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The Long, Strange Trip of Willful and Wanton Misconduct and a Proposal to Clarify the Doctrine, 26 J. Marshall L. Rev. 363 (1993)

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NOTES

THE LONG, STRANGE TRIP OF WILLFUL AND WANTON MISCONDUCT AND A PROPOSAL TO CLARIFY THE DOCTRINE

A HYPOTHETICAL

Nick Niagara,[1] a former construction worker, takes great pride in repairing his house by himself. One day, he stacked a large pile of bricks in his driveway. Nick planned to use the bricks to repair holes and cracks in his garage masonry. He posted no warnings on or near the pile of bricks. Nick's sixteen-year-old neighbor, Sam Clumsy, came to chat with Nick and attempted to climb on the bricks. With a thunderous crash, the bricks came tumbling down, injuring Clumsy.

After Clumsy received hospital treatment, his parents filed a lawsuit against Nick. A short time after the close of discovery, Clumsy's attorney, with leave from the trial judge, added a count charging Nick with willful and wanton misconduct. At trial, Clumsy presented evidence of Nick's negligence. Likewise, Nick presented evidence of Clumsy's negligence which contributed to the accident. The jury returned a verdict finding Clumsy ninety percent negligent and Nick ten percent negligent. Nick, having been instructed on the principles of modified comparative negligence, breathed a sigh of relief. His comfort was short-lived, however, as the jury also found Nick guilty of willful and wanton misconduct in stacking the bricks without posting a warning.

Illinois tort law[2] currently assesses damages according to a sys-

1. All names used in this hypothetical are fictional.

2. Burke v. 12 Rothschild's Liquor Mart, 148 Ill. 2d 429, 593 N.E.2d 522 (1992). The *Burke* case forms the centerpiece of this Note. In *Burke*, the plaintiff sued a store manager, the City of Chicago, and several police officers for the paralyzing injuries the plaintiff sustained during a scuffle over a case of cola and a subsequent arrest arising from that confrontation. *Id.* at 434-36, 593 N.E.2d at 524. The plaintiff and the store manager argued over the case of cola and the store manager shoved the plaintiff, causing him to trip on loose tiles, fall, and lose consciousness. *Id.* at 434-36, 593 N.E.2d at 524. The plaintiff regained consciousness when several police officers arrived to arrest him. *Id.* at 434-36, 593 N.E.2d at 524. Even though the plaintiff informed the officers that he was injured and unable to move, the officers dragged the plaintiff to the

tem known as modified comparative negligence.[3] Modified comparative negligence determines damages by weighing the plaintiff's degree of fault against the defendant's degree of fault.[4] The plaintiff must prove that the defendant's responsibility for the injury equalled or surpassed his own in order to recover.[5] If the plaintiff meets this threshold, then he can recover the percentage of damages attributable to the defendant's fault.[6] However, Illinois law denies a civil defendant found guilty of willful and wanton miscon-

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paddy wagon. *Id.* at 434-36, 593 N.E.2d at 524. The plaintiff suffered further injuries in a series of falls. *Id.* at 434-36, 593 N.E.2d at 524. The trial court found that all of the incidents combined to cause the single indivisible injury of quadriplegia. *Id.* at 439, 593 N.E.2d at 526. The jury determined that the police officers were willful and wanton when they injured the plaintiff. *Id.* at 435, 593 N.E.2d at 524. In addition, the jury found the plaintiff responsible for 32% of his own injury. *Id.* at 435, 593 N.E.2d at 524. However, the trial court refused to reduce the amount of damages in proportion to the plaintiff's negligence. *Id.* at 432-33, 593 N.E.2d at 523. The Illinois Appellate Court affirmed this ruling in Burke v. 12 Rothschild's Liquor Mart, 209 Ill. App. 3d 192, 568 N.E.2d 80 (1st Dist. 1991). The city then appealed this issue to the Illinois Supreme Court. *Burke*, 148 Ill.2d at 433, 593 N.E.2d at 523.

3. Modified comparative negligence is a subsystem of comparative negligence. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 67, at 470-73 (5th ed. 1984). Comparative negligence allows for the reduction of damages awarded to the plaintiff based on the plaintiff's proportion of fault. *Id.* at 470-75. Since comparative negligence allows recovery based on fault, commentators consider comparative negligence much fairer than contributory negligence. *Id.* Contributory negligence denied a plaintiff any recovery if the plaintiff was responsible for his own injury in any way. *Id.* § 65, at 451-52.

Two basic forms of comparative negligence exist in American common law today. *Id.* § 67 at 471-72. These are "pure" and "modified" comparative negligence. *Id.* at 471. The pure form of comparative negligence allows a plaintiff to recover for his injury, provided he is not completely at fault. *Id.* at 471-72. Under the pure form of comparative negligence, if a plaintiff is responsible for 70% of the injury, he may recover 30% of his damages from the defendant. *Id.* at 472. The defendant, however, may recover 70% of his damages from the plaintiff. *Id.*

Under the modified system, the plaintiff must pass a threshold of liability. *Id.* at 473. Typically, the plaintiff must show that his fault is less than or equal to the defendant's fault. *Id.*

A third form of comparative negligence, used only in Nebraska and South Dakota, is the "slight-gross" system. *Id.* at 474. The slight-gross system allows the plaintiff to recover full damages from the defendant if the plaintiff was only slightly negligent and the defendant was grossly negligent by comparison. *Id.* *See also* HENRY WOODS, COMPARATIVE FAULT, § 4:1 at 85 (2d ed. 1987); VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE 45-76 (2d ed. 1986).

4. Modified comparative negligence, therefore, is similar to pure comparative negligence. The sole distinguishing factor is the threshold of liability. KEETON ET AL., *supra* note 3, § 67 at 473.

5. In Illinois, the General Assembly set the threshold of recovery at 50%. *See* 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV STAT. ch. 110, para. 2-1116 (1991)). Therefore, in order for the plaintiff to recover, the defendant's responsibility for the injury must equal or surpass the plaintiff's.

6. 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV. STAT. ch. 110, para. 2-1116 (1991)).

duct the benefits of modified comparative negligence.[7] On a scale of misconduct, willful and wanton misconduct, also known as recklessness, falls somewhere between actual intent and simple negligence.[8] Generally, a willful actor engages in acts that surpass negligence in egregiousness, but fall short of intentional conduct.[9]

In response to what it perceives as deplorable conduct, the Illinois Supreme Court places total liability on a willful and wanton defendant.[10] As a result, Nick's sense of relief in the above hypothetical was short-lived due to the jury's finding of willful and wanton misconduct. Although Nick's fault was assessed at ten percent, under Illinois law he remains liable for Clumsy's full damages.

Illinois recently developed this quirk in its tort law when the Illinois Supreme Court decided *Burke v. 12 Rothschild's Liquor Mart*.[11] *Burke* imposed full liability on a defendant solely on a finding of willful and wanton misconduct, without any consideration for the defendant's true amount of responsibility for the injury.[12] Therefore, *Burke* subjects the willful and wanton defendant to the same unfair treatment that the contributory system imposed on the slightly negligent plaintiff.[13] To remedy this problem, this Note proposes that the Illinois General Assembly adopt a system blending the equity-based system of comparative negligence[14] with the deterrence-oriented system of willful and wanton misconduct.[15] Part I of this Note outlines the history of negligence law and the role of willful and wanton misconduct in Illinois. Part II evaluates the *Burke* rationale and reveals the decision's inadequacies. Part III focuses on a decision reached in another jurisdiction to contrast the methods used to decide the status of willful and wanton misconduct under comparative negligence. Part IV proposes a model stat-

7. Burke v. 12 Rothschild's Liquor Mart, 148 Ill. 2d 429, 451, 593 N.E.2d 522, 532 (1992).

8. KEETON ET AL., *supra* note 3, § 34, at 212-13.

9. *Id.* at 213. This egregiousness is sometimes characterized as a "disregard of the known danger that will inevitably follow." *Id.* Due to this heightened degree of culpability, the defendant cannot invoke the plaintiff's contributory negligence as a shield to the cause of action. *Id.*

10. *Burke*, 148 Ill. 2d at 451-52, 593 N.E.2d at 531-32. The *Burke* court identified a qualitative difference between willful and wanton misconduct and negligence. *Id.* at 450, 593 N.E.2d at 531. The Illinois Supreme Court found that the willful actor's "intentional or conscious disregard for the danger" warranted the imposition of punitive measures to deter similar outrageous acts in the future. *Id.* at 451, 593 N.E.2d at 532.

11. 148 Ill. 2d 429, 593 N.E.2d 522 (1992).

12. *Id.* at 451-52, 593 N.E.2d at 532.

13. See *infra* notes 17-18 and accompanying text for a discussion on the operation of contributory negligence.

14. See *infra* notes 34-37 and accompanying text for an examination of the rationales behind the adoption of comparative negligence.

15. See *infra* notes 28-31 and accompanying text for a treatment of the history and development of the willful and wanton misconduct doctrine.

ute for enactment in Illinois and other states. This proposed statute would equitably resolve the issue by synthesizing the goals and policy considerations of the willful and wanton misconduct doctrine and the comparative negligence system into a method that handles these cases in a fair manner for all parties.

I. EVOLUTION OF NEGLIGENCE LAW

In order to fully understand the role willful and wanton misconduct plays in Illinois negligence law, it is necessary to review the development of the contributory and comparative negligence systems. Section A analyzes the historical transformation of contributory negligence to comparative negligence, and highlights the creation of the willful and wanton misconduct exception to contributory negligence. Section B explores the history of Illinois' negligence law from its chaotic early period to the eventual adoption of comparative negligence. Finally, Section C examines the development of willful and wanton misconduct in Illinois negligence law, from its inception to the *Burke* decision.

A. The Evolution of Comparative Negligence from Contributory Negligence

Comparative negligence arose in response to the inequitable distribution of damages under contributory negligence.[16] Therefore, to fully appreciate the benefits of comparative negligence, it is necessary to analyze the history of contributory negligence as well. This section relates the history of negligence law from the development of contributory negligence to the adoption and refinement of comparative negligence.

In 1809, the English introduced the contributory negligence doctrine in the case of *Butterfield v. Forrester*.[17] Contributory neg-

16. See *infra* notes 34-37 and accompanying text for a discussion of the origins of comparative negligence.

17. 103 Eng. Rep. 926 (K.B. 1809). In *Butterfield*, the plaintiff was riding home from a local alehouse when he struck a pole laid across the road by the defendant who was making repairs to his house. *Id.* The court denied recovery for the defendant's negligent act because the plaintiff, by riding his horse at an excessive speed, failed to exercise due care for his own safety. *Id.* at 926-27. The contributory negligence defense, therefore, precluded the plaintiff's recovery because the plaintiff's actions added to the injury. KEETON ET AL., *supra* note 3, § 65, at 451-52.

Several theories attempt to explain the rationale underlying the defense, including voluntary assumption of risk, proximate cause, and deterrence. *Id.* at 452. However, none of these rationalizations adequately explain the defense. *Id.* The deterrence argument fails due to its reliance on the unlikely situation of a potential plaintiff conducting his affairs while concentrating on the viability of future lawsuits. *Id.* In addition, opponents of the deterrence argument point out that contributory negligence is just as likely to promote the defendant's negligent behavior because of the defendant's belief that any liability will

ligence precluded a plaintiff's recovery if the plaintiff contributed to his injury in any way.[18] Several commentators attributed the doctrine's conception and rapid acceptance to the dawning age of industrialism,[19] the advent of the railroads,[20] and a desire to prevent juries from awarding excessive verdicts to plaintiffs injured by the new enterprises.[21] The courts quickly realized that large awards to injured parties, particularly workers, would soon bankrupt these nascent, yet vital, industries.[22] The desire to safeguard industry permeated the jurisdictions of the United States as well.[23] As a result, the Supreme Court of Massachusetts adopted the doctrine in the 1824 case of *Smith v. Smith*.[24] Other American jurisdictions rapidly followed suit.[25]

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be negated by the plaintiff's contributory negligence. *Id.* Furthermore, the proximate cause argument departs from the usual application of proximate cause. *Id.* Keeton notes that the use of the proximate cause rule in a contributory negligence case distorts the normal application of the rule by finding an insular cause despite the simultaneous occurrence of negligence. *Id.* Finally, the assumption of risk justification errs on its basic premise. *Id.* The negligent plaintiff cannot be said to knowingly assent to the dangers involved in a course of conduct that has not yet been identified as dangerous. *Id.*

The actual reasons for the adoption of contributory negligence are found in the policy decisions underlying the doctrine. *Id.* The early courts protected the interests of industry from plaintiff-minded juries prevalent at the time. *Id.* For a more detailed discussion of the influences of industry on the adoption of contributory negligence, see *infra* notes 19-23 and accompanying text.

18. KEETON ET AL., *supra* note 3, § 65, at 451.

19. WOODS, *supra* note 3, § 1:4, at 7-8. Woods attributed the English and American courts' decision to adopt contributory negligence to a patriotic urge to protect the vital industries. *Id.* § 1:4, at 7-10, § 1:5, at 10-11. Woods also noted that the tone of the decisions adopting contributory negligence suggested the doctrine was not a wholly new development to judges. *Id.* § 1:1, at 1-4, § 1:2, at 4-6. In fact, it appeared to Woods that the judges merely granted formal recognition to an existing doctrine. *Id.*

20. Earnest A. Turk, *Comparative Negligence on the March* (pts. 1 & 2), 28 CHI.-KENT L. REV. 189, 304 (1950). Turk, like Woods, acknowledged the protectionist influence of judicial decisions during the industrial revolution. *Id.* at 198.

21. Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. - NW. UNIV. 151, 158-69 (1946). Malone noted that an individual plaintiff, wounded by a faceless industry, would appear more sympathetic to juries. *Id.* at 157-58.

22. KEETON ET AL., *supra* note 3, § 67, at 469.

23. Leon Green, *Illinois Negligence Law* (pts. 1-3), 39 ILL. L. REV. - NW. UNIV. 36, 116, 197 (1944). Green attributed the adoption of contributory negligence to domestic courts seeking to protect the new enterprises. *Id.* at 39.

24. 15 Mass. (1 Pick) 464 (1824). The *Smith* case followed a fact pattern similar to that in Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809). The defendant placed a pile of wood in the highway that caused injury to the plaintiff's horse. *Smith*, 15 Mass. (1 Pick) at 464-65. The plaintiff's servant ran into the wood when attempting to deliver ale. *Id.* at 465. The court held that the plaintiff's failure to use ordinary care for the safety of his property precluded his recovery. *Id.* at 467.

25. See, *e.g.*, WOODS, *supra* note 3, § 1 for a full analysis of the development and acceptance of contributory negligence; *see also* Malone, *supra* note 21, at 151.

Critics derided contributory negligence because of the mechanics of the doctrine.[26] The doctrine's disregard for the degree of fault among the parties led to slightly negligent plaintiffs enduring the past and future costs of damages, while the more culpable defendants completely evaded liability.[27] To counter the inequitable nature of contributory negligence and allow the plaintiff to recover for his injury, the courts carved out exceptions to the defense such as the doctrine of willful and wanton misconduct.[28] By adopting willful and wanton misconduct, courts allowed the plaintiff to recover for injuries, attributable in part to his own negligence, if the plaintiff could prove that the defendant engaged in willful and wanton misconduct.[29] However, this new exception to the contributory negligence defense provided relief in only a limited number of cases.[30] In comparison to its later significance, willful and wanton misconduct played only a slight role in the early development of contributory negligence law.[31]

By the twentieth century, federal[32] and state[33] legislation be-

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26. Green, *supra* note 23, at 36. Dean Green characterized contributory negligence as "the harshest doctrine known to [man]." *Id.* Several commentators who followed Green relied on this description in attacking the use of contributory negligence. *See, e.g.*, Turk, *supra* note 20, at 199-200; Malone, *supra* note 21, at 169.

27. See *supra* note 18 and accompanying text for a discussion on the application and development of the contributory negligence defense.

28. See *supra* notes 8-9 and accompanying text for a definition of the willful and wanton misconduct doctrine. The other main exception to the contributory negligence defense was the doctrine of last clear chance. Last clear chance originated in Davies v. Mann, 152 Eng. Rep. 588 (K.B. 1842), where the defendant ran down the plaintiff's jackass which the plaintiff negligently left in the road. *Id.* The court found the defendant liable because he had the "last clear chance" to avoid the collision. *Id.* at 589. Some jurisdictions required varying degrees of helplessness on the plaintiff's part before invoking the doctrine. KEETON ET AL., *supra* note 3, § 66, at 464-68. Keeton believes the last clear chance doctrine was adopted as a means of mitigating the harsh effects of contributory negligence. *Id.* § 67, at 464.

29. Early courts found that the heightened degree of heedlessness for the danger involved with a particular course of conduct negated the plaintiff's contributory negligence for the injury. KEETON ET AL., *supra* note 3, § 65 at 462 n.9.

30. William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 470 (1951). Prosser characterized the doctrine of willful and wanton misconduct as being of limited importance due to its restricted use. *Id.*

31. *Id.* For a full discussion of the influence that willful and wanton misconduct played in Illinois in later years, see *infra* notes 87 to 120 and accompanying text.

32. *See, e.g.*, Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 (1988). Congress enacted this legislation in 1906 and corrected it in 1908, after the United States Supreme Court declared it unconstitutional in Howard v. Ill. Cent. R.R., 207 U.S. 463 (1908). *See* 45 U.S.C. § 51 (1988). See also WOODS, *supra* note 3, §§ 2:1-2:7, at 31-47 for a full analysis of FELA and its effects on negligence law.

33. *See, e.g.*, Structural Work Act, 820 ILL. COMP. STAT. 220/9 (1993) (ILL. REV. STAT. ch. 48, para. 59.90 (1991)); Workers' Compensation Act, 820 ILL. COMP. STAT. 305/1 (1993) (ILL. REV. STAT. ch. 48, para. 138.1 (1991)); Child La-

gan sounding the death knell for contributory negligence. Comparative negligence[34] began to replace contributory negligence in several areas of the law. The doctrine of comparative negligence existed in various forms in admiralty law for some time.[35] Advocates of comparative negligence viewed its method of apportioning damages according to fault as a fairer way of dealing with negligent conduct in a civilized society.[36] Although it met with heavy resistance from the insurance bar, comparative negligence, in one form or another, is now the law in forty-four states, including Illinois.[37]

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bor Laws, 820 ILL. COMP. STAT. 205/1 (1993) (ILL. REV. STAT. ch. 40, para. 31.1 (1991)). None of these statutes address fault; they address only the defendant's compliance with the statute. For an application of the Child Labor Law, see, *e.g.*, Almanderez v. Keller, 207 Ill. App. 3d 756, 566 N.E.2d 441 (1st Dist. 1990).

34. See *supra* notes 3-6 and accompanying text for a definition of comparative negligence.

35. *See* WOODS, *supra* note 3, § 3:1, at 49 (providing a detailed history of the evolution of comparative negligence in admiralty law); *see also* Prosser, *supra* note 30, at 475-76.

36. Turk, *supra* note 20, at 341. The consideration given to relative fault among tortfeasors underlies the great support for the doctrine. *Id.* at 339. The application of percentages eradicates the unjust situations occurring under contributory negligence where the slightly negligent plaintiff suffers greatly while the defendant, the more culpable party, completely escapes responsibility. *Id.*

37. Thirteen states use the pure form of comparative negligence. *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975), *aff'd in part, rev'd in part*, 572 P.2d 775 (Alaska 1975); later adopted by the legislature, ALASKA STAT. § 9.17.900 (Supp. 1991); ARIZ. REV. STAT. ANN. tit. 4A, §§ 12-2501 to 12-2509 (Supp. 1992); Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Hilen v. Hayes, 673 S.W.2d 713 (Ky. 1984); LA. CIV. CODE ANN. tit. 9, art. 2323 (West Supp. 1992); Placek v. Sterling Heights, 405 Mich. 638 (Mich. 1979); MISS. CODE ANN. § 11-7-15 (1972); Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983); Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981); N.Y. CIV. PRAC. L. & RULES § 1411 (Consol. 1976); R.I. GEN. LAWS § 9-20-4 (1985); WASH. REV. CODE ANN., tit. 4, § 4.22.005 (West 1988).

Twenty-nine states employ the modified system of comparative negligence. *See* ARK. CODE ANN. § 16-64-122 (Michie Supp. 1991); COLO. REV. STAT. § 13-21-111 (1987); CONN. GEN. STAT. § 52-572h (1991); DEL. CODE ANN. tit. 10, § 8132 (Supp. 1992); Elk Cotton Mills v. Grant, 79 S.E. 836 (1913); HAW. REV. STAT. § 663-31 (1985); IDAHO CODE §§ 6-801 to 6-806 (1990); 735 ILL. COMP. STAT. 5/2-1116 (1992) (ILL. REV. STAT., ch. 110, para. 2-1116 (1991)); IND. CODE § 34-4-33-3 (Burns 1986); IOWA CODE ANN. § 668.3 (West 1987); KAN. STAT. ANN. § 60-258a (Supp. 1991); ME. REV. STAT. ANN. tit. 14, § 156 (West 1980); MASS. GEN. LAWS. ANN. ch. 231, § 85 (West 1986); MINN. STAT. ANN. § 604.01 (West 1988); MONT. CODE ANN. § 27-1-702 (1991); NEV. REV. STAT. § 41.141 (1987); N.H. REV. STAT. ANN. § 507.7a (1983); N.J. STAT. ANN. tit. 2A, §§ 15-5.1 to 15-5.3 (West 1987); N.D. CENT. CODE § 9-10-07 (1987); OHIO REV. CODE ANN. § 2315.19 (Anderson 1991); OKLA. STAT. ANN. tit. 23, §§ 12, 13 (West 1987); OR. REV. STAT. § 18.470 (1988); PA. STAT. ANN. tit. 42, § 7102 (1982); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (West 1986); UTAH CODE ANN. §§ 78-27-37 to 78-27-38 (1992); VT. STAT. ANN. tit. 12, § 1036 (1973); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979); WIS. STAT. ANN. § 895.045 (West 1983); WYO. STAT. § 1-1-109 (1988).

Only Nebraska and South Dakota employ a third form of comparative negligence, the slight-gross system. *See* NEB. REV. STAT. § 25-21105 (1989); S.D. CODIFIED LAWS ANN. § 20-9-2 (1987); *see also* KEETON ET AL., *supra* note 3, § 67, at 474 (defining the slight-gross system).

B. The Development of Illinois Negligence Law

The history of negligence law in Illinois is complex and at some points incomprehensible. Illinois first adopted the doctrine of contributory negligence in 1852.[38] Then, in 1858, the Illinois Supreme Court recognized a form of comparative negligence without expressly overruling contributory negligence.[39] As a result, confusion ensued over the correct application of the two competing systems.[40] This section explores the development of negligence law in Illinois from the early period of confusion, to the eventual adoption of comparative negligence.

In the 1852 case of *Aurora Branch Railroad v. Grimes*,[41] the Illinois Supreme Court adopted the reasoning embraced by the English judiciary in *Butterfield v. Forrester*,[42] and made contributory negligence part of Illinois law.[43] The *Grimes* court, however, incorporated the contributory negligence defense as part of the plaintiff's prima facie case.[44] Therefore, a plaintiff in Illinois had to show not only the negligent act of the defendant, but also an absence of negligence on his own part to recover for his injuries under the Illinois negligence system.[45] Since the mechanics of this system practically doomed the plaintiff's chances for recovery, many commentators considered the system too harsh.[46]

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38. Aurora Branch R.R. v. Grimes, 13 Ill. 585 (1852). See *infra* notes 41-46 and accompanying text for a detailed discussion of the *Grimes* case.

39. Galena & Chicago R.R. v. Jacobs, 20 Ill. 478 (1858). See *infra* notes 47-53 and accompanying text for a discussion of the facts and rationale the court used to arrive at the *Jacobs* decision.

40. *See* Chicago, Burlington, and Quincy R.R. v Johnson, 33 Ill. 512 (1882); Green, *supra* note 23, at 47-54; Turk, *supra* note 20, at 307-09. For a discussion of *Johnson*, see *infra* notes 56-58 and accompanying text.

41. 13 Ill. 585 (1852). In *Grimes*, the plaintiff's mare fell into a hole on the defendant's property. *Id.* at 586. The court held that the plaintiff's failure to use ordinary care in protecting his property precluded his recovery. *Id.* at 591.

42. 103 Eng. Rep. 926 (K.B. 1809).

43. *Grimes*, 13 Ill. at 591.

44. *Id.* Several commentators considered this interpretation to be a minority view that doubly burdened the plaintiff. *See, e.g.*, Green, *supra* note 23, at 43.

45. *Grimes*, 13 Ill. at 587. The Illinois Supreme Court alleviated this onerous burden later in the same year. Green, *supra* note 23, at 44. In Moore v. Moss, 14 Ill. 106 (1852), the Illinois Supreme Court adopted the doctrine of last clear chance. See *supra* note 28 for a definition of last clear chance. The court in *Moore* imposed a duty on the defendant to avoid recognizable danger created by the plaintiff's negligence. *Moore*, 14 Ill. at 111. The adoption of last clear chance, however, was not a panacea for the negligent plaintiff. Green, *supra* note 23, at 44. Courts limited its use to those cases where the plaintiff could show that the defendant recognized the danger, but nonetheless proceeded to act negligently. *Id.*

46. One commentator characterized the contributory negligence defense as "the harshest doctrine known to the common law of the nineteenth century." Green, *supra* note 23, at 36.

To reduce the harshness of this system,[47] the Illinois Supreme Court adopted a new rationale in the 1858 case of *Galena & Chicago Railroad Co. v. Jacobs*.[48] The *Jacobs* court allowed the plaintiff to recover full damages after showing that the defendant railroad engaged in willful and wanton misconduct.[49] The doctrine proposed by the *Jacobs* court is similar to the slight-gross system of negligence, which allows a plaintiff full recovery upon a showing that his negligence was slight in comparison to the defendant's grossly negligent acts.[50] Unlike comparative negligence, the *Jacobs* doctrine did not decrease the defendant's liability for damages by the percentage of fault attributable to the plaintiff.[51]

The *Jacobs* decision allowed a slightly negligent plaintiff to recover, yet did not expressly overrule the *Grimes* decision which precluded a negligent plaintiff from recovering any damages.[52] As a result, confusion ensued as the lower courts freely chose either system in reaching decisions.[53] Over the next thirty years, the Illinois Supreme Court unsuccessfully attempted to clarify *Jacobs*.[54]

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47. Green, *supra* note 23, at 47. Green attributes this motivation to the Illinois Supreme Court. *Id.* However, the *Jacobs* decision lacks any policy statements to support Green's characterization. *See* Galena & Chicago R.R. v. Jacobs, 20 Ill. 478 (1858).

48. 20 Ill. 478 (1858). This decision may have been motivated by its facts. The defendant's train hit the plaintiff, a four-year-old boy, as he crossed an area of track commonly used by railroad employees. *Id.* at 485. The court, however, did not find the boy's technical trespass controlling. *Id.* at 496. Instead, it focused on the relative degrees of negligence of the parties. *Id.* at 497. From the approving language the *Jacobs* court used when citing the *Grimes* decision, it appears that the *Jacobs* court intended for the new holding to be used in conjunction with the *Grimes* decision. *Id.*

49. *Id.* at 496-97.

50. See *supra* note 3 for a definition of the slight-gross system of negligence.

51. *Jacobs*, 20 Ill. at 496. One commentator attributes the birth of Illinois comparative negligence to this case. Green, *supra* note 23, at 46. Green viewed this decision as an attempt to eradicate the harshness of contributory negligence and replace it with the more equitable system of comparative negligence. *Id.* at 47.

52. *Jacobs*, 20 Ill. at 488. After citing *Grimes* with approval, the *Jacobs* court then went on to evaluate other precedents to formulate a synthesis of opinion resulting in the *Jacobs* doctrine. *Id.* at 488-97.

53. Green, *supra* note 23, at 47; Turk, *supra* note 20, at 307-08. The appellate and trial level courts had the option of applying either *Grimes* or *Jacobs* in their decisions. *Id.* at 308. Thus, the plaintiff's recovery was based on the whims of the courts. *Id.* at 309.

54. In Illinois Central Railroad v. Baches, 55 Ill. 379 (1870), the Illinois Supreme Court sought to blend the *Grimes* and *Jacobs* rationales. The *Baches* court held that an injured plaintiff must first show due care on his part. *Id.* at 390. If the plaintiff failed to meet the burden established in *Grimes*, then the plaintiff could only recover by proving that the defendant acted in a grossly negligent manner. *Id.* From the language used in *Jacobs*, as well as the *Jacobs* court's refusal to expressly overrule *Grimes*, it appears that the *Baches* court correctly interpreted the *Jacobs* rationale. However, the court weakened the *Baches* two-step compromise approach in Indianapolis and St. Louis Railroad v. Evans, 88 Ill. 63 (1878). In *Evans*, the Illinois Supreme Court held that the

Despite the Illinois Supreme Court's efforts at clarification, the correct application of the two systems remained confusing.[55] This confusion drew the criticism of the Illinois Supreme Court in *Chicago, Burlington, & Quincy Railroad Co. v. Johnson*.[56] The decision ridiculed the lengths to which "gross" and "slight" negligence could be taken.[57] The *Johnson* court noted that the determination of degrees of negligence was relative.[58] Eventually, the Illinois Supreme Court recognized the unwieldy[59] nature of the *Jacobs* system and discarded it in *City of Lanark v. Dougherty*,[60] thereby establishing contributory negligence as the law in Illinois.[61]

Nevertheless, the worker's compensation and employer liability statutes on state[62] and federal[63] levels whittled away at the shield contributory negligence provided to defendants. By the middle of the twentieth century, industry, the original beneficiary of contributory negligence,[64] no longer enjoyed the protection of the contributory negligence system because new statutes discarded contributory negligence. The individual, however, still labored under

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plaintiff had the burden of showing slight or no negligence before he could recover. *Id.* at 64. After the plaintiff met this burden, the court compared the parties' degree of fault. *Id.* at 65. The plaintiff would then recover after proving that the defendant's negligence was gross in comparison. *Id.*

55. Green, *supra* note 23, at 47 (discussing the extent of the confusion in Illinois appellate and trial courts).

56. 33 Ill. 512 (1882). In *Johnson*, a speeding train killed the plaintiff's decedent while he was working at a store serviced by the defendant railroad. *Id.* at 517. Despite the fact that the train was traveling in excess of the city speed limit, the decedent's contributory negligence was still at issue. *Id.* at 520. The court, clearly exasperated with the new system of degrees of negligence, called for changes in the system. *Id.* at 522-23.

57. *Id.* at 522.

58. *Id.* *Johnson* also pointed out the paradoxical workings of the *Jacobs* reasoning, in that both parties neglected to use ordinary care, but one party was found to be grossly negligent, while the other was found to be only slightly negligent. *Id.* at 523. The *Johnson* court expressed dissatisfaction with this quirk, since it appeared to reward negligence. *Id.* at 524.

59. Although most commentators concede that the system was onerous, some cling to the belief that the courts discarded the *Jacobs* doctrine for other reasons, such as a reluctance to burden industry. *See, e.g.*, Green, *supra* note 23, at 51.

60. 153 Ill. 163, 38 N.E. 892 (1894). *Dougherty* expressly overruled the *Jacobs* doctrine. *Dougherty*, 153 Ill. at 165-66, 38 N.E. at 893. The destruction of the *Jacobs* doctrine has also been attributed to two other cases, Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N.E. 456 (1885), and Lake Shore and Michigan Southern Railway Co. v. Hessions, 150 Ill. 546, 37 N.E. 905 (1894). These cases, however, are more properly labeled as merely narrowing the doctrine. Green, *supra* note 23, at 51-54.

61. *Dougherty*, 153 Ill. at 165-66, 38 N.E. at 893.

62. See *supra* note 33 for examples of state laws discarding the contributory negligence doctrine.

63. *See, e.g.*, Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 (1988) (rejecting contributory negligence as a defense).

64. See *supra* notes 19-23 and accompanying text for a discussion of the influence of industry on the adoption of the contributory negligence doctrine.

contributory negligence's cumbersome burden of proof.[65]

Several members of the Illinois bar launched attacks aimed at curing this inequity in 1959.[66] A judicial conference addressed the validity of contributory negligence in a modern state.[67] The conference recommended adoption of comparative negligence.[68] The majority at the conference considered modified comparative negligence's apportionment of damages according to fault to be a more just system of imposing liability.[69]

Although several conferees staunchly defended the doctrine of contributory negligence and argued against the adoption of comparative negligence,[70] the Illinois Appellate Court rejected these arguments and recommended that contributory negligence be discarded in favor of comparative negligence in *Maki v. Frelk*.[71] The Illinois

65. This legacy of industrial interests rankled several commentators. *See, e.g.*, Green, *supra* note 23, at 121-25; Turk, *supra* note 20, at 339-46. Clearly, any justification for contributory negligence evaporated when the statutory enactments prevented the main beneficiaries from utilizing the defense. Turk, *supra* note 20, at 341. With the large number of deaths and injuries precipitated by the advent of automobiles, the crisis became critical. Prosser, *supra* note 30, at 466. Advocates for comparative negligence pointed to the horrible consequences of contributory negligence as well as the virtual rejection of the doctrine by juries. *Id.* at 469.

66. William C. Atten, *Should Illinois Adopt a Comparative Negligence Statute? Yes!*, 51 ILL. B.J. 195 (1962). Atten, a supporter of comparative negligence, reported on the attempts to change Illinois law to comparative negligence. He pointed to the injustice of allowing the more culpable defendant to escape liability because of the plaintiff's contributory negligence. *Id.* at 197. He also noted the unpredictable tendency of juries to reject the doctrine and return compromise verdicts. *Id.*

67. *Id.* at 195. Atten reported on the judicial conference and addressed the pros and cons of comparative negligence. *Id.* at 197-99. He recommended the adoption of modified comparative negligence as the proper method for apportioning liability among parties. *Id.* at 205.

68. *Id.* at 205.

69. *Id.*

70. *See, e.g.*, David M. Burrell, *Should Illinois Adopt a Comparative Negligence Statute? No!*, 51 ILL. B.J. 195 (1962). The one remarkable feature of Burrell's article is that it is completely devoid of footnotes. Burrell instead relies on *ad hominem* attacks and self-glamorization to arrive at the conclusion that contributory negligence works because the juries ignore it. *See id.* at 207-09. Some of the arguments put forth by Burrell and other opponents of comparative negligence are that juries, although told that contributory negligence acts as a bar to recovery, often arrived at compromise verdicts; that litigation would increase if comparative negligence were to be adopted; and that settlement would be discouraged under a comparative negligence system. *Id.* But see Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981), where the Illinois Supreme Court addressed and rejected these arguments.

71. 85 Ill. App. 2d 439, 229 N.E.2d 284 (2d Dist. 1967), *rev'd*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968). The plaintiff in *Maki* brought suit on a theory of comparative negligence. *Id.* at 440, 229 N.E.2d at 285. The trial court dismissed the comparative negligence count as having no basis in law. *Id.* at 440, 229 N.E.2d at 285. The appellate court in *Maki*, disillusioned by the lack of legislative response, took the initiative and tried to change the law. *See id.* at 451, 229 N.E.2d at 290.

Appellate Court in *Maki* analyzed the utility of contributory negligence in modern society and found it wanting.[72] The court pointed out that contributory negligence was originally adopted to safeguard industry, but that those safeguards no longer existed due to statutory enactments prohibiting contributory negligence as a defense in industrial accidents.[73] As a result, the appellate court in *Maki* recommended the approval of a modified form of comparative negligence in Illinois.[74] However, the Illinois Supreme Court rejected this invitation for change, and stated that it would leave the adoption of comparative negligence to the legislature.[75]

However, thirteen years later, the Illinois Supreme Court changed its position on both contributory negligence and judicial abstinence by adopting the pure form of comparative negligence in *Alvis v. Ribar*.[76] In *Alvis*, the court weighed the benefits of the continued use of contributory negligence in a modern society against the advantages of the fairer system of comparative negli-

72. *Id.* at 441, 229 N.E.2d at 286. The Illinois Appellate Court in *Maki* noted that modern conditions eliminated the need for the contributory negligence defense. *Id.* at 452, 229 N.E.2d at 291. Industrial accidents were being handled under worker's compensation statutes. *Id.* at 441, 229 N.E.2d at 286. The court could find no justification for retaining the doctrine when its primary beneficiary, industry, was no longer able to take advantage of it. *Id.* at 449, 229 N.E.2d at 290. These views were by no means unique. They formed the centerpiece arguments in Prosser's article, *Comparative Negligence*, *supra* note 30, at 466.

73. See *supra* text accompanying notes 32-37, concerning the statutory rejection of contributory negligence.

74. *Maki*, 85 Ill. App. 2d at 451, 229 N.E.2d at 290-91. There the appellate court reasoned that because the courts created contributory negligence, the courts could replace it. *Id.* at 452, 229 N.E.2d at 291.

75. *Maki v. Frelk*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968). In reaching this decision, the Illinois Supreme Court rejected the theory that contributory negligence could be abandoned by the court solely because the court created it. *Id.* at 196, 239 N.E.2d at 447. The court reasoned that the Illinois Constitution granted the legislature the sole power to change the law. *Id.* at 196, 239 N.E.2d at 447.

Justice Ward, in his dissent, wholeheartedly endorsed the appellate court's attempt to end the inequitable system. *Id.* at 202-03, 239 N.E.2d at 450 (Ward, J., dissenting). He relied on the fact that the court had adopted contributory negligence in *Grimes*, and believed, therefore, that the court could dispose of it. *Id.* at 199-202, 239 N.E.2d at 448-50. Justice Ward also stated that England, the birthplace of the doctrine, had since discarded it. *Id.* at 201, 239 N.E.2d at 450. Further, Justice Ward observed that the primary beneficiary of the doctrine, industry, no longer received the fruits of the doctrine. *Id.* at 201, 239 N.E.2d at 449. He concluded by noting that the comparative negligence system was working well in numerous other jurisdictions. *Id.* at 201, 239 N.E.2d at 450.

76. 85 Ill. 2d 1, 421 N.E.2d 886 (1981). *Alvis* was a consolidated case. *Id.* at 4, 421 N.E.2d at 887. In the title case, Alvis was a passenger in the defendant Ribar's car when it struck a sign erected by the defendant Milburn Bros., Inc. *Id.* at 4-5, 421 N.E.2d at 887. Milburn was working as a contractor for the third defendant, Cook County. *Id.* at 4, 421 N.E.2d at 887. The plaintiff filed suit against all three parties. *Id.* at 4, 421 N.E.2d at 887.

In the other case, the defendant Abbott Laboratories' truck collided with a car driven by the plaintiff's decedent. *Id.* at 4-5, 421 N.E.2d at 887. The plaintiff, Krohn, brought a wrongful death action against the defendant. *Id.* at 4-5,

gence and adopted the latter.[77] After analyzing the strengths and weaknesses of the two predominant systems of comparative negligence, modified[78] and pure,[79] the *Alvis* court chose the pure form as the new law for Illinois.[80] Therefore, in Illinois, a plaintiff could recover damages from a defendant proportional to the defendant's fault.[81] In the years immediately following the *Alvis* decision, a defendant responsible for the majority of the blame for the injury could also file a counterclaim and recover damages from the plaintiff in proportion to the plaintiff's fault.[82] Consequently, a defendant responsible for 90% of the damage could recover from the plaintiff who bore only 10% of the responsibility for the injury.[83]

In 1986, the Illinois General Assembly, as part of the Tort Reform Act, altered this aspect of the *Alvis* rule and enacted a modified form of comparative negligence.[84] Under the statute, a plaintiff must satisfy a threshold test by showing that he is not

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421 N.E.2d at 887. Both cases included a count based on comparative negligence. *Id.* at 4, 421 N.E.2d at 887.

The trial courts in both cases dismissed the comparative negligence counts. *Id.* The appellate court affirmed Alvis' dismissal. *Id.* at 4, 421 N.E.2d at 884. The Illinois Supreme Court accepted Alvis' appeal and certified Krohn's case for immediate appeal. *Id.* at 4, 421 N.E.2d at 887.

77. *Id.* at 9-16, 421 N.E.2d at 890-93. The court found the logic and fairness of comparative negligence "difficult to dispute." *Id.* at 15, 421 N.E.2d at 892. The court also noted the wave of transformation occurring around the country as more states adopted comparative negligence. *Id.* at 12-13, 421 N.E.2d at 891-92.

78. Modified comparative negligence establishes a threshold of liability that the plaintiff must meet in order to recover. KEETON ET AL., *supra* note 3, § 67, at 473. The plaintiff satisfies this threshold requirement by showing that the defendant's liability for the injury exceeds the statutorily established limit of 50%. *Id.* Once this requirement is met, then the plaintiff is allowed to recover damages proportional to the defendant's liability. *Id.* See, 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV. STAT. ch. 110, para. 2-1116 (1991)), for an example of a modified comparative negligence statute.

79. Pure comparative negligence allows a plaintiff to recover damages from the defendant in proportion to the defendant's liability. KEETON ET AL., *supra* note 3, § 67, at 472. So long as the plaintiff's conduct is not the sole cause of the injury, the plaintiff may recover damages from the defendant. *See id.*

80. *Alvis*, 85 Ill. 2d at 25-28, 421 N.E.2d at 896-98. The *Alvis* court found that the apportionment of damages under pure comparative negligence best served the interests of justice. *Id.* at 27, 421 N.E.2d at 897. The court noted that modified comparative negligence merely shifts the contributory negligence burden but does not eliminate it. *Id.*

81. *Id.*

82. *Id.*

83. In situations where the defendant's damages greatly exceeded the plaintiff's damages, this aspect of the *Alvis* decision could work grave injustices. To illustrate, a defendant who was determined to be 90% at fault, but suffered $400,000 in damages, could prevent any damages from being awarded to a plaintiff who had less than $40,000 in damages, simply by filing a counter suit.

84. 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV. STAT. ch. 110, para. 2-1116 (1991)).

more than 50% at fault to recover.[85] The statute, however, does not specifically address the willful and wanton misconduct doctrine; thus, the doctrine's status remains unclear.[86]

C. The Willful and Wanton Misconduct Doctrine in Illinois

The doctrine of willful and wanton misconduct, like comparative negligence, arose as a method of reducing the harsh effects of contributory negligence on plaintiffs[87] and as a means of deterring potential tort-feasors.[88] The Illinois Supreme Court, however, utilized the doctrine to protect the interests of industry.[89] The doctrine of willful and wanton misconduct originally appeared in *Chicago & Mississippi Railroad Co. v. Patchin* where the Court termed it recklessness.[90] In *Patchin*, the Illinois Supreme Court defined recklessness as the deliberate disregard of danger, and held that a contributorily negligent plaintiff could only recover after proving that the defendant acted recklessly.[91]

Generally, plaintiffs in early cases were limited to showing recklessness or willful and wanton misconduct, as it came to be called, by proving that a defendant willfully violated a statute.[92] The cases distinguished willful and wanton misconduct from gross

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85. The statute in pertinent part reads as follows: "[T]he plaintiff shall be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is more than 50% of the proximate cause of the injury." 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV. STAT. ch. 110, para. 2-1116 (1991)).

86. The fact that the statute did not specifically include willful and wanton misconduct played a major role in *Burke*. *See* Burke v. 12 Rothschild's Liquor Mart, 148 Ill. 2d 429, 441-43, 593 N.E.2d 522, 527-28 (1992). See *infra* notes 122-30 and accompanying text for a detailed analysis of the court's decision-making process in *Burke*.

87. Turk, *supra* note 20, at 306.

88. Green, *supra* note 23, at 200. In his article, Dean Green cites several cases where the court used willful and wanton misconduct as a warning to future wrongdoers. *Id.*, *citing e.g.*, Brown v. Illinois Terminal Co., 319 Ill. 326, 150 N.E. 242 (1925); Walldren Express & Van Co. v. Krug, 291 Ill. 472, 126 N.E. 97 (1920).

89. See *supra* notes 19-23 and accompanying text concerning the influence of industry on the adoption of contributory negligence; *see also* Illinois Cent. R.R. v. Godfrey, 71 Ill. 500 (1874).

90. 16 Ill. 197 (1854). This case dealt with the killing of the plaintiff's livestock on several occasions by locomotives. *Id.* at 198. The stock were considered to be trespassing, however. *Id.* at 202. The plaintiff's failure to prevent the trespass by neglecting to secure his stock was the basis for the finding of negligence on the part of the plaintiff. *Id.*

91. *Id.* at 204.

92. *See, e.g.*, Schultz v. Henry Ericsson Co., 264 Ill. 156, 106 N.E. 236 (1914); Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N.E. 131 (1899); Catlett et al. v. Young, 143 Ill. 74, 32 N.E. 447 (1892) (all dealing with the violation of safety statutes resulting in a finding of willfulness on the defendant's part). *But see* Illinois Cent. R.R. v. Godfrey, 71 Ill. 500 (1874) (holding that evidence showing a disregard of local speed ordinances was not controlling and deeming the plain-

negligence.[93] Willful and wanton misconduct surpassed gross negligence in culpability because of the foreseeability of harm.[94] Therefore, the defense of contributory negligence was not available to a willful and wanton defendant.[95] The contributory negligence defense, however, remained available in the majority of cases where the defendant did not violate a safety statute.[96]

Nevertheless, the plaintiff's violation of a safety statute did not automatically preclude the plaintiff's recovery. In *Walldren Express Co. v. Krug*,[97] the Illinois Supreme Court allowed the plaintiff to recover despite the fact that he violated a safety statute prohibiting the use of public streets as baseball diamonds.[98] Even though the plaintiff violated a municipal ordinance, the *Krug* court found that the defendant's actions surpassed all degrees of negligence, and ordered recovery for the plaintiff.[99] In its ruling, the *Krug* court redefined willful and wanton misconduct making it the equivalent of gross negligence, thereby widening the scope of the exception established in the *Patchin* case.[100] Willful and wanton misconduct became firmly ensconced as an exception to contributory negligence.

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tiff's presence in an area of danger with only tacit license more determinative of the matter).

Today, a plaintiff must show not only the violation of a statute, but also that he was among the class intended to be protected by the statute, that the statute was intended to prevent the type of injury that he incurred, and that his injury would not have occurred absent the violation of the statute. Rodgers v. St. Mary's Hosp. of Decatur, 149 Ill. 2d 302, 308, 597 N.E.2d 616, 619 (1992) (quoting Corgan v. Muehling, 143 Ill. 2d 296, 574 N.E.2d 602 (1991)).

93. Walldren Express & Van Co. v. Krug, 291 Ill. 472, 475, 126 N.E. 97, 100-01 (1920); *Schultz*, 264 Ill. at 103, 106 N.E. at 239.

94. Dean Green takes it as a matter of known fact that the two doctrines were wholly different in Illinois law. Green, *supra* note 23, at 201. Green makes his offhand remark about willfulness being outside the three types of negligence (simple, ordinary, gross) in his discussion on the *Godfrey* case. *Id.* at 202. He also points out that the failure to exercise ordinary care will lead some fact-finders to declare the breach of duty as willful. *Id.*

95. *See, e.g.*, Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N.E. 131 (1899).

96. Green, *supra* note 23, at 200-04.

97. 291 Ill. 472, 126 N.E. 97 (1920). In *Walldren*, the defendant's truck driver ran down the plaintiff as the plaintiff was playing baseball in the street. *Id.* at 474, 126 N.E.at 98. The truck's defective engine regulator failed to slow its speed. *Id.* at 475, 126 N.E. at 98. The driver knew that the boys were playing ball in the street, yet failed to slow down or sound his horn. *Id.* at 475, 126 N.E. at 98. The jury found for the plaintiff and awarded damages. *Id.* at 474, 126 N.E. at 98. The trial court denied the defendant's motion for a judgment notwithstanding the verdict. *Id.* at 474, 126 N.E. at 98.

98. *Id.* at 476, 126 N.E. at 98.

99. *Id.* at 477, 126 N.E. at 99. The truck driver's failure to stop or give any warning despite his knowledge of the impending danger constituted willful and wanton misconduct. *Id.* at 477, 126 N.E. at 99.

100. *Id.*

The status of this exception naturally came into question after the Illinois Supreme Court adopted comparative negligence.[101] However, the *Alvis* court deferred to the legislature or future decisions on these types of "collateral issues."[102] In addressing the role willful and wanton misconduct would play in Illinois law, however, the legislature enacted only minor procedural changes that made willful and wanton misconduct counts subject to the judge's discretion.[103]

The silence of the Illinois General Assembly and the Illinois Supreme Court over the proper role willful and wanton misconduct was to play under comparative negligence spawned two diametrically opposed decisions in the Illinois Appellate Courts. In *State Farm Mutual Auto Insurance Co. v. Mendenhall*,[104] the appellate court allowed a reduction of damages based on plaintiff's fault despite the fact that the trial court found the original wrongdoer willful and wanton.[105] The court reasoned that reducing damages in willful and wanton misconduct cases was proper because the boundaries between willful and wanton misconduct and ordinary negligence were not clear enough to support disparate treatment.[106] As a result, willful and wanton misconduct practically ceased to exist because of its transformation into another form of negligence.[107]

In *Montag v. Board of Education*,[108] however, the appellate court reached the opposite conclusion and found that willful and

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101. Burke v. 12 Rothschild's Liquor Mart, 148 Ill. 2d 429, 440, 593 N.E.2d 522, 528-29 (1992).

102. Alvis v. Ribar, 85 Ill. 2d 1, 28, 421 N.E.2d 886, 898 (1981).

103. 735 ILL. COMP. STAT. 5/2-604.1 (1993) (ILL. REV. STAT. ch. 110, para. 2-604.1 (1991)). This statute strictly forbids the inclusion of a count seeking punitive damages in the original complaint. *Id.* Such a count can only be added within 30 days after the close of discovery. *Id.* To file a punitive count, the plaintiff must establish at a pre-trial hearing that there is a reasonable likelihood that the facts will support such a count. *Id.* The final decision rests with the trial judge's discretion. *Id.*

104. 164 Ill. App. 3d 58, 517 N.E.2d 341 (4th Dist. 1987). The *Mendenhall* case is peculiar because of the parties contesting the matter. The defendant was involved in an auto accident. *Id.* at 58, 517 N.E.2d at 342. The other party in the accident was determined to be willful and wanton. *Id.* at 58, 517 N.E.2d at 342. However, the defendant was also found to be contributorily negligent. *Id.* at 58, 517 N.E.2d at 342. The original wrongdoer in the accident was not insured, and the defendant had to recover from his insurance company. *Id.* at 342, 517 N.E.2d at 342. The insurance company sought a declaratory judgment allowing the company to reduce the award it had to pay to its insured by the insured's proportion of negligence. *Id.* at 58, 517 N.E.2d at 342.

105. *Id.* at 58, 517 N.E.2d at 342.

106. *Id.* at 61, 517 N.E.2d at 343-44.

107. *See* Burke v. 12 Rothchild's Liquor Mart, 148 Ill. 2d 429, 444-45, 593 N.E.2d 522, 529 (1992).

108. 112 Ill. App. 3d 1039, 446 N.E.2d 299 (3d Dist. 1983). *Montag* was also decided in a strange fashion. The plaintiff sued the school board, but could not show that the board was willful and wanton in its actions. *Id.* at 1041, 446 N.E.2d at 300. Therefore, the plaintiff argued that after *Alvis*, willful and wan-

wanton misconduct still existed as a legal doctrine distinct from negligence.[109] By statute,[110] the plaintiff in *Montag* could only recover by proving that the defendant school district acted in a willful and wanton manner.[111] Therefore, the plaintiff, in one of several alternative arguments, proposed that the adoption of contributory negligence discarded willful and wanton misconduct.[112] The court rejected the plaintiff's contention that the adoption of contributory negligence discarded willful and wanton misconduct.[113] Consequently, the plaintiff had to show that the defendant's conduct exceeded mere negligence and constituted willful and wanton misconduct to collect full damages from the school.[114] As a result of these decisions, the status of willful and wanton misconduct in Illinois law remained unclear.[115]

In 1992, the Illinois Supreme Court finally clarified the matter in *Burke v. 12 Rothschild's Liquor Mart*.[116] The *Burke* court held that willful and wanton misconduct exception still exists in Illinois.[117] Furthermore, the *Burke* court found that willful and wanton misconduct differs in kind rather than degree from ordinary negligence.[118] As a result, a willful and wanton defendant may not reduce payment of damages by the percentage of fault attributable to the plaintiff.[119] Thus, a willful and wanton defendant must pay the plaintiff's full damages, despite the presence of contributory negligence on the plaintiff's part.[120] As the next section demonstrates, the *Burke* opinion is fraught with inconsistencies and plagued by a selective application of precedent and statutory law.

II. ANALYSIS OF THE *BURKE* DECISION

The *Burke* decision attempts to remedy a problem that arose due to Illinois' adoption of modified comparative negligence.[121]

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ton misconduct is no longer recognized as a heightened form of fault in Illinois. *Id.* at 1044, 446 N.E.2d at 303.

109. *Id.* at 1045, 446 N.E.2d at 303.

110. 745 ILL. COMP. STAT. 10/3-108 (1993) (ILL. REV. STAT. ch. 85, para. 3-108 (1991)).

111. *Montag*, 112 Ill. App. 3d at 1044, 446 N.E.2d at 303.

112. *Id.* at 1045, 446 N.E.2d at 303.

113. *Id.* 446 N.E.2d at 303.

114. *Id.* 446 N.E.2d at 303.

115. *See* Burke v. 12 Rothschild's Liquor Mart, 148 Ill. 2d 429, 444, 593 N.E.2d 522, 528-29 (1992).

116. 148 Ill. 2d 429, 593 N.E.2d 522 (1992).

117. *Id.* at 451, 593 N.E.2d at 532.

118. *Id.*, 593 N.E.2d at 532.

119. *Id.*, 593 N.E.2d at 532.

120. *Id.*, 593 N.E.2d at 532.

121. *See Burke*, 148 Ill. 2d at 443-44, 593 N.E.2d at 528. Whenever a state changes from a contributory negligence system to a comparative negligence system, the status of the contributory negligence exceptions such as willful and

This part explores the *Burke* decision in two sections. Section A focuses on the analysis used by the *Burke* court in reaching its decision. Section B analyzes the court's failure to adequately incorporate the policy objectives of the precedent and statutory language it relied on and describes the implications of these defects.

A. An Analysis of the Burke *Rationale*

In *Burke v. 12 Rothschild's Liquor Mart*,[122] the Illinois Supreme Court relied on principles of statutory construction, precedent, and deterrence to hold that willful and wanton misconduct differs in kind, rather than degree, from ordinary negligence.[123] As a result, the court found that under modified comparative negligence, willful and wanton defendants assume total liability for the plaintiff's injury regardless of the degree of the plaintiff's fault.[124] This section discusses the three factors the *Burke* court utilized in reaching its decision.

In analyzing the facts,[125] the *Burke* court noted that the incident occurred before the legislature enacted modified comparative negligence.[126] Nevertheless, the court, in an attempt to clarify the role of willful and wanton misconduct in the law, announced that its holding applied to present Illinois law.[127] The court noted that the modified comparative negligence statute made no mention of willful and wanton misconduct.[128] Applying statutory construction principles, the court held that the legislature intended willful and

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wanton misconduct become unclear. Jim Hasenfus, Comment, *The Role of Recklessness in American Systems of Comparative Fault*, 43 OHIO ST. L.J. 399, 403-04 (1982). Hasenfus formulates a method for analyzing the status of willful and wanton misconduct in comparative fault systems. *Id.* at 420-21. The analysis focuses on the legislative and common law history of willful and wanton misconduct, as well as the policy considerations underlying the doctrine's adoption. *Id.*

122. 148 Ill. 2d 429, 593 N.E.2d 522 (1992).

123. *Id.* at 439-51, 593 N.E.2d at 526-32.

124. *Id.* at 451, 593 N.E.2d at 532.

125. In *Burke*, the plaintiff suffered crippling injuries at the hands of the defendants. *Id.* at 432-34, 593 N.E.2d at 523-24. First, the manager of the liquor store shoved the plaintiff to the floor in an argument over payment for a case of cola. *Id.* at 433-34, 593 N.E.2d at 523-24. The plaintiff tripped and struck a steel panel on the door, which rendered him unconscious. *Id.* The store manager called the police, who further injured the plaintiff by dropping him as they carried him to the paddy wagon. *Id.* at 434, 593 N.E.2d at 524. For a more detailed discussion of the facts in the *Burke* case, see *supra* note 2.

126. *Id.* at 440, 593 N.E.2d at 527. The modified comparative negligence statute requires the plaintiff to prove that the defendant's fault exceeded or equalled his own. 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV. STAT. ch. 110, para. 2-1116 (1991)).

127. *Burke*, 148 Ill. 2d at 440, 593 N.E.2d at 527.

128. *Id.* at 442, 593 N.E.2d at 527. The pertinent part of the comparative negligence statute reads as follows: "In all actions . . . based on negligence or product liability . . . the plaintiff shall be barred from recovering damages . . . if the

wanton misconduct to remain separate from and incomparable with ordinary negligence.[129] In addition, the court relied on a statutory definition of willful and wanton misconduct in holding that the legislature considered willful and wanton misconduct to be different in nature from ordinary negligence.[130]

In addition to statutory construction, the *Burke* court analyzed conflicting precedent concerning willful and wanton misconduct.[131] The court noted the predilection in the Illinois Appellate Courts,[132] and the United States Court of Appeals for the Seventh Circuit,[133] to compare willful and wanton misconduct with negligence. The Illinois Supreme Court ignored other decisions by these appellate courts that contradicted this position by refusing to compare the two types of conduct.[134] The court also analyzed case law from other jurisdictions to decide the crucial issue of whether willful and wanton misconduct differs in kind from negligence.[135] After a thorough review of the genesis of willful and wanton misconduct, the court held that the doctrine acts to preclude reduction of damages

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plaintiff is more than 50% of the proximate cause of the injury . . . ." 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV. STAT. ch. 110, para. 2-1116 (1991)).

129. *Burke*, 148 Ill. 2d at 441-42, 593 N.E.2d at 527. The *Burke* court reasoned that the legislature deliberately omitted willful and wanton misconduct from the statute. *Id.* at 443, 593 N.E.2d at 527. Therefore, to meet the legislative intent of the statute, the *Burke* court denied the willful and wanton defendant the opportunity to reduce damages based on the plaintiff's comparative fault. *Id.* at 441-43, 593 N.E.2d at 527-28.

130. *Id.* at 443, 593 N.E.2d at 528. The *Burke* court relied on a statutory definition of willful and wanton that described the conduct as intentional, or utterly indifferent to the consequences of the actions. *Id.*, 593 N.E.2d at 528, *citing* 745 ILL. COMP. STAT. 10/1-210 (1993) (ILL. REV. STAT. ch. 85, para. 1-210 (1991)).

131. *Burke*, 148 Ill. 2d at 444-46, 593 N.E.2d at 528-29.

132. *E.g.*, Downing v. United Auto Racing Ass'n, 211 Ill. App. 3d 877, 570 N.E.2d 828 (1st Dist. 1991) (finding that defendant's actions of allowing races to continue without stewards after being informed of the danger by the plaintiff constituted willful and wanton misconduct and allowing reduction of damages in proportion to plaintiff's negligence); State Farm Mut. Auto Ins. Co. v. Mendenhall, 164 Ill. App. 3d 58, 517 N.E.2d 341 (4th Dist. 1987) (holding that the vaguely defined boundaries between willful and wanton misconduct and negligence mandate a comparison of the two types of conduct).

133. *Burke*, 148 Ill. 2d at 444, 593 N.E.2d at 529. In examining federal case law, the *Burke* court naturally limited its analysis to the federal court decisions that applied Illinois law. *Id.* The *Burke* court analyzed Davis v. United States, 716 F.2d 418 (7th Cir. 1983) and Wassell v. Adams, 865 F.2d 849 (7th Cir. 1989), both of which allowed a reduction of damages in proportion to the plaintiff's degree of negligence, even though the defendant was found to be willful and wanton.

134. *See, e.g.* Montag v. Board of Educ., 112 Ill. App. 3d 1039, 446 N.E.2d 299, 303 (3d Dist. 1983). The appellate court in *Burke* used the *Montag* approach. *See* Burke v. 12 Rothschild's Liquor Mart, 209 Ill. App. 3d 192, 568 N.E.2d 80 (1st Dist. 1991).

135. *Burke*, 148 Ill. 2d at 444-47, 593 N.E.2d at 529-30. See *infra* notes 184-208 and accompanying text for a detailed evaluation of the holdings and reasoning used in a contrary jurisdiction.

under modified comparative negligence.[136] Therefore, the court held that the plaintiff's contributory negligence is not a basis for reducing damages caused by a willful and wanton defendant.[137]

The *Burke* court also relied on principles of deterrence to arrive at this decision.[138] The court noted that Illinois common law defines willful and wanton misconduct as bordering on intent.[139] While willful and wanton acts lack the requisite state of mind for intent, the unreasonable risk inflicted by the defendant warrants imposition of harsher penalties.[140] The court justified the imposition of these penalties by pointing to its traditional role of discouraging reckless conduct in order to protect society.[141] To deter such dangerous conduct, the *Burke* court refused to reduce the plaintiff's recovery when the defendant acts wantonly.[142]

Due to this ruling, the willful and wanton defendant's situation remains the same as it was under contributory negligence.[143] This is so despite the fact that comparative negligence allows the reduction of damages in proportion to the plaintiff's negligence.[144] The

136. *Burke*, 148 Ill. 2d at 451, 593 N.E.2d at 532.

137. *Id.*, 593 N.E.2d at 532. The *Burke* court, however, declined to determine the outcome when both parties were willful and wanton. *Id.* at 452, 593 N.E.2d at 532. By refusing to answer this question, the *Burke* court reopened an issue that previous case law had settled. *See, e.g.*, Deal v. Byford, 127 Ill. 2d 192, 537 N.E.2d 267 (1989) (acknowledging that contributory willful and wanton misconduct precludes recovery); Spence v. Commonwealth Edison Co., 34 Ill. App. 3d 1039, 340 N.E.2d 550 (1st Dist. 1975) (acknowledging that contributory willful and wanton misconduct precludes recovery).

138. *Burke*, 148 Ill. 2d at 451, 593 N.E.2d at 532. The court analogized the treatment of willful and wanton misconduct to punitive damages. *Id.*, 593 N.E.2d at 532. Therefore, to warn future wrongdoers, the *Burke* decision disallowed comparison of willful and wanton misconduct and negligence. *Id.*, 593 N.E.2d at 532.

139. *Id.* at 448-49, 593 N.E.2d at 531.

140. *Id.* at 448-52, 593 N.E.2d at 531-32. The *Burke* decision denies comparison between negligence and willful and wanton misconduct to inflict stiffer consequences on the defendant. *Id.* at 451, 593 N.E.2d at 532. The *Burke* court based this decision on its finding that negligence and willful and wanton misconduct differed in kind rather than degree. *Id.*, 593 N.E.2d at 532.

141. *Id.* at 449, 593 N.E.2d at 531. This approach reflects the court's role in promoting proper conduct. The *Burke* court reached its decision by adopting an intentional tort perspective toward willful and wanton misconduct. *Id.* at 449-50, 593 N.E.2d at 531. One of the bedrock principles of intentional tort law is that the plaintiff's negligence will not reduce the defendant's responsibility. KEETON ET AL., *supra* note 3, § 8, at 33-37. The rationale is to impose a heightened degree of responsibility because of the intentional nature of the tortious conduct. *Id. But see* Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991) (allowing a reduction of damages based on the plaintiff's fault in all tort cases and rationalizing that justice would be better served by allowing juries to determine responsibility in each factual situation without judicially-imposed boundaries).

142. *Burke*, 148 Ill. 2d at 451, 593 N.E.2d at 532.

143. See *supra* notes 17-31 and accompanying text for an explanation of the mechanics of contributory negligence and willful and wanton misconduct.

144. 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV. STAT. ch. 110, para. 2-1116 (1991)). As was the case under contributory negligence, the defendant re-

plaintiff need only show that the defendant's actions constituted willful and wanton misconduct to recover all of his damages, regardless of his own fault.[145] This decision precludes the defendant from using modified comparative negligence's equitable system of assessing financial responsibility according to fault.[146]

B. The Flaws in the Burke *Decision*

The justifications offered in the *Burke* decision for the willful and wanton misconduct exception flounder under close scrutiny. The very principles the court relied on as the basis for its decision mandate a different outcome. Utilizing an approach based on legislative intent, judicial precedent, and practical application, this section focuses on the potential problems the *Burke* decision will create.

In both statutory construction and legal precedent, the *Burke* decision lacks support. In *Alvis*, the court stated that its objective in adopting comparative negligence was to apportion damages according to the party's relative fault.[147] The use of the word "fault" encompasses more conduct than the term negligence.[148] It is arguable, therefore, that the use of the broader term denotes the *Alvis* court's willingness to include types of conduct other than negligence in its comparison.[149] Furthermore, the language of the modified comparative negligence statute includes the term fault as well.[150] Therefore, the *Burke* court's analysis ignores critical language from both the statute and the precedent upon which it is based.

In addition, the *Burke* decision ignores the legislative design of distinguishing between different types of conduct and effectively eradicates the distinction between intent and recklessness.[151] Ac-

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mains liable for full damages upon a finding of willful and wanton misconduct. See *supra* notes 28-31 and accompanying text, discussing the status of willful and wanton defendants under contributory negligence.

145. *Burke*, 148 Ill. 2d at 451-52, 593 N.E.2d at 532.

146. *Id.*, 593 N.E.2d at 532.

147. Alvis v. Ribar, 85 Ill. 2d 1, 25, 421 N.E.2d 886, 897 (1981). Specifically, the court stated that "[t]he liability of a defendant should not depend on what damages he sustained but should be determined by the relationship of his fault to the ultimate damages." *Id.* at 25, 421 N.E.2d at 897.

148. Hasenfus, *supra* note 121, at 399, n.1. Hasenfus notes that most jurisdictions have embraced the more inclusive term, thereby allowing comparison of more types of conduct. *Id.*

149. *Id.*

150. 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV. STAT. ch. 110, para. 2-1116 (1991)). The *Burke* court reasoned that this word choice reflected the decision to include strict liability comparisons with negligence. Burke v. 12 Rothschild's Liquor Mart, 148 Ill. 2d 429, 441-43, 593 N.E.2d 522, 527-28 (1992).

151. A determination of intentional or willful misconduct now results in the same penalty for defendants in both situations. Under either theory, an Illinois

tions brought in Illinois under intentional tort or willful and wanton theories now have the same status.[152] Neither cause of action allows reduction of damages for contributory negligence,[153] while punitive damages are available for both.[154] Therefore, by interpreting the Tort Reform Act to exclude a comparison of willful and wanton acts with ordinary negligence, the *Burke* court eliminated willful and wanton misconduct as a doctrine distinct from intent.[155]

In addition, the *Burke* court's holding fails to compensate for the actual application of the doctrine.[156] The Illinois Appellate Courts in *State Farm Mutual Auto Insurance Co. v. Mendenhall* [157]

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defendant may be forced to pay punitive damages. *See, e.g.*, 720 ILL. COMP. STAT. 5/12-7.1(c) (1993) (ILL. REV. STAT. ch. 38, para. 12-7.1(c) (1991)) (allowing the imposition of punitive damages in a civil proceeding after a determination of criminal guilt for hate crimes); 225 ILL. COMP. STAT. 460/16(a) (1993) (ILL. REV. STAT. ch. 23, para. 5116(a) (1991)) (imposing punitive damages for intentional misuse of charitable assets). *But see* 735 ILL. COMP. STAT. 5/2-109 (1993) (ILL. REV. STAT. ch. 110, para. 2-109 (1991)) (prohibiting imposition of punitive damages in malicious prosecution cases arising out of medical malpractice claims). In addition, neither an intentional tort defendant nor a willful and wanton tort defendant is able to reduce damages by the proportion of the plaintiff's contributory negligence. *Burke*, 148 Ill. 2d at 450-51, 593 N.E.2d at 532.

152. After *Burke*, the only distinction is in the defendant's state of mind prior to the commission of the tort. The willful defendant will have engaged in actions that are reckless and ignore the extremely likely chance of injury, but do not rise to the level of intent, KEETON ET AL., *supra* note 3, § 34 at 212-14, while the defendant in an intentional tort, by definition, will have acted with a desire to injure the plaintiff. *Id.* § 8 at 33-35.

153. *Burke*, 148 Ill. 2d at 451, 593 N.E.2d at 532. *See also* 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV. STAT. ch. 110, para. 2-1116 (1991)) (applying comparative fault only in cases of negligence or strict liability).

154. *See* 735 ILL. COMP. STAT. 5/2-604 (1993) (ILL. REV. STAT. ch. 110, para. 2-604.1 (1991)) (granting the trial court discretion to allow punitive damages in negligence cases); Cornell v. Langland, 109 Ill. App. 3d 472, 440 N.E.2d 985 (1st Dist. 1982) (stating that punitive damages are to punish the defendant for past intentional behavior and deter future intentional acts).

155. *Burke*, 148 Ill. 2d at 451-52, 593 N.E.2d at 532. The Illinois Appellate Court in *Montag* rejected a similar argument regarding willful and wanton misconduct's continued existence under modified comparative negligence. Montag v. Board of Educ., 112 Ill. App. 3d 1039, 446 N.E.2d 299, 303 (3d Dist. 1983). Although the *Burke* decision acknowledged the separate existence of willful and wanton misconduct, the decision also simultaneously merged the doctrine of willful and wanton misconduct with intentional conduct. *Burke*, 148 Ill. 2d at 429, 523 N.E.2d at 531.

156. The factual situations in which willful and wanton misconduct have been found vary greatly in Illinois law. In some cases, actions bordering on intent are classified as negligence. *See, e.g.*, Booth v. Goodyear Tire & Rubber Co., 224 Ill. App. 3d 720, 587 N.E. 2d 9 (3d Dist. 1992) (holding that a landowner did not act wantonly in allowing uninsulated tires to remain on the premises despite the occurrence of an indentical accident a few years ealier.) In other cases, the failure to warn of an obvious danger results in a determination of willful misconduct. *See, e.g.*, Soucie v. Drago Amusements Co., 145 Ill. App. 3d 348, 495 N.E.2d 997 (1st Dist. 1986) (finding liability existed due to failure to warn a slightly retarded adult of the danger of an unprotected fan blade).

157. 164 Ill. App. 3d 58, 517 N.E.2d 341 (4th Dist. 1987).

and *Downing v. United Auto Racing Ass'n*[158] emphasized the impracticality of distinguishing between willful and wanton misconduct and ordinary negligence.[159] The *Burke* court rejected these arguments, but failed to offer any workable definitions of willful and wanton misconduct to alleviate the problem.[160]

The *Burke* court also neglected to analyze the types of conduct that have been deemed willful and wanton misconduct.[161] A cursory reading of Illinois case law demonstrates the wide range of conduct that has earned the willful and wanton misconduct label.[162] This variance weakens the *Burke* court's deterrence argument[163] because no clear definition of willful and wanton misconduct exists under Illinois law to send a warning to potential tort-feasors. Furthermore, with the case law so blurred, courts have no clear directives to give juries for determining what conduct constitutes willful and wanton behavior.[164]

In addition, the *Burke* court ignored the question of threshold considerations. The critical aspect of modified comparative negligence is its incorporation of a threshold of liability into the concept of comparative negligence.[165] The *Burke* decision, however, offers no guidance on this aspect of the law.[166] Therefore, as a result of the *Burke* decision, a plaintiff who would ordinarily be denied recovery for bearing the majority of the blame for the injury can now recover simply by showing that the defendant was willful and

158. 211 Ill. App. 3d 877, 570 N.E.2d 828 (1st Dist. 1991).

159. *Downing*, 211 Ill. App. 3d at 897-98, 570 N.E.2d at 842-43; *Mendenhall*, 164 Ill. App. 3d at 57-58, 517 N.E.2d at 343-44. See *infra* notes 184-208 and accompanying text for a discussion of a jurisdiction concluding that the line between willful and wanton misconduct and negligence is illusory at best.

160. Burke v. 12 Rothschild's Liquor Mart, 148 Ill. 2d 429, 445-46, 593 N.E.2d 522, 529 (1992). Instead of providing workable boundaries to define willful and wanton misconduct, the *Burke* court used only vague generalities in defining willful and wanton misconduct. *Id.* at 450-51, 593 N.E.2d at 531. In light of the confused precedent in Illinois case law, the *Burke* court's solution to the status of willful and wanton misconduct in a comparative negligence system addressed only half of the problem. The court ignored the more pressing question of exactly what constitutes willful and wanton misconduct.

161. *Id.* at 449-50, 593 N.E.2d at 531. The *Burke* decision merely describes willful and wanton misconduct; it does not provide concrete examples despite voluminous case law on the subject from which it could have drawn examples.

162. See *supra* note 156 for cases illustrating the types of conduct Illinois courts have held to be willful and wanton.

163. *Burke*, 148 Ill. 2d at 451, 593 N.E.2d at 532.

164. The situation recalls the confusion under the *Jacobs* and *Grimes* decisions in early Illinois case law. See *supra* notes 54-61 and accompanying text for a discussion of the confusion engendered by these two cases.

165. KEETON ET AL., supra note 3, § 67, at 473.

166. The *Burke* holding does not establish thresholds of liability, and instead holds that a finding of willful and wanton misconduct absolutely prohibits any reduction in damages. *Burke*, 148 Ill. 2d at 451-52, 593 N.E.2d at 532.

wanton.[167]

Under the contributory negligence system, this method of allowing an "all or nothing recovery" had merit.[168] The doctrine of willful and wanton misconduct allowed a slightly negligent plaintiff, otherwise faced with the full financial burden, to recover.[169] When faced with allowing a willful and wanton defendant to escape liability, or awarding full recovery to the plaintiff, tort law naturally favored the least culpable party.[170]

This method of dealing with willful and wanton misconduct now seems anachronistic in light of the adoption of comparative negligence.[171] Illinois adopted comparative negligence for its equitable method of apportioning damages.[172] However, *Burke* allows recovery based solely on the actions of one party without giving consideration to the plaintiff's responsibility.[173] Such an unbalanced approach impugns the very rationale behind comparative negligence.[174]

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167. Indeed, this was almost the case in *Burke*. The co-defendant liquor store's responsibility for the injury surpassed that of both of the other parties. *Id.* at 435, 593 N.E.2d at 524. The jury determined that the liquor store's responsibility was 44.2% of the total fault. *Id.*, 593 N.E.2d at 524. This figure is calculated from the figures given in the case as follows: 68% x 65% = .68 x .65 = .442 = 44.2%.

168. Under the contributory negligence system, the plaintiff's negligence precluded recovery absent a showing of the defendant's willful and wanton misconduct. KEETON ET AL., *supra* note 3, § 34, at 213.

169. The doctrine sought to punish the defendant and deter future defendants from similar rash actions. KEETON ET AL., *supra* note 3, § 64 at 462.

170. Although the operation of contributory negligence ignored this aspect of tort law, the willful and wanton misconduct doctrine upheld this objective in a limited number of cases. See *supra* notes 28-31 and accompanying text for a full explanation of this phenomenon in tort law.

171. Under comparative negligence, the plaintiff no longer suffers the injustice of bearing the full burden of an injury for which he was only slightly responsible. KEETON ET AL., *supra* note 3, § 66, at 468-70. Instead, the fact-finder assesses liability on a case by case basis. *Id.* at 470-71. The plaintiff and defendant incur liability proportionate to their own responsibility for the injury. *Id.*

172. Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). The Illinois Supreme Court in *Alvis* adopted the pure form of comparative negligence to facilitate a just apportionment of damages. *Id.* at 25, 421 N.E.2d at 897. The Illinois Supreme Court reasoned that the pure form of comparative negligence "achieves total justice." *Id.* at 27, 421 N.E.2d at 898. Nonetheless, the Illinois General Assembly later adopted the modified system. 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV. STAT. ch. 110, para. 2-1116 (1991)).

173. Burke v. 12 Rothschild's Liquor Mart, 148 Ill. 2d 429, 451, 593 N.E.2d 522, 532 (1992). By ignoring the rationale given in *Alvis*, equitable apportionment of damages, the *Burke* court neglected this key objective in the adoption of comparative negligence.

174. The *Alvis* court changed Illinois law to comparative negligence in an effort to establish a system based on responsibility and equity. *Alvis*, 85 Ill. 2d 1, 29, 421 N.E.2d at 892-95. In its holding, the *Burke* court completely ignores this policy of promoting responsibility.

Furthermore, the doctrine of willful and wanton misconduct arose as an exception to the unfair workings of contributory negligence,[175] yet the *Burke* decision creates unfairness. The willful and wanton defendant's predicament greatly resembles that of the nineteenth century contributorily negligent plaintiff.[176] In both situations, the determination of culpability based on a one-sided analysis resulted in the imposition of full damages.[177] The *Burke* court's rationale that the willful and wanton defendant's actions prevent reduction of damages based upon the plaintiff's fault contradicts the very reasoning underlying modified comparative negligence.[178] Furthermore, as the jury verdict in *Burke* demonstrates, a finding of willfulness is not always accompanied by a finding of a greater degree of responsibility on the part of the willful and wanton party.[179]

The *Burke* decision, however, asserts that a finding of willful misconduct requires the defendant to shoulder the full damages

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175. KEETON ET AL., *supra* note 3, § 65, at 462.

176. See *supra* notes 17-26 and 41-46, discussing the mechanics of contributory negligence. In both cases, one party's actions determine responsibility without any regard for the other party's degree of fault. Due to the injustice inherent in this method, 44 states discarded contributory negligence for comparative negligence. See *supra* note 37 for a listing of states utilizing comparative negligence. In *Burke*, the Illinois Supreme Court denied the defendant city the opportunity to reduce liability, despite the fact that the jury determined the defendant city to be the least responsible party. *Burke*, 148 Ill. 2d at 451, 593 N.E.2d at 532.

177. A great amount of criticism rested on the fact that contributory negligence unfairly imposed the full financial responsibility for an injury on a party who may have contributed only slightly to its causation. *See, e.g.*, Green, *supra* note 23, at 36; Prosser, *supra* note 30, at 469. In rendering its decision, the *Burke* court ignored the fact that its classification of willful and wanton misconduct as different in kind from negligence threatens to establish a system that greatly resembles the unjust system of contributory negligence. *See Burke*, 148 Ill. 2d at 451, 593 N.E.2d at 532.

178. Illinois law establishes a threshold of responsibility of 50%, thereby requiring the plaintiff to prove that the defendant's responsibility for the injury equalls or surpasses the plaintiff's in order to recover. 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV. STAT. ch. 110, para. 2-1116 (1991)). However, the *Burke* court ignored this aspect of the law and instead chose to apply the principles of deterrence. *Burke*, 148 Ill. 2d at 451, 593 N.E.2d at 532. *But see* Sorensen v. Allred, 169 Cal. Rptr. 441 (Cal. Ct. App. 1980) (reasoning that deterring potential defendants from willful and wanton misconduct was unlikely due to the reality of modern society and human nature).

179. The *Burke* court held that the injury inflicted on the plaintiff was indivisible. *Burke*, 148 Ill. 2d at 438-39, 593 N.E.2d at 525-26. Therefore, it can be assumed that the court relied on the 68% negligence figure rendered by the jury. However, the court gave no guidance for future cases where the plaintiff's responsibility exceeds that of the willful and wanton defendant. *See, e.g.*, Davies v. Butler, 602 P.2d 605 (Nev. 1979) (reversing the trial court's comparison of fault where the jury found the plaintiff's decedent to be responsible for 55% of the injury).

burden regardless of the plaintiff's degree of fault.[180] In arriving at this decision, the court found that deterrence and punishment outweigh the principles of fairness and responsibility that spawned the comparative negligence doctrine.[181] While willful and wanton misconduct deserves stiffer penalties than those imposed by ordinary negligence, the *Burke* court exceeded appropriate boundaries by equating willful and wanton misconduct with intent.[182] The proper status of willful and wanton misconduct is between intent and negligence.[183]

III. ANALYSIS OF A CONTRASTING JURISDICTION

The dilemma over the proper status of willful and wanton misconduct plagues other comparative negligence jurisdictions as well as Illinois.[184] In resolving this debate, other jurisdictions have for-

180. The court based this holding on the determination that negligent conduct differs in kind, rather than degree, from willful and wanton misconduct. *Burke*, 148 Ill. 2d at 451-52, 593 N.E.2d at 532.

181. *Id.* at 451, 593 N.E.2d at 532.

182. The *Burke* court effectively eliminated any distinction between willful and wanton misconduct and intent by establishing the same consequences for both types of actions. *Id.* at 451-52, 593 N.E.2d at 532.

183. KEETON ET AL., *supra* note 3, § 34, at 212.

184. The following list contains statutes and cases concerning the status of the willful and wanton misconduct doctrine in various states' comparative negligence systems. The listing includes states that equate gross negligence with willful and wanton misconduct. The jurisdictions allowing a negligent plaintiff to recover from a willful and wanton defendant in proportion to the defendant's fault are as follows: Sturm, Ruger and Co. v. Day, 594 P.2d 38 (Alaska 1979), *aff'd on reh'g*, 627 P.2d 204 (Alaska 1981), *cert. denied*, 454 U.S. 894 (1981), *and rev'd on other grounds*, Dura Corp. v. Harned, 703 P.2d 396 (Alaska 1985); Billingsley v. Westrac Co., 365 F.2d 619 (8th Cir. 1966), later enacted into statutory law by ARK. CODE ANN. § 27-1763 (Michie 1987); Sorensen v. Allred, 169 Cal. Rptr. 441 (Cal. Ct. App. 1980); Lira v. Davis, 832 P.2d 240 (Colo. 1992); Geldert v. State, 649 P.2d 1165 (Haw. 1982); Burgess v. Salmon River Canal Co., 805 P.2d 1223 (Idaho 1991); IND. CODE ANN. § 34-4-33-2 (Burns 1986), applied in Beresford v. Starkey, 563 N.E.2d 116 (Ind. Ct. App. 1990), *aff'd in part, rev'd in part*, 571 N.E.2d 1257 (Ind. 1991); IOWA CODE ANN. § 668.1 (West 1987) (allowing a comparison of negligence with recklessness); Thompson v. Hodge, 577 So. 2d 1172 (La. Ct. App. 1991); Comer v. Gregory, 365 So. 2d 1212 (Miss. 1978) (reducing plaintiff's damages by comparative negligence in assault and battery case), *see also* Anderson v. Eagle Motor Lines, 423 F.2d 81 (5th Cir. 1970); Martel v. Montana Power Co., 752 P.2d 140 (Mont. 1988), *see also* Gurnsey v. Conklin Co., 751 P.2d 151 (Mont. 1988) (allowing a comparison between plaintiff's and defendant's willful and wanton misconduct); Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991) (allowing a comparison in intentional and negligence torts reasoning that the jury is best equipped to determine comparative fault in all situations); Kabella v. Bouschelle, 672 P.2d 290 (N.M. Ct. App. 1983); Jordan v. Britton, 515 N.Y.S.2d 678 (N.Y. App. Div. 1987) (allowing comparative negligence to apply in wrongful death action after defendant pleaded guilty to manslaughter of plaintiff's decedent); Amoco Pipeline Co. v. Montgomery, 487 F. Supp. 1268 (W.D. Okla. 1980) (interpreting Oklahoma's comparative negligence statute to include willful and wanton misconduct based on similar interpretation given to Arkansas statute on which it was based); DeYoung v. Fallon, 798 P.2d 1114 (Or. 1990); Trevino v. Lightning Laydown, Inc., 782 S.W.2d 946 (Tex. Ct. App. 1990); UTAH

mulated two distinct approaches.[185] The great majority of jurisdictions allow the plaintiff to recover a percentage of his damages based on a comparison of the defendant's willful and wanton misconduct with the plaintiff's contributory negligence.[186] Other jurisdictions, including Illinois, find that willful and wanton misconduct differs in kind from ordinary negligence, and therefore, do not allow for comparison of the plaintiff's and defendant's conduct and simply award full damages to a plaintiff injured by a willful and wanton defendant.[187] This part explores the rationales used in a state allowing comparison between willful and wanton misconduct and negligence to identify the strengths and weaknesses of such a decision.

The critical question in determining the status of willful and wanton misconduct under comparative negligence systems is whether willful and wanton misconduct differs in kind or degree from ordinary negligence.[188] California, the representative jurisdiction in this part, found that it differs only in degree and elected to compare the two types of conduct in *Sorensen v. Allred*.[189] The *Sor-*

CODE ANN. § 78-27-37 (1992) (applying comparative negligence principles to negligence "in all of its degrees"); Bielski v. Schulze, 114 N.W.2d 105 (Wis. 1962), *see also* Tucker v. Marcus, 418 N.W.2d 818 (Wis. 1988) (refusing to award plaintiff compensatory or punitive damages because a majority of the fault resided with the plaintiff).

The statutes and case law from states finding a difference in kind between the two types of conduct, and therefore, refusing to reduce a negligent plaintiff's damages when the defendant has acted willfully and wantonly are as follows: ARIZ. REV. STAT. ANN. § 12-2505 (1991) (prohibiting comparison of fault when defendant was willful and wanton), *see also* Bauer v. Crotty, 805 P.2d 392 (Ariz. Ct. App. 1991); Burke v. 12 Rothschild's Liquor Mart, 148 Ill. 2d 429, 593 N.E.2d 522 (1992); Menaugh v. Resler Optometry, 799 S.W.2d 71 (Mo. 1990); Davies v. Butler, 602 P.2d 605 (Nev. 1979); Schellhouse v. Norfolk & W. Ry., 575 N.E.2d 453 (Ohio 1991) (stating, in *dicta*, that comparative negligence would not be applied in cases where defendant was willful and wanton); Krivijanski v. Union R.R., 515 A.2d 933 (Pa. Super. Ct. 1986); Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979).

185. The difference between the two approaches is that one allows a comparison between negligence and willful and wanton misconduct, whereas the other classifies willful and wanton misconduct as a different kind of conduct than negligence and does not reduce damages in proportion to the plaintiff's negligence. For an example of the first approach, see, *e.g.*, Sorensen v. Allred, 169 Cal. Rptr. 441 (Cal. Ct. App. 1980) and *infra* notes 199-208 and accompanying text. For an example of the "different in kind" approach, see, *e.g.*, Burke v. 12 Rothschild's Liquor Mart, 148 Ill. 2d 429, 593 N.E.2d 522 (1992) and *supra* notes 121-83 and accompanying text.

186. See *supra* note 184 for a list of the jurisdictions that allow comparison between the two types of conduct.

187. See *supra* note 184 for a list of the jurisdictions that differentiate between the two types of conduct.

188. See *supra* note 140 and accompanying text for a definition of the degree-kind distinction and the role it plays in determining the status of willful and wanton misconduct under comparative negligence.

189. 169 Cal. Rptr. 441 (Cal. Ct. App. 1980). In *Sorensen*, the plaintiff's car collided with the defendant's car when attempting a turn. *Id.* at 443. The crash

ensen decision is similar to *Burke* in that it relies on policy and precedent to reach its decision. Like the *Burke* decision, *Sorensen* neglected to allow for factors that were critical to the development of the willful and wanton misconduct doctrine during the years of contributory negligence. Specifically, the *Sorensen* court ignored the vital role deterrence played during the doctrine's development.[190]

Like Illinois, California judicially adopted the comparative negligence doctrine.[191] The California Supreme Court in *Li v. Yellow Cab Co.*[192] acknowledged that the adoption of comparative negligence brought the status of contributory negligence exceptions, such as willful and wanton misconduct, into question.[193] The *Sorensen* court relied on dicta in *Li*, as well as practical considerations, in validating comparisons between willful and wanton misconduct and negligence.[194] In addition, the *Sorensen* court also relied on the California Supreme Court's application of comparative negligence principles to strict liability tort theories in *Daly v. General Motors*.[195] Based on these two precedents, the *Sorensen* court compared the defendant's willful and wanton misconduct to the plaintiff's negligence and reduced the plaintiff's damages by his degree of fault.[196]

The *Sorensen* court noted that negligence and willful and wan-

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injured the plaintiff and killed her husband. *Id.* The evidence showed that the defendant driver was driving at an excessive speed. *Id.* at 443-44. The jury found the defendant guilty of willful and wanton misconduct, and attributed 55% of the fault to him. *Id.* at 443. The trial court entered judgment for the plaintiff for full damages. *Id.* The defendant appealed the trial court's refusal to reduce damages. *Id.*

190. See *supra* note 88 and accompanying text, discussing the influence of deterrence principles on the development of the willful and wanton misconduct exception to the contributory negligence defense.

191. Li v. Yellow Cab, 532 P.2d 1226 (Cal. 1975).

192. *Id.*

193. *Id.* The *Li* court, however, left such matters to future decisions. *Id.* at 1241.

194. *See Sorenson*, 169 Cal. Rptr. at 443. The *Li* court noted that a comprehensive system of comparative fault includes willful and wanton misconduct within its confines. *Li*, 532 P.2d 1226.

195. 575 P.2d 1162 (Cal. 1978). The *Sorensen* court saw no reason to include strict liability claims under comparative negligence, while differentiating willful and wanton misconduct from negligence. *Sorensen*, 169 Cal. Rptr. at 446. It should be noted that the Illinois General Assembly also intended for modified comparative negligence to be applied in cases of strict liability. *See* 735 ILL. COMP. STAT. 5/2-1116 (1993) (ILL. REV. STAT. ch. 110, para. 2-1116 (1991)).

196. *Sorensen*, 169 Cal. Rptr. at 444, *citing* Daly v. General Motors Corp., 575 P.2d 1162 (Cal. 1978). *See also* UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. 33 (1982), *reprinted in* HENRY WOODS, COMPARATIVE FAULT § 22:2 at 485 (2d ed. 1987). The court noted that the definition of comparable fault includes recklessness. *Sorensen*, 169 Cal. Rptr. at 444-45. Therefore, the court reasoned, comparing willful and wanton misconduct with negligence reflects the national trend in negligence law exemplified by the Uniform Act. *Id.* at 445.

ton misconduct resemble each other.[197] In uniquely California style, the court analogized the comparison of willful and wanton misconduct to negligence not to "apples and oranges," but rather to "the comparison of two types of oranges, or at worst oranges and lemons."[198] Citric metaphors aside, the *Sorensen* court noted that willful and wanton misconduct arose as a counter to the harsh operation of contributory negligence.[199] Therefore, with contributory negligence now jettisoned, the need for the willful and wanton misconduct disappeared as well.[200]

The *Sorensen* court also addressed the deterrence argument for retaining willful and wanton misconduct as a separate doctrine.[201] Practical considerations, however, precluded the court from validating the deterrence argument.[202] Therefore, the *Sorensen* court removed the distinction between classes of conduct to allow a more precise focus on the actual issue of comparison of fault.[203]

The *Sorensen* court properly interpreted the precedent set forth in *Li* and *Daly*.[204] However, the court slighted the importance of deterrent policies in willful and wanton misconduct's development.[205] By neglecting this critical aspect of negligence law and wholly eradicating the distinctions between classes of conduct, the court ignored the policy objectives of willful and wanton misconduct.[206] The court's characterization of willful and wanton misconduct's deterrent effect as dubious at best is warranted in situations of absent-mindedness or recklessness.[207] However, the

197. *Sorenson*, 169 Cal. Rptr. at 445.

198. *Id.* at 445-46.

199. *Id.* at 446.

200. In reaching its decision, the *Sorensen* court applied the maxim, "when the need for a rule ceases[,] the rule ceases." *Id.*

201. *Id.*

202. *Sorenson*, 169 Cal. Rptr. at 446. The *Sorensen* court noted that it was "highly unlikely that people, especially motorists, act with deliberation" when conducting their affairs. *Id.*

203. *Id.* In addition, the *Sorensen* court noted that the elimination of the differing classes of conduct would accelerate the fact-finding process by simply allowing jurors to determine the percentage of fault attributable to each party, rather than exploring the intricacies of conduct classifications. *Id.*

204. See *supra* notes 192-95 and accompanying text for the rationales and holdings in these cases.

205. The *Sorensen* court addressed the issue, but dismissed it as being inconsequential in modern society. *Sorensen*, 169 Cal. Rptr. at 446. The court noted that it is highly unlikely that the average person in modern society contemplates the consequences of their potentially negligent actions. *Id.*

206. Courts adopted the willful and wanton misconduct doctrine to alleviate the harshness of contributory negligence and to deter egregious defendants from future similar conduct. KEETON ET AL., *supra* note 3, § 34, at 213.

207. *See id.* In these circumstances, the court's theory that no one ponders the legal consequences of their *reckless* actions is correct. If a defendant does give sufficient consideration to his actions, then his conduct is intentional. *Id.* § 8, at 33-35.

court failed to consider the punitive aspect of the willful and wanton misconduct doctrine, as well as the deterrent effect it has on torts based on continuing practices or land conditions.[208] Therefore, the *Sorensen* decision correctly analyzes the objectives of comparative negligence, but fails to assign the proper weight to the policy objectives of the willful and wanton misconduct doctrine. Clearly, the situation cries out for a solution employing the deterrent policies outlined in *Burke* as well as the principles of comparison discussed in *Sorensen*.

IV. AN EQUITABLE BLEND OF RATIONALES

The problem with the current state of willful and wanton misconduct under comparative negligence appears rooted in the idea that the principle of deterrence must either take precedence over or be subservient to the rationale of liability based upon comparative fault.[209] However, a viable solution that remains faithful to both the equitable principle of modified comparative negligence and the deterrent rationale of willful and wanton misconduct is mandated by the present situation of uncertainty and injustice. This section first outlines a solution by identifying the important features of the competing systems and then proposes a model statute that incorporates ideas from both systems. Section A reviews the important ideas of modified comparative negligence as well as the critical aspects of willful and wanton misconduct. Section B blends the rationales in the form of a model statute.

A. Vital Aspects of Modified Comparative Negligence and Willful and Wanton Misconduct

The rationale behind modified comparative negligence reflects the belief that the system promotes justice in a fair and equitable manner.[210] The adoption of modified comparative negligence precludes recovery by the party responsible for the majority of dam-

208. Cases involving continuing practices or land conditions constitute a significant portion of willful and wanton misconduct cases. *See, e.g.*, Soucie v. Drago Amusements Co., 145 Ill. App. 3d 348, 495 N.E.2d 997 (1st Dist. 1986) (assessing liability against carnival owner for inadequate warnings on a fan in a trailer); Drews v. Mason, 29 Ill. App. 2d 269, 172 N.E.2d 383 (3d Dist. 1961) (finding that a daughter's failure to warn her mother of a broomstick laying on the floor of a house recently gutted by fire constituted willful and wanton misconduct).

209. This assumption appears in all decisions addressing the status of willful and wanton misconduct under comparative negligence. *See, e.g.*, Burke v. 12 Rothschild's Liquor Mart, 148 Ill. 2d 429, 439-50, 593 N.E.2d 522, 526-32 (1992); Sorensen v. Allred, 169 Cal. Rptr. 441, 443-47 (Cal. Ct. App. 1980).

210. See *supra* notes 3-4, 36-37 and accompanying text for the rationales used by courts in deciding to adopt comparative negligence.

age.[211] The critical aspect of the rationale lies in preventing unjust recovery by the party responsible for the majority of the damages.[212]

Equitable principles also established the willful and wanton misconduct doctrine.[213] The exception to the harsh rule of contributory negligence serves as both a deterrent and punishment to the defendant engaging in willful and wanton actions.[214] In addition, a jury may impose punitive damages on a defendant found to be willful and wanton.[215] Therefore, in addition to alleviating the harshness of contributory negligence, willful and wanton misconduct sought to promote due care in society by awarding monetary damages to the party harmed by the willful and wanton misconduct.

B. The Proposal

The status of willful and wanton misconduct remains a mystery in many United States jurisdictions. In addition, the answers given by jurisdictions encountering this problem fail to adequately resolve the issue. However, by blending the deterrent and punitive objectives of willful and wanton misconduct with the equity and fairness principles of modified comparative negligence, a solution faithful to both interests appears.

A proper interpretation would incorporate a threshold similar to the type used in modified comparative negligence to limit recovery. In this way, the law in Illinois would remain true to modified comparative negligence. However, a threshold of liability does not mandate the pure comparison of a plaintiff's responsibility with a defendant's as the court in California chose to proceed in *Sorensen*.[216] A pure comparison of a plaintiff's negligence with a defendant's willful and wanton misconduct negates the deterrent and

211. See *supra* notes 3-4 and accompanying text for the mechanics of modified comparative negligence.

212. See *supra* notes 3-4 and accompanying text for the operation of modified comparative negligence.

213. See *supra* notes 9-12, 47-50 and accompanying text for the genesis of the willful and wanton misconduct exception to the contributory negligence defense.

214. See *supra* notes 10, 29-30 and accompanying text, discussing the policy objectives underlying willful and wanton misconduct.

215. *See, e.g.*, Cornell v. Langland, 109 Ill. App. 3d 472, 440 N.E.2d 985 (1st Dist. 1982) (holding that the imposition of punitive damages rests with the fact-finder and serves to punish the defendant for past conduct and deter future reckless actions).

216. The *Sorensen* decision allows comparison of all types of conduct, short of intent, regardless of the surrounding circumstances. Sorensen v. Allred, 169 Cal. Rptr. 441, 446-47 (Cal. Ct. App. 1980).

punitive policies that underlie the willful and wanton doctrine.[217] The consequences of willful and wanton misconduct should remain stricter than those imposed for negligence. However, the distinction between willful and wanton misconduct and intentional torts should stay intact as well. Therefore, a willful and wanton defendant should be allowed to reduce liability in certain situations.

The proposed statute[218] blends the rationales of deterrence and equity in an attempt to resolve the issue of damages in a manner that is fair to both plaintiffs and defendants. It employs a threshold standard of recovery, yet still treats willful and wanton misconduct in a different and stricter manner than negligence. The statute allows a willful and wanton defendant to reduce damages when a plaintiff's responsibility exceeds the 50% threshold. However, if the defendant is determined to be responsible for more than 50% of the damages, then the statute imposes full liability on the defendant. If, for example the defendant were determined to be willful and wanton, and responsible for 40% of the plaintiff's injuries, then the defendant would pay 40% of the plaintiff's damages. As a result, the defendant would absorb damages proportional to his fault. If the fact-finder determines that the defendant was both willful and wanton and responsible for more than 50% of the injuries, then the defendant would pay the plaintiff's full damages.

By enacting this statute, the legislature would satisfy the deterrent objectives of willful and wanton misconduct as well as the principles of equity inherent in modified comparative negligence. Thus, cases where the willful and wanton defendant contributed only slightly to the injury would be fairly resolved for both parties. Furthermore, the proposed statute punishes an act of willful and wanton misconduct causing a greater proportion of the injury with the severity it deserves. Therefore, the injustice of forcing a slightly responsible defendant to shoulder the entire burden would be eliminated, while the egregious defendant would suffer the just consequences of his actions.

The holding in the *Burke* case that willful and wanton misconduct differs in kind from contributory negligence[219] provides further justification for this proposal. The distinction remains viable under this proposal. This classification mandates stiffer treatment

217. See *supra* notes 10, 29-30 and accompanying text for the role that the rationales of deterrence and punishment played in the adoption of willful and wanton misconduct.

218. See the Appendix to this note for the proposed statute.

219. Burke v. 12 Rothschild's Liquor Mart, 148 Ill. 2d 429, 450, 593 N.E.2d 522, 532 (1992).

for willful and wanton defendants.[220] In addition, willful and wanton misconduct would not merge into intentional tort law as the *Burke* court's holding implies. By adopting this proposal, the consequences for different levels of fault such as negligence, intent, and willful and wanton misconduct remain separate, thereby serving the interests of both justice and compensation.

In addition, the trial court's discretion in determining the viability of a count charging willful and wanton misconduct remains intact. The trial court would retain the authority to allow the addition of such a count as the Illinois General Assembly intended.[221] Therefore, the proposal respects the authority of the trial court in determining the presence of willful and wanton misconduct.

The proposed statute incorporates a two-step process in determining liability. After the judge determines that enough evidence exists to warrant the additional charge of willful and wanton misconduct, the fact-finder answers two questions. First, the fact-finder determines whether a defendant committed a negligent or a willful and wanton act. If the fact-finder determines that the defendant acted negligently, rather than in a willful and wanton manner, then modified comparative negligence determines liability.

The second phase of the process occurs if the defendant is found to be willful and wanton. The fact-finder would then ascertain, under ordinary principles of comparative fault, the level of responsibility attributable to each party. If the defendant's responsibility surpasses the 50% threshold, then he must pay the plaintiff's full damages. Otherwise, the defendant would only be responsible for a percentage of the damages, equal to the amount of his fault as determined by the fact-finder. In this manner, the willful and wanton defendant suffers harsher consequences than a negligent defendant, but is not subjected to a disproportionate amount of liability. In addition, the plaintiff in a willful and wanton case does not receive a windfall recovery that ignores his responsibility. As a result, the proposed statute prevents injustice reminiscent of contributory negligence while it deters future tort-feasors from egregious behavior.

CONCLUSION

The objectives of modified comparative negligence are to equitably apportion fault according to responsibility. Current Illinois

220. After determining that willful and wanton misconduct differed in kind from negligence, the *Burke* court established stiffer consequences for the willful and wanton defendant. *Id.* at 451, 593 N.E.2d at 532.

221. Illinois law mandates that the trial judge exercise this discretion in allowing plaintiffs to add willful and wanton counts. 735 ILL. COMP. STAT. 5/2-604.1 (1993) (ILL. REV. STAT. ch. 110, para. 2-604.1 (1991)).

law defeats this objective by allowing windfall recoveries to contributorily negligent plaintiffs injured by willful and wanton defendants. Furthermore, the doctrine of willful and wanton misconduct arose to deter and punish defendants for their heightened degree of responsibility. Illinois law meets this objective, but deals with the willful and wanton defendant too harshly. By adopting the proposed statute, the objectives of both doctrines would be satisfied in a fair and equitable manner for all parties.

Dan Groth, Jr.

APPENDIX

Proposed Willful and Wanton Misconduct Statute

§ 5/2-1116.1. *Treatment of Willful and Wanton Misconduct.*

1. All actions filed on or after June 1, 1993 that allege willful and wanton misconduct against any person, corporation, association, partnership, or governmental entity in compliance with paragraph 2-604.1 of the Illinois Code of Civil Procedure shall present two preliminary questions for the finder of fact:

(a) Whether the party alleging willful and wanton misconduct has shown that the opposing party acted in a willful and wanton manner, and

(b) What percentage of the harm was caused by the opposing party's actions.

2. If the party alleging willful and wanton misconduct fails to prove to the finder of fact, by a preponderance of the evidence, that the opposing party acted willfully and wantonly, then the apportionment of fault shall be determined under paragraph 2-1116 of the Illinois Code of Civil Procedure. If the finder of fact determines that the party bringing the allegation has proved the existence of willful and wanton misconduct on the part of the opposing party *and* that the willful and wanton misconduct proximately caused 50% or more of the injury or harm, then the court shall award the full damages sustained by the party alleging willful and wanton misconduct. If the fact-finder determines that the willful and wanton misconduct proximately caused less than 50% of the harm or injury, then the party alleging willful and wanton misconduct shall be awarded monetary damages in proportion to the percentage of causation attributed to the opposing party determined by the fact-finder.

3. No part of this statute shall be construed to interfere with the assessment of punitive damages.