.[197] On a more basic level, the doctrine reduces the burden on the plaintiff in seeking recovery. The plaintiff is allowed to take the easiest route of recovery by going after the most solvent tortfeasor, thus leaving that tortfeasor to seek contribution from his fellow tortfeasors for their share of the liability.[198]

In other states adopting comparative negligence, there has been a divergence of opinion on this question.[199] California, which judicially adopted comparative negligence, found that its adoption should not affect the doctrine of joint and several liability.[200] States such as

196. Erie County United Bank v. Berk, 73 Ohio App. 314, 56 N.E.2d 285 (1943) (defendant notary public who wrongfully certified to a forged and fraudulent affidavit was found jointly and severally liable for the whole damage even though others contributed to the harm); *see* Hageman v. Signal L.P. Gas, Inc., 486 F.2d 479 (6th Cir. 1973) (under Ohio law, a person injured by the negligence of several parties may collect the entire amount of damages against one party or severally against all the parties).

197. Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979) (applying the Idaho comparative negligence statute, this case utilized the rationale of the indivisibility of the injury as underpinning the theory of joint and several liability).

198. Contribution is allowed joint tortfeasors under OHIO REV. CODE ANN. §2307.31 (Page 1981).

199. *See generally* V. SCHWARTZ, *supra* note 3, at §16.4; H. WOODS, *supra* note 7, at §13:4.

200. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr 182 (1978). The court there stated, "we hold that after *Li*, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only 'in porportion to the amount of negligence attributable to the person recovering.'" *Id.* at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189, quoting, Li v. Yellow Cab. Co., 13 Cal 3d 804, 829, 532 P.2d 1226, 1243, 146 Cal. Rptr. 858, 875 (1975). The court also stated, "we reject AMA's suggestion that our adoption of comparative negligence logically compels the abolition of joint and several liability of concurrent tortfeasors." 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189. An impression seemed to be made on the court by Professor Schwartz' statement that, "[t]he concept of joint and several liability of tortfeasors has been retained under comparative negligence, unless the statute specifically abolishes it, in all states that have been called upon to decide the question." *Id.* This statement may also be given serious consideration by Ohio courts since Ohio's Act does not specifically abolish the doctrine. Examples of other courts applying joint and several liability following the adoption of comparative negligence are: Caldwell v. Piggly-Wiggly Madison Co., 32 Wis. 2d 447, 145 N.W.2d 745 (1966); Saucier v.

Idaho,[201] Wyoming[202] and Utah[203] specifically provide in their comparative negligence statutes for a continuation of the doctrine. Other states such as Vermont,[204] New Hampshire[205] and Kansas[206] have done away with the doctrine and hold each defendant only severally liable under their statute. Where a liable defendant is less negligent than the plaintiff, Nevada,[207] Texas[208] and Oregon[209] have abandoned the doctrine.

Section 2315.19 reads, "[i]f recovery for damages determined to be directly and proximately caused by the negligence of more than one person is allowed under division (A)(1) of this section, each person against whom recovery is allowed is liable to the person bringing the action for a portion of the total damages allowed under that division."[210] The statute then enumerates the formula by which

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Walker, 203 So. 2d 299 (Miss. 1967); Gazaway v. Nicholson, 190 Ga. 345, 9 S.E.2d 154 (1940); *See generally* V. SCHWARTZ, *supra* note 3, at §16.4, nn. 33-35. The *American Motorcycle* decision followed a series of conflicting decisions by lower California courts. H. WOODS, *supra* note 7, at 438.

201. IDAHO CODE §6-803 (1979). This section has been interpreted according to its express language to retain the doctrine. Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979).

202. WYO. STAT. §1-1-109(h) (1977).

203. UTAH CODE ANN. §78-27-39 through 43 (1953 Replacement). These divisions deal with joint tortfeasors. "Nothing in this act shall affect: (1) The common-law liability of the several joint tortfeasors to have judgment recovered, and payment from them individually by the injured person for the whole injury." *Id.* at §78-27-41.

204. VT. STAT. ANN. tit. 12 § 1036 (1973 Replacement) provides "[w]here recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed." *Id.* While this statute does not expressly abolish joint and several liability, the Vermont Supreme Court has read it as abolishing the doctrine. Howard v. Spafford, 132 Vt. 434, 437, 321 A.2d 74, 76 (1974). This may be important since Ohio's Act reads very similarly. OHIO REV. CODE ANN. §2315.19(A)(2) (Page 1981).

205. The New Hampshire statute contains the same language as the Vermont statute. N.H. REV. STAT. ANN. §507:7-a (Supp. 1979).

206. The Kansas statute likewise, reads much the same. KAN. STAT. ANN. §60-258a(d) (Supp. 1980). *See* Geier v. Wikel, 4 Kan. App. 2d 188, 603 P.2d 1028 (1979) (joint and several liability abrogated in comparative negligence actions under the statute).

207. NEV. REV. STAT. §41.141(3) (1979) provides, "[w]here recovery is allowed against more than one defendant in such an action, the defendants are jointly and severally liable to the plaintiff, except that a defendant whose negligence is less than that of the plaintiff or his decedent is not jointly liable and is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to him." *Id.*

208. TEX. CIV. CODE ANN. tit. 42 §2212a(2)(C) (Vernon Supp. 1980).

209. OR. REV STAT. §18.485 (1979 Replacement) (similar language).

210. OHIO REV. STAT. ANN. §2315.19 (Page 1981).

damages are calculated, setting up a proportion of particular defendant negligence over aggregate defendant negligence.[211] The language seems to be basically the same as that used by New Hampshire, Vermont and Kansas where joint and several liability has been held to be abrogated by the comparative negligence statute.[212] Should Ohio courts accept this same interpretation, joint and several liability would end in Ohio.

Predicting the end of joint and several liability in Ohio, however, would be very premature. Such a change would place an added burden on the plaintiff which might limit his recovery.[213] Considering the long standing use of the doctrine, courts might be reluctant to place this added burden on the injured plaintiff. There is also no clear legislative intent to abbrogate the doctrine[214] and the courts may wish to leave such an important decision to the legislature.[215] The legislature enacted a contribution statute recently which would lose much of its reason to be if the doctrine were abbrogated.[216] With these factors in mind, it seems unlikely that Ohio will abolish the doctrine of joint and several liability.

CONCLUSION

The General Assembly has provided the courts of Ohio with a modification to the contributory negligence rule and a rudimentary system of apportioning the damages among the parties. It can be seen as an entirety to itself, with certain gaps in need of filling only as the

211. *Id.*

212. *See* notes 204-06 *supra*.

213. Without joint and several liability the plaintiff would be forced to seek judgment against each defendant for only that defendant's portion of the damage instead of being able to collect the full amount from any available defendant, leaving the defendants to argue over splitting the damages. In the case where several defendants are "judgment proof," the plaintiff will still be able to collect his full allowable damages from the remaining wealthy defendant under joint and several liability. Without joint and several liability, however, the plaintiff would reduce his recovery by the amount of damages due from the "judgment proof" defendants.

214. Recall how impressed the California Supreme Court was with Professor Schwartz' statement that the doctrine was only rejected if specifically abolished by the statute. *See* note 200 *supra*. Of course this must be weighed against the Vermont Supreme Court's dictum in *Howard*. *See* note 204 *supra*. The wording of the Vermont statute does not expressly or specifically abolish the doctrine.

215. The Ohio Supreme Court may have the same feeling as it did in Baab v. Shockling, 61 Ohio St. 2d 55, 57, 399 N.E.2d 87, 88 (1980) (rejecting judicial adoption of comparative negligence and opting to leave the decision to the legislature which was more suited to deal with the question). *See* note 48 *supra*.

216. Contribution is allowed among joint tortfeasors under OHIO REV. CODE ANN. §2307.31 (Page 1981) (effective Oct. 1, 1976). This statute refers to and is premised on joint and several liability. *Id.* at (A).

need arises. It can also be seen as a mere foundation, with much building left for future lawmakers. If *Baab v. Schockling*[217] is any indication, the Supreme Court is likely to fill the gaps only when necessary, and leave any building to the General Assembly. Sen. Roberto suggested that if the votes could be obtained, amendments would be proposed and other areas covered under the statute.[218] S.B. 67 demonstrates the legislature's willingness to expand the use of comparative negligence principles, but more may not be reasonably expected from the legislature, considering the length of time taken to pass this Act. The courts of Ohio should intervene and resolve these issues when they arise, whether it be merely gap-filling or by substantial addition to the statute. When there is no basis in Ohio law for resolving certain issues, the law of other states is an invaluable source for legal reasoning with which Ohio courts can thrash out such issues. There appears to be little reason for further deference to the legislature by the Ohio Supreme Court in this area of the law. Such deference may delay resolution of important issues for years, while the lower state courts will be left to their own resources.

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217. 61 Ohio St. 2d 55, 399 N.E.2d 87 (1980); *see* note 48 *supra*.
218. Interview with Senator Marcus A. Roberto, (Sept. 14, 1980).