

H B

1 7 6

0 2 3

Alaska has had a comparative neg statute since 1949 AS 23.25.010

7 1/2 states have adopted C.N. Florida by court rule, Calif too

Modified forms of C.N.

(a) equal division - admiralty law rule. Damages divided equally among negligent parties, regardless of relative contributions the negligent parties made to accident.

(b) slight-gross system - Nebraska + South Dakota et al use it. If P's negligence is slight + D's gross, P recovers but reduced by % of fault attributable to him.

(c) 45% system - most popular plan. Wisconsin started it. Recovers where his % is less than that of any given D, reduced by P's %. Where P's negligence is equal to or greater than that of D, contrib bars recovery.

* 50% New Hampshire variant very popular. Recovers even if 50% responsible, but gets only 50% of his damages.

Liability Joint Tortfeasors

state statutes p. 40 apportioned where gross differences

see Minnesota's Nevada's all apportioned Texas
see p 256 for 50% results. Nevada statute

Contribution

a) Idaho, Maine et al - each D liable for whole amt P's damages

b) N.H. + Vermont - each D liable only for his part.

c) where D₂'s neg < P's; D₂ liable for only his share

Comparative negligence, even modified, should have no effect

on doctrine of contribution Bielske v Schulze 16 W 2d 1

114 N.W 2d 105. Follow pure C.N. rules here.

Reckless + Gross Negligence

Bielske says it's apportioned accord to degrees despite common law where contrib was no defense where D's act was "reckless" Not intentional torts

Example 1.

P, motorcyclist is 90% cause of accident \$100,000 damages

D, truck driver is 10% " " " -0- damages

- (a) pure form - P recovers 10% of his damages \$10,000.
- (b) 50% form - P does not recover
- (c) contrib - nobody recovers anything

1. Present law in negligence cases

Law of contributory negligence. Contributory negligence is a defense that the defendant can assert against plaintiff's lawsuit.

It is the old English common law rule, and the rule in fewer than 23 states, of which AK is one.

It has been a very unfair and disfavored system which the courts and juries have worked with, sometimes inventing exceptions to avoid harsh results in difficult cases. There are now so many "exceptions" and "modifications" to the defense of contributory negligence, that the exceptions have become the rule.

Example: Plaintiff is 1% at fault, has \$100,000 damages. D is 99% at fault, has 1,000 damages.

P recovers nothing from D, D recovers nothing from P. Court simply leaves the parties as it found them, because each was partially at fault for the harm each suffered.

2. Comparative negligence

Has been the law in admiralty (maritime) cases for hundreds of years.

Has been adopted by the majority of states in the U.S. as the law in negligence cases. Florida, and last week, California, have adopted it judicially. Many others in the last few years have accepted it legislatively.

Alaska may adopt it judicially; there are 3 cases urging judicial adoption currently before the

Supreme Court of Alaska. One case, LINDLEY and KAATZ vs STATE OF ALASKA was just argued several weeks ago. Because the Court might adopt comparative negligence judicially is no reason for not acting in the legislature. Because: 1. the Court may not actually reach the issue, and find some other way to decide the lawsuit 2. the Court is not able to resolve other problems created by the adoption of the rule unless those problems are raised in the particular case before it. 3. legislatures traditionally have the responsibility for making laws.

3. Forms of Comparative Negligence

Three basic forms are: (1) "pure" (2) "49%" (3) 50%.

"Pure" you recover a certain percentage of your damages, regardless of the degree of fault in the case.

In the "49%" and "50%" systems, you recover only if your negligence was not more than 49% (or 50%) in the case, else you are barred.

Scholars and other professors etc urge that a "pure" form be adopted. California and Washington have "pure". But most states have some sort of "modified" form. Of the "modified" plans, the "50%" type seems the most popular.

Why is a 50% system more equitable?
See examples

In the examples #2 and #5, each party collects half his damages, which seems only fair when both were equally to blame.

A 49% system leaves each to bear his own damages when both equally to blame. But when one is more to blame than the other, he should bear the burden of paying (see example 6)

You avoid cases like example #1 with the results in the "pure" form - highly negligent, highly damaged plaintiff recovering big money from slightly negligent, slightly injured defendant.

EXAMPLES

Example #1 Auto wreck. P is 90% at fault, has \$100,000 in damages. D is 10% at fault, has \$1,000 in damages.

Results

a. "Pure" system

P will recover 10% of his damages, here \$10,000

D will recover 90% of his damages, here \$900

Offsetting the claims, P collects \$9,100

b. "49%" system

P, being more than 49% at fault, is barred from recovering against D. Note, that D would be able to collect \$900 if D sued P.

c. "50%" system

some results as in b. above, for same reasons.

Example #2 Auto wreck. P is 50% at fault, has \$100,000 in damages. D is 50% at fault, has \$1,000 in damages

Results

a. "Pure" system

P will recover 50% of his damages, here \$50,000

D will recover 50% of his damages, here \$500.

Offsetting claims, P collects \$49,500

b. "49%" system

P, being more than 49% at fault, is barred from recovery. D would be also if he sued P.

c. "50%" system

P recovers 50% of his damages, here \$50,000

D recovers 50% of his damages, here \$500

Offsetting claims, P collects \$49,500

Example #3 Auto wreck. P is 49% at fault, has \$100,000 damages. D is 51% at fault, has \$1,000 damages.

Results

a. "Pure" system

P will recover 51% of his damages, here \$51,000

D will recover 49% of his damages, here \$490.

Offsetting claims, P recovers \$50,510.

b. "49%" system

P, being not more than 49% responsible, recovers 51% of his damages, here \$51,000. D would be barred from recovering anything, as his negligence was greater than 49%.

c. "50%" system

Same results as in b, for same reasons.

Example #4 Auto wreck. P is 90% at fault, has 1,000 in damages. D is 10% at fault with \$100,000 damages.

a. "Pure"

P recovers 10% of his damages, here \$100

D recovers 90% of his damages, here \$90,000

Offsetting claims, D recovers \$89,900

b. "49%"

P, being more than 49% negligent, recovers -0-

D recovers 90% of his damages, here \$90,000.

c. 50%

Same results as in b. above.

Example #5 Auto wreck P is 50% at fault, has 1,000 damages
D is 50% at fault, has \$100,000 damages.

Results

a. "Pure"

P recovers 50% of his damages, here \$500

D " " " " " " " \$50,000

Offsetting claims, D recovers \$49,500

b. "49%"

P, being more than 49% at fault, is barred

D would be also

c. "50%"

P recovers 50% of his damages, here 500

D recovers 50% of his damages, here 50,000

D recovers net of 49,500.

Example #6 Auto wreck. P is 49% at fault, has
\$1,000 damages. D is 51%, with \$100,000

a. "Pure"

P recovers 51%, or 51,000

D recovers 49%, or 490

Offset, P recovers 50,510

b. 49%

P recovers 51% of his damages, \$510

D is barred, gets -0-

c. 50%

P recovers 510

D is barred -0-

The Bill

is a "50%" type, modified comparative negligence.

types of cases it will apply to:

- typical negligence cases (slip + fall - auto wreck - product liability)
- wrongful death
- strict liability in tort (products liability)

Does not apply to:

- cases where D's conduct was "reckless"
- cases where D's conduct was "intentional"

Jury instructions
no problem

Multiple Parties

joint and several liability is retained. Example:

P is injured in amount of \$100,000 by D₁ and D₂, who each cause 30% of the accident and have no damages. P is 40% responsible for his harm. Results:

P collects 60% of his damages, \$60,000 and if D₂ is insolvent, D₁ must pay it all under principles of joint and several liability.

California Case
judicially adopting comparative negligence - "pure"

j

April 8, 1975

Alaska Supreme Court
Pouch U
Juneau, Alaska 99801

Re: Lindley and Kaatz v. State of Alaska,
Supreme Court No. 2259
State of Alaska v. Lindley and Kaatz,
Supreme Court No. 2291

Dear Chief Justice Rabinowitz and Members of the Supreme Court:

This letter is in response to the Court's invitation to reply in writing to opposing counsel's citation at oral argument of the case of Syroid v. Albuquerque Gravel Products Company, 522 P.2d 570 (N.M. 1974). In addition, I am taking this opportunity to bring to the attention of the Court the case of Ng Li v. Yellow Cab Company, L.A. 30277, decided by the Supreme Court of California on March 31st. A copy of that opinion, obtained from the Clerk of the California Supreme Court is appended hereto. A copy has already been furnished counsel for the State.

In Syroid v. Albuquerque Gravel Products Company, supra, the Supreme Court of New Mexico confirmed an interlocutory order of the trial court denying plaintiff's motion to strike the defense of contributory negligence. The New Mexico Court alluded to five reasons that it was reluctant to repudiate the contributory negligence doctrine:

(1) The Court reviewed the American and United Kingdom jurisdictions which had overthrown the contributory negligence doctrine (then including twenty-one states) and inferred that the reluctance of other jurisdictions to adopt comparative negligence, particularly in its pure form, belied the asserted "greater capacity of comparative negligence to work justice in tort cases . . ." 522 P.2d at 571.

(2) The Court cited its own long adherence to the contributory negligence rule, and indicated that it would not abandon such an entrenched rule of law without a showing by the proponents of comparative negligence of "a clear superiority of their system over ours." 522 P.2d at 572, 573.

(3) The Court asserted that the contributory negligence doctrine was not harsh in application in New Mexico, citing the Workmen's Compensation statute and the doctrines of last clear chance, sudden emergency, and degrees of culpability which had been developed in that jurisdiction as ameliorative devices. 522 P.2d at 572, 573.

(4) The Court implied that in practice, courts have avoided the application of contributory negligence in extreme cases by interpretations of the doctrines of negligence or proximate cause. 522 P.2d at 573.

(5) Finally, the Court speculated that contributory negligence was more workable under the jury system, citing the difficulty of exact apportionment of fault. 522 P.2d at 573.

The purported reasons for judicial abstention will be dealt with in the order above listed.

First, it was becoming clear even as the New Mexico court wrote that comparative negligence was and is a strong trend, which will soon isolate a handful of states refusing to acknowledge the need for reform. At least twenty-seven states now have some form of comparative negligence, and two of Alaska's closest sister states, Washington and California, have now adopted pure comparative negligence.

The doctrines of last clear chance and sudden emergency, and the concept of degrees of culpability, alluded to by the New Mexico Supreme Court as ameliorative devices, are in fact half measures which operate as deftly as meat axes. As pointed out in earlier briefs, they shift the entire burden of the loss back on the opposing party, without any necessary relation to the relative degree of that party's causally connected negligence. There is no reason to expect, for instance, that one who has had "the last clear chance" to avoid an accident, will necessarily be the person whose negligence was the greatest part of that contributing to the

Alaska Supreme Court
April 8, 1975
Page Three

accident. All that can really be said, is that, given a multiplicity of doctrines, a court or a jury can bend the facts in order to completely bar the party guilty of the greater part of the negligence.

It is understandable that courts wish to recognize and act upon their obligation to do justice to the parties before the court. A willingness to suspend the application of recognized doctrines of law in order to do justice in individual cases, without overthrowing those doctrines, however, is to undercut the predictability and respectability of the law. This is the dangerous ground upon which the New Mexico court treads in the following statement:

"Further, we do not feel that the extreme examples often posed by critics of contributory negligence are consistent with reality. For instance, inconsistent with actualities in the application of the principles of negligence, contributory negligence and proximate causation to factual situations in litigated tort cases, are the often-cited examples of a plaintiff being precluded from recovering any of his excessively great damages sustained in an accident to which his negligence contributed only 10% or less of the cause, while the defendant, whose negligence constituted 90% or more of the cause, escapes without damage." 522 P.2d at 573.

The Court seems to be suggesting that the trier of fact could, would, and should apply doctrines of negligence, contributory negligence and proximate cause to ensure that a plaintiff in the described situation would recover, whether or not those doctrines, taken literally, would lead to that result. This position, while not judicial statemanship, is the necessary result of a refusal to overthrow the unjust doctrine of contributory negligence. It is the difficulty to which this Court in Young v State, 491 P.2d 122 (Alaska 1971), had reference when the Court warned against the excessive use of the "disfavored defense" of contributory negligence.

The last argument suggested by the Supreme Court of New Mexico, is that contributory negligence is thought by that court to be more workable under the jury system, because of the difficulty of an exact or scientific apportionment of fault. There are several answers to this unsupported assertion,

and all of them are treated exhaustively in the materials to which this Court has been cited by both parties. Briefly, it is hard to see how the apportionment of culpability is any more difficult an exercise in substantial justice for a jury, than a decision under the almost metaphysical instructions which they receive on various issues, which are regularly put to them to resolve. Examples begin with the concept of proximate cause in negligence cases, but reach much more abstruse levels in economic regulation litigation and other technical fields. In fact, juries are making such determinations in a majority of American jurisdictions, and they do not seem to be having as much difficulty as the New Mexico Supreme Court would have expected. If the results are not exact, they are certainly closer to a just division of fault and damages than are determinations under the doctrine of contributory negligence, which are "all or nothing" in their nature. Courts are certainly capable of assisting the juries in identifying relevant factors. See Schwartz, Comparative Negligence, (1974) §§17.1 and 21.1. Courts have the ability, and legal authority, to clarify the issues and streamline the overall litigation, through such devices as compulsory joinder under Alaska Civil Rule 19(a). In short, there is simply no showing that juries are any less capable of handling determinations under a comparative negligence rule, than they are of handling other matters, and the evidence would appear to be to the contrary.

The opinion in Syroid v. Albuquerque Gravel Products Company was joined in by only three of the five sitting members of the New Mexico Supreme Court. The Chief Justice and Justice Stephenson dissented. The decision is an example of judicial intransigence, based on speculation about the hardships of change, and a belief that Courts can do justice in spite of the law they proclaim. That approach is to be distinctly contrasted with the approach of the California Supreme Court in Nga Li v. Yellow Cab Company, supra. In Nga Li, the California Supreme Court has echoed its sister court in Florida by accepting the responsibility for the operation of the common law in modern society. Tracking almost exactly with the Florida Supreme Court in Hoffman v. Jones, 280 S.2d 431 (Fla. 1973) and with the conclusions urged upon this Court by plaintiff-appellants, California has adopted pure comparative negligence. That opinion speaks for itself.

The Alaska Supreme Court has always looked to the best reasoned and most progressive judicial thinking in

Alaska Supreme Court
April 8, 1975
Page Five

determining the common law of the State of Alaska, It has looked particularly to the law of Oregon, Washington, and California. Those three states have now all adopted comparative negligence, two adopting a pure comparative negligence system. The California Supreme Court, which is one of the most respected judicial bodies in the country, has been compelled by the force of logic and the weight of judicial duty to join twenty-six other states in abandoning the legal gargoyle called contributory negligence. This Court should do no less.

Very truly yours,

ROBERTSON, MONAGLE, EASTAUGH & BRADLEY

W. G. Ruddy



M. T. Thomas

Of Attorneys for Appellants
Kaatz and Lindley

WGR:MTT:pc
Enclosure
cc: Allen Compton, Esquire

SUPREME COURT
FILED
MAY 1 1975
C. E. [unclear], Clerk

RECEIVED
APR 7 1975
ROBERTSON, MONAGLE
EASTAUGH & BRADLEY

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

NGA LI,
Plaintiff and Appellant,
v.
YELLOW CAB COMPANY OF CALIFORNIA
et al.,
Defendants and Respondents.

L.A. 30277
Super. Ct. No. 947 992

In this case we address the grave and recurrent question whether we should judicially declare no longer applicable in California courts the doctrine of contributory negligence, which bars all recovery when the plaintiff's negligent conduct has contributed as a legal cause in any degree to the harm suffered by him, and hold that it must give way to a system of comparative negligence, which assesses liability in direct proportion to fault. As we explain in detail infra, we conclude that we should. In the course of reaching our ultimate decision we conclude that:
(1) The doctrine of comparative negligence is preferable to the "all-or-nothing" doctrine of contributory negligence from the point of view of logic, practical experience, and

fundamental justice; (2) judicial action in this area is not precluded by the presence of section 1714 of the Civil Code, which has been said to "codify" the "all-or-nothing" rule and to render it immune from attack in the courts except on constitutional grounds; (3) given the possibility of judicial action, certain practical difficulties attendant upon the adoption of comparative negligence should not dissuade us from charting a new course -- leaving the resolution of some of these problems to future judicial or legislative action; (4) the doctrine of comparative negligence should be applied in this state in its so-called "pure" form under which the assessment of liability in proportion to fault proceeds in spite of the fact that the plaintiff is equally at fault as or more at fault than the defendant; and finally (5) this new rule should be given a limited retrospective application.

The accident here in question occurred near the intersection of Alvarado Boulevard and Third Street in Los Angeles. At this intersection Third Street runs in a generally east-west direction along the crest of a hill, and Alvarado Boulevard, running generally north and south, rises gently to the crest from either direction. At approximately 9 p.m. on November 21,

1968, plaintiff Nga Li was proceeding northbound on Alvarado in her 1967 Oldsmobile. She was in the inside lane, and about 70 feet before she reached the Third Street intersection she stopped and then began a left turn across the three southbound lanes of Alvarado, intending to enter the driveway of a service station. At this time defendant Robert Phillips, an employee of defendant Yellow Cab Company, was driving a company-owned taxicab southbound in the middle lane on Alvarado. He came over the crest of the hill, passed through the intersection, and collided with the right rear portion of plaintiff's automobile, resulting in personal injuries to plaintiff as well as considerable damage to the automobile.

The court, sitting without a jury, found as facts that defendant Phillips was traveling at approximately 30 miles per hour when he entered the intersection, that such speed was unsafe at that time and place, and that the traffic light controlling southbound traffic at the intersection was yellow when defendant Phillips drove into the intersection. It also found, however, that plaintiff's left turn across the southbound lanes of Alvarado "was made at a time when a vehicle was approaching from the opposite direction

so close as to constitute an immediate hazard." The dispositive conclusion of law was as follows: "That the driving of NGA LI was negligent, that such negligence was a proximate cause of the collision, and that she is barred from recovery by reason of such contributory negligence." Judgment for defendants was entered accordingly.

I

"Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm." (Rest. 2d Torts, § 463.) Thus the American Law Institute, in its second restatement of the law, describes the kind of conduct on the part of one seeking recovery for damage caused by negligence which renders him subject to the doctrine of contributory negligence. What the effect of such conduct will be is left to a further section, which states the doctrine in its clearest essence: "Except where the defendant has the last clear chance, the plaintiff's contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him." (Rest. 2d Torts, § 467.) (Italics added.)

This rule, rooted in the long-standing principle that one should not recover from another for damages brought upon oneself (see *Baltimore & P.R. Co. v. Jones* (1877) 95 U.S. 439, 442; *Buckley v. Chadwick* (1955) 45 Cal.2d 183, 192), has been the law of this state from its beginning. (See *Innis v. The Steamer Senator* (1851) 1 Cal. 459, 460-461; *Griswold v. Sharpe* (1852) 2 Cal. 17, 23-24; *Richmond v. Sacramento Valley Railroad Company* (1861) 18 Cal. 351, 356-358; *Gay v. Winter* (1867) 34 Cal. 153, 162-163; *Needham v. S.F. & S.J. R. Co.* (1869) 37 Cal. 409, 417-423.) Although criticized almost from the outset for the harshness of its operation, it has weathered numerous attacks, in both the legislative¹ and the judicial² arenas, seeking its amelioration or repudiation. We have undertaken a thorough reexamination of the matter, giving particular attention to the common law and statutory sources of the subject doctrine in this state. As we have indicated, this reexamination leads us

1. (See, for example, Sen. Bill No. 43 (1971 Reg. Sess.); Assem. Bill No. 694 (1971 Reg. Sess.); Sen. Bill No. 132 (1972 Reg. Sess.); Assem. Bill No. 102 (1972 Reg. Sess.); Sen. Bill No. 10 (1973 Reg. Sess.); Sen. Bill No. 557 (1973 Reg. Sess.); Assem. Bill No. 50 (1973 Reg. Sess.); Assem. Bill No. 801 (1973 Reg. Sess.); Assem. Bill No. 1666 (1973 Reg. Sess.); Sen. Bill No. 2021 (1974 Reg. Sess.).)

2. See *Tucker v. United Railroads* (1916) 171 Cal. 702, 704-705; *Sego v. Southern Pacific Co.* (1902) 137 Cal. 405, 407; *Summers v. Burdick* (1961) 191 Cal.App.2d 464, 471; *Haerdter v. Johnson* (1949) 92 Cal.App.2d 547, 553.

to the conclusion that the "all-or-nothing" rule of contributory negligence can be and ought to be superseded by a rule which assesses liability in proportion to fault.

It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the "all-or-nothing" approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault.³ Against this have been raised several arguments in justification, but none⁴ have proved even remotely adequate to the task. The basic

3. Dean Prosser states the kernel of critical comment in these terms: "It [the rule] places upon one party the entire burden of a loss for which two are, by hypothesis, responsible." (Prosser, Torts (4th ed. 1971) § 67, p. 433.) Harper and James express the same basic idea: "[T]here is no justification -- in either policy or doctrine -- for the rule of contributory negligence, except for the feeling that if one man is to be held liable because of his fault, then the fault of him who seeks to enforce that liability should also be considered. But this notion does not require the all-or-nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim. The logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the present rule." (2 Harper & James, The Law of Torts (1956) § 22.3, p. 1207.)

4. Dean Prosser, in a 1953 law review article on the subject which still enjoys considerable influence, addressed himself to the commonly advanced justificatory arguments in the following terms: "There has been much speculation as to why the rule thus declared found such ready acceptance in later decisions, both in England and in the United States. The explanations given by the courts themselves never have carried much conviction. Most of the decisions have talked about 'proximate cause,'

(Fn. continued)

objection to the doctrine -- grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability -- remains irresistible to reason and all intelligent notions of fairness.

saying that the plaintiff's negligence is an intervening, insulating cause between the defendant's negligence and the injury. But this cannot be supported unless a meaning is assigned to proximate cause which is found nowhere else. If two automobiles collide and injure a bystander, the negligence of one driver is not held to be a superseding cause which relieves the other of liability; and there is no visible reason for any different conclusion when the action is by one driver against the other. It has been said that the defense has a penal basis, and is intended to punish the plaintiff for his own misconduct; or that the court will not aid one who is himself at fault, and he must come into court with clean hands. But this is no explanation of the many cases, particularly those of the last clear chance, in which a plaintiff clearly at fault is permitted to recover. It has been said that the rule is intended to discourage accidents, by denying recovery to those who fail to use proper care for their own safety; but the assumption that the speeding motorist is, or should be, meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant. Probably the true explanation lies merely in the highly individualistic attitude of the common law of the early nineteenth century. The period of development of contributory negligence was that of the industrial revolution, and there is reason to think that the courts found in this defense, along with the concepts of duty and proximate cause, a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds." (Prosser, *Comparative Negligence* (1953) 41 Cal.L.Rev. 1, 3-4; fns. omitted. For a more extensive consideration of the same subject, see 2 Harper & James, *supra*, § 22.2, pp. 1199-1207.)

To be distinguished from arguments raised in justification of the "all or nothing" rule are practical considerations which have been said to counsel against the adoption of a fairer and more logical alternative. The latter considerations will be discussed in a subsequent portion of this opinion.

Furthermore, practical experience with the application by juries of the doctrine of contributory negligence has added its weight to analyses of its inherent shortcomings: "Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff's fault. But the process is at best a haphazard and most unsatisfactory one." (Prosser, Comparative Negligence, supra, p. 4; fn. omitted.) (See also Prosser, Torts, supra, § 67, pp. 436-437; Comments of Malone and Wade in Comments on Maki v. Frelk - Comparative v. Contributory Negligence: Should the Court or Legislature Decide? (1968) 21 Vand.L.Rev. 889, at pp. 934, 943; Ulman, A Judge Takes the Stand (1933) pp. 30-34; cf. Comment of Kalven, 21 Vand.L.Rev. 889, 901-904.) It is manifest that this state of affairs, viewed from the standpoint of the health and vitality of the legal process, can only detract from public confidence in the ability of law and legal institutions to assign liability on a just and consistent basis. (See Keeton, Creative Continuity in the Law of Torts (1962) 75 Harv.L.Rev. 463, 505; Comment of Keeton in Comments on Maki v. Frelk, supra, 21 Vand.L.Rev.

889, at p. 916⁵; Note (1974) 21 U.C.L.A.L.Rev. 1566, 1596-1597.)

It is in view of these theoretical and practical considerations that to this date 25 states,⁶

5. Professor Keeton states the matter as follows in his Vanderbilt Law Review comment: "In relation to contributory negligence, as elsewhere in the law, uncertainty and lack of evenhandedness are produced by casuistic distinctions. This has happened, for example, in doctrines of last clear chance and in distinctions between what is enough to sustain a finding of primary negligence and what more is required to sustain a finding of contributory negligence. Perhaps even more significant, however, is the casuistry of tolerating blatant jury departure from evenhanded application of the legal rules of negligence and contributory negligence, with the consequence that a kind of rough apportionment of damages occurs, but in unpoliced, irregular, and unreasonably discriminatory fashion. Moreover, the existence of this practice sharply reduces the true scope of the substantive change effected by openly adopting comparative negligence. [¶] Thus, stability, predictability, and evenhandedness are better served by the change to comparative negligence than by adhering in theory to a law that contributory fault bars when this rule has ceased to be the law in practice." (21 Vand.L.Rev. at p. 916.)

A contrary conclusion is drawn in an article by Lewis F. Powell, Jr., now an Associate Justice of the United States Supreme Court. Because a loose form of comparative negligence is already applied in practice by independent American juries, Justice Powell argues, the "all-or-nothing" rule of contributory negligence ought to be retained as a check on the jury's tendency to favor the plaintiff. (Powell, Contributory Negligence: A Necessary Check on the American Jury (1957) 43 A.B.A. J. 1005.)

6. Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming. (Schwartz, Comparative Negligence (1974), Appendix A, pp. 367-369.)

In the federal sphere, comparative negligence of the "pure" type (see infra) has been the rule since 1908 in cases arising under the Federal Employers' Liability Act (see 45 U.S.C. § 53) and since 1920 in cases arising under the Jones Act (see 46 U.S.C. § 688) and the Death on the High Seas Act (see 46 U.S.C. § 765).

have abrogated the "all or nothing" rule of contributory negligence and have enacted in its place general apportionment statutes calculated in one manner or another to assess liability in proportion to fault. In 1973 these states were joined by Florida, which effected the same result by judicial decision. (Hoffman v. Jones (1973) 280 So.2d 431.) We are likewise persuaded that logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery -- and that it should be replaced in this state by a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to the extent of their causal responsibility.

The foregoing conclusion, however, clearly takes us only part of the way. It is strenuously and ably urged by defendants and two of the amici curiae that whatever our views on the relative merits of contributory and comparative negligence, we are precluded from making those views the law of the state by judicial decision. Moreover, it is contended, even if we are not so precluded, there exist considerations of a practical nature which should dissuade us from embarking upon the course which we have indicated. We proceed to take up these two objections in order.

II

It is urged that any change in the law of contributory negligence must be made by the Legislature, not by this court. Although the doctrine of contributory negligence is of judicial origin -- its genesis being traditionally attributed to the opinion of Lord Ellenborough in *Butterfield v. Forrester* (K.B. 1809) 103 Eng. Rep. 926 -- the enactment of section 1714⁷ of the Civil Code in 1872 codified the doctrine as it stood at that date and, the argument continues, rendered it invulnerable to attack in the courts except on constitutional grounds. Subsequent cases of this court, it is pointed out, have unanimously affirmed that -- barring the appearance of some constitutional infirmity -- the "all-or-nothing" rule is the law of this state and shall remain so until the Legislature directs otherwise. The fundamental constitutional doctrine of separation of powers, the argument concludes, requires judicial abstention.

7. Section 1714 of the Civil Code has never been amended. It provides as follows: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself". The extent of liability in such cases is defined by the Title on Compensatory Relief." (Italics added.)

We are further urged to observe that a basic distinction exists between the situation obtaining in Florida prior to the decision of that state's Supreme Court abrogating the doctrine (Hoffman v. Jones, supra, 280 So.2d 431), and the situation now confronting this court. There, to be sure, the Florida court was also faced with a statute, and the dissenting justice considered that fact sufficient to bar judicial change of the rule. The statute there in question, however, merely declared that the general English common and statute law in effect on July 4, 1776, was to be in force in Florida except to the extent it was inconsistent with federal constitutional and statutory law and acts of the state Legislature. (Fla. Stat., § 2.01, F.S.A.) The majority simply concluded that there was no clear-cut common law rule of contributory negligence prior to the 1809 Butterfield decision (Butterfield v. Forrester, supra, 103 Eng. Rep. 926), and that therefore that rule was not made a part of Florida law by the statute. (280 So.2d at

8. It should be observed that the Florida court held alternatively that even if contributory negligence was recognized by the common law prior to the day of American independence, and therefore was made a part of Florida law by the statute, it remained subject to judicial overruling because of its common law origin. (280 So.2d at pp. 435-436.)

pp. 434-435.) In the instant case, defendants and the amici curiae who support them point out, the situation is quite different: here the Legislature has specifically enacted the rule of contributory negligence as the law of this state. In these circumstances, it is urged, the doctrine of separation of powers requires that any change must come from the Legislature.

We have concluded that the foregoing argument, in spite of its superficial appeal, is fundamentally misguided. As we proceed to point out and elaborate below, it was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.

Before turning our attention to section 1714 itself we make some observations concerning the 1872 Civil Code as a whole. Professor Arvo Van Alstyne, in

an excellent and instructive article entitled The California Civil Code which appears as the introductory commentary to West's Annotated Civil Code (1954), has carefully and authoritatively traced the history and examined the development of this, the first code of substantive law to be adopted in this state. Based upon the ill-fated draft Civil Code prepared under the direction and through the effort of David Dudley Field for adoption in the state of New York, the California code found acceptance for reasons largely related to the temperament and needs of an emerging frontier society. "In the young and growing commonwealth of California, the basically practical views of Field commanded wider acceptance than the more theoretic and philosophic arguments of the jurists of the historic school. In 1872, the advantages of codification of the unwritten law, as well as of a systematic revision of statute law, loomed large, since that law, drawing heavily upon the judicial traditions of the older states of the Union, was still in a formative stage. The possibility of widely dispersed popular knowledge of basic legal concepts comported well with the individualistic attitudes of the early West." (Van Alstyne, supra, p. 6.)

However, the extreme conciseness and brevity of expression which was characteristic of the 1872 code, although salutary from the point of view of popular access to basic legal concepts, early led to uncertainty and dispute as to whether it should be regarded as the exclusive or primary source of the law of private rights. Due largely to the influence of a series of articles on the subject by Professor John Norton Pomeroy, this problem of interpretation was soon resolved, and by 1920 this court was able to state with confidence: "The Civil Code was not designed to embody the whole law of private and civil relations, rights, and duties; it is incomplete and partial; and except in those instances where its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning a particular subject matter, a section of the code purporting to embody such doctrine or rule will be construed in light of common-law decisions on the same subject." (Estate of Elizaalde (1920) 182 Cal. 427, 433; see also Van Alstyne, supra, pp. 29-35.)

In addition, the code itself provides explicit guidance as to how such construction shall proceed. "The rule of the common law, that statutes in derogation thereof

are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice." (Civ. Code (1872) § 4.) Also, "[t]he provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments." (Civ. Code (1872) § 5; italics added.) The effect of these sections was early expressed by us in *In re Jessup* (1889) 81 Cal. 408, 419, in the following terms: "[E]ven as to the code, 'liberal construction' does not mean enlargement or restriction of a plain provision of a written law. If a provision of the code is plain and unambiguous, it is the duty of the court to enforce it as it is written. If it is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction is to be indulged in as, within the fair interpretation of its language, will effect its apparent object and promote justice." (See also *Baxter v. Shanley-Furness Co.* (1924) 193 Cal. 558, 560; see generally 45 Cal. Jur.2d, Statutes, § 162, pp. 663-667.)

The foregoing view of the character, function, and proper mode of interpretation of the Civil Code has imbued it with admirable flexibility from the standpoint of adaptation to changing circumstances and conditions. As Professor Van Alstyne states the matter: "[The code's] incompleteness, both in scope and in detail[,] have provided ample room for judicial development of important new systems of rules, frequently built upon Code foundations. In the field of torts, in particular, which the Civil Code touches upon only briefly and sporadically, the courts have been free from Code restraint in evolving the details of such currently vital rules as those pertaining to last clear chance, the right of privacy, res ipsa loquitur, unfair competition, and the 'impact rule' in personal injury cases . . . [¶] In short, the Civil Code has not, as its critics had predicted, restricted the orderly development of the law in its most rapidly changing areas along traditional patterns. That this is true is undoubtedly due in large measure to the generality of Code treatment of its subject matter, stress being placed upon basic principles rather than a large array of narrowly drawn rules. In addition, the acceptance of Professor Pomeroy's

concept of the Civil Code as a continuation of the common law created an atmosphere in which Code interpretation could more easily partake of common law elasticity." (Van Alstyne, supra, pp. 36-37.)

It is with these general precepts in mind that we turn to a specific consideration of section 1714. That section, which we have already quoted in full (fn. 7, ante), provides in relevant part as follows: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." (Italics added.)

The present-day reader of the foregoing language is immediately struck by the fact that it seems to provide in specific terms for a rule of comparative rather than contributory negligence -- i.e., for a rule whereby plaintiff's recovery is to be diminished to the extent that his own actions have been responsible for his injuries. The use of the compound conjunction "except so far as" -- rather than some other conjunction setting up a wholly

disqualifying condition -- clearly seems to indicate an intention on the part of the Legislature to adopt a system other than one wherein contributory fault on the part of the plaintiff would operate to bar recovery.⁹ Thus it could be argued -- as indeed it has been argued with great vigor by plaintiff and the amici curiae who support her position -- that no change in the law is necessary in this case at all. Rather, it is asserted, all that is here required is a recognition by this court that section 1714 announced a rule of comparative negligence in this state in 1872 and a determination to brush aside all of the misguided decisions which have concluded otherwise up to the present day. (See also Bodwell, It's Been Comparative Negligence For Seventy-Nine Years (1952) 27 L.A. Bar Bull. 247.)

Our consideration of this arresting contention -- and indeed of the whole question of the true meaning and intent of sec 1714 -- cannot proceed without reference

9. This impression is strengthened by a comparison of the language of section 1714 with the section of the Field draft on which it was modeled. Section 853 of the 1865 draft of the New York Civil Code, whose manifest intention was to state the strict rule of contributory negligence, uses the word "unless" in the position wherein its successor section 1714 substitutes "except so far as." (See fn. 12, infra.) As we shall explain, however, wisdom does not lie in drawing hasty conclusions from this change in language.

to the Code Commissioners' Note which appeared immediately following section 1714 in the 1872 code.¹⁰ That note provided in full as follows: "Code La., § 2295; Code Napoleon, § 1383; Austin vs. Hudson River R.R. Co., 25 N.Y., p. 334; Jones vs. Bird, 5 B. & Ald., p. 837; Dodd vs. Holmes, 1 Ad. & El., p. 493. This section modifies the law heretofore existing. -- See 20 N.Y., p. 67; 10 M. & W., p. 546; 5 C.B. (N.S.), p. 573. This class of obligations imposed by law seems to be laid down in the case of Baxter vs. Roberts, July Term, 1872, Sup. Ct. Cal. Roberts employed Baxter to perform a service which he (Roberts) knew to be perilous, without giving Baxter any notice of its perilous character; Baxter was injured. Held: that Roberts was responsible in damages for the injury which Baxter sustained. (See facts of case.)" (1 Annot. Civ. Code (Haymond & Burch 1874 Ed.) p. 519; italics added.)

Each of the parties and amici in this case has applied himself to the task of legal cryptography which the interpretation of this note involves. The

10. In determining whether a specific code section was intended to depart from or merely restate the common law, weight is to be accorded the notes and comments of the Code Commissioners. (See O'Hara v. Wattson (1916) 172 Cal. 525, 53^d 535.)

variety of answers which has resulted is not surprising. We first address ourselves to the interpretation advanced by plaintiff and the amici curiae in support of her contention set forth above, that section 1714 in fact announced a rule of comparative rather than contributory negligence.

The portion of the note which is relevant to our inquiry extends from its beginning up to the series of three cases cited following the italicized sentence: "This section modifies the law heretofore existing." Plaintiff and her allies point out that the first authorities cited are two statutes from civil law jurisdictions, Louisiana and France; then comes the italicized sentence; finally there are cited three cases which state the common law of contributory negligence modified by the doctrine of last clear chance. The proper interpretation, they urge, is this: Civil law jurisdictions, they assert, uniformly apportion damages according to fault. The citation to statutes of such jurisdictions, followed by a sentence indicating that a change is intended, followed in turn by the citation of cases expressing the common law doctrine -- these taken together, it is urged, support the clear language of section 1714 by

indicating the rejection of the common law "all-or-nothing" rule and the adoption in its place of civil law principles of apportionment.

This argument fails to withstand close scrutiny. The civil law statutes cited in the note, like the common law cases cited immediately following them, deal not with "defenses" to negligence¹¹ but with the basic concept of negligence itself. In fact the Code Commissioners' Note to the parallel section of the Field draft cites the very same statutes and the very same cases in direct support¹² of its statement of the basic rule. Moreover, in

11. Section 1383 of the Code Napoleon (1804) provided: "Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence." [Every person is responsible for the damage that he has caused not only by his act, but also by his negligence or by his imprudence.]

In 1872, article 2295 of the Louisiana Civil Code (now art. 2316) provided: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

12. Section 853 of the 1865 Field draft of the New York Civil Code, along with its Code Commissioners' Note, provided: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person;¹ unless the latter has, willfully, or by want or ordinary care, incurred the risk of such injury.² The extent of liability in such cases is defined by the Title on COMPENSATORY RELIEF.

1872, when section 1714 was enacted and the Code Commissioners' Note was written, neither France nor Louisiana applied concepts of comparative negligence. The notion of "faute commune" did not become firmly rooted in French law until 1879 and was not codified until 1915. (See Turk, Comparative Negligence on the March (1950) 28 Chi.Kent L.Rev. 189, 239-240.) Louisiana, in spite of an 1825 statute which appeared to establish comparative negligence,¹³ firmly adhered to the "all-or-nothing" common law rule in 1872 and has done so ever since. (See Schwartz, supra, § 1.3, p. 10, fn. 76; Turk, supra, at pp. 318-326.) In fact, in 1872 there was no American jurisdiction applying concepts of true comparative negligence for general purposes,¹⁴

"1. Code La., 2295; Code Napoleon, 1383; Austin v. Hudson River R. R. Co., 25 N.Y., 334; Jones v. Bird, 5 B. & Ald., 837; Dodd v. Holmes, 1 Ad. & El., 493.

"2. Johnson v. Hudson River R. R. Co., 20 N.Y., 69."

13. The statute here in question (La. Code 1825, art. 2303) was not that cited by the Code Commissioners. (See fn. 11, ante, and accompanying text.)

14. In 1872 two American jurisdictions, Illinois and Kansas, applied concepts of slight versus gross negligence -- which was not really comparative negligence but another form of "all-or-nothing" rule according to which a slightly negligent plaintiff could recover 100 percent of his damages against a grossly negligent defendant. One jurisdiction, Georgia, had a true comparative negligence statute, but it was limited in application to railroad accidents. (Turk, supra, at pp. 304-318, 326-333.)

and the only European jurisdictions doing so were Austria and Portugal. (Turk, supra, at p. 241.) Among those jurisdictions applying such concepts in the limited area in which they have traditionally been applied, to wit, admiralty, was California itself: in section 973 of the very Civil Code which we are now considering (now Harb. & Nav. Code, § 292) apportionment was provided for when the negligence of the plaintiff was slight. Yet the Code Commissioners' Note did not advert to this section.

In view of all of the foregoing we think that it would indeed be surprising if the 1872 Legislature, intending to accomplish the marked departure from common law which the adoption of comparative negligence would represent, should have chosen to do so in language which differed only slightly from that used in the Field draft to describe the common law rule. (See fn. 12, ante; see also Buckley v. Chadwick, supra, 45 Cal.2d 183, 192-193.) It would be even more surprising if the Code Commissioners, in stating the substance of the intended change, should fail to mention the law of any jurisdiction, American or foreign, which then espoused the

new doctrine in any form, and should choose to cite in their note the very statutes and decisions which the New York Code Commissioners had cited in support of their statement of the common law rule. (See fn. 12, ante, and accompanying text.) It is in our view manifest that neither the Legislature nor the Code Commissioners harbored any such intention -- and that the use of the words "except so far as" in section 171⁴ manifests an intention other than that of declaring comparative negligence the law of California in 1872.¹⁵

That intention, we have concluded, was simply to insure that the rule of contributory negligence, as applied in this state, would not be the harsh rule then applied in New York but would be mitigated by the doctrine of last clear chance. The New York rule, which did not incorporate the latter doctrine, had been given judicial expression several years before in the case of Johnson v. The Hudson

15. The statement in some cases to the effect that section 171⁴ states a civil law rather than a common law principle (see Rowland v. Christian (1968) 69 Cal.2d 108, 112; Fernandez v. Consolidated Fisheries, Inc. (1950) 98 Cal.App.2d 91, 95-96) is correct insofar as it indicates that the duty to refrain from injuring others through negligence has its roots in civil law concepts. (See Turk, supra, at p. 209.) It is incorrect, however, insofar as it might be read

River Railroad Company (1859) 20 N.Y. 65. It is apparent from Code Commissioners' Note that this rule was considered too harsh for adoption in California, and that the Legislature therefore determined to adopt a provision which would not have the effect of barring a negligent plaintiff from recovery without regard to the quantity or quality of his negligence.¹⁶

Turning to the text of the note, we observe that, as indicated above (fn. 11, ante, and accompanying text), the first group of citations, both statutory and decisional, deal with defining the basic concept of negligence and announcing a rule of recovery therefor. Then appears the sentence "This section

to indicate that defenses affecting recovery for breach of that basic duty are also rooted in the civil law. As we have shown, the defense of contributory negligence and its mitigative corollary, the doctrine of last clear chance, as they are stated in the statute, are clearly of common law origin.

16. "Although . . . the bulk of the Code was based on the New York draft code, it nevertheless cannot be classified as a mere duplication thereof. On the contrary, the original California Civil Code bears the unmistakable imprint of a thoroughgoing critical reconsideration and evaluation of the New York provisions, and their recasting where necessary in the light of California statutory and decision law, with a view to the improvement of the whole structure." (Van Alstyne, supra, at p. 11.)

modifies the law heretofore existing," followed immediately by the citation of three cases. The first of these, as we have indicated, is Johnson v. The Hudson River Railroad Company (1859) 20 N.Y. 65; that case represented the strict New York rule of contributory negligence, derived directly from the 1809 Butterfield case, under which any negligence on the part of the plaintiff barred recovery; and it had been specifically cited for that proposition in the Field draft section 853. (See fn. 12, ante.) The second and third cases cited by the California commissioners were Davies v. Mann (1842) 10 M & W 546, and Tuff v. Warman (1858) 5 C.B. (N.S.) 573; these cases stated the emerging doctrine of last clear chance, which the English courts had begun to apply in order to ameliorate the harsh Butterfield rule. Interestingly, the last cited of these cases contains language which might well have been the source of the term "except so far as" which the California Legislature used to indicate its parting of the ways with the New York rule: "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper

conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened." (Tuff v. Warman, ¹⁷ supra, 5 C.B. (N.S.) 573, 585; italics added.)

17. It is difficult to understand why the Code Commissioners did not incorporate in their note citations to California cases dealing with the plaintiff's duty of care and the doctrine of last clear chance. Perhaps it was felt that a citation of the seminal English cases was sufficient to recognize the emerging principles. In any event, it is worthy of note that this court, in the 1869 decision of *Needham v. S. F. & S.J. R.Co.* (1869) 37 Cal. 409, had carefully examined the New York rule and had firmly rejected it in favor of the more humane English view. Of more than passing interest in the present premises is the following language from our opinion: "To this doctrine [the strict New York rule], however, notwithstanding the very respectable authority by which it is sustained, we are unable to assent. About the general rule upon which it is founded -- that a plaintiff cannot recover for the negligence of the defendant, if his own want of care or negligence has in any degree contributed to the result complained of -- there can be no dispute. (*Gay v. Winter*, 34 Cal. 153.) The reason of this rule is, that both parties being at fault, there can be no apportionment of the damages, and not that the negligence of the plaintiff justifies or excuses the negligence of the defendant, which would seem to be the true reason in the estimation of the New York Courts. The law does not justify or excuse the negligence of the defendant. It would, notwithstanding the negligence of the plaintiff, hold the defendant responsible, if it could. It merely allows him to escape judgment because, from the nature of the case, it is unable to

We think that the foregoing establishes conclusively that the intention of the Legislature in enacting section 1714 of the Civil Code was to state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance. It remains to determine whether by so doing the Legislature intended to restrict the courts from further development of these concepts according to evolving standards of duty, causation, and liability.

This question must be answered in the negative. As we have explained above, the peculiar nature of the 1872 Civil Code as an avowed continuation of the common law has rendered it particularly flexible and

ascertain what share of the damages is due to his negligence. He is both legally and morally to blame, but there is no standard by which the law can measure the consequences of his fault, and therefore, and therefore only, he is allowed to go free of judgment. The impossibility of ascertaining in what degree his negligence contributed to the injury being then the sole ground of his exemption from liability, it follows that such exemption cannot be allowed where such impossibility does not exist; or, in other words, the general rule that a plaintiff who is himself at fault cannot recover, is limited by the reason upon which it is founded."

(37 Cal. 409, 419; italics added.) This language clearly contains the germ of a comparative approach, if not the outright statement that such an approach would be adopted if apportionment of damages were technically possible.

adaptable in its response to changing circumstances and conditions. To reiterate the words of Professor Van Alstyne, "[the code's] incompleteness, both in scope and detail[,] have provided ample room for judicial development of important new systems of rules, frequently built upon Code foundations." (Van Alstyne, supra, at p. 36.) Section 1714 in particular has shown great adaptability in this respect. For example, the statute by its express language speaks of causation only in terms of actual cause or cause in fact ("Every one is responsible . . . for an injury occasioned to another by his want of ordinary care."), but this has not prevented active judicial development of the twin concepts of proximate causation and duty of care. (See, e.g., *Vesely v. Sager* (1971) 5 Cal.3d 153, 158-167; *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 865-868; *Dillon v. Legg* (1968) 68 Cal.2d 728, 739-748; *Stewart v. Cox* (1961) 55 Cal.2d 857, 861-863; *Biakanja v. Irving* (1958) 49 Cal.2d 647; *Richards v. Stanley* (1954) 43 Cal.2d 60, 63-66.) Conversely, the presence of this statutory language has not hindered the development of rules which, in certain limited circumstances, permit a finding of liability in the absence of direct

evidence establishing the defendant's negligence as the actual cause of damage. (See *Summers v. Tice* (1948) 33 Cal.2d 80; *Ybarra v. Spangard* (1944) 25 Cal.2d 486.) By the same token we do not believe that the general language of section 1714 dealing with defensive considerations should be construed so as to stifle the orderly evolution of such considerations in light of emerging techniques and concepts. On the contrary we conclude that the rule of liberal construction made applicable to the code by its own terms (Civ. Code, § 4, discussed ante) together with the code's peculiar character as a continuation of the common law (see Civ. Code, § 5, also discussed ante) permit if not require that section 1714 be interpreted so as to give dynamic expression to the fundamental precepts which it summarizes.

The aforementioned precepts are basically two. The first is that one whose negligence has caused damage to another should be liable therefor. The second is that one whose negligence has contributed to his own injury should not be permitted to cast the burden of liability upon another. The problem facing the Legislature in 1872 was how to accommodate these twin precepts in a manner consonant with the then progress

of the common law and yet allow for the incorporation of future developments. The manner chosen sought to insure that the harsh accommodation wrought by the New York rule -- i.e., barring recovery to one guilty of any negligence -- would not take root in this state. Rather the Legislature wished to encourage a more humane rule -- one holding out the hope of recovery to the negligent plaintiff in some circumstances.

The resources of the common law at that time (in 1872) did not include techniques for the apportionment of damages strictly according to fault -- a fact which this court had lamented three years earlier (see fn. 17, ante). They did, however, include the nascent doctrine of last clear chance which, while it too was burdened by an "all-or-nothing" approach, at least to some extent avoided the often unconscionable results which could and did occur under the old rule precluding recovery when any negligence on the part of the plaintiff contributed in any degree to the harm suffered by him. Accordingly the Legislature sought to include the concept of last clear chance in its formulation of a rule of responsibility. We are convinced, however, as we have indicated, that in so doing the Legislature in no way intended to thwart future judicial progress

toward the humane goal which it had embraced. Therefore, and for all of the foregoing reasons, we hold that section 1714 of the Civil Code was not intended to and does not preclude present judicial action in furtherance of the purposes underlying it.

III

We are thus brought to the second group of arguments which have been advanced by defendants and the amici curiae supporting their position. Generally speaking, such arguments expose considerations of a practical nature which, it is urged, counsel against the adoption of a rule of comparative negligence in this state even if such adoption is possible by judicial means.

The most serious of these considerations are those attendant upon the administration of a rule of comparative negligence in cases involving multiple parties. One such problem may arise when all responsible parties are not brought before the court: it may be difficult for the jury to evaluate relative fault in such circumstances, and to compound this difficulty such an evaluation would not be res judicata in a subsequent suit against the absent wrongdoer. Problems

of contribution and indemnity among joint tortfeasors lurk in the background. (See generally Prosser, Comparative Negligence, supra, 41 Cal.L.Rev. 1, 33-37; Schwartz, Comparative Negligence, supra, §§ 16.1 - 16.9, pp. 247-274.)

A second and related major area of concern involves the administration of the actual process of fact-finding in a comparative negligence system. The assigning of a specific percentage factor to the degree of fault attributable to a particular party, while in theory a matter of little difficulty, can become a matter of perplexity in the face of hard facts. It is to be remembered that fault and culpability are the quantities to be measured, not mere physical causation, and such an assessment can involve the personal attitudes and prejudices of individual jurors to a great extent. The temptation for the jury to resort to a quotient verdict in such circumstances can be great. (See Schwartz, supra, § 17.1, pp. 275-279.) These inherent difficulties are not, however, insurmountable. Guidelines might be provided the jury which will assist it in keeping focussed upon the true inquiry (see, e.g., Schwartz, supra, § 17.1, pp. 278-279),

and the utilization of special verdicts or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards and appropriate reverence. (See Schwartz, supra, § 17.4, pp. 282-291; Prosser, Comparative Negligence, supra, 41 Cal.L.Rev., pp. 28-33.)

The third area of concern, the status of the doctrines of last clear chance and assumption of risk, involves less the practical problems of administering a particular form of comparative negligence than it does a definition of the theoretical outline of the specific form to be adopted. Although several states which apply comparative negligence concepts retain the last clear chance doctrine (see Schwartz, supra, § 7.2, p. 134), the better reasoned position seems to be that when true comparative negligence is adopted, the need for last clear chance as a

18. It has been argued by one of the amici curiae that the use of special verdicts in negligence cases would require amendment of section 625 of the Code of Civil Procedure, which reposes the matter of special findings within the sound discretion of the trial court. (See *Cembrook v. Sterling Drug Inc.* (1964) 231 Cal.App.2d 52, 62-65.) The argument is frivolous. The delineation by this court of factors which should guide the exercise of section 625 discretion in negligence cases surely need not operate to remove that discretion altogether.

palliative of the hardships of the "all-or-nothing" rule disappears and its retention results only in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault. (See Schwartz, supra, § 7.2, pp. 137-139; Prosser, Comparative Negligence, supra, 41 Cal.L.Rev., p. 27.) As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. "To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care." (Grey v. Fibreboard Paper Products Co. (1966) 65 Cal.2d 240, 245-246; see also Fonseca v. County of Orange (1972) 28 Cal.App.3d 361, 368-369; see generally,

4 Witkin, Summary of Cal. Law, Torts, § 723, pp. 3013-3014; 2 Harper & James, The Law of Torts, supra, § 21.1, pp. 1162-1168; cf. Prosser, Torts, supra, § 68, pp. 439-441.) We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence. (See generally, Schwartz, supra, ch. 9, pp. 153-175.)

Finally there is the problem of the treatment of willful misconduct under a system of comparative negligence. In jurisdictions following the "all-or-nothing" rule, contributory negligence is no defense to an action based upon a claim of willful misconduct. (see Rest.2d Torts, § 503; Prosser, Torts, supra, § 65, p. 426), and this is the present rule in California. (Williams v. Carr (1968) 68 Cal.2d 579, 583.)¹⁹ As Dean

19. BAJI No. 3.52 (1971 re-revision) currently provides: "Contributory negligence of a plaintiff is not a bar to his recovery for an injury caused by the willful or wanton misconduct of a defendant. [¶] Wilful or wanton misconduct is intentional wrongful conduct,

(footnote continued)

Prosser has observed, "[this] is in reality a rule of comparative fault which is being applied, and the court is refusing to set up the lesser fault against the greater." (Prosser, Torts, supra, § 65, p. 426.) The thought is that the difference between willful and wanton misconduct and ordinary negligence is one of kind rather than degree in that the former involves culpability of an entirely different order,²⁰ and under this conception it might well be urged that comparative negligence concepts should have no application when one of the parties has been guilty of willful and wanton misconduct. It has been persuasively argued, however, that the loss of deterrent effect that would occur upon

done either with knowledge, express or implied, that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results. An intent to injure is not a necessary element of willful or wanton misconduct. [¶] To prove such misconduct it is not necessary to establish that defendant himself recognized his conduct as dangerous. It is sufficient if it be established that a reasonable man under the same or similar circumstances would be aware of the dangerous character of such conduct."

20. "Disallowing the contributory negligence defense in this context is different from last clear chance; the defense is denied not because defendant had the last opportunity to avoid the accident but rather because defendant's conduct was so culpable it was different in 'kind' from the plaintiff's. The basis is culpability rather than causation." (Schwartz, supra, § 5.1, p. 100; fn. omitted.)

application of comparative fault concepts to willful and wanton misconduct as well as ordinary negligence would be slight, and that a comprehensive system of comparative negligence should allow for the apportionment of damages in all cases involving misconduct which falls short of being intentional. (Schwartz, supra, § 5.3, p. 108.) The law of punitive damages remains a separate consideration. (See Schwartz, supra, § 5.4, pp. 109-111.)

The existence of the foregoing areas of difficulty and uncertainty (as well as others which we have not here mentioned -- see generally Schwartz, supra, § 21.1, pp. 335-339) has not diminished our conviction that the time for a revision of the means for dealing with contributory fault in this state is long past due and that it lies within the province of this court to initiate the needed change by our decision in this case. Two of the indicated areas (i.e., multiple parties and willful misconduct) are not involved in the case before us, and we consider it neither necessary nor wise to address ourselves to specific problems of this nature which might be expected to arise. As the Florida court stated with respect to the same subject, "it is not the proper function of this Court to decide unripe issues, without the benefit of adequate briefing, not involving an actual controversy,

and unrelated to a specific factual situation." (Hoffman v. Jones, supra, 280 So.2d 431, 439.)

Our previous comments relating to the remaining two areas of concern (i.e., the status of the doctrines of last clear chance and assumption of risk, and the matter of judicial supervision of the finder of fact) have provided sufficient guidance to enable the trial courts of this state to meet and resolve particular problems in this area as they arise. As we have indicated, last clear chance and assumption of risk (insofar as the latter doctrine is but a variant of contributory negligence) are to be subsumed under the general process of assessing liability in proportion to fault, and the matter of jury supervision we leave for the moment within the broad discretion of the trial courts.

Our decision in this case is to be viewed as a first step in what we deem to be a proper and just direction, not as a compendium containing the answer to all questions that may be expected to arise. Pending future judicial or legislative developments, we are content for the present to assume the position taken by the Florida court in this matter: "We feel the trial judges of this State are capable of applying [a] comparative negligence rule without our setting guidelines

in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of a theoretical solution at the appellate level. The trial judges are granted broad discretion in adopting such procedures as may accomplish the objectives and purposes expressed in this opinion." (280 So.2d at pp. 439-440.)

It remains to identify the precise form of comparative negligence which we now adopt for application in this state. Although there are many variants, only the two basic forms need be considered here. The first of these, the so-called "pure" form of comparative negligence, apportions liability in direct proportion to fault in all cases. This was the form adopted by the Supreme Court of Florida in *Hoffman v. Jones*, supra, and it applies by statute in Mississippi, Rhode Island, and Washington. Moreover it is the form favored by most scholars and commentators. (See, e.g., Prosser, Comparative Negligence, supra, 41 Cal.L.Rev. 1, 21-25; Prosser, Torts, supra, § 67, pp. 437-438; Schwartz, supra, § 21.3, pp. 341-348; Comments on Maki v. Frelk - Comparative v. Contributory Negligence: Should the Court or Legislature Decide?, supra, 21 Vand. L.Rev. 889 (Comment by Keeton at p. 906, Comment by Leflar at p. 918).) The second basic form of comparative

negligence, of which there are several variants, applies apportionment based on fault up to the point at which the plaintiff's culpability is equal to or greater than that of the defendant -- when that point is reached, plaintiff is barred from recovery. Nineteen states have adopted this form or one of its variants by statute. The principal argument advanced in its favor is moral in nature: that it is not morally right to permit one more at fault in an accident to recover from one less culpable. Other arguments assert the probability of increased insurance, administrative, and judicial costs if a "pure" rather than a "50 percent" system is adopted, but this has been seriously questioned. (See authorities cited in Schwartz, supra, § 21.3, pp. 344-346; see also Vincent v. Pabst Brewing Co. (1970) 47 Wis.2d 120, 138 (dissenting opinion).)

We have concluded that the "pure" form of comparative negligence is that which should be adopted in this state. In our view the "50 percent" system simply shifts the lottery aspect of the contributory negligence rule ²¹ to a different ground. As Dean Prosser

21. "The rule that contributory fault bars completely is a curious departure from the central principle of nineteenth century Anglo-American tort law -- that wrongdoers should bear the losses they cause. Comparative negligence more faithfully serves that central

has noted, under such a system "[i]t is obvious that a slight difference in the proportionate fault may permit a recovery; and there has been much justified criticism of a rule under which a plaintiff who is charged with 49 percent of the total negligence recovers 51 percent of his damages, while one who is charged with 50 percent recovers nothing at all."²²

(Prosser, Comparative Negligence, supra, 41 Cal.L.Rev. 1, 25; fns. omitted.) In effect "such a rule distorts the very principle it recognizes, i.e., that persons are responsible for their acts to the extent their fault contributes to an injurious result. The partial rule simply lowers, but does not eliminate, the bar of contributory negligence." (Juenger, Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae,

principle by causing the wrongdoers to share the burden of resulting losses in reasonable relation to their wrongdoing, rather than allocating the heavier burden to the one who, as luck would have it, happened to be more seriously injured." (Comments on Maki v. Frelk, supra, 21 Vand.L.Rev. 889, Comment by Keeton, pp. 917-913.)

22. This problem is compounded when the injurious result is produced by the combined negligence of several parties. For example in a three-car collision a plaintiff whose negligence amounts to one-third or more recovers nothing; in a four-car collision the plaintiff is barred if his negligence is only one-quarter of the total. (See Juenger, Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae, Parsonson v. Construction Equipment Company (1972) 18 Wayne L.Rev. 3, 50-51.)

Parsonson v. Construction Equipment Company, supra, 18 Wayne L.Rev. 3, 50; see also Schwartz, supra, § 21.3, p. 347.)

We also consider significant the experience of the State of Wisconsin, which until recently was considered the leading exponent of the "50 percent" system. There that system led to numerous appeals on the narrow but crucial issue whether plaintiff's negligence was equal to defendant's. (See Prosser, Comparative Negligence, supra, 41 Cal.L.Rev. 1, 23-25.) Numerous reversals have resulted on this point, leading to the development of arcane classifications of negligence according to quality and category. (See cases cited in Vincent v. Pabst Brewing Co., supra, 47 Wis.2d 120, at p. 137 (dissenting opinion).) This finally led to a frontal attack on the system in the Vincent case, cited above, wherein the state supreme court was urged to replace the statutory "50 percent" rule by a judicially declared "pure" comparative negligence rule. The majority of the court rejected this invitation, concluding that the Legislature had occupied the field, but three concurring justices and one dissenter indicated their willingness to accept it if the Legislature failed to act with reasonable dispatch. The dissenting opinion

of Chief Justice Hallows, which has been cited above, stands as a persuasive testimonial in favor of the "pure" system. We wholeheartedly embrace its reasoning. (See also, Hoffman v. Jones, supra, 280 So.2d 431, 438-439.)

For all of the foregoing reasons we conclude that the "all-or-nothing" rule of contributory negligence as it presently exists in this state should be and is herewith superseded by a system of "pure" comparative negligence, the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the fault of the persons whose negligence has brought such damage about. Therefore, in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of fault attributable to that person. The doctrine of last clear chance is abolished, and the defense of assumption of risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; both of these are to be subsumed under the general process of assessing liability in proportion to fault. Pending future judicial or legislative developments, the trial courts of this state are to use broad

discretion in seeking to assure that the principle stated is applied in the interest of justice and in furtherance of the purposes and objectives set forth in this opinion.

It remains for us to determine the extent to which the rule here announced shall have application to cases other than those which are commenced in the future. It is the rule in this state that determinations of this nature turn upon considerations of fairness and public policy. (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 800; *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 868; *Forster Shipbldg. Co. v. County of L.A.* (1960) 54 Cal.2d 450, 459; *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 680-681.) Upon mature reflection, in view of the very substantial number of cases involving the matter here at issue which are now pending in the trial and appellate courts of this state, and with particular attention to considerations of reliance applicable to individual cases according to the stage of litigation which they have reached, we have concluded that a rule of limited retroactivity should obtain here. Accordingly we hold that the present opinion shall be applicable to all cases in which trial has not begun before the date this decision becomes final in this court, but that it shall not be applicable to any case in which

trial began before that date (other than the instant case) -- except that if any judgment be reversed on appeal for other reasons, this opinion shall be applicable to any retrial.

As suggested above, we have concluded that this is a case in which the litigant before the court should be given the benefit of the new rule announced. Here, unlike in *Westbrook v. Mihaly*, supra, 2 Cal.3d 765, considerations of fairness and public policy do not dictate that a purely prospective operation be given to our decision.²³ To the contrary, sound principles of decision-making compel us to conclude that, in the light of the particular circumstances of the instant case,²⁴ the new rule here announced should be applied additionally to the case at bench so as to provide incentive in future cases for parties who may

23. Indeed, as we have indicated in the preceding paragraph, such considerations have led us to permit application of the new rule to actions which have been commenced but have not yet been brought to trial.

24. Nothing we say here today on this point is intended to overrule, in whole or in part, expressly or by implication, the case of *Westbrook v. Mihaly*, supra, 2 Cal.3d 765, or any other case involving the prospective or retrospective operation of our decisions.

have occasion to raise "issues involving renovation of unsound or outmoded legal doctrines." (See Mishkin, Foreword, The Supreme Court 1964 Term (1965) 79 Harv.L.Rev. 56, 60-62.) We fully appreciate that there may be other litigants now in various stages of trial or appellate process who have also raised the issue here before us but who will nevertheless be foreclosed from benefitting from the new standard by the rule of limited retroactivity we have announced in the preceding paragraph. This consideration, however, does not lead us to alter that rule. "Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." (Stovall v. Denno (1967) 388 U.S. 293, 301; fn. omitted.)

In view of the foregoing disposition of this case we have not found it necessary to discuss plaintiff's additional contention that the rule of contributory

negligence is in violation of state and federal constitutional provisions guaranteeing equal protection of the laws.

The judgment is reversed.

SULLIVAN, J.

WE CONCUR:

WRIGHT, C.J.
TOBRINER, J.
BURKE, J.**

** Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

C O P Y

NGA LI v. YELLOW CAB CO. OF CALIFORNIA

L.A. 30277

CONCURRING AND DISSENTING OPINION BY MOSK, J.

Although I concur in the judgment and agree with the substance of the majority opinion, I dissent from its cavalier treatment of the recurring problem of the manner of applying a new court-made rule.

In footnote 24 the opinion denies that the court now "is intending to overrule" the case of Westbrook v. Mihaly (1970) 2 Cal.3d 765. Whether or not the majority subjectively intend to overrule Westbrook, the result and the text of the opinion indicate beyond any doubt that they have actually done so. Precedent is established not merely by what a court says; it is created primarily by what a court does. (Norris v. Moody (1890) 84 Cal. 143, 149; Childers v. Childers (1946) 74 Cal.App.2d 56, 61.)

Unfortunately the forthrightness of the majority opinion as a whole is sadly diminished by a curious reluctance to face up to reality by recognizing that this court is finally overruling Westbrook and several other cases on the subject of applying a new court-made rule to the parties at hand.

As recently as *People v. Hitch* (1974) 12 Cal.3d 641, 654, the majority of this court, while upholding the appellant's contentions, denied him relief on a theory that prospectivity should prevail over retroactive application of a new rule. I pointed out in my dissent (id. at p. 655) that "there is a third, and preferable, alternative: applying the new rule to the aggrieved party responsible for bringing the issue to judicial attention, and thereafter prospectively."

Up to now the majority never deigned to consider the third alternative, but persisted in their erroneous notion that the only choice was between total retroactivity and absolute prospectivity. This occurred in two other cases last year: see my concurring opinion in *In re Stewart* (1974) 10 Cal.3d 902, 907, and my dissenting opinion in *In re Yurko* (1974) 10 Cal.3d 857, 867.

In retrospect it is clear that *Westbrook v. Mihaly*, *supra*, was the point of departure in which the majority first strayed from the accepted doctrine that a prevailing party is to be awarded the fruits of his victory. In my concurring and dissenting opinion in that case (2 Cal.3d at p. 802) and in *Hitch* (12 Cal.3d at p. 656) I quoted from *Stovall v. Denno* (1967) 388 U.S. 293, to the effect that the benefits of a new

rule should apply to the parties to the proceeding which results in the new rule. In the instant case, the majority now quote that same portion of Stovall, this time with approval (ante, p. ____*).

Also, in Westbrook v. Mihaly (2 Cal.3d at p. 804) I noted that if a new rule is to apply prospectively only, "it will tend to deter counsel from presenting 'issues involving renovation of unsound or outmoded legal doctrines,'" citing Mishkin's foreword to the article on the 1964 term of the Supreme Court in 79 Harvard Law Review 56. The majority now adopt the same point based upon the same quotation (ante, p. ____**).

The majority paint their conclusion herein with such broad-brush and standardless terms as "considerations of fairness and public policy" and "sound principles of decision-making," without giving any clue why application of a new rule is fair to Nga Li, but somehow was unfair as applied over the past several years to Westbrook and to the several other litigants who helped us develop new rules of law only to be deprived of the benefits thereof. The most inexplicable previous result was Larez v. Shannon (1970) 2 Cal.3d 813, in which, it will be remembered, the plaintiffs prevailed completely on principle, but the majority went so far as to reverse a judgment in their favor.

*Multilith opinion, page 48.

**Multilith opinion, pages 47-48.

Nevertheless it is comforting that the majority of the court have finally settled on the third of the three available alternatives in applying a new court-made rule. Despite the majority's gratuitous disclaimer, the bench and bar will understand that this court is now overruling, insofar as they are inconsistent, the following opinions: Westbrook v. Mihaly, supra, 2 Cal.3d 765; Alhambra City Sch. Dist. v. Mize (1970) 2 Cal.3d 806; Larez v. Shannon, supra, 2 Cal.3d 813, Foytik v. Aronson (1970) 2 Cal.3d 818; In re Yurko, supra, 10 Cal.3d 857; People v. Hitch, supra, 12 Cal.3d 641.

MOSK, J.

C O P Y

LI v. YELLOW CAB CO.

L.A. 30277

DISSENTING OPINION BY CLARK, J.

I dissent.

For over a century this court has consistently and unanimously held that Civil Code section 1714 codifies the defense of contributory negligence. Suddenly--after 103 years--the court declares section 1714 shall provide for comparative negligence instead. In my view, this action constitutes a gross departure from established judicial rules and role.

First, the majority's decision deviates from settled rules of statutory construction. A cardinal rule of construction is to effect the intent of the Legislature.^{1/} The majority concedes

^{1/} Tyrone v. Kelley (1973) 9 Cal.3d 1, 10-11 [106 Cal.Rptr. 761, 507 P.2d 65]; Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 256 [104 Cal.Rptr. 761, 502 P.2d 1049]; Mannheim v. Superior Court (1970) 3 Cal.3d 678, 686 [91 Cal.Rptr. 585, 478 P.2d 17]; Scala v. Jerry Witt & Sons, Inc. (1970) 3 Cal.3d 359, 366 [90 Cal.Rptr. 592, 475 P.2d 864]; Merrill v. Department of Motor Vehicles (1969) 71 Cal.2d 907, 918 [80 Cal.Rptr. 89, 458 P.2d 33].

"the intention of the Legislature in enacting section 1714 of the Civil Code was to state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance." (Ante, p. ____.*) Yet the majority refuses to honor this acknowledged intention --violating established principle.

The majority decision also departs significantly from the recognized limitation upon judicial action --encroaching on the powers constitutionally entrusted to the Legislature. The power to enact and amend our statutes is vested exclusively in the Legislature. (Cal.Const., art. III, § 3; art. IV, § 1.) "This court may not usurp the legislative function to change the statutory law which has been uniformly construed by a long line of judicial decisions." (Estate of Calhoun (1955) 44 Cal.2d 378, 387 [282 P.2d 880].) The majority's altering the meaning of section 1714, notwithstanding the original intent of the framers and the century-old judicial interpretation of the statute, represents no less than amendment by judicial fiat. Although the Legislature intended the courts to develop the working details of the defense of contributory

negligence enacted in section 1714 (see generally, Commentary, Arvo Van Alstyne, The California Civil Code, 6 West Civ. Code (1954) pp. 1-43), no basis exists-- either in history or in logic--to conclude the Legislature intended to authorize judicial repudiation of the basic defense itself at any point we might decide the doctrine no longer serves us.

I dispute the need for judicial--instead of legislative--action in this area. The majority is clearly correct in its observation that our society has changed significantly during the 103-year existence of section 1714. But this social change has been neither recent nor traumatic, and the criticisms leveled by the majority at the present operation of contributory negligence are not new. I cannot conclude our society's evolution has now rendered the normal legislative process inadequate.

Further, the Legislature is the branch best able to effect transition from contributory to comparative or some other doctrine of negligence. Numerous and differing negligence systems have been urged over the years, yet there remains widespread disagreement among both the commentators and the states as to which one is

best. (See Schwartz, Comparative Negligence (1974) Appendix A, pp. 367-369 and § 21.3, fn. 40, pp. 341-342, and authorities cited therein.) This court is not an investigatory body, and we lack the means of fairly appraising the merits of these competing systems. Constrained by settled rules of judicial review, we must consider only matters within the record or susceptible to judicial notice. That this court is inadequate to the task of carefully selecting the best replacement system is reflected in the majority's summary manner of eliminating from consideration all but two of the many competing proposals --including models adopted by some of our sister states.^{2/}

Contrary to the majority's assertions of judicial adequacy, the courts of other states--with near unanimity--have conceded their inability to determine the best system for replacing contributory negligence, concluding instead that the legislative

^{2/} "It remains to identify the precise form of comparative negligence which we now adopt for application in this state. Although there are many variants, only the two basic forms need be considered here." (Ante, p. ____.*)

branch is best able to resolve the issue.^{3/}

By abolishing this century old doctrine today, the majority seriously erodes our constitutional function. We are again guilty of judicial chauvinism.

CLARK, J.

I CONCUR:

McCCOMB, J.

^{3/} See, e.g., *Codling v. Paglia* (1973) 32 N.Y.2d 330, 344-345 [298 N.E.2d 622, 345 N.Y.S.2d 461]; *McGraw v. Corrin* (Del. 1973) 303 A.2d 641, 644; *Bridges v. Union Railroad Company* (1971) 26 Utah 2d 281 [488 P.2d 738]; *Parsonson v. Constr. Equipment Co.* (1970) 385 Mich. 61 [191 N.W.2d 465] (concurring opinion); *Krise v. Gillund* (N.Dak. 1971) 184 N.W.2d 405; *Peterson v. Culp* (1970) 255 Ore. 269 [465 P.2d 876]; *Vincent v. Pabst Brewing Co.* (1970) 47 Wis.2d 120 [177 N.W.2d 513]; *Maki v. Frelk* (1968) 40 Ill.2d 193 [239 N.E.2d 447]; compare *Hoffman v. Jones* (Fla. 1973) 280 So.2d 431.

Joint tort-feasors by injured party will release all other tort-feasors who contributed to wrong. *Id.*

An innocent party is to be fully compensated by a joint tort-feasor for his loss. *Allstate Ins. Co. v. Clarke (Civ.App.1971) 471 S.W.2d 901, ref. n. r. e.*

7. — Common liability, joint tort-feasors

Where bidder was under no obligation to indemnify owner, pursuant to indemnity provision of contract calling for bidder to undertake certain work on owner's utility lines and poles, for settlement made for injury to bidder's employee in course of job as result of separate acts of negligence of both owner and bidder, whether employee was contributorily negligent was immaterial and submission of special issues relating to contributory negligence of employee, although error, was harmless. *Bluebonnet Elec. Co-op., Inc. v. Universal Elec. Const. Co. (Civ.App.1971) 467 S.W.2d 567, ref. n. r. e.*

15. Indemnity agreements

McCann Const. Co. v. Joe Adams and Son (Civ.App.1970) 458 S.W.2d 477 [main volume] reversed on other grounds 475 S.W.2d 721.

Generally, indemnity agreement will not protect indemnitee against consequences of his own negligence unless the obligation is expressed in unequivocal terms. *Joe Adams and Son v. McCann Const. Co. (Sup. 1971) 476 S.W.2d 721.*

Under oil well drilling contract providing that contractor would assume full liability for, and hold oil field leaseholder harmless, against all claims arising as result of accidents incident to drilling operation conducted by contractor, leaseholder was not indemnified for accidents arising out of its own negligence. *Coastal States Crude Gathering Co. v. Williams (Civ.App.1972) 476 S.W.2d 339, ref. n. r. e.*

General rule is that a contract of indemnity will not afford protection to the indemnitee against the consequences of his own negligence unless the contract clearly expresses such an obligation in unequivocal terms. *Ref-Chem Corp. v. El Paso Products Co. (Civ.App.1974) 506 S.W.2d 701.*

Contract providing indemnification for owner against claims asserted by contractor, its officers, agents, employees, or any member of the public, arising out of or in connection with the work, except for claims by a member of the public caused by the negligence of the owner without contributory negligence on the part of the contractor, provided indemnification for owner's own negligence, but only with respect to claims of the contractor, its agents and employees or where the claim arose out of the work being done by the contractor. *Id.*

16. Products liability

Manufacturer of defective intracath needle which was found liable to patient injured thereby was not entitled to contribution from either the packager and distributor if intracath unit of which needle was

part or hospital in which patient was staying at time of injury, because both packager and hospital would be entitled to indemnification at common law against manufacturer which was solely liable for judgment and which had breached duty owed to packager and hospital. *Vergott v. Deseret Pharmaceutical Co. (C.A.1972) 463 F.2d 12.*

Where manufacturer sold dealer a truck with defectively designed cooling system and dealer materially and knowingly aggravated and contributed to condition by installing air conditioner which severely enhanced danger, both operating concurrently to cause accident, dealer could not recover indemnity from manufacturer but could recover contribution. *Ford Motor Co. v. Russell & Smith Ford Co. (Civ.App.1971) 474 S.W.2d 549.*

17. Landlord and tenant

Where pipeline owner which held easement over oil field for its pipeline created potentially dangerous condition in not marking location of underground pipeline but no injury would have resulted therefrom in absence of active negligence of oil field leaseholder in having water pit dug in preparation for well drilling at place over pipeline whose location leaseholder either knew or should have known, resulting in rupturing of pipeline and resulting fire in which plaintiffs' decedent, an operator of bulldozer digging water pit, died, pipeline owner was entitled to common law indemnity from leaseholder. *Coastal States Crude Gathering Co. v. Williams (Civ.App. 1972) 476 S.W.2d 339, ref. n. r. e.*

18. Contract provisions for contributions

Where indemnity contract between railroad and LP gas supplier provided that railroad was entitled to full indemnity if damages were caused by negligent acts or omissions of producer and that producer would share equally with the railroad in payment of loss if damages were caused by their joint or concurring negligence, and where neither was guilty of active negligence but they both, due to failure of each to act, were guilty of passive negligence which was joint and concurrent with sole cause not being attributable to either, railroad was entitled to contribution from producer for one-half of recovery by railroad employee against railroad in employee's action under Federal Employers' Liability Act (45 U.S.C.A. § 51 et seq.) against railroad for injuries sustained when he inhaled LP gas. *Atchison, T. & S. F. Ry. Co. v. Denton (Civ.App.1971) 475 S.W.2d 821, ref. n. r. e.*

19. Contractors and subcontractors

McCann Const. Co. v. Joe Adams and Son (Civ.App.1970) 468 S.W.2d 477 [main volume] reversed 475 S.W.2d 721.

Provision in contract between general contractor and subcontractor whereby subcontractor would indemnify general contractor for any injuries sustained by parties through or on account of any act or in connection with the work of the subcontractor did not entitle general contractor to indemnification from subcontractor for

judgment entered against general contractor for injuries sustained by subcontractor's employees when concrete forms erected by general contractor before subcontractor began doing its work of pouring concrete collapsed solely by the fault of the general contractor. *Joe Adams & Son v. McCann Const. Co. (Sup.1971) 475 S.W.2d 721.*

30. Release

Where it did not appear that owner or operator of automobile which ran over infant plaintiff, or hospital where plaintiff was treated by physician, were joint tort-feasors with physician, settlement with and release of parties other than physician did not require reduction of damages recoverable from physician. *Leong v. Wright (Civ.App.1972) 478 S.W.2d 839, ref. n. r. e.*

38. Summary judgment

Evidence generated genuine issue of material fact whether trust agreement, which had been entered into between uninsured motorist carrier and its insured following automobile accident, which made insured trustee as to any recovery insured might make against uninsured motorist but which was silent as to insured being trustee as to any recovery he might make against joint tort-feasor, superseded trust agreement, which was contained in policy and which gave insurer right of reimbursement from any recovery against joint tort-feasor, precluding summary judgment for insurer, which had intervened in insured's suit against joint tort-feasor. *Allstate Ins. Co. v. Clarke (Civ.App.1971) 471 S.W.2d 901, ref. n. r. e.*

40. Evidence

In action against leaseholder and drilling contractor for wrongful death of operator

of bulldozer, blade struck and ruptured subterranean crude oil pipeline while digging water pit preparatory to well drilling operation for leaseholder, master drilling contract executed after date of accident by leaseholder and well drilling contractor which sought indemnity against leaseholder was properly excluded. *Coastal States Crude Gathering Co. v. Williams (Civ.App. 1972) 476 S.W.2d 339, ref. n. r. e.*

40.5 Jury questions

Where there was no showing that field personnel of general contractor were authorized to agree to indemnity obligation or that indemnity clause printed on work orders prepared by equipment supplier had been subject of negotiations between general contractor and equipment supplier, and executive of general contractor testified that he had no knowledge of indemnity clause printed on face of work order signed by general contractor's field superintendent after job for which cranes had been hired and during which damage to bridge tee occurred and that general contractor considered work orders as nothing more than receipts given in field after accomplishment of work, determination of whether contract of indemnity existed should have been left to jury as trier of fact. *Hawa & Garrett General Contractors, Inc. v. Gorbett Bros. Welding Co. (Sup.1972) 480 S.W.2d 607.*

45. Judgment, in general

Where under "trust agreement" insured agreed to hold any recovery he made against uninsured motorist for benefit of uninsured motorist insurer, insurer was not, on theory of contribution, entitled to recover its payments out of judgment insured had obtained against joint tort-feasor. *Allstate Ins. Co. v. Clarke (Civ.App. 1971) 471 S.W.2d 901, ref. n. r. e.*

Art. 2212a. Comparative negligence; contribution among joint tort-feasors

Modified comparative negligence

Section 1. Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.

Contribution among joint tort-feasors

Sec. 2. (a) In this section:

(1) "Claimant" means any party seeking relief, whether he is a plaintiff, counterclaimant, or cross-claimant.

(2) "Defendant" includes any party from whom a claimant seeks relief.

(b) In a case in which there is more than one defendant, and the claimant's negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant.

Texas
50%

(c) Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him.

(d) If an alleged joint tort-feasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or nonsuited after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants.

(e) If an alleged joint tort-feasor makes a settlement with a claimant but nevertheless is joined as a party defendant at the time of the submission of the case to the jury (so that the existence and amount of his negligence are submitted to the jury) and his percentage of negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tort-feasor.

(f) If the application of the rules contained in Subsections (a) through (e) of this section results in two claimants being liable to each other in damages, the claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant.

(g) All claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant.

(h) This section prevails over Article 2212, Revised Civil Statutes of Texas, 1925, and all other laws to the extent of any conflict. Acts 1973, 63rd Leg., p. 41, ch. 28, §§ 1, 2, eff. Sept. 1, 1973.

Section 3 of the 1973 Act amended section 1 of article 6701b; §§ 4, 5 thereof provided:

"Sec. 4. Saving clause. This Act does not apply to any cause of action arising before its effective date.

"Sec. 5. Severability clause. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

Comparative Laws:

| STATE | CITATION |
|---------------|---------------------------------|
| Arkansas | Ark.Stats. § 27-1730.2 |
| Connecticut | Laws 1973, c. 622 |
| Maine | 14 M.R.S.A. § 156 |
| Massachusetts | M.G.L.A. c. 231, § 85 |
| Minnesota | M.S.A. § 604.01 |
| Mississippi | Code 1942 § 1454 |
| Nebraska | N.R.S. § 25-1151 |
| New Hampshire | n.S.A. 507:7-a |
| New Jersey | N.J.S.A. 2A:16-5.1 to 2A:16-5.3 |
| Oklahoma | 23 Okl.St. Ann. §§ 11, 12 |
| Rhode Island | Gen.Laws 1956, § 9-20-4 |

Comparative Laws:

| STATE | CITATION |
|--------------|----------------------|
| South Dakota | SDCL § 20-9-2 |
| Vermont | 12 V.S.A. § 1036 |
| Washington | Laws 1973, c. 138(X) |
| Wisconsin | W.S.A. § 895.046 |

Law Review Commentaries

Automobile insurance rate changes under comparative negligence. Jerry D. Todd, 36 Texas Bar J. 1153 (1973).

Automobile reparations reform bills. John M. Lawrence III, 36 Texas Bar J. 1117 (1972).

Comparative negligence. Frank T. Abraham and Don R. Riddle, 25 Baylor L.Rev. 411 (1973).

Comparative negligence in Texas. 11 Houston L.Rev. 101 (1973).

Negligence law, no-fault, and jury trial. Leon Green and Allen E. Smith, 51 Texas L.Rev. 825 (1973).

Proposed modified comparative negligence statute. Frank T. Abraham, 35 Texas Bar J. 1114 (1972).

Library references

- Contribution § 5(2).
- Negligence § 92.
- C.J.S. Contribution § 11.
- C.J.S. Negligence § 168(2).

Art. 2212b. Indemnity provisions in mineral agreements where negligence attributable to indemnitee

Section 1. The legislature finds that an inequity is fostered on certain contractors by the indemnity provisions contained in some agreements pertaining to wells for oil, gas, or water, or mines for other minerals. It is the intent of the legislature and the purpose of this Act to declare provisions for indemnity in certain agreements where there is negligence attributable to the indemnitee to be against the public policy of the State of Texas.

Sec. 2. Except as specified in Section 4 of this Act, a covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or mine for any mineral, is void and unenforceable if it purports to indemnify the indemnitee against loss or liability for damages arising from either death or bodily injury to persons, or injury to property, or any other loss, damage, or expense arising from either death or bodily injury, injury to property, or loss, damage, or expense, which is caused by or results from the sole or concurrent negligence of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

Sec. 3. The term "agreement pertaining to a well for oil, gas, or water, or mine for any mineral" as used in Section 2 of this Act, means any agreement or understanding, written or oral, concerning any operations related to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or disposing of oil, gas, or other minerals, or water, or designing, excavating, constructing, improving, or otherwise rendering services in or in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.

Sec. 4. (a) The provisions of this Act do not apply to loss or liability for damages, or any other expenses, arising from

(1) death or bodily injury to persons or injury to property resulting from radioactivity;

(2) injury to property resulting from pollution; or

(3) injury to property resulting from reservoir or underground damage.

(b) The provisions of this Act do not affect the validity of any insurance contract or any benefit conferred by the Workmen's Compensation Law of this state and do not deprive an owner of the surface estate of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals of the owner's land.

(c) The provisions of Section 2 of this Act shall not apply to any agreement providing for indemnity with respect to claims for personal injury or death to indemnitor's employees or agents, or the employees or agents of indemnitor's sub-contractors if the parties agree in writing that such indemnity obligation will be supported by available liability insurance coverage to be furnished by indemnitor; provided, however, that such indemnity obligation shall be only to the extent of the coverages and dollar limits of insurance agreed to be furnished; but in no event shall said insurance be required in an amount in excess of twelve times state basic limits for bodily injury, approved by the Board of Insurance Commissioners

and Washington State University during the 1973-75 biennium under the provisions of RCW 66.08.180. If this section is not deleted, the University of Washington will receive \$300,000 less than anticipated, Washington State University will receive \$200,000 less than anticipated, and the Division of Health-Department of Social and Health Services will receive \$500,000 more than anticipated for alcoholism programs authorized by RCW 70.96.040.

Veto
Message

Although the language of this section does not contain the word "appropriation," in the absence of any specific language to the contrary, the effect is an appropriation of \$500,000 for additional expenditures by the Division of Health. The Alcoholism Program of the Division of Health was funded at the level recommended in my proposed budget for the 1973-75 biennium, and I do not believe the Legislature intended to provide additional funds for that program.

With the exception of the items described above, the remainder of the bill is approved."

CHAPTER 138

[Engrossed Senate Bill No. 2045]

COMPARATIVE NEGLIGENCE--IMPUTED NEGLIGENCE

AN ACT Relating to civil procedure; creating a new chapter in Title 4 RCW; and declaring an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages caused by negligence resulting in death or in injury to person or property, but any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering.

NEW SECTION. Sec. 2. The negligence of one marital spouse shall not be imputed to the other spouse to the marriage so as to bar recovery in an action by the other spouse to the marriage, or his or her legal representative, to recover damages from a third party caused by negligence resulting in death or in injury to the person.

NEW SECTION. Sec. 3. This act takes effect as of 12:01 a.m. on April 1, 1974.

NEW SECTION. Sec. 4. If any provision of this act or the application thereof to any person or circumstance is held

WASHINGTON
"PURE" FORM

unconstitutional, the remainder of this act and the application of such provisions to other persons or circumstances shall not be affected thereby, and it shall be conclusively presumed that the legislature would have enacted the remainder of this act without such invalid or unconstitutional provision.

NEW SECTION. Sec. 5. Sections 1 through 4 of this act shall constitute a new chapter in Title 4 RCW.

Passed the Senate March 31, 1973.

Passed the House April 14, 1973.

Approved by the Governor April 23, 1973.

Filed in Office of Secretary of State April 24, 1973.

CHAPTER 139

[Engrossed Substitute Senate Bill No. 2800]

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES BUDGET

AN ACT Adopting the budget for the department of social and health services and allied agencies; making appropriations and authorizing expenditures for the operations of the department and allied agencies for the fiscal biennium beginning July 1, 1973, and ending June 30, 1975; designating effective dates for certain appropriations; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. That a budget is hereby adopted for the department of social and health services and its allied agencies and subject to the provisions set forth in the following sections, the several amounts specified in the following sections, or so much thereof as shall be sufficient to accomplish the purposes designated, are hereby appropriated and authorized to be disbursed for salaries, wages and other expenses and for other specified purposes for the fiscal biennium beginning July 1, 1973, and ending June 30, 1975, except as otherwise provided, out of the several funds of the state hereinafter named.

NEW SECTION. Sec. 2. FOR THE DEPARTMENT OF
SOCIAL AND HEALTH SERVICES

General Fund Appropriation: PROVIDED, That

\$594,866,929 is from state funds and

\$6,541,168 is from private and local funds and

\$417,713,196 is from federal funds: PROVIDED,

That any proposal to expend moneys or man

years from an appropriated fund or account

in excess of appropriations provided by law, based

ACTIONS

507: 7-a

CHAPTER 507

ACTIONS

[New Sections]

- 507: 7-a Comparative Negligence.
- 507: 7-b Release or Covenant Not to Sue; Joint Tortfeasors.
- 507: 7-c Inadmissible Evidence; Post Verdict Procedure.
- 507: 8 Contributory Negligence as Defense [Repealed.]
- 507: 8-b Strict Liability and Implied Warranties Limited.
- 507: 14 Minors Contracts; Motor Vehicles [Repealed.]

507: 1 Partners.

[Repealed 1973, 378: 2, eff. Aug. 29, 1973, superseded by RSA 304-A: 18 et seq. (supp).]

507: 2 Cotenants.

ANNOTATIONS

Library references

Larceny: cotenant taking cotenancy property. 17 ALR3d 1394.

507: 7 False Checks, etc. Any person who makes, draws, utters or delivers any check, draft or order for the payment of money upon any bank or other depository, knowing that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment thereof, and which is not paid in full upon presentation, shall be liable to the person injured thereby.

Source. 1917, 55: 1. PL 328: 12. RL Amendments—1971. Omitted provisions 384: 12. RSA 507: 7. 1971, 227: 5, eff. Aug. 17, 1971. relating to arrest.

507: 7-a [New] Comparative Negligence. Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury, or property damage, if such negligence was not greater than the causal negligence of the defendant, but the damages awarded shall be diminished, by general verdict, in proportion to the amount of negligence attributed to the plaintiff; provided that where recovery is allowed against more than one defendant, each such defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The burden of proof as to the existence or amount of causal negligence alleged to be attributable to a party shall rest upon the party making such allegation. This section shall govern all actions arising out of injuries and other damages sustained on and after August 12, 1969, and none other.

Source. 1969, 225: 1, eff. Aug. 12, 1969. thereof the provision concerning the burden of proof as to comparative negligence. 1970, 35: 1, eff. May 4, 1970. Amendments—1970. Added at the end

Hawaii
Regular Session
1969 New Laws 1. 543
(Page 542 - In Blank)

HAWAII
49%

HAWAII
Regular Session
Act 227, Laws 1969
House Bill No. 857

AN ACT

RELATING TO TORT ACTIONS BASED ON NEGLIGENCE AND
AMENDING CHAPTER 663 - HAWAII REVISED STATUTES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Chapter 663 of the Hawaii Revised Statutes is
2 amended by adding a new Part to be appropriately designated and
3 to read as follows:

4 Part-----Comparative Negligence

5 "Section 663 - Contributory negligence no bar; compara-
6 tive negligence; findings of fact and special verdicts.

7 "(a) Contributory negligence shall not bar recovery
8 in any action by any person or his legal representative to
9 recover damages for negligence resulting in death or in injury
10 to person or property, if such negligence was not as great
11 as the negligence of the person against whom recovery is
12 sought, but any damages allowed shall be diminished in propor-
13 tion to the amount of negligence attributable to the person
14 for whose injury, damage or death recovery is made.

15 "(b) In any action to which subsection (a) of this
16 section applies, the court, in a nonjury trial, shall make
17 findings of fact or, in a jury trial, the jury shall return
18 a special verdict which shall state:

19 "(1) The amount of the damages which would

1 have been recoverable if there had been no contributory
2 negligence; and

3 "(2) The degree of negligence of each party,
4 expressed as a percentage.

5 "(c) Upon the making of the finding of fact or the
6 return of a special verdict, as is contemplated by subsection
7 (b) above, the court shall reduce the amount of the verdict
8 in proportion to the amount of negligence attributable to
9 the person for whose injury, damage or death recovery is
10 made, provided, however, that if the said proportion is equal
11 to or greater than the negligence of the person against whom
12 recovery is sought, then, in such event, the court will enter
13 a judgment for the defendant."

14 SECTION 2. The provisions of this Act shall not be
15 retroactive and shall affect only those claims accruing after
16 its effective date.

17 SECTION 3. This Act shall take effect upon its approval.

Approved, July 14, 1969

AMERICAN INSURANCE ASSOCIATION

85 JOHN STREET
NEW YORK, N. Y. 10038

Legislative Information Service

LAW MEMO 1272

THIS IS NOW LAW

HAWAII REGULAR SESSION 1969

H.B. 857

COMPARATIVE NEGLIGENCE -

Newly provides that contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.

Further provides that in any action to which the above applies, the court, in a non-jury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict which shall state: (1) the amount of damages which would have been recoverable if there had been no contributory negligence; and (2) the degree of negligence of each party, expressed as a percentage.

Further provides that upon the making of the finding of fact or the return of a special verdict, as contemplated above, the court shall reduce the amount of the verdict in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made, provided however that if the said portion is equal to or greater than the negligence of the person against whom recovery is sought, then, in such event, the court will enter a judgment for the defendant.

Provides that the provisions hereof shall affect only those claims accruing the effective date hereof.

ACT 227

Effective July 14, 1969

AG:sgt
9(1)

TEXT OF LAW ATTACHED

RECEIVED
FEB 28 1970
ROBERTSON, MORGAN & ANNIS

5080

Senate Bill No. 524—Committee on Judiciary

CHAPTER 787

AN ACT relating to tort actions; providing for a system of comparative negligence in lieu of the defenses of contributory negligence; providing that multiple defendants shall be severally liable and damages shall be apportioned in accordance with negligence of each defendant; and providing other matters properly relating thereto.

[Approved May 3, 1973]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 41 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. In any action to recover damages for injury to persons or property in which contributory negligence may be asserted as a defense, the contributory negligence of the plaintiff shall not bar a recovery if the negligence of the person seeking recovery was not greater than the negligence or gross negligence of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person seeking recovery.

2. In such cases, the judge may, and when requested by any party shall instruct the jury that:

(a) The plaintiff may not recover if his contributory negligence has contributed more to the injury than the negligence of the defendant or the combined negligence of multiple defendants.

(b) If the jury determines the plaintiff is entitled to recover, it shall return by general verdict the total amount of damages the plaintiff would be entitled to recover except for his contributory negligence.

(c) If the jury determines that a party is entitled to recover, it shall return a special verdict indicating the percentage of negligence attributable to each party.

(d) The percentage of negligence attributable to the person seeking recovery shall reduce the amount of such recovery by the proportionate amount of such negligence.

3. Where recovery is allowed against more than one defendant in such an action:

(a) The defendants are severally liable to the plaintiff.

(b) Each defendant's liability shall be in proportion to his negligence as determined by the jury, or judge if there is no jury. The jury or judge shall apportion the recoverable damages among the defendants in accordance with the negligence determined.

note

AS 09.16 Uniform Joint Liability Tortfeasors

Assembly Bill No.

CH

AN ACT relating to justices of the peace in townships; and providing

IA:

The People of the State of Nevada do enact as follows:

SECTION 1. NRS 4.020 is amended to read: 4.020 1. [There shall be one justice of the peace for each township of the state having a population of 100 or more as determined by the last preceding national census of the United States Department of Commerce shall be elected by the qualified electors of the township at a general state election in November of each year.

2. There shall be one justice of the peace for each township of the state having a population of 100 or more as determined by the last preceding national census of the United States Department of Commerce shall be elected by the qualified electors of the township at a general state election to be held in Nevada every 4 years thereafter.

3. There shall be one justice of the peace for each township of the state having a population of 100 or more as determined by the last preceding national census of the United States Department of Commerce shall be elected by the qualified electors of the township at a general state election to be held in Nevada every 4 years thereafter.

4. The term of office of a justice of the peace shall be 4 years, beginning on the 1st Monday in January of each year.

5. Justices of the peace shall be elected by the qualified electors of the township at a general state election to be held in Nevada every 4 years thereafter.

6. The clerk of the township shall be elected by the qualified electors of the township at a general state election to be held in Nevada every 4 years thereafter.

7. The board of county commissioners shall certify under seal the election and qualification of a justice of the peace and file the same in the office of the county clerk.

8. Section 2 of this act shall be amended to read: Section 1 of this act shall be amended to read:

#2

CS for HB 176

Sec. 09.65. CONTRIBUTORY NEGLIGENCE NO BAR TO ACTION: MODIFIED

COMPARATIVE NEGLIGENCE. (a) In any action to recover damages for death or for injury to persons or property in which contributory negligence may be asserted as a defense, ~~the~~ contributory negligence of ~~the plaintiff~~ shall not bar a recovery if the negligence of the person seeking recovery was not greater than the negligence or gross negligence of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person seeking recovery.

(b)

Sec. 09.65.140. JURY INSTRUCTIONS. In such cases, the judge may, and when requested by any party shall instruct the jury that:

(1) The ^{claimant} plaintiff may not recover if his contributory negligence has contributed more to the injury than the negligence of the defendant or the combined negligence of multiple defendants.

(2) If the jury determines the plaintiff is entitled to recover, it shall return by general verdict the total amount of damages the ^{claimant} plaintiff would be entitled to recover except for his contributory negligence.

(3) If the jury determines that a ^{person} party is entitled to recover, it shall return a special verdict indicating the percentage of negligence attributable to each ^{person} party.

(4) The percentage of negligence attributable to the person seeking recovery shall reduce the amount of such recovery by the proportionate amount of such negligence.

Sec. 09.65. MULTIPLE PARTIES. (a) Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant.

(b) Contribution among jointly liable defendants shall be as provided in AS 09.16.

1 * Section 2. AS 09.16 is amended to read:

2 Sec. 09.16.020. PRO RATA SHARES? In determining the pro rata shares
3 of tortfeasors in the entire liability

4 (1) their relative degrees of fault shall [NOT] be considered;

5 (2) if equity requires, the collective liability of some as a group
6 constitutes a single share; and

7 (3) principles of equity applicable to contribution generally shall
8 apply./

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

MODEL STATUTE COMPARATIVE NEGLIGENCE

11/10/78
Section 1. GENERAL RULES. (a) In all actions based on ^{+ death} strict liability, negligence or recklessness, the fact the party bringing the action was at fault because that person was negligent or reckless or unreasonably and impliedly assumed the risk, shall not necessarily bar recovery; rather, the person's damages shall be diminished by the trier of fact in proportion to the amount of fault attributable to that person.

(b) The principles set forth in Subsection A shall also apply in actions for wrongful death with respect to the negligence of the plaintiff and his or her decedent.

(c) The principles set forth in Subsection A shall apply regardless of whether either party violated a criminal safety statute or had the last clear change to prevent the injury.

Section 2. PROCEDURAL RULES. (a) In any action to which this Act applies, the court in a non-jury trial shall make findings of fact, or in a jury trial, the jury shall answer special questions indicating:

(1) The amount of damages which the party bringing the action would be entitled to recover had that person not been at fault;

(2) The amount of the party's fault that had a bearing on that person's damages, expressed as a percentage.

The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering. The jury may, however, upon request of a party, be informed of the legal effect of their answers to the special questions.

(b) A court may make a limited reversal of a jury's verdict on the ground that its answer under (1) or (2) of subsection (a) was wholly unreasonable. The court may then determine a proper amount of damage or percentage of fault, utilizing the principles of additur and remittitur properly used in this state.

Section 3. MULTIPLE PARTIES. (a) This act in no way modifies the common-law principle that joint tortfeasors are jointly and severally liable for their torts.

(b) In all actions subject to this act, the trier of fact shall allocate fault on the basis of parties who are represented in court.

(c) In actions for contribution, damages shall be allocated on the basis of the relative fault of the parties to the contribution action.

Section 4 EFFECTIVE DATE. This act shall take effect _____, _____, and shall apply only to actions arising out of events which occur on or after that date.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29