2013

The Death of the Common Law: Judicial Abdication and Contributory Negligence in Maryland

Donald G. Gifford

THE DEATH OF THE COMMON LAW: JUDICIAL ABDICATION AND CONTRIBUTORY NEGLIGENCE IN MARYLAND

DONALD G. GIFFORD*

INTRODUCTION

A generation ago, singer-songwriter Don McLean sang of "The Day the Music Died."[1] This summer, for many victims of negligently inflicted injuries, July 9, 2013, marked the day that the common law process in Maryland died. In *Coleman v. Soccer Association of Columbia*,[2] the Court of Appeals of Maryland denied recovery to a twenty-year old volunteer soccer coach who sustained multiple, severe facial fractures when, in a moment of youthful exuberance, he jumped up and grabbed the crossbar of a soccer goal as so many before him have done. The jury found the defendant was negligent in failing to properly inspect the goal, but it also found that the plaintiff was contributorily negligent. The Court of Appeals applied the ancient doctrine of contributory negligence, a rule followed by only three other states and the District of Columbia,[3] to totally bar the plaintiff's recovery. In this article, I examine the Court of Appeals' rationale for

* Edward M. Robertson Research Professor of Law, University of Maryland Carey School of Law; J.D., Harvard, 1976. I greatly appreciate the very helpful comments from Chris Robinette of the Widener University School of Law, who has previously written about the consequences of a change from contributory negligence to comparative fault, *see* Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which Is the Optimal Negligence Rule?*, 24 N. ILL. U. L. REV. 41 (2003), and from my Maryland colleagues Bill Reynolds and Richard Boldt. I also thank Laura Koman and Jane Kalinina for their research and editorial assistance. In 2004, I served as a member of the task force that reported to the Maryland General Assembly on the issues of contributory negligence, comparative fault, and joint and several liability. *See* Negligence Systems: Contributory Negligence, Comparative Fault, and Joint and Several Liability, Maryland Department of Legislative Services (2004).

1. DON MCLEAN, *American Pie*, *on* AMERICAN PIE (United Artists Records 1971) (referring to the 1959 plane crash that killed early rock legends Buddy Holly, Ritchie Valens and The Big Bopper (Jiles Perry Richardson, Jr.)).

2. Coleman v. Soccer Ass'n of Columbia, No. 9, 2013 Md. LEXIS 460 (Md. July 9, 2013).

3. *Id.* at *36 n.3 (Harrell, J., dissenting).

its decision in *Coleman* and contend that the court failed to fulfill its obligations as Maryland's highest common law court.

It may be worth noting that before entering legal education, I represented both plaintiffs and defendants in personal injury actions. Since becoming a law professor in 1979, however, I have worked only on behalf of defendants in my limited consulting activities. In short, it is not just plaintiffs' attorneys who believe that *Coleman* is wrongly decided and poorly reasoned.

I. A SMIDGEN OF TORT LAW: THE SUBSTANTIVE ISSUE

A. Coleman v. Soccer Association of Columbia: The Case

When the Court of Appeals of Maryland agreed to hear *Coleman*,[4] many lawyers and judges believed the court would at long last leave the tiny group of jurisdictions that continue to hold that contributory negligence constitutes a total bar to recovery. Chief Judge Robert Bell was retiring, and it was well known that he favored the adoption of comparative fault.[5] To many, the facts in *Coleman* were "plaintiff-friendly," suggesting that the court had accepted certiorari in this particular case in order to add another important accomplishment to Chief Judge Bell's already impressive legacy. A year later, we know better. Chief Judge Bell was one of only two judges on the court to dissent to the outcome in *Coleman*.[6] More importantly, despite the fact that a jury found that the Soccer Association of Columbia was negligent and that its negligence was a necessary, proximate cause of the plaintiff's injuries, James Kyle Coleman's resort to the common law was unsuccessful.

During a practice session with the team of young players he helped coach, Coleman kicked the ball into the goal and, as he retrieved the ball, he instinctively celebrated by jumping up and grabbing the crossbar of the goal.[7] The goal, unfortunately, was not anchored to the ground. Coleman fell backwards, causing the crossbar to crash onto his face, resulting in "multiple severe facial fractures which required surgery and the placing of three titanium

4. Coleman v. Soccer Ass'n of Columbia, 425 Md. 396, 41 A.3d 570 (2012) (order granting cert.), *opinion after grant of cert.*, No. 9, 2013 Md. LEXIS 460, (Md. July 9, 2013).

5. Ann E. Marimow, *Maryland's High Court Considers Rewriting Rules for Assessing Fault*, WASH. POST, Sept. 10, 2012, http://articles.washingtonpost.com/2012-09-10/local/35495479_1_soccer-association-soccer-club-court-system.

6. *Coleman*, 2013 Md. LEXIS 460, at *29 (Harrell, J., dissenting). Chief Justice Robert Bell joined Justice Harrell in his dissent. *Id.* at *112.

7. *Id.* at *2–3 (majority opinion).

plates in his face."[8] Coleman sued the Soccer Association. At trial, the coach who invited Coleman to assist him testified that he had not inspected the goal where the accident occurred in order to assure that it was properly anchored. Other witnesses testified that it was common for those participating in soccer to hang from the crossbar of the goal. The jury found the association negligent, but it also found that the plaintiff was contributorily negligent. The trial court judge quite properly applied Maryland law as it existed and denied Coleman any recovery. Before the case could be briefed and argued in the intermediate appellate court, the Court of Special Appeals, the Court of Appeals of Maryland accepted certiorari to consider the sole issue of whether contributory negligence should continue to be a total bar to recovery. In *Coleman,* the court held that "we decline to abrogate Maryland's long-established common law principle of contributory negligence."[9]

B. The Role of Plaintiff's Fault in Negligence Cases

The *Coleman* decision leaves Maryland as one of only five states that have not eliminated contributory negligence as a total bar to recovery and replaced it with comparative fault.[10] Most states adopted comparative fault during the period extending from the late 1960s through the early 1980s, and it appears to be working. No state that adopted comparative fault has gone back to a contributory negligence regime. Each year businesses and insurance companies in the forty-six comparative fault jurisdictions propose a variety of "tort reform" measures, just as they do in Maryland. A return to contributory negligence is rarely, if ever, included in the "wish list" of these businesses and insurance companies. In virtually all states, including many with the most thriving economies, the change from contributory negligence to comparative fault is accepted, ancient history. Not in Maryland.

Under Maryland's doctrine of contributory negligence, even if the jury believes that the defendant's negligence is far more culpable (or contributed far more to the injury) than the victim's own contributory negligence, that is, the plaintiff's failure to use reasonable care to protect herself or himself, the plaintiff still

8. *Id.* at *3.

9. *Id.* at *7.

10. *Id.* at *36 n.3 (Harrell, J., dissenting). The other jurisdictions that still apply contributory negligence as a total bar to recovery include Alabama, North Carolina, Virginia, and the District of Columbia. *Id.*

recovers nothing. The alternative to contributory negligence as a total bar to recovery is known as comparative fault. There are two basic forms of comparative fault: "pure" and "modified." Under the pure form of comparative fault, the jury is asked to compare the defendant's negligence that was a necessary cause of the plaintiff's injuries with the plaintiff's own contributory negligence and quantify the comparison by attributing a percentage of fault to each party. The plaintiff is then able to recover the total amount of the damages as determined by the jury, multiplied by the defendant's degree of fault. For example, if the jury finds that the plaintiff is ten percent at fault and the defendant is ninety percent at fault, the plaintiff receives ninety percent of the total damages instead of nothing, which would be the outcome under a contributory negligence rule.

Most *courts* adopting comparative fault endorse the variant known as pure comparative fault that operates as described above.[11] More often than not, however, it is the legislature that adopts comparative fault, and all, or virtually all legislatures, have adopted a "modified" comparative fault system. Under modified comparative fault a plaintiff who is more at fault (most modified comparative fault jurisdictions) or equally at fault (a small minority of such jurisdictions) as the defendant, recovers nothing. Otherwise, as in a pure comparative fault state, the plaintiff's recovery is reduced by the percentage of fault attributable to plaintiff.

Proponents of the modified form of comparative fault argue it has two advantages. First, it avoids the anomaly, troubling to some, of the more culpable plaintiff recovering from a less culpable defendant. Second, it reduces both the filing of actions—by discouraging plaintiff's counsel from filing cases in which the plaintiff clearly is more at fault—and the number of cases remaining to be heard by the jury after judicial dismissals of cases in which the plaintiff clearly is more at fault than the defendant.

In and of itself, the widespread judicial and legislative adoption of comparative fault suggests a discordant anomaly. How is it that Maryland, usually perceived to be one of the nation's most progressive states, is one of only four states that retains a doctrine regarded as very traditional, conservative, anti-consumer, and even antiquated?

---

11. When the legislature either initially adopts comparative fault or steps in after the court initially adopts comparative fault, it usually enacts a system of modified comparative fault. VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE 64, 81 (5th ed. 2010).

II. THE COURT ON ITS OWN TERMS: JUSTIFYING JUDICIAL ABDICATION

The majority and concurring opinions in *Coleman* are curious in any number of regards. Nowhere do they present a substantive argument that the continued application of contributory negligence yields more just or fairer judicial decisions than would a change to comparative fault. Judge Eldridge's majority opinion made absolutely no attempt to rebut the arguments that he explicitly acknowledged exist in favor of abrogating contributory negligence:

> They argue contributory negligence is an antiquated doctrine, that it has been roundly criticized by academic legal scholars, and that it has been rejected in a majority of our sister states. It is also pointed out that contributory negligence works an inherent unfairness by barring plaintiffs from any recovery, even when it is proven in a particular case that a defendant's negligence was primarily responsible for the act or omission which resulted in a plaintiff's injuries. It is said that contributory negligence provides harsh justice to those who may have acted negligently, in minor ways, to contribute to their injuries, and that it absolves those defendants from liability who can find any minor negligence in the plaintiffs' behavior.[12]

Even more blatantly, Judge Greene, concurring in an opinion joined by three of his colleagues (thus constituting a majority of the seven-member court), wrote, "I am willing to concede that a system premised on comparative negligence for apportioning fault appears to be a more equitable system of determining liability and a more socially desirable method of loss distribution."[13]

Further, the court explicitly accepted the idea that the original purpose of the creation of contributory negligence during the first half of the nineteenth century in Maryland and elsewhere was to protect emerging industries and railroads, a new form of transportation, from juries that "had the potential to stifle newly developing industry"[14] and "wreak financial disaster" upon the "burgeoning" railroad industry.[15] Obviously, these justifications no longer apply in the twenty-first century.

---

12. *Coleman*, 2013 Md. LEXIS 460, at *17–18.

13. *Id.* at *27 (Green, J., concurring) (citations omitted) (internal quotation marks omitted).

14. *Id.* at *9 (majority opinion) (internal quotation marks omitted).

15. *Id.* at *9 n.5 (citations omitted) (internal quotation marks omitted).

Perhaps most important, the court stated that it "has the authority to change the common law rule of contributory negligence."[16] Judge Greene added, "[T]here is no dispute about whether this Court has the authority to change the common law."[17] The majority noted that the principle of *stare decisis*:

> [S]hould not be construed to inhibit [this Court] from changing or modifying a common law rule by judicial decision where we find, in light of changed conditions or increased knowledge, that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people.[18]

The majority opinion continued: "This Court has repeatedly said that the common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems."[19] Further, the court acknowledged that "because contributory negligence is a court-created principle, and has not been embodied in Maryland statutes, this Court possesses the authority to change the principle."[20]

Then the court punted, abdicating its judicial duty in the process. To recap the reasoning of the judges, the majority opinion implicitly suggested that it recognizes that contributory negligence is an unfair, antiquated policy with its roots and justifications lying in a long-past era that no longer applies. The concurring opinion openly stated that the rule is neither "equitable" nor "socially desirable."[21] The judges recognized that it is within their authority as common law judges to adopt comparative fault. The court, however, ultimately decided to apply the law of contributory negligence in the case before it and to future cases.

Why? The majority stated that "[t]he General Assembly's repeated failure to pass legislation abrogating the defense of contributory negligence is very strong evidence that the legislative policy in Maryland is to retain the principle of contributory negligence."[22]

---

16. *Id.* at *7.

17. *Id.* at *25 (Greene, J., concurring).

18. *Id.* at *14 (majority opinion) (quoting Harrison v. Montgomery Cnty. Bd. of Educ., 295 Md. 442, 459, 456 A.2d 894, 903 (1983)) (internal quotation marks omitted).

19. *Id.* at *19 (citations omitted) (internal quotation marks omitted).

20. *Id.* at *18.

21. *Id.* at *27 (Greene, J., concurring).

22. *Id.* at *23–24.

Judge Greene also expressed concerns about the details of the implementation and the collateral consequences of the adoption of comparative fault—such as whether to adopt pure or modified comparative fault; how it would apply in the case of multiple tortfeasors; and whether its adoption would affect joint and several liability, contribution, assumption of risk, and last clear chance.[23] Somehow other state supreme courts, while identifying the same issues, have concluded that the courts are able to work out such issues as the years go by.[24] A generation after adopting the principle of comparative fault, the judicial systems of these states have operated smoothly, without descending into chaos or confusion. Perhaps the members of the court are not aware that these specific issues are among those typically addressed today in first-semester Torts classes. Of course, the legislature may want to get involved in the specifics of implementation if it thinks the courts are getting things wrong, but this does not excuse the court from walking away from the important transcendent issue of whether or not contributory negligence should be replaced with comparative fault.

A contrary result in *Coleman* would not have required the court to, at this time, address the issues about which Judge Greene is concerned—issues not presented by the case. As the Florida Supreme Court stated when it adopted comparative fault forty years ago in *Hoffman v. Jones*, "[I]t is not the proper function of this Court to decide unripe issues, without the benefit of adequate briefing, not involving an actual controversy, and unrelated to a specific factual situation."[25] When such issues are in fact posed to the Court of Appeals of Maryland, the court would be able to draw upon decades of experience from the courts and legislatures in forty-six other states. The wheel would not need to be reinvented.

I recognize that my critique of the court's reasoning in this article may sound harsh. In the opinion, the majority seems to be trying to inoculate itself from the attack it anticipates from "academic legal scholars,"[26] a phrase so linguistically redundant as to echo the

23. *Id.* at *38–39 (Harrell, J., dissenting).

24. *See, e.g.*, Li v. Yellow Cab Co., 532 P.2d 1226, 1241 (Cal. 1975) (stating that these issues have "not diminished our conviction that the time for a revision of the means for dealing with contributory fault in this state is long past due and that it lies within the province of this court to initiate the needed change by our decision in this case"); Hoffman v. Jones, 280 So.2d 431, 439–40 (Fla. 1973) ("We feel the trial judges of this State are capable of applying this comparative negligence rule without our setting guidelines in anticipation of expected problems.").

25. 280 So.2d at 438.

26. *Coleman*, 2013 Md. LEXIS 460, at *17.

scathing populists of an earlier generation. To place the tone of my own critique in the context of "real world" standards, I quote the entire first paragraph of the dissenting opinion of Judge Harrell, who before now has never been considered an out-of-touch academic radical:

> Paleontologists and geologists inform us that Earth's Cretaceous period (including in what is present day Maryland) ended approximately 65 million years ago with an asteroid striking Earth (the Cretaceous-Paleogene Extinction Event), wiping-out, in a relatively short period of geologic time, most plant and animal species, including dinosaurs. As to the last premise, they are wrong. A dinosaur roams yet the landscape of Maryland (and Virginia, Alabama, North Carolina and the District of Columbia), feeding on the claims of persons injured by the negligence of another, but who contributed proximately in some way to the occasion of his or her injuries, however slight their culpability. The name of that dinosaur is the doctrine of contributory negligence. With the force of a modern asteroid strike, this Court should render, in the present case, this dinosaur extinct. It chooses not to do so. Accordingly, I dissent.[27]

III. THE ROLE OF THE STATE'S HIGHEST COMMON LAW COURT

A. The Obligations of a Common Law Court

The basic law of torts—governing, among other things, whether or not the victim of a personal injury is able to recover from the party who caused the injury—is, except when the legislature acts affirmatively, determined by judge-made or common law. In this regard, American law differs from that of most other countries, such as China, France, or Russia, where the law governing personal injury claims is statutory, enacted by the legislature, albeit often in very broadly-articulated terms.

The legitimacy of the common law differs from that which gives authority to statutes enacted by legislatures, and regulations and rulings of administrative agencies. Judicial rulings are not meant to be a reflection of the will of the electorate. Instead, the legitimacy of judicial lawmaking rests on the idea that judges begin their reasoning

27. *Id.* at *29–30 (Harrell, J., dissenting).

process with a presumption that they will follow precedents in earlier cases on similar facts. Even in the 1890s, however, at a time when the law of negligence dominated the legal landscape, Judge Oliver Wendell Holmes, Jr., later a Supreme Court Justice and regarded as perhaps the key figure in defining the traditional law of negligence, wrote the following:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[28]

Few American judges, lawyers, and legal scholars in the late-twentieth and twenty-first centuries subscribe to the views of legal formalism or "mechanical jurisprudence" that often prevailed during the late-nineteenth and early-twentieth centuries when the common law was sometimes conceived of as nothing more than rules deduced from precedents applied syllogistically to the facts of the present case. For example, as early as 1936, United States Supreme Court Justice Harlan F. Stone stated, "[T]he law itself is something better than its bad precedents . . . the bad precedent must on occasion yield to the better reason."[29] He specifically suggested that courts are justified in overruling precedents because "[s]cience, invention and industrial expansion have done more than all else to change the habits of the life of the people . . . since the Civil War . . . than occurred in the three centuries which followed the discovery of America."[30] Judge Learned Hand, a conservative and one of the most respected judges of the mid-twentieth century, similarly concluded that while a judge "must preserve his authority by cloaking himself in the majesty of an overshadowing past . . . he must discover some composition with the dominant trends of his time."[31] Even Sir Edward Coke, perhaps the most important writer on the topic of the common law as it developed in England, wrote as early as the sixteenth century that precedents should be overruled when the results of such precedents result in "inconvenience."[32]

The common law evolves as societal norms, as well as changes in relevant aspects of society—such as, in the case of negligence law, the types and sources of tortious harms—change. Precedents establish

28. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
29. Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 8 (1936).
30. *Id.* at 11.
31. Learned Hand, *Mr. Justice Cardozo,* 52 HARV. L. REV. 361, 361 (1939).
32. Stone, *supra* note 29, at 8.

the beginning point of the common law process, but only the beginning point. The Court of Appeals of Maryland repeatedly has acknowledged this through the decades as it has altered the precedents that previously governed recovery (or, more typically, prevented recovery) for tortious injury.[33] In the past, the court explicitly stated, "Because of the inherent dynamism of the common law, we have consistently held that it is subject to judicial modification in the light of modern circumstances or increased knowledge."[34] The court also explicitly has cited "the guidance of a significant majority of other states"[35] as a justification for overturning precedents.

Along with the Court of Appeals' authority to establish the common law and to change it when circumstances warrant modification comes judicial obligation. When a litigant presents a court with a claim of right, the court is obligated to rule on the claim assuming that the court has jurisdiction over it. In this regard, the court is fundamentally different from a legislature, which establishes new law only when it wants to do so and can always decide not to address an issue. A court, however, cannot decide that an issue is too difficult or too controversial upon which to rule. It must decide the litigant's claim. Even if the court writes, as it did in *Coleman*, that it is up to the legislature to make any change in the law, in doing so the court reaffirms that the law status quo ante governs both the case before it and others in the future. A common law court cannot pass the buck. Indeed, the Court of Appeals of Maryland has repeatedly stated that "it is *our duty* to determine the common law as it exists in this State."[36]

The role of the court in establishing the law in a field such as torts where the common law predominates is very, very different from the role of the court in evaluating a claim alleging that a statute or executive action is unconstitutional. In the latter instance, except where the claim involves either a suspect class or a fundamental right, the proper role of the court is to defer to the legislature unless there is no rational justification for the statutory enactment or executive

33. Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978) (abolishing the defense of interspousal immunity in the case of outrageous intentional torts); Phipps v. Gen. Motors Corp., 278 Md. 337, 363 A.2d 955 (1976) (adopting strict liability as expressed in § 402A of the Restatement (2d) of Torts); Mackubin v Curtiss-Wright Corp., 190 Md. 52, 57 A.2d 318 (1948) (belatedly relaxing the privity requirement in third-party beneficiary cases).

34. Ireland v. State, 310 Md. 328, 331, 529 A.2d 365, 366 (1987).

35. B&K Rentals and Sales Co., Inc. v. Universal Leaf Tobacco Co., 324 Md. 147, 158, 596 A.2d 640, 645 (1991).

36. *E.g.*, Ass'n of Indep. Taxi Operators v. Yellow Cab Co., 198 Md. 181, 204, 82 A.2d 106, 117 (1951) (emphasis added).

action.[37] In short, in cases raising constitutional challenges, the legislature or the executive has the primary responsibility for declaring what the law is; and the court acts only in highly unusual circumstances. When it comes to the common law, however, the courts have the responsibility—indeed, the obligation, the duty—to establish the law unless and until the legislature acts.

B. The Court's Interpretation of Legislative Inaction

The Court of Appeals correctly noted in *Coleman* that the legislature can change the common law of contributory negligence if it were inclined to do so. The Maryland legislature, however, has never codified the judge-made law of contributory negligence. The petitioners in *Coleman* were not asking the court to declare unconstitutional a statute establishing contributory negligence as a total bar to recovery, but rather asking the court to fulfill its responsibility to declare the common law, taking into account changed conditions. There simply is no legislative policy or public policy declared by the legislature in the State of Maryland to which the court has any reason to defer.

The Maryland General Assembly has considered legislative proposals to adopt comparative fault on a number of occasions in recent years. Their proposals have failed to receive an affirmative recommendation from either or both the judiciary committees of the two houses of the legislature.[38] In *Coleman*, the court erroneously concluded that the legislature's failure to legislatively impose comparative fault establishes that contributory negligence reflects the "legislative policy" and or the "public policy" of the state. However, it is widely accepted that the legislature's failure to act does not necessarily indicate its opposition to a proposed piece of legislation.[39] As leading constitutional law scholar Laurence Tribe wrote,

> When the array of powers held by the executive, the judiciary, or the states with respect to a given matter can be transformed only by congressional approval or disapproval,

37. *See, e.g.*, DRD Pool Serv. v. Freed, 416 Md. 46, 67, 5 A.3d 45, 57 (2010) (explaining that "the rational basis test is highly deferential" and "presumes a statute is constitutional and should be struck down only if the reviewing court concludes that the Legislature enacted the statute irrationally or interferes with a fundamental right").

38. Coleman v. Soccer Ass'n of Columbia, No. 9, 2013 Md. LEXIS 460, at *21 n.6 (Md. July 9, 2013) (listing several unfavorable House and Committee reports on legislative proposals to adopt comparative fault legislation).

39. *See, e.g.*, HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1358–60 (William N. Eskridge & Philip P. Frickey eds., 1994).

> then it is essential that such approval or disapproval take the form of legislation made through [the formal constitutional procedures for passing laws].[40]

In *Goldstein v. State*,[41] the Court of Appeals of Maryland itself took the same approach:

> Maryland generally adheres to the majority view on legislative inaction, which is that ordinarily the fact that a bill on a specific subject fails of passage in the General Assembly is a rather weak reed upon which to lean in ascertaining legislative intent. Thus, the mere fact that the General Assembly has declined to adopt a particular proposal does not preclude this Court from incorporating the substance of that proposal into the common law . . . . []Courts have traditionally been reluctant to infer legislative intent from legislative inaction when there are several possible reasons for defeat.[42]

In *Coleman*, the court made no attempt to distinguish *Goldstein*.

It is far easier to kill a legislative proposal than it is to enact one. Literally from the founding of our Republic,[43] Congress and state legislatures have operated with "veto gates" or "negative legislative checkpoints"[44] designed to protect minorities—most often, in the early decades of the United States, propertied interests—from the tyranny of the majority.[45] As my colleague Professor Maxwell Stearns observed, "The very mechanisms designed to protect against majority tyranny by making legislation more difficult to procure serve as venues for special interest influence."[46]

Enacting comparative fault legislation requires the Maryland General Assembly to undertake a difficult process that usually requires action by two houses of the legislature, the signature of the governor, and the time and energy required to accomplish these steps during an often crowded and busy legislative session. Adding to the legislature's challenge is the fact that sometimes (even in Maryland at points during the past 170 years), the governor and the majority in each legislative chamber are not of the same political party. Stearns

---

40. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 204–05 (3d ed. 2000).

41. 339 Md. 563, 664 A.2d 375 (1995).

42. *Id.* at 569–70, 644 A.2d at 378 (citations omitted) (internal quotation marks omitted).

43. *See* THE FEDERALIST No. 10 (James Madison).

44. Maxwell L. Stearns, *Direct (Anti-) Democracy,* 80 GEO. WASH. L. REV. 311, 316 (2012) (citations omitted) (internal quotation marks omitted).

45. *Id.* at 315–17.

46. *Id.* at 316.

observed that "[t]hese junctures make it easier to block than to pass legislation because success at every focal point is required for passage whereas failing at only one is sufficient for defeat."[47] Legislative inaction is not a declaration that the legislature approves the existing common law.

During the mid-1990s, I attended committee hearings of the Maryland General Assembly considering replacing contributory negligence with comparative fault. Legislators who voted against such reform legislation often explained their votes by saying that this is a matter for the courts to decide. At least in the first instance, these legislators' understanding of the role of common law courts was more accurate than that of the judges comprising the majority in *Coleman*!

Further, if the court is deriving the legislative policy or public policy of the state from the General Assembly's failure to enact proposed legislation adopting comparative fault, what significance should be given to the fact that the legislature also has repeatedly failed to codify the doctrine of contributory negligence?[48] The court's failure to even mention this legislative inaction is totally at odds with its conclusion that legislative inaction establishes the public policy of the state. The court cannot have it both ways.

Finally, what is the precedential value of the holding in *Coleman*? If the court's opinion means that it will not change the common law when the legislature repeatedly has failed to do so, the implications are staggering. Each legislative session, the Maryland General Assembly considers many bills designed to change one specific aspect or another of the judge-made, common law of Maryland. Often such tort reform proposals are recycled year after year. If the Court of Appeals were to apply *Coleman* as precedent, it would refuse to consider the merits of litigants' arguments whenever the legislature has repeatedly refused to change the law. Obviously, if that occurs, the common law of torts in Maryland is no longer on life support. It is truly dead.

What is worse is that *Coleman* results in a perverse incentive for special interest lobbyists to encourage members of the General Assembly to introduce legislation opposed to the interests of the lobbyists' clients under circumstances in which passage of the legislation is highly unlikely in order to establish a record that the legislature has repeatedly failed to overturn the common law status quo ante. If *Coleman* is to be treated as a precedent, a legislative

47. *Id.* at 336.

48. *See, e.g.*, H.B. 1156, 2013 Reg. Sess. (Md. 2013).

record finessed by special interest lobbyists would bar the Court of Appeals from changing the common law.

C. The Legislature as an Imperfect Democratic Institution

Obviously, it is the legislature, not the courts, that should reflect the popular will of the electorate. Remember again that I am not suggesting that an "elitist" court undo the popular will as expressed in a legislative enactment. However, legislative action and, more pertinently for our purposes, legislative *inaction*, may not perfectly reflect the will of the electorate.

It is inherent in the nature of tort litigation that legislative attempts to modify the common law of torts encounter an asymmetrical balance of lobbying interests. Many Maryland businesses are continuously aware that they may become defendants in negligence actions, and liability insurance carriers always know that they will be financially responsible in many such actions. Each year they spend millions of dollars hiring some of the very best lobbyists in Annapolis and making campaign contributions to legislators, particularly those in leadership positions and on judiciary committees with jurisdiction over the reform of tort law.

In contrast, those random citizens who in the future may unpredictably end up as victims of negligence dramatically underestimate the probability that they will be harmed by the combination of the negligence of others and their own momentary inadvertence or carelessness.[49] Further, the realistic likelihood that any particular Maryland resident will be an accident victim is quite small. As a result, few future accident victims think about contributory negligence when they vote. Fewer yet make campaign contributions based on their interests in this issue or lobby the state legislature for change.

"Wait," cry insurance defense lawyers and insurance and business lobbyists, "Plaintiffs' personal injury attorneys are among the most potent lobbyists and most generous campaign contributors in the state legislative process." This may be true, but these representatives of plaintiffs' personal injury attorneys are far from perfect proxies for the interests of future accident victims. Why?

First, and most important, we must consider the relationship between the legal doctrines of contributory negligence and joint and several liability and how it affects the balance of lobbying power on

49. Guido Calabresi & Kenneth C. Bass, III., *Right Approach, Wrong Implications: A Critique of McKean on Products Liability*, 38 U. CHI. L. REV. 74, 88–89 (1970).

the issue of contributory negligence. One of the traditional justifications for the doctrine of contributory negligence, albeit not one mentioned by the majority in *Coleman*, is that it is too difficult for ordinary citizens as jurors to calibrate the respective degrees of fault of the victim and the tortfeasor and express them in percentage terms as required by a comparative fault regime. This same justification exists for the "all-or-nothing" approach of joint and several liability under which each individual tortfeasor is liable to the plaintiff for the entire harm to which it contributed. The all-or-nothing approach of contributory negligence favors the defendant; the all-or-nothing approach of joint and several liability favors the plaintiff. Of course, under the current regime of joint and several liability, if one defendant pays more than its fair share of a judgment, it can seek contribution from a co-defendant. However, if the co-defendant is judgment proof, it is the first defendant, and not the plaintiff, who is stuck with the loss.

Through the years in Maryland and elsewhere, trading the adoption of comparative fault for the abrogation of joint and several liability has sometimes been suggested as a possible legislative compromise. Many future defendants would benefit from the abrogation of joint and several liability, and many plaintiffs' attorneys would welcome comparative fault. Many of the most politically powerful plaintiffs' attorneys in Maryland, however, practice in areas such as mass products and medical malpractice litigation, where the continuation of joint and several liability is typically regarded as more important to their clients and themselves than is the abrogation of contributory negligence as a total bar to recovery. Hence, the interests of politically powerful segments of the plaintiffs' bar lobbyists sometimes deviate from that of future negligence victims who will be prevented from recovering because of contributory negligence.

In addition, lobbyists representing the interests of plaintiffs' attorneys may not be as effective as one might expect in the legislative process as proxies representing all Maryland residents who might unforeseeably become accident victims at any moment. In recent decades, the insurance industry and business interests have fueled a massive public relations campaign disparaging both plaintiffs' personal injury lawyers and the performance of courts in these cases. These campaigns have been at least somewhat effective.[50] As a result,

50. *See, e.g.*, Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1236 (2004) (reporting survey research attributing the decline in auto accident claims rate to insurers' intense public relations campaigns).

lobbyists for plaintiffs' lawyers may no longer be as effective as proxies for future accident victims as they might once have been.

D. "Changed Conditions"

The majority opinion in *Coleman* recognized that "changed conditions" justify a court in changing the common law. The appropriate question to ask, therefore, is what conditions have changed since *Irwin v. Sprigg*,[51] where the Court of Appeals of Maryland first adopted contributory negligence as a total bar to recovery, a doctrine that the court has since ritualistically reaffirmed as precedent .[52]

The most relevant changes, of course, are those that relate to accidental injury. In 1850, the population of Maryland was 583,034,[53] a significant percentage of which was slaves. Even though the first railroads had begun in the preceding decades, the industrial revolution had yet to transform Maryland; it remained largely an agrarian, tobacco-growing state. In short, Maryland had yet to experience what legal historian John Fabian Witt described as "the great waves of industrialization in the American economy [that] have always been . . . a central interpretative tool in explaining changes in the nineteenth- and twentieth-century law of torts."[54] Obviously, the automobile— the largest single source of negligence cases in modern-day Maryland, once described by federal circuit court of appeals Judge Guido Calabresi as "an evil deity who demanded 55,000 lives every year in exchange for providing amazing powers of individual transportation"[55]—would not be invented for another half-century. Although statistics indicating the numbers of accidental injuries and deaths caused by negligence in Maryland in 1847 are not available, it is noteworthy that in 1870 only thirteen personal injury claims were filed in New York City, a number that would increase more than

51. 6 Gill 200 (Md. 1847).

52. *See* Harrison v. Montgomery Cnty. Bd. of Educ., 295 Md. 442, 451, 456 A.2d 894, 898 (1983) (observing that "Maryland has steadfastly adhered to the doctrine since its adoption in 1847").

53. U.S. CENSUS BUREAU, RESIDENT POPULATION AND APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES, MARYLAND, *available at* http://www.census.gov/dmd/www/resapport/states/maryland.pdf (last visited July 22, 2013).

54. John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 HARV. L. REV. 690, 693-94(2001).

55. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 1(1985).

thirty-fold within forty years.[56] One would think that the exponential increase in accidental injury as a result of the proliferation of the automobile and other machinery would constitute "changed conditions."

Today, a very high percentage of damages resulting from negligence actions are paid for by liability insurance. In the 1840s, except for maritime insurance, there was no liability insurance[57]—any judgment against defendants would be paid from their own pockets. This too would seem to be a "changed condition."

In modern times, Maryland courts, as well as those of other jurisdictions, recognize both loss minimization (deterrence) and loss distribution (compensation) as legitimate goals of tort law.[58] Notwithstanding (or if you prefer, legitimizing) the objections of the Tea Party, both loss minimization and loss distribution at the hands of the other branches of government dramatically increased during the twentieth century in ways unimaginable in 1847. Regulation of goods and services by federal agencies such as the Food and Drug Administration and the Environmental Protection Agency, as well as by state agencies, are integral components of the American economic structure. We spread the losses of old age and misfortune through governmental programs such as social security, Medicare, and Medicaid, as well as through private health insurance. The integral involvement of governmental regulation in the American economy, in effect loss minimization implemented by legislatures and administrative agencies, and the ubiquitousness of loss distribution through government programs—and, to a greater or lesser extent, the public's acceptance of these governmental functions—are also "changed conditions" since 1847.

Under the standards the Court of Appeals of Maryland itself has set for overruling past precedents, the court should have considered comparative fault on its merits and overturned its 1847 precedent establishing contributory negligence as a total bar to recovery.

---

56. Witt, *supra* note 54, at 759.

57. David A. Fischer & Robert H. Jerry, II, *Teaching Torts Without Insurance: A Second-Best Solution,* 45 ST. LOUIS L.J. 857, 860-61 (2001) (identifying 1886 as the date of the first liability insurance policy in the United States).

58. *See* Phipps v. Gen. Motors Corp., 278 Md. 337, 343, 363 A.2d 955, 958 (1976) (justifying strict liability because it "shifts the risk of loss to those better able financially to bear the loss" and that "consumer relies upon the seller in expecting that a product is safe").

III. CONCLUSION

The fact that the state's highest common law court abdicated its authority and dodged its constitutionally imposed institutional responsibilities at this time in history is extraordinarily ironic. No one would deny that Maryland's state capital is a place infused with special interest lobbyists and pervaded by campaign contributions. The legislature is neither the constitutionally preferred nor probably the best-suited branch of government to establish the principles and rules governing whether James Kyle Coleman and tens of thousands of other Maryland residents will be treated fairly when they are unexpectedly injured. Public confidence in the legislative process is at an all-time low.[59] This, however, is the process to which the Court of Appeals of Maryland yields when it abdicates its traditional functions.

Why? We can only speculate. For decades now, businesses and insurance carriers have conducted a massive public relations campaign to besmirch the judicial process that governs the claims of accident victims. Were the well-financed, repeated annual campaigns in Annapolis against legislative enactment of comparative fault so pervasive that they seeped through the walls of the Robert C. Murphy Court of Appeals Building? A small group of business and insurance lobbyists makes huge fees running around each year predicting doom if comparative fault is adopted. Mind you, that is not the experience in the forty-six other states that have adopted comparative fault, and there is no empirical consensus justifying the argument.[60] However, the ritual incantation that the sky will fall if comparative fault is adopted contributes substantially to the lobbyists' very healthy incomes. No doubt their clients genuinely believe the prognostications of doom from their own "experts." Did the judges of the Court of Appeals of Maryland fear embarrassment if they adopted comparative fault, which at least several of the judges seem to personally prefer, only to have the Maryland General Assembly overturn that result?

---

59. Elizabeth Mendes & Joy Wilke, *Americans' Confidence in Congress Falls to Lowest on Record*, GALLUP POLITICS (June 13, 2013), http://www.gallup.com/poll/163052/americans-confidence-congress-falls-lowest-record.aspx.

60. *See, e.g.*, Eli K. Best & John J. Donohue III, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 U. CHI. L. REV. 945, 974 n.92 (2012) (stating that the economic efficiency of contributory and comparative has been debated "with no conclusive result" and citing two opposing studies).

Or did the judges simply not understand that the deference they owe the legislature when a state statute is challenged on constitutional grounds does not apply when they are addressing a common law issue on which the legislature has not acted? In all probability, the judges in the majority believe that their decision was a traditional and conservative one. It is not. It is a radical redefinition constraining the lawful authority of Maryland's highest common law court.