

HB

124

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December 30, 1976

Representative Steve Cowper  
Pouch V  
Juneau AK 99811

Re: Uniform Comparative Fault Act

Dear Steve:

Enclosed please find a copy of Uniform Comparative Fault Act with my proposed modifications. I have already spoken to you generally about the Act.

As I mentioned, the Act first came to my attention as a member of the Alaska Bar Association Civil Rules Committee. The Act was sent to us by Chief Justice Boochever with the request that we review it with the idea, I assume, of adopting it as a Civil Rule. All members of the committee felt they were disqualified from acting with regard to the Act because all had cases pending that would be directly affected by some portion of the Act. Furthermore, all members of the committee felt that the matters contained in the Act were more appropriately the subject for legislation rather than rules. Regardless of what our committee felt, I believe it can be inferred from Chief Justice Boochever's request to the committee that if the legislature does not adopt some sort of legislation implementing comparative negligence in Alaska, the court will do so by rules.

The main argument that I have with the proposed Act is in section 3. Under section 3, the common law doctrine of joint and several liability of joint tort feorsors is abolished and all parties, including the injured party, must share proportionately in the insolvency of an uninsured or otherwise insolvent tort feasor. This is not the law in other jurisdictions that have considered the problem. See 57 Am. Jur. 2nd, Negligence §435, especially notes 12, 13, and 14, a copy of which I am enclosing. The whole theory of comparative negligence is that a tort victim should be penalized in recovery from a tort feasor in an amount equal to his contribution to his own injuries. It would be contrary to the humanitarian spirit of the doctrine to further penalize the tort victim for the

Representative Steve Cowper  
Re: Uniform Comparative Fault Act  
December 30, 1976  
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insolvency of one or more tort feasons. Furthermore, the proposed Act, in practice, would severely complicate litigation. I can imagine in every action filed under the proposed Act, that defendants would attempt to join every potential insolvent defendant around in an effort to decrease their own liability. I have had many cases where potential defendants are not joined because they are uninsured or otherwise insolvent and to join them under such circumstances would merely complicate the litigation. Defendants in such actions have not joined them either because, under the rule of joint and several liability, they know that they could not collect contribution from them. But if there is no joint and several liability, there would be very good reason for defendants to join insolvent defendants in an effort to reduce their own liability to the plaintiff.


The other changes that I have made are strictly technical. I have everywhere changed "plaintiff" to "claimant" and "defendant" to "tort feason". The reason for this is that often a tort claimant may be cast in the role of a counterclaiming defendant and a tort feason may be cast in the role of a plaintiff. In section 5, I have adopted alternative 1, for the reasons stated in the second paragraph of the comments, and for the reason that some defendants, may be uninsured but have assets or be self-insured. I believe that the amendment to the Uniform Contribution Among Tort Feasons Act should be adopted.

I wish that you would attempt to get this Uniform Act, as amended by me, adopted as law. I have no particular vanity about draftsmanship and would be agreeable to any language so long as the end is accomplished.

If you have any questions, please do not hesitate to call me collect, either at the office (452-1201) or at home (456-5000). I would like to go to Juneau to testify at any important hearings regarding the Act and would appreciate it if you would advise me when any are scheduled.

Yours very truly,

RICE, HOPNER & HEDLAND

  
Millard F. Ingraham

MFI/mcb  
Enclosures

against one or more of the defendants.<sup>7</sup> However, even though apportionment of negligence on a percentage basis among the parties to the action may be required,<sup>8</sup> such an apportionment may not be controlling on the question whether all, or only some, of the defendants may be held liable for the damages suffered by the plaintiff as diminished by his proportionate negligence under an "equal to or greater than" type of statute which is construed as designed to serve the same basic purpose as the so-called "Prosser Act,"<sup>9</sup> although its application is limited to cases in which the plaintiff's negligence is less than 50 percent of the cause of his damage.<sup>10</sup> Where such a statute is so construed, the plaintiff, if he can recover anything, can recover his damages, diminished by the percentage his negligence contributed to his injuries, against all the defendants, including those whose negligence equaled his.<sup>11</sup>

Whether or not the jury's apportionment of negligence among the parties to the action has any bearing on the right of the plaintiff or claimant to recover diminished damages from all, or only from some, of the defendants, the general rule appears to be that once a determination is made that the injured person or claimant has a right to recover against any of those whose negligence contributed proximately to his injuries the amount of his damages diminished in proportion to the negligence attributable to him, all the tortfeasors who remain liable are liable to the injured person for the entire amount recoverable.<sup>12</sup> In one jurisdiction the rule is set forth in the comparative negligence statute.<sup>13</sup> Therefore, even though recovery against one joint tortfeasor who is liable for the injuries suffered by the claimant is impossible or improbable because he is uninsured and judgment proof, the other tortfeasor or tortfeasors are liable for the full amount recoverable, even though the causal negligence attributable to them is relatively minor.<sup>14</sup>

7. § 434, supra.

8. *Fitzhugh v Elliott*, 237 Ark 88, 371 SW 2d 533, stating that the jury must apportion negligence among the parties to the action on the basis of 100 percent.

9. Dean Prosser, in his article entitled "Comparative Negligence," 51 Mich Law Review, page 465, recommends a comparative negligence statute which, in providing for recovery despite contributory negligence, would require that damages awarded be diminished in proportion to the amount of negligence attributable to the plaintiff or person injured, and which, except for an added provision for special verdicts, embodies the "pure" contributory negligence concept, which is discussed in §§ 443 et seq., infra.

10. *Walton v Tull*, 234 Ark 882, 356 SW 2d 20, 8 ALR3d 708.

11. *Walton v Tull*, supra.

12. *Walton v Tull*, supra; *Chille v Howell*, 34 Wis 2d 491, 149 NW2d 600 (holding that the comparative negligence statute did not change the common-law rule that every joint tortfeasor who is liable at all is liable for such

damage as the injured person is entitled to recover).

The refinement of the rule of contribution between joint tortfeasors does not apply to or change the plaintiff's right to recover against any defendant tortfeasor the total amount of his damage to which he is entitled. *Bielski v Schalte*, 16 Wis 2d 1, 114 NW2d 105.

13. *Peterson v Minneapolis*, 285 Minn 282, 173 NW2d 353, 37 ALR3d 1431, wherein the court set forth the statute which in pertinent part provides that where "there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award."

14. *Walton v Tull*, 234 Ark 882, 356 SW 2d 20, 8 ALR3d 708, recognizing that this conclusion may require a single defendant to pay the entire judgment even though his negligence was comparatively slight, where some of the tortfeasors are insolvent or unavailable, leaving the remedy, if any, for relief from such disproportionate liability to action under the Uniform Contribution Among Tortfeasors Act.

UNIFORM COMPARATIVE FAULT ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS EIGHTY-FIFTH YEAR  
ATLANTA, GEORGIA

JULY 31 - AUGUST 6, 1976

UNIFORM COMPARATIVE FAULT ACT

With Comments

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The ideas and conclusions herein set forth, including drafts of proposed legislation, have not been passed upon by the Commissioners on Uniform State Laws. They do not necessarily reflect the views of the Committee, Reporters or Commissioners. Proposed statutory language may not be used to ascertain legislative meaning of any promulgated final law.

SPECIAL COMMITTEE ON UNIFORM COMPARATIVE FAULT ACT

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REVIEW COMMITTEE ON UNIFORM COMPARATIVE FAULT ACT

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as great as" defendant's negligence, (3) plaintiff's negligence "not greater than" defendant's negligence, and (4) the "pure type," apportionment allowed even though plaintiff's negligence exceeds that of defendant.

The slight-gross form can be dismissed as having no current support. The second and third are "modified" forms, differing from each other only in the situation where both parties are found to be 50% negligent. Number 2 would not allow recovery then; number 3 would allow recovery and seems the better of the two.

The real issue is between the modified forms and the pure form (number 4). The two modified forms may possibly work satisfactorily in the case in which only one party is hurt and he sues the other, and might perhaps be the choice if these were the only cases to arise. But when there are multiple plaintiffs and cross-claims, the modified form becomes entirely inadequate. To compare the two forms, take variations of a case in which A and B were both negligent and both injured. Assume A's negligence is found to be 25% and B's is found to be 75%.

Case (1). Assume each party suffers \$8,000 damages. Under the modified form, A recovers \$6,000; B recovers nothing. A's loss is \$2,000 (all his own), or 12.5% of the total of \$16,000. B's loss is \$14,000 (\$6,000 to A, and \$8,000 of his own) for 87.5% of the total. Under the pure form (assuming no set-off), A recovers \$6,000; B, \$2,000. A's loss is \$4,000 (\$2,000 to B and \$2,000 of his own) for 25% of the total; B's loss is \$12,000 (\$6,000 to A and \$6,000 of his own) for 75% of the total.

Case (2). Assume A suffers \$4,000 damages; B, \$12,000. Under the modified form, A recovers \$3,000; B, nothing. A incurs \$1,000 (all his own) for 6% of the total; B incurs \$15,000 (\$3,000 to A and \$12,000 of his own) for 94% of the total. Under the pure form, A recovers \$3,000; B, \$3,000. A incurs \$4,000 loss (\$3,000 to B and \$1,000 of his own) for 25% of the total; B incurs \$12,000 (\$3,000 to A and \$12,000 of his own) for 75% of the total.

Case (3). Assume A suffers \$12,000 damages; B, \$4,000. Under the modified form, A recovers \$9,000; B, nothing. A incurs \$3,000 loss (all his own) for 19% of the total; B incurs \$13,000 loss (\$9,000 to A, \$4,000 of his own) for 81% of the total. Under the pure form, A recovers \$9,000; B, \$1,000. A

incurs \$4,000 loss (\$1,000 to B and \$3,000 of his own) for 25% of the total; B incurs \$12,000 loss (\$9,000 to A and \$3,000 of his own) for 75%.

Case (4). Now change the fault percentage. Assume that each party suffered \$8,000 damages and that A was 49% negligent; B, 51%. Under the modified form, A recovers \$4,080; B, nothing. A incurs \$3,920 loss (all his own) for 24.5% of the total; B incurs \$12,080 loss (\$4,080 to B and \$8,000 of his own) for 74.5% of the total. Under the pure form, A incurs \$7,840 loss (\$3,920 to B and \$3,920 of his own) for 49% of the total; B incurs \$8,160 loss (\$4,080 to A, and \$4,080 of his own) for 51% of the total.

Thus, it is apparent that the pure form always divides the total loss according to the established fault percentage, while the modified form fluctuates wildly and very unfairly.

While the pure form of comparative negligence is not presently the majority form, it has grown very substantially in the 1970's and is now sustained by an impressive list of authorities. First enacted in the Federal Employers Liability Act in 1908, it was later adopted in other Federal Acts. Mississippi adopted the pure form in 1910. It has also been adopted by legislation in New York (1975), Rhode Island (1971) and Washington (1973). In three states it has been judicially adopted by the supreme court. Kaatz v. State, 540 P.2d 1037 (Alas. 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226; Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). It has also just been adopted by the U. S. Supreme Court for admiralty cases. United States v. Reliable Transfer Co., 421 U.S. 397 (1975). The pure form is also adopted in Great Britain, most of the states and provinces in Australia and Canada, and other common law jurisdictions.

UNIFORM COMPARATIVE FAULT ACT

1. Section 1. In a tort action for damages based on  
2 negligence, recklessness, or strict liability (including breach  
3 of warranty), <sup>claimant</sup> ~~plaintiff's~~ contributory fault does not bar re-  
4 covery but has the effect of diminishing his damages proportion-  
5 ately according to his own fault or the fault attributable to  
6 him. This section applies to a tort action based upon a  
7 statute, unless otherwise expressed or construed. In a deriv-  
8 ative action or an action for wrongful death, <sup>claimant</sup> ~~plaintiff's~~  
9 damages are diminished according to the fault of any person  
10 whose conduct might otherwise have barred the liability.  
11 This section applies whether or not the contributory fault  
12 previously constituted a defense and replaces such common  
13 law principles as last clear chance and implied assumption of  
14 risk.

COMMENT

Torts covered by the Act. The proposed act applies to tort actions for negligence, recklessness and strict liability. As to recklessness, the common-law rule that contributory negligence did not bar recovery or diminish damages was an overture. A comparison of the relative fault of the parties is appropriate here.

There is more question about applying the act to strict liability, since the theory is that the defendant is liable regardless of fault. But for strict liability for both abnormally dangerous activities and for products there is strong similarity to negligence declared by the court as a matter of

law (negligence) trier of fact will have serious difficulty of fault. In addition, it would be highly anomalous in a products liability case to have the damages mitigated if the plaintiff elects to sue in negligence, but to allow him to recover full damages if he elects instead to sue for strict liability in tort. The two actions should be treated alike, especially when they are separate counts in the same complaint. There would also be anomaly in diminishing the amount of the plaintiff's recovery for contributory negligence if the defendant is found to be negligent but in allowing the plaintiff to recover his full damages in the absence of a finding of defendant's negligence.

There is a problem about how to handle an action for breach of implied warranty. The Act is not intended to include actions which are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not obtain what he contracted to receive. But many actions for breach of warranty sound primarily, or partially, in tort -- especially when the damage involves physical harm to person or property. These actions should be included. The essential nature of the breach-of-warranty action varies greatly in different states, and the language may have to vary for some states. The words "strict liability (including breach of warranty)" are intended to indicate that the act includes an action for breach of warranty which comes within the common concept of an action of strict tort liability for products.

By conscious decision, the Act does not apply to intentional torts. It seems inappropriate in that situation, and no state has attempted to extend the concept of comparative fault to intentional torts.

For certain types of torts, such as nuisance, the defendant's tortious conduct may be intentional, negligent or subject to strict liability. In the latter two instances the Act would apply, but not in the case of intentionally inflicting the injury on the plaintiff. A similar analysis applies to actions for misrepresentation.

"Contributory fault" is treated as a term of art referring to fault on the part of the plaintiff (or one under whom he claims), and which has a causal relationship to his injury.

"Fault attributable to the plaintiff" is to take care of imputed negligence, as in the case of respondeat superior.

Comparison of fault of parties. In comparing plaintiff's fault with that of the defendants, there are a number of in-

plications arising from the concept of fault. The conduct of plaintiff, or of any defendant, may be more or less at fault, depending on whether it was mere inadvertence or acting with an awareness of the danger involved, on the magnitude of the risk created by the conduct, on the significance of what he was seeking to attain by his conduct, and on his superior or inferior capacities. The rule of law that a particular defendant owes a higher degree of care (as in the case of a common carrier of passengers) or a lesser degree of care (as in the case of an automobile host in a state having a valid automobile-guest statute) is important in determining whether he is liable at all; but if his liability has been established, the rule does not play a part in determining the relative proportion of fault of this party in comparison with the others.

On the other hand, in determining the relative fault of the parties, the trier of fact may give consideration to the relative closeness of causal relationship, so that the concept of comparative fault absorbs the causation elements of the common law doctrine of last clear chance. This holding in such cases as Cushman v. Perkins, 245 A.2d 846 (Me. 1968); and Lovesee v. Allied Dev. Corp., 45 Wis.2d 340, 170 N.W.2d 196 (1970) seems properly applicable to this Act.

"Action based on a statute" includes wrongful death and survival acts, dram-shop acts, dog-bite statutes, actions of negligence per se based on criminal statutes, etc. An attempt to enumerate them in the statute would almost inevitably leave some out. "Unless otherwise expressed or construed" is to keep from repealing by implication and to give a court the authority to construe a statute such as a child-labor act to prevent any mitigation if it thinks the policy of the act requires protection of a class of persons even against their own weaknesses or inadequacies.

"Whether previously constituting a defense or not" includes last clear chance, assumption of risk (to the extent that it is based on fault), contributory fault for recklessness or strict liability, etc., plus all cases where contributory negligence was a complete defense. Consent to defendant's conduct is not regarded as a form of contributory fault.

Section 2. In a tort action involving contributory

2 fault, the court, unless otherwise requested by the parties, shall  
3 instruct the jury to give answers to special interrogatories  
4 [to render special verdicts], or make findings itself if  
5 there is no jury, indicating:

6 (1) the amount of damages each claimant  
7 would recover if contributory fault were  
8 disregarded, and

9 (2) the percentage of the fault for each party to  
10 the action as compared with the combined fault of all  
11 parties to the action. For this purpose, the court  
12 may determine that <sup>two</sup> 2 or more persons are approp-  
13 riately treated as a single party.

COMMENT

These questions are expected to reach percentages whose total for the relevant parties (plaintiffs or defendants) will add up to 100%.

"Parties to the action" includes third-party defendants, whether made defendants by the original plaintiff or not.

The limitation to "parties to the action" means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. There is no way of telling whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he was not a party would not be binding on him as res judicata. If a separate suit is necessary to settle these issues in any event, there seems to be no point in speculating on the matter in the first suit. The second suit would probably be brought by a defendant in the first suit who is seeking contribution; other defendants in the first suit should be willing to join with him, and the plaintiff might also be joined as a party. Nothing is said about this in the Act because the common law is adequate to cover it.

The court should have, without providing for it in this section, the usual powers of setting aside or modifying a verdict if it is internally inconsistent or shows bias or prejudice, etc. On the same basis as the remittitur principle, a court might indicate its intent to set aside a percentage allocation unless the parties agreed to a somewhat different one.

1           SECTION 3. Contribution rights among multiple  
2 ~~defendants~~ <sup>tortfeasors</sup> are determined in accordance with the percentage  
3 of fault of each ~~defendant~~ <sup>tortfeasor</sup>, as found by the trier of fact. The  
4 court shall enter judgment on the basis of those rights and  
5 findings made under Section 2. ~~If a judgment against a~~ <sup>All tortfeasors liable to</sup>  
6 ~~party cannot be collected within one year after the judg-~~ <sup>claimant are jointly and severally liable for all</sup>  
7 ~~ment becomes final, the responsibility for the amount in-~~ <sup>damages to which claimant is entitled</sup>  
8 ~~volved is distributed among the other parties in proportion~~  
9 ~~to their relative fault.~~

See  
Ch. 162

COMMENT

A state which does not already have a practice of granting contribution between joint tortfeasors may wish to start the section with language like this: "The right of contribution exists as among multiple defendants, and apportionment is determined . . . ."

Joint and severable liability under the common law means that every defendant contributing to a plaintiff's injury is liable to him for the whole amount of the recoverable damages. This is not changed by the Act. Between the defendants themselves, however, the apportionment is in accordance with the percentages established under § 2.

Special problems exist when defendants are not liable for exactly the same injuries, as when an automobile accident victim has his injury exacerbated by negligence of the doctor treating him; but these are better handled by the trial judge in the light of the facts before him than by providing for them in the statute in advance and in the abstract.

If an award against one party is uncollectible, the plaintiff could collect at common law against any of the other defendants, who are jointly and severally liable. The last sentence in the section provides that the apportionment for the uncollectible amount will be made among all of the other parties (including the claimant) according to their relative

SECTION 4. A release or a covenant not to sue or

2 enforce judgment, given by a ~~sett~~ claimant to a tort-  
3 feisor, does not discharge other tortfeasors liable for the  
4 same harm unless it so provides; but it reduces the claim  
5 against the others to the extent of the consideration paid  
6 for it or the amount stipulated in it, if greater. If  
7 the release or covenant is given in good faith, it discharges  
8 the person to whom it is given from liability for con-  
9 tribution.

See  
09.16.07

COMMENT

The question of the contribution rights of Tortfeasors A and B against Tortfeasor C who settled and obtained a release admits of three answers: (1) A and B are still able to obtain contribution against C despite the release, (2) the plaintiff's total claim is reduced for the proportionate share of C, and (3) B and C are not entitled to contribution unless the release was given not in good faith but by way of collusion. Experience has shown that the first two solutions both strongly discourage settlements, though for different reasons. A careful study of the matter was made when the Uniform Contribution Among Tortfeasors Act (1955) was drafted and the third solution was adopted in § 4. This section follows that decision, though the wording is slightly different.

Alternative 1

SECTION 5. Damages awarded under this Act may be set off only to the extent that an award against one party cannot be collected.

Alternative 2

~~SECTION 5. To the extent that liability, insurance is available to pay a judgment entered under this Act, damages awarded under this Act may not be set off.~~

If plaintiff and defendant are both found to be 50% negligent and they suffered the same amount of damages, neither party would recover anything if set-off is applied, even though they both carried liability insurance and paid for coverage. The loss is taken from the insurance companies who were paid to carry it and placed upon the parties, who paid to have it carried. Factual variations do not change the essence of the result. Set-off would thus destroy the effectiveness of the Act.

Two alternative provisions are offered. The second may raise some constitutional questions of equal protection.

1           SECTION 6. This Act applies to all injuries incurred  
2 after it takes effect.

1           SECTION 7. If any provision of this Act or appli-  
2 cation thereof to any person or circumstance is held invalid,  
3 the invalidity does not affect other provisions or appli-  
4 cations of the Act that can be given effect without the in-  
5 valid provision or application, and to this end the provisions  
6 of this Act are severable.

Amendment of Uniform Contribution Among Tortfeasors Act (1955)

1           Amend Section 2 of the Uniform Contribution Among  
2 Tortfeasors Act to read as follows:

3           "SECTION 2. [Pro Rata Shares.] In determining the  
4 pro rata shares of tortfeasors in the entire liability (a) their

5 ~~relative degrees of fault shall not be considered~~ their relative  
6 degrees of fault shall be the basis for allocation; (b) if  
7 equity requires, the collective liability of some as a group shall  
8 constitute a single share; and (c) principles of equity appli-  
9 cable to contribution generally shall apply.

COMMENT

This is needed. The Uniform Contribution Among Tortfeasors Act had assumed no comparative negligence, so that it was concerned solely with dividing the responsibility between the defendants. It had divided into halves, thirds, fourths, etc. -- a rough sort of justice, as in the former American admiralty rule for comparative negligence. If the plaintiff's diminution is determined on a percentage basis, the allocation among the defendants should be on a percentage basis, too. A mixture of the two systems will produce confusion and inequity. Some states by statute or judicial decision presently provide for contribution on the basis of fault.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE AMERICAN MOTORCYCLE ASSOCIATION, )  
a nonprofit corporation, )

Petitioner, )

v. )

THE SUPERIOR COURT OF THE STATE OF )  
CALIFORNIA FOR THE COUNTY OF )  
LOS ANGELES, )

Respondent. )

2d Civil No. 49032

COURT OF APPEALS - SECOND DISTRICT

JAN 19 - 1977

VIKING MOTORCYCLE CLUB, an unincorp. )  
assn., JERRALD KINDSVOCCEL, STEPHEN )  
ELSNER; DENNIS ALDERETTE, CHUCK )  
ALEXANDER, PAUL ASHFORD, DON BOYER, )  
JOHN GRANVILLE, LEE GREENWOOD, DON )  
HARRIS, RAMON LOWE, FRED MacDOUGALL, )  
HOYT MORROW, BICK RAINO, RON PARK, )  
BENNY PADILLA, GARY REICHENBACK, )  
ED SCHLUP, JIM SOVIE, ED TOMMASINO, )  
RICHARD TRUSTY, JIM TUCKER, BILL )  
TURNER, BOB PHILLIPS, ROB PHILLIPS, )  
GLEN GREGOS, a minor by and through )  
his Guardian ad litem GORDON GREGOS; )  
GORDON GREGOS and "DOE" GREGOS, )

Real Parties in Interest. )

Lawler, Felix & Hall, Thomas E. Workman, Jr.,

Erwin E. Adler, and Jane H. Barrett for Petitioner.

Association of Southern California Defense Counsel,  
John W. Baker, Caywood J. Borrer, Francis Breidenbach, Richard  
B. Goethals, Stephen J. Grogan, Henry E. Kappler, Kenneth E.  
Moes; W. F. Rylaarsdam, and Lucien A. Van Hulle as Amici Curiae  
on behalf of Petitioner.

No appearance for Respondent.

Jack A. Rose for Real Parties in Interest Glen Gregos,  
a minor by and through his Guardian ad Litem Gordon Gregos, and  
Gordon Gregos.

Robert E. Cartwright, Edward I. Pollock, Leroy Hersh,  
David B. Baum, Stephen I. Zetterberg, Robert G. Beloud, Ned Good,  
Arne Werchick, Sanford M. Gage, Leonard Sacks, and Joseph Posner,  
as Amici Curiae on behalf of Real Parties in Interest Glen Gregos,  
a minor by and through his Guardian ad Litem Gordon Gregos, and  
Gordon Gregos.

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In Li v. Yellow Cab Co. (1975) 13 Cal.3d 804, our  
Supreme Court: (1) opened for reexamination in light of changed  
conditions the California statutory law of negligence to the extent  
that it is declaratory of the common law (13 Cal.3d at pp. 814,  
821-822); (2) adopted the rule of "pure comparative negligence"  
in lieu of the doctrine of contributory negligence codified in  
Civil Code section 1714 (13 Cal.3d at pp. 827-828); (3) determined

the easy questions of the effect of the judicially adopted rule upon the doctrines of last clear chance (13 Cal.3d at pp. 824-825) and assumption of risk (id.); and (4) left the hard questions such as application of the new principle in multi-party situations to the "'trial judges of this State'" unencumbered by specific guidelines (13 Cal.3d at p. 826).

The petition for writ of mandate which is here before us raises the manner in which Li v. Yellow Cab is to be applied to the situation of multiple parties, all of whom are asserted to be negligent in a manner proximately contributing to a plaintiff's injury. Specifically, the petition concerns the right of a named defendant to bring persons not named as defendants into the action by a cross-complaint alleging the negligence of those persons and its proximate causation of the injury for which the complaint seeks to hold the defendant-cross-complainant liable.

We conclude that: (1) Li v. Yellow Cab's rule of "pure comparative negligence" fastens liability upon a person "in direct proportion to his negligence"; (2) the rule of comparative negligence requires modification of California's pre-Li doctrine of joint and several liability of concurrent tortfeasors;<sup>1</sup> and

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<sup>1</sup> We do not consider the impact of the rule of Li upon joint tortfeasors acting in concert or upon vicarious liability. Resolution of those questions is unnecessary to our decision and the matter at bench is sufficiently difficult of itself.

(3) a defendant may cross-complain to bring other persons into the action so that the proportion of his negligence may be compared to theirs and the modified rule of liability of concurrent tortfeasors applied to the situation of multiple parties.

#### Facts

On January 14, 1973, 16-year-old Glen Gregos was injured while participating in a cross-country motorcycle race. Acting through Gordon Gregos, his guardian ad litem, Glen filed an action to recover for his injuries. The lawsuit names as defendants the American Motorcycle Association (AMA), Viking Motorcycle Club (Viking), Jerrald Kindsvogel, Stephen R. Elsner, Continental Casualty Company of Chicago (Continental), and Does 1 through 200.

As eventually amended, the complaint is framed in six causes of action.

The first cause of action is based in negligence. It asserts that AMA, Viking, and other named defendants (excluding Continental) sponsored, managed, administered, and controlled a race for novice motorcycle riders and solicited and encouraged members of the public to participate in it for an entry fee of \$5. Glen paid the entry fee and entered the race. The first cause of action claims that by reason of the negligence of the defendants in sponsoring, operating, controlling, and managing the race and in soliciting entrants, Glen suffered personal -

injuries causing damage of \$3,000,000, plus the cost of future medical care.

The second cause of action asserts fraud of the named defendants other than Continental. The fraud is related to the defendants' failure to perform on promises made to Glen to instruct him in racing technique, evaluate his capability, and place him in races with entrants of similar ability.

The third cause of action seeks compensatory and punitive damages from Continental. It alleges the bad faith refusal of Continental to make payments on a \$10,000 medical reimbursement policy covering injuries to participants in AMA sanctioned amateur events.

The fourth cause of action sounds in fraud and is based upon the allegedly false and untrue representation that the motorcycle race in which Glen was injured was an event officially sponsored by AMA and Viking. Continental and its agents are asserted to be parties to the fraud.

The fifth cause of action claims that the various defendants intentionally inflicted emotional distress upon Glen by causing his insurance claim against Continental to be dishonored.

The sixth cause of action alleges a conspiracy among the defendants to violate Glen's rights generally in the fashion claimed in the preceding causes of action.

AMA answered the amended complaint denying its charging allegations and asserting affirmative defenses. After an unsuccessful attempt to file a cross-complaint bringing Viking, various of its agents, and Glen's parents, one of whom is his guardian ad litem, into the case on theories of indemnity and comparative negligence, AMA filed a second motion for leave to file a cross-complaint. The proposed cross-complaint is framed in two causes of action asserted against Glen's mother and father.

The first alleges notice to Glen's parents that motorcycle competition is a dangerous sport, that the parents participated in Glen's decision to enter the event, that his entry would not have been received without parental consent, that Glen's father gave his written consent which permitted Glen's participation, that Glen's parents knew of the extent of Glen's training and negligently failed to exercise their powers of supervision over their minor child by allowing his entry in the race, and that while AMA's negligence, if any, was passive, that of Glen's parents was active. The first cause of action seeks indemnity from the parents if AMA is found liable to Glen.

The second cause of action seeks declaratory relief. It alleges that Glen has failed to join his father and mother as defendants in the action, reasserts their negligence, and asks for a declaration of the relative negligence of those who contributed

to Glen's injury so that the rule of Li v. Yellow Cab may be applied.

Believing itself bound by existing case law pre-dating Li, the trial court denied AMA's motion to file its cross-complaint. AMA petitioned this court for a writ of mandate compelling the trial court to grant its motion. Recognizing that the problem must be a recurring one in which the trial courts are in need of guidance, we issued our alternative writ.

#### Pre-Li Law

Prior to Li v. Yellow Cab Co., supra, 13 Cal.3d 804, California in general applied an all-or-nothing concept of negligence. If a person's negligence was a proximate cause of damage to a person or property, he was deemed responsible for the entire damage. That responsibility barred a plaintiff whose own negligence was a proximate cause of the damage from recovering any part of it. (4 Witkin, Summary of Cal. Law (8th ed.) Torts, § 683.) That responsibility rendered a joint or concurrent tortfeasor liable for the entire damage and it was improper for a court to apportion damages among tortfeasors. (4 Witkin, Summary of Cal. Law (8th ed.) Torts, § 35; 1 Harper & James, The Law of Torts, §§ 10.1, 10.2.) In either event, the person's negligence precluded his loss from being shifted in part to another who was also at fault. While the all-or-nothing principle was mitigated

somewhat as to plaintiffs by rules such as last clear chance (4 Witkin, Summary of Cal. Law (8th ed.) Torts, §§ 714-721), and to defendants by a limited right of contribution among judgment debtors who, at the plaintiff's election, were named in the lawsuit (Code Civ. Proc., §§ 875, 876; 4 Witkin, Summary of Cal. Law (8th ed.) Torts, §§ 43-49; cf. Schwartz, Comparative Negligence, § 16.7, pp. 261-263), and by a complex system of equitable indemnity to persons "secondarily" liable from persons whose liability was "primary" (4 Witkin, Summary of Cal. Law (8th ed.) Torts, §§ 50-52), nevertheless the underlying California principle of negligence was founded on attaching total responsibility to each person whose lack of care contributed to the damage.

Consequences of Li v. Yellow Cab

Demise of all-or-nothing doctrine. In Li v. Yellow

Cab Co., supra, 13 Cal.3d 804, our Supreme Court prospectively terminated the operation of the all-or-nothing doctrine as applied to plaintiffs seeking damages for negligence (13 Cal.3d at pp. 812-813), and replaced it with a principle "under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault." (13 Cal.3d at p. 813; i.e., "negligence," 13 Cal.3d fn. 6a at p. 813.) Carrying the principle to its ultimate limit, the high court opted for a rule of "pure comparative negligence" rather than the "50%

*Plaintiffs relieved of the all-or-nothing doctrine which has been still subject to it except for contributory negligence which is already out of date. O'Connor p. 114*

system" of comparative negligence followed by most jurisdictions which had previously abandoned the rule of contributory negligence. (13 Cal.3d at p. 827.) The court's action was taken despite recognition that the superseded rule had been codified in Civil Code section 1714. (13 Cal.3d at p. 821.)

Logical extension of the high court's action in Li, considerations of policy, and the language of the Li opinion itself point to the conclusion that the decision requires a drastic revision of the principles governing liability of concurrent tortfeasors.

Concurrent tortfeasors - traditional bases of joint and several liability. The pre-Li principle of joint and several liability of concurrent tortfeasors is founded: (1) on the "all-or-nothing" concept allocating full responsibility to each person whose negligence contributes to damage without respect to the proportion of his negligent conduct to that of others; (2) the proposition that a plaintiff totally "innocent" because he is not contributorily negligent is entitled to recovery from all "guilty" defendants; (Schwartz, Comparative Negligence, § 16.1); and (3) an assumed inability of the fact finding process to apportion negligent fault. (1 Harper & James, The Law of Torts, § 10.2; see also Anno., The Doctrine of Comparative Negligence and its Relation to the Doctrine of Contributory Negligence, 32 ALR 3d 463, 492, - § 15.)

Effect of Li upon Traditional Bases of

Joint and Several Liability

The impact of "pure" comparative negligence eliminates totally the all-or-nothing rule on the side of the tort coin which determines the plaintiff's right of recovery. The same reasoning which impelled our Supreme Court to take the step it did is equally applicable to the obverse side of the coin - that which determines the extent of the relative liability of persons who may be liable in negligence to the plaintiff.

That reasoning is synthesized in Li as "The basic objection to the doctrine [of contributory negligence] - 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." (13 Cal.3d at p. 811.) In a system where the liability of several defendants concurrently causing an injury is based upon fault, the conclusion is equally irresistible that the extent of the fault of each should govern the extent of liability of each.

Li now permits recovery in negligence to a plaintiff who is himself negligent. The rule of comparative negligence dispels any foundation for joint and several liability of concurrent tortfeasors based upon the plaintiff's total "innocence."

In its pure form as adopted in California, the rule eliminates any basis for joint and several liability founded on the proposition that the plaintiff is necessarily less at fault than others whose negligence contributed to his damage.

Li accepts the ability of the fact finding process to apportion degrees of negligence. In so doing, it eliminates the previously assumed inability to apportion fault among tortfeasors as the foundation of joint and several liability.

Policy consideration. Because the underpinning of Li eliminates the pre-Li basis of joint and several liability of concurrently negligent tortfeasors, we must determine whether sound policy requires continuation or rejection of the principle.

The law of other jurisdictions which have adopted one form or another of comparative negligence is of no help in the policy choice. Examination of the approach of other states shows no discernible pattern of the consequences of the elimination of the complete bar of contributory negligence upon the question of joint versus several liability of concurrent tortfeasors.

The lack of pattern is disclosed in the chart prepared from a cursory examination of the law of sister jurisdictions which appears in the appendix to this opinion. Georgia, Kansas, Nevada, New Hampshire, South Dakota, and Vermont have apparently opted for the principle of several liability. Joint liability has

been retained in Arkansas, Colorado, Florida, Hawaii, Idaho, Maine, Mississippi, New Jersey, New York, North Dakota, Pennsylvania, Utah, Wisconsin, and Wyoming. Oregon and Texas preserve the rule of joint liability where a defendant's negligence equals or exceeds that of the plaintiff, but apply the principle of several liability where the defendant's negligence is less than that of the plaintiff. Minnesota provides for joint liability if the plaintiff is free of negligence, but otherwise applies the rule of several liability. (Citations in appendix.)

The policy underpinning of the various rules in other states is not readily apparent. Ascertaining the rationale in other jurisdictions is complicated to the point of impossibility by their variants of comparative negligence.

Finding no guidance in the experience of other states, we approach the issue by reference to the underlying basis of the California law of negligence. That basis is essentially one of loss shifting (Fleming, Foreword: Comparative Negligence at Last - By Judicial Choice, 64 Cal.L.Rev. 239, 242) in a system founded upon socializing the loss incident to tortious conduct. (Kaiser Steel Corp. v. Westinghouse Elec. Corp. (1976) 55 Cal.App. 3d 737.)

Virtually all negligence law involves a decision on the extent of loss shifting from the plaintiff to someone else,

and generally from that someone to still others. Where, as in California, tort law is imbedded in the concept of socialization of loss, the "others" are taxpayers, consumers, or purchasers of insurance. To a significant degree, judicial adoption of rules of loss shifting represents a decision whether or not to call upon the finite social fund which represents the tax base upon which the legislative arms of government assert their charge. As judicially enunciated loss shifting calls upon the fund, its availability for use to improve education, to enhance equality of opportunity for the disadvantaged, to reduce street crime, to lessen the burden of local property taxation, and to serve any of the multitude of other growing fiscal needs of government is reduced.

The policy choice must thus be made in light of the social costs involved. The choice is complicated because, by reason of an ingrained system of contingent fees, claims administration costs, and expense incident to a complex procedure of litigation, somewhere between \$2.00 and \$3.00 of cost must be socialized to cover \$1.00 of loss shifted from the individual. (See Keeton, O'Connell and McCord, Crisis in Car Insurance (1968) p. 90; State of New York Insurance Department, Automobile Insurance, pp. 34-36.)

Specifically, then, we must determine whether, in the

contrast of a system of pure comparative negligence. At the ratio of two or three to one of loss should be shifted to society to cover a plaintiff's risk that one of several defendants whose concurrent negligence caused him damage is insolvent. In our view, it should not.

Plaintiffs have historically borne the risk of insolvency of the defendant where only one defendant negligently caused damage as well as the total loss where they themselves were negligent.

Only in the situation where the plaintiff was not negligent, one of the defendants was insolvent, and another responsible in damages was the risk of the negligent insolvent defendant socialized by the rule of joint and several liability.

Adoption of the rule of pure comparative negligence has now shifted a portion of the loss formerly borne by the negligent plaintiff to the social fund. There is good reason not to burden the finite fund further with the risk of insolvency of one of several defendants.

By definition, the policy choice must be made where one of multiple concurrent tortfeasors is financially responsible and another is not. By reason of pure comparative negligence, the plaintiff will necessarily recover something in that situation where prior to Li he would recover nothing if he himself were negligent. It is a small trade-off from the plaintiff's standpoint

that he rather than the societal fund bear that portion of his misfortune attributable to insolvency of one of several tortfeasors where the fund rather than the plaintiff now bears a part of the cost of damage to which the plaintiff's negligence contributed.

Unquestionably, the rule of several liability is an imperfection in a system of socialization of loss from tortious conduct if one of the concurrent tortfeasors is unable to respond in damages. But the system is already grossly imperfect. Vicissitudes of a fact finding process not attuned to professional expert witnesses and measures of damage incapable of objective determination result in loss which should be shifted remaining with some plaintiffs while other plaintiffs profit by overcompensation at the expense of the societal fund.

Language of Li. The language of our Supreme Court in Li is consistent with the elimination of the principle of joint liability of concurrent negligent tortfeasors. The Li court says: "the extent of fault should govern the extent of liability" (13 Cal.3d at p. 811); "liability for damages will be borne by those whose negligence caused it in direct proportion to their respective fault" (13 Cal.3d at p. 813), and "the fundamental purpose of [the rule of pure comparative negligence] shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties" (13 Cal.3d at

p. 829), while using the term "parties" synonymously with "persons." (Richards, Parties or Persons? Dispelling the Parties in Action Only Myth in Li v. Yellow Cab Company, 16 Cal. Courts Commentary, No. 2, March 1976.)

New rule. We thus conclude that the adoption of the rule of pure comparative negligence in Li abrogates the pre-existing rule of joint and several liability of concurrent tortfeasors. Where the Li rule applies, liability among concurrent tortfeasors must be apportioned according to their respective degrees of negligence with each liable to the plaintiff only for his proportion. (See Prosser, Comparative Negligence, 41 Cal.L.Rev. 1, 33.)

The rule which we here adopt accommodates the principle of comparative negligence to the California statutes governing contribution among tortfeasors in a manner which is simple in application and which preserves separation of powers.

Liability of concurrent tortfeasors in direct proportion to their relative degrees of fault is a highly desirable if not necessary element of any system of comparative negligence. (Fleming, The Supreme Court of California 1974-1975, Foreword: Comparative Negligence at Last - By Judicial Choice, 64 Cal. L.Rev. 239, 252-253 (hereafter Fleming).) Proportionate liability can be achieved in the face of California statutes providing for contribu-

tion in equal rather than proportionate shares among only those tortfeasors who have been named as defendants in an action at the plaintiff's option in one of three ways: (1) by adoption of the rule of several liability; (2) by judicially rewriting Code of Civil Procedure sections 875 and 876<sup>2</sup> which codify the rule

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<sup>2</sup> "§ 875. [Existence and incidents of right of contribution]

(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided.

(b) Such right of contribution shall be administered in accordance with the principles of equity.

(c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof. It shall be limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment.

(d) There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person.

(e) A liability insurer who by payment has discharged the liability of a tortfeasor judgment debtor shall be subrogated to his right of contribution.

(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them.

(g) This title shall not impair the right of a plaintiff to satisfy a judgment in full as against any tortfeasor judgment debtor."

"§ 876. [Pro rata share]

(a) The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them.

(b) Where one or more persons are held liable solely for the tort of one of them or of another, as in the case of the liability of a master for the tort of his servant, they shall contribute a single pro rata share, as to which there may be indemnity between them."

of contribution among tortfeasors who are jointly liable; or  
(3) by extending the California rules of indemnity so that they  
apply to concurrent negligent tortfeasors without reference to  
the existing distinction between primary and secondary liability.  
(Fleming, at pp. 253-256.)

Judicially rewriting Code of Civil Procedure sections  
875 and 876 treads dangerous ground. Neither section is declara-  
tory of the common law. The jurisprudential concept which allowed  
the Li court to modify the rule of contributory negligence codified  
in Civil Code section 1714 thus does not afford the same leeway of  
judicial decision in the case of sections 875 and 876. To extend  
the Li concept to statutes which, while not declaratory of the  
common law, are functionally related to others which are, is to  
open a great portion of the California substantive law statutes  
to judicial amendment. That intrusion upon the fundamental  
principle of separation of powers is one that should not be under-  
taken if it can be avoided.

Extension of the California concepts of indemnity to  
achieve proportionate liability of jointly liable tortfeasors  
also intrudes upon the power of the Legislature. Code of Civil  
Procedure sections 875 and 876 state that liability is to be  
borne equally and not proportionately. (Fleming, at p. 255.)  
The extension has the additional vice of inviting multiplicity

of litigation rather than disposing of the entire matter in one proceeding absent a requirement of compulsory joinder or cross-demand which is extremely difficult to formulate.

Several liability, however, satisfies the need simply and without invasion of separation of powers. (Fleming, at p. 256.) Joint liability of concurrent tortfeasors derives from the common law. The common law adaptation of principles to changed circumstances which is the basis of Li is equally applicable to abandonment of joint liability where Li applies. Several liability is simple in application in the Li setting. The jury special verdicts or court findings of fact which are necessary to the application of Li determine the apportionment of liability among concurrent tortfeasors so that the action is resolved in one place; at one time, as to all persons involved.

We recognize that our conclusion of the consequences of the rule of Li to the principle of joint and several liability of concurrent tortfeasors is at variance with language and possibly the rationale of decision of Court of Appeal opinions in Stambaugh v. Superior Court (1976) 62 Cal.App.3d 231, and Safeway Stores, Inc. v. Nest-Kent (1976) 63 Cal.App.3d 934. (See also E. B. Wills Co. v. Superior Court (1976) 56 Cal.App.3d 650.) Neither Stambaugh nor Safeway addresses the policy considerations of loss shifting or the logical extension of Li v. Yellow Cab.

which we treat as controlling of our decision. St. Louis seems bottomed on a false analogy to statutory systems accompanying a rule of comparative negligence with fully compatible principles of contribution and indemnity. Stanbaugh also rests on the by no means clear assumption that Code of Civil Procedure section 877, dealing with settling tortfeasors, is not limited by Li and its statutory history to tortfeasors who are jointly liable. Neither case considers the undesirable consequences of the rule of comparative negligence without a compatible method to achieve equality of treatment of defendants. Neither considers the jurisprudential consequences of attempting to reach that equality in the face of a statutory scheme which is inconsistent with the objective if the rule of joint and several liability is retained. Thus, while according deference to the post-Li Court of Appeal decisions, we cannot follow them.

#### Parties to the Action

The substantive rules which we have here articulated require procedural companions. Once the principle of allocation of liability among defendants based upon their respective degrees of negligence is accepted, there is a patent interest in having all persons whose fault contributed to the injury before the court in one action. One set of findings of fact or one set of special jury verdicts can then determine the entire matter as to all who

are involved. Multiple litigation can be avoided. A thicket of imponderable questions of the consequences of Li to the overly complicated California law of indemnity which preceded Li is penetrated if not skirted.

The policy reasons indicating the adoption of procedural rules which will permit the litigation to include as defendants all persons whose negligence contributed to the injury are particularly pertinent here. AMA, named as a defendant in the litigation seeks to bring into it as a party defendant the guardian ad litem of the minor who is the plaintiff. Accepting, as we must at this stage of the litigation, AMA's allegation that the guardian ad litem's negligence contributed to Glen's injury (see Gibson v. Gibson (1971) 3 Cal.3d 914, 921), it is hardly conceivable that the guardian ad litem would sue himself. It is not much more likely he would sue his wife, who is the other defendant to whom AMA's motion to file a cross-complaint is directed.

#### Disposition

Let a peremptory writ of mandate issue directing the superior court to vacate its order denying AMA's motion for leave to file a cross-complaint and to enter a new order granting the motion.

CERTIFIED FOR PUBLICATION.

THOMPSON, J.

We concur:

WOOD, P. J.

LILLIE, J.

Jurisdiction	Pure	Adult-erated			Joint & Several	Several Only	Joint Where Defendant's Fault Equals Plaintiff's; Otherwise Several	Contribution Proportional to Fault	Uniform Contribution Among Tortfeasors Act Ad: 3d	Defendant Permitted to Join	Seek Contribution from Plaintiff Not Named by Plaintiff	Notes
		50/50 Aggregate	50/50 Each Defendant	Other								
Alaska	1						No 2	2	2			
Arkansas		3			4		No 5	6	7	8		
Colorado			9		10				11	12		
Connecticut		13							14			
Florida	15				16		May- be 17/19	19	18			
Georgia				20	21							
Hawaii			22		23		May- be 24/25	25	26			
Idaho			27		28		Yes 29		30			
Kansas		31			32				33			
Maine		34			35		Yes 36		37			
Massachusetts		38					No 39	39	39			
Minnesota			40		41	42	Yes 43			44		

Jurisdiction	Pure	Adult- erated			Joint & Several	Several Only	Joint Where Defendant's Fault Equals Plaintiff's; Otherwise Several	Contribution Proportionate to Fault	Uniform Contribution Among Tortfeasors Act Adopted	Defendant Permitted to Joint Seek Contribution as to Party Not Named by Plaintiff	Notes
		50/50 Aggregate	50/50 Each Defendant	Other							
Mississippi	45				46		No	47	47	47	
Montana			48								
Nebraska				49							
Nevada			50			51	Yes	52	52	52	
New Hampshire			53			54					
New Jersey			55		56		Yes	57/58	58	58	
New York	59				60		Yes	51		62	
North Dakota			63		64		Yes	55/65	66	66	
Oklahoma				67							
Oregon		68					Yes	70			
Pennsylvania		71			72		Yes	73/74	74	74	
Rhode Island	75						No	76	76	76	

Jurisdiction	Pure	Adult-crated		Joint & Several	Several Only	Joint Where Defendant's Fault Equals Plaintiff's; Otherwise Several	Contribution Proportionate to Fault	Uniform Contribution Among Tortfeasors Act	Defendant Permitted to Join to Seek Contribution to Party Not Named by Plaintiff	Notes
		50/50 Aggregate	50/50 Each Defendant							
South Carolina			77							
South Dakota				78	79		80 80	80	80	
Texas		81				82	Yes 83		84	
Utah			85	86			Yes 87		88	
Vermont		89			90				90 91	
Washington	92									
Wisconsin			93	94			Yes 95			
Wyoming			96	97			Yes 98		99	

The following states and specific Federal Acts apply comparative negligence rules to the limited fact situations indicated:

Arizona	100									
District of Columbia	101									
Iowa	102									

Jurisdiction

Jurisdiction	Pure	Adult-erated		Other	Joint & Several	Several Only	Joint Where Defendant's Fault Equals Plaintiff's; Otherwise Several	Contribution Proportionate to Fault	Uniform Contribution Among Tortfeasors Act Adopted	Defendant Permitted to Join	Seek Contribution to Part	Not Named by Plaintiff	Notes
		50/50 Aggregate	50/50 Each Defendant										
Kentucky	103												
Michigan	104												
North Carolina	105												
Ohio	106												
Virginia	107												
F.E.L.A.	108												
Jones Act	109												
Death on the High Seas Act	110												

1. Kaatz v. State of Alaska (1975) 540 P.2d 1037
2. Alaska Stat. §§ 09.16.010 to 09.16.060
3. Ark. Stat. Ann. §§ 27-1763 to 27-1765, 27-1730.1 to 27-1730.2
4. Walton v. Tull (1962) 356 S.W.2d 20
5. Id., at p. 25
6. Ark. Stats. §§ 34-1001 to 34-1009.
7. Lacewell v. Griffin (1949) 219 S.W.2d 227
8. Id.; contribution not limited to parties named by plaintiff; unclear as to whether defendant has right to join parties not named by plaintiff.
9. Colo. Rev. Stat. Ann. §§ 13-21-111, 41-2-14
10. Bass v. United States (1974) 379 F.Supp. 1208, 1209
11. Colo. Rules of Civil Procedure, Rule 22
12. Id.; no contribution, indemnity only.
13. Conn. Gen. Stat. § 52-572h(a)
14. Id., § 52-104
15. Hoffman v. Jones (1973) 280 So.2d 431
16. Stuart v. Hertz Corp. (1974) 302 So.2d 187
17. Lincenberg v. Issen (1975) 318 So.2d 386, 391
18. Stuart v. Hertz Corp., supra, 302 So.2d at p. 194, fn. 3
19. Fla. Stats. Ann. § 768.31
20. Ga. Code Ann. §§ 105-603, 94-703; Smith v. American Oil Co. 49 S.E.2d 90; Elk Cotton Mills v. Grant (1913) 79 S.E. 836
21. Higgenbotham v. Ford Motor Co. (5th Cir. 1976) 540 F.2d 762 (no apportionment in strict liability cases)
22. Haw. Rev. Stat. § 663-31

23. Id., §§ 663-31, 663-12, 663-17
24. Id., § 663-12
25. Id., §§ 663-11 to 663-17
26. Id., § 663-17(a)
27. Idaho Code Ann. § 6-801
28. Id., § 6-804
29. Id., § 6-803(3)
30. Id., § 6-803(4)
31. Kan. Stat. Ann. § 60-258a(a)
32. Id., § 60-258a(d)
33. Id., § 60-258a(c)
34. Me. Rev. Stat. Ann., Tit. 14, § 156
35. Id., § 156; see also Packard v. Whitten (1971) 274 A.2d 169, 180
36. Packard v. Whitten, supra, 274 A.2d 169
37. Packard v. Whitten, supra, 274 A.2d at p. 174
38. Mass. Gen. Laws Ann., Ch. 231, § 85; 54 Mass.L.G. 140
39. Id., Ch. 231 B, §§ 1 to 4
40. Minn. Stat. Ann. § 604.01(1)
41. Id.
42. But see Kowalski v. Armour & Co. (1974) 220 N.W.2d 268
43. Minn. Stat. Ann. § 604.01(1)
44. Where plaintiff contributes by his own negligence to the injury, liability is several only; where there is no contributory negligence attributable to plaintiff, liability is joint and several.

45. Miss. Code Ann. § 11-7-15
46. Saucier v. ... (1967) 203 So.2d 299
47. Miss. Code Ann. § 85-5-5
48. Mont. Stat. § 58-607.1
49. Neb. Rev. Stat. § 25-1151
50. Nev. Laws § 41.141(1)
51. Id., § 41.141(3)(a)
52. Id., §§ 17.215 to 17.325
53. N.H. Rev. Stat. Ann. § 507:7-a
54. Id.
55. N.J. Stat. Ann. § 2A:15-5.1
56. Id., § 2A:15-5.3
57. Id., §§ 2A:15-5.2, 2A:15-5.3
58. Id., §§ 2A:53A-1 to 2A:53A-5
59. N.Y. C.P.L.R. § 1411; see also Rossmann v. LaGrana (1971) 270 N.E.2d 313
60. N.Y. C.P.L.R. §§ 1401-1402
61. Id., § 1401, 1402; Dole v. Dow Chemical Co. (1972) 282 N.E.2d 288
62. N.Y. C.P.L.R. §§ 1401-1403; Berliner v. Kacov (1974) 361 N.Y.S.2d 477
63. N.D. Cent. Code § 9-10-07
64. Id.
65. Id.
66. Id., §§ 32-38-01 to 32-38-04
67. Okla. Stat. Ann., Tit. 23, § 11

68. Ore. Rev. Stat. § 18.4.0
69. Id., § 18.485
70. Id.
71. Pa. Stat. Ann. § 2101
72. Id., § 2102
73. Id.
74. Id., §§ 2082-2089
75. R.I. Gen. Laws Ann. § 9.20.4
76. Id., §§ 10-6-1 to 10-6-11
77. S.C. Code § 46-802.1
78. S.D. Comp. Laws § 20-9-2
79. Burmeister v. Youngstrom (1965) 139 N.W.2d 226 (several unless plaintiff has right of recovery against other party)
80. S.D. Comp. Laws §§ 15-8-11 to 15-8-22
81. Tex. Vernon's Civ. Stat. Art. 2212a, § 1
82. Id., § 2(c); see also Goodyear Tire & Rubber Co. v. Edwards (1974) 512 S.W.2d 748
83. Tex. Vernon's Civ. Stat. Art. 2212a, § 2(b)
84. Id., § 2(g)
85. Utah Code Ann. § 78-27-37
86. Id., §§ 78-27-40(2), 78-27-41(1); see also 1973 Utah L.Rev. 406, 421
87. Id., § 78-27-40(2)
88. Id., § 78-27-40(3)
89. Vt. Stat. Ann., Tit. 12, § 1036
90. Id.

91. Howard v. Spafford (1971) 321 A.2d 74
92. Wash. Rev. Code, Ch. 4.22.010
93. Wis. Stat. § 895.045; but see Chille v. Howell, 149 N.W.2d 600, suggesting that plaintiff cannot recover if his negligence is greater than that of all defendants, rather than greater than that of any one defendant. See also Vincent v. Pabst Brewing Co. (1970) 177 N.W.2d 513 where, over a strong dissent, the majority refused to switch to pure comparative negligence but suggested that upon failure of the Legislature to so act within a reasonable period of time the court would judicially make the change.
94. Chille v. Howell, supra, 149 N.W.2d 600
95. Bielski v. Schulze (1962) 114 N.W.2d 105
96. Wyo. Stat. Ann. § 1-7.2(a)
97. Id., §§ 1-7.3(d), 1-7.4(a)
98. Id., § 1-7.3(c); cf. Pure Gas & Chemical Co. v. Cook (1974) 526 P.2d 986, 989, fn. 3
99. Id., § 1-7.3(d)
100. Ariz. Stat. Rev., §§ 23-801 to 23-803, limited to damages arising from manufacturing, mining, building, etc.
101. Dist. of Col. Code §§ 44-401 to 44-404, limited to damages arising from employment by common carrier only.
102. Iowa Code Ann. §§ 479-124, 479-125, limited to damages arising from employment by railway.
103. Ky. Rev. Stat. §§ 277.310 to 277.320, limited to damages arising from employment by railway.
104. Mich. Stat. Ann. §§ 17-461 to 17-464, limited to damages arising from employment by railway.
105. N.C. Gen. Stat. § 62-242, limited to damages arising from employment by railroad.
106. Ohio Rev. Stat. §§ 4973.07 to 4973.09, limited to damages arising from employment by railroad or other employment not covered by workers compensation.

107. Va. Code §§ 8-641, 8-645, limited to damages arising from employment by railroad and damage to traveler on public highway caused by railroad.

108. 45 U.S.C. §§ 51-60

109. 46 U.S.C. § 688

110. 46 U.S.C. § 766

A M E N D M E N T

Offered in the HOUSE

By the Commerce Committee

TO: HOUSE BILL NO. 124

Page 1, line 6:

After "fault" add "; and amending Rule 49(c) of the Alaska Supreme Court's Rules of Civil Procedure"

Page 2, line 16:

Add a new section to read:

"Sec. 3. AS 09.17.020 of sec. 2 of this Act amends Rule 49(c) of the Alaska Supreme Court's Rules of Civil Procedure by requiring the trial court to instruct the jury to give answers to special interrogatories in a tort action involving contributory fault."

file HB 124



# Supreme Court

State of Alaska

March 30, 1977

CHIEF JUSTICE  
ROBERT BOOCHEVER

JUSTICES  
JAY A. RABINOWITZ  
ROGER G. CONNOR  
ROBERT C. ERWIN  
EDMOND W. BURKE

POUCH U  
STATE COURT AND OFFICE BUILDING  
JUNEAU, ALASKA  
99811  
907-485-3410

The Hon. Terry Gardiner  
Chairman  
House Judiciary Committee  
Pouch V  
Juneau, Alaska 99811

Dear Rep. Gardiner:

Receipt is acknowledged of your letter of March 17 in which you expressed displeasure over "a direction of the court toward invading the legislative area." You refer particularly to the case of Kaatz v. State, 540 P.2d 1037 (Alaska 1975). I am enclosing a copy of the opinion in that case because I find it difficult to understand how one could contend that that opinion constitutes any invasion of legislative powers. What we were dealing with in Kaatz was an ancient court-originated doctrine whereby one who was contributorily negligent in any manner was denied recovery. The doctrine is outmoded, and contemporary judicial thinking favors the comparative negligence doctrine whereby damages are apportioned according to relative fault. Since the contributory negligence doctrine is judicial in origin, it certainly was subject to judicial change, unless one takes the position that all decisions are embodied in concrete. I am sure that you do not countenance any such theory.

The court in Kaatz was merely exercising the traditional judicial function of delineating the common law. The United States Supreme Court in the case of Funk v. United States, 290 U.S. 371, 78 L. Ed. 369 (1933), discusses the function of the courts, both federal and state, "to decline to enforce the ancient rule of the common law under conditions as they now exist." The Court stated:

The Hon. Terry Gardiner  
March 30, 1977  
Page 2

To concede this capacity for growth and change in the common law by drawing "its inspiration from every foundation of justice," and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a "flexibility and capacity for growth and adaptation" which was "the peculiar boast and excellence" of the system in the place of its origin.

The court cites with approval opinions of various state supreme courts including that of the Indiana Supreme Court in Ketelsen v. Stilz, 184 Ind. 702, 111 N.E. 423 (1918), as follows:

"Since the courts have had an existence in America," that court said (p. 708), "they have never hesitated to take upon themselves the responsibility of saying what are the proper rules of the common law."

I know that it has become popular to decry legal opinions as "judicial legislation." I have no quarrel with restricting a court's function where valid statutes are enacted. When provisions of such statutes are questioned before the court, its function is limited to determining constitutionality. Where different meanings are attributed to the statute, the court's role is only to ascertain the legislature's intent. Even in this latter function, however, it may be said that the court is legislating. Whether it gives a literal or a broad interpretation of a questioned statutory provision, in the last analysis, the court is defining the law.

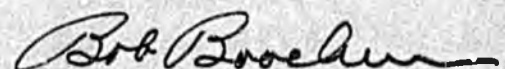
In any event, however, I fail to see how the court can be accused of invading the legislative area when performing its traditional task of construing the common law as was done in Kaatz. The legislature, of course, is free to pass statutes on this subject, but to date it has not seen fit to do so.

The Hon. Terry Gardiner  
March 30, 1977  
Page 3

With reference to your further comment pertaining to the possible need of an amendment to Alaska's Uniform Contribution among Tortfeasors Act (AS 09.10.010), I think that it would be improper for the court to propose a form of legislation. I am enclosing, however, a portion of a law review article appearing in Vol. 64 of the California Law Review discussing the problems involved in the application of contribution among tortfeasors under comparative negligence. I hope that this article will be of some assistance. In addition, I will send you in the near future a proposed Uniform Comparative Negligence Act which also covers the subject of contribution among tortfeasors. I am certain that the Legislative Affairs Agency can furnish further assistance as to various legislative alternatives.

We realized that when we adopted the doctrine of comparative negligence that additional problems would arise in the future. This is the nature of the legal process which resolves disputes as they arise. The legislature, of course, may at any time endeavor to study the broad ramifications of problems and enact laws across a much broader spectrum. I agree with the portion of your letter which says that the courts in our society should interpret laws. I do not agree, however, that the court's function is to enforce laws. That is an executive function. I hope that this answers your inquiries and helps to clarify my views as to some of the functions of the courts in our tripartite system of government.

Sincerely yours,

  
Robert Boochever  
Chief Justice

cc: Senator John Rader  
Rep. Hugh Malone  
Ed Stahla, Pres., Alaska Bar

P.S. I am enclosing a copy of the Uniform Comparative Fault Act. Note this draft has not been discussed as yet by the National Conference. I call your attention to Pages 10 and 11 of the draft which contains proposed amendatory language to the Uniform Contribution Among Tortfeasors Act.

UNIFORM COMPARATIVE FAULT ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS EIGHTY-FIFTH YEAR  
ATLANTA, GEORGIA

JULY 31 - AUGUST 6, 1976

UNIFORM COMPARATIVE FAULT ACT

With Comments

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The ideas and conclusions herein set forth, including drafts of proposed legislation, have not been passed upon by the Commissioners on Uniform State Laws. They do not necessarily reflect the views of the Committee, Reporters or Commissioners. Proposed statutory language may not be used to ascertain legislative meaning of any promulgated final law.

SPECIAL COMMITTEE ON UNIFORM COMPARATIVE FAULT ACT

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## PREFATORY NOTE

The first question is whether a system of comparative negligence is superior to the common law system of contributory negligence. Comparative negligence is much fairer than contributory negligence and more consistent with the fault concept. The common law all-or-nothing approach which either let the plaintiff recover his full damages or did not give him anything is now outdated and inconsistent with contemporary ideals. Either way it went, it was unfair to one party or the other. This unfairness was not cured by the several exceptions such as last clear chance. Although they may have evened out on the average, that average did nothing for the particular parties in a particular case. One of the parties is always treated unfairly. Relying on the lay jury to accomplish some form of apportionment of damages, without proper instructions, and acting as outlaws in disregarding the law given to them by the judge, is simply not a defensible practice.

The current trend is decidedly to comparative negligence, with a substantial majority of the states adopting it in one form or another, mostly in recent years. Almost every common-law jurisdiction outside the United States has adopted comparative negligence. The language of the statutes varies considerably, and the form adopted often comes about as a result of a political compromise without careful consideration of its practical implications. A strong case exists for the NCCUSL to undertake the necessary careful study required to prepare a Comparative Negligence Act, whether it is called a uniform act or a model act. This committee is acting on the basis of that case.

A preliminary question which should be considered before commenting on the individual provisions of the proposed act is what form of comparative negligence should be adopted.

There presently exist in this country four forms of comparative negligence: (1) plaintiff's negligence slight, and defendant's negligence gross, (2) plaintiff's negligence "not

as great as" defendant's negligence, (3) plaintiff's negligence "not greater than" defendant's negligence, and (4) the "pure type," apportionment allowed even though plaintiff's negligence exceeds that of defendant.

The slight-gross form can be dismissed as having no current support. The second and third are "modified" forms, differing from each other only in the situation where both parties are found to be 50% negligent. Number 2 would not allow recovery then; number 3 would allow recovery and seems the better of the two.

The real issue is between the modified forms and the pure form (number 4). The two modified forms may possibly work satisfactorily in the case in which only one party is hurt and he sues the other, and might perhaps be the choice if these were the only cases to arise. But when there are multiple plaintiffs and cross-claims, the modified form becomes entirely inadequate. To compare the two forms, take variations of a case in which A and B were both negligent and both injured. Assume A's negligence is found to be 25% and B's is found to be 75%.

Case (1). Assume each party suffers \$8,000 damages. Under the modified form, A recovers \$6,000; B recovers nothing. A's loss is \$2,000 (all his own), or 12.5% of the total of \$16,000. B's loss is \$14,000 (\$6,000 to A, and \$8,000 of his own) for 87.5% of the total. Under the pure form (assuming no set-off), A recovers \$6,000; B, \$2,000. A's loss is \$4,000 (\$2,000 to B and \$2,000 of his own) for 25% of the total; B's loss is \$12,000 (\$6,000 to A and \$6,000 of his own) for 75% of the total.

Case (2). Assume A suffers \$4,000 damages; B, \$12,000. Under the modified form, A recovers \$3,000; B, nothing. A incurs \$1,000 (all his own) for 5% of the total; B incurs \$15,000 (\$3,000 to A and \$12,000 of his own) for 94% of the total. Under the pure form, A recovers \$3,000; B, \$3,000. A incurs \$4,000 loss (\$3,000 to B and \$1,000 of his own) for 25% of the total; B incurs \$12,000 (\$3,000 to A and \$12,000 of his own) for 75% of the total.

Case (3). Assume A suffers \$12,000 damages; B, \$4,000. Under the modified form, A recovers \$9,000; B, nothing. A incurs \$3,000 loss (all his own) for 19% of the total; B incurs \$13,000 loss (\$9,000 to A, \$4,000 of his own) for 81% of the total. Under the pure form, A recovers \$9,000; B, \$1,000. A

incurs \$4,000 loss (\$1,000 to B and \$3,000 of his own) for 25% of the total; B incurs \$12,000 loss (\$9,000 to A and \$3,000 of his own) for 75%.

Case (4). Now change the fault percentage. Assume that each party suffered \$8,000 damages and that A was 49% negligent; B, 51%. Under the modified form, A recovers \$4,080; B, nothing. A incurs \$3,920 loss (all his own) for 24.5% of the total; B incurs \$12,080 loss (\$4,080 to B and \$8,000 of his own) for 74.5% of the total. Under the pure form, A incurs \$7,840 loss (\$3,920 to B and \$3,920 of his own) for 49% of the total; B incurs \$8,160 loss (\$4,080 to A, and \$4,080 of his own) for 51% of the total.

Thus, it is apparent that the pure form always divides the total loss according to the established fault percentage, while the modified form fluctuates wildly and very unfairly.

While the pure form of comparative negligence is not presently the majority form, it has grown very substantially in the 1970's and is now sustained by an impressive list of authorities. First enacted in the Federal Employers Liability Act in 1908, it was later adopted in other Federal Acts. Mississippi adopted the pure form in 1910. It has also been adopted by legislation in New York (1975), Rhode Island (1971) and Washington (1973). In three states it has been judicially adopted by the supreme court. Kaatz v. State, 540 P.2d 1037 (Alas. 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226; Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). It has also just been adopted by the U. S. Supreme Court for admiralty cases. United States v. Reliable Transfer Co., 421 U.S. 397 (1975). The pure form is also adopted in Great Britain, most of the states and provinces in Australia and Canada, and other common law jurisdictions.

UNIFORM COMPARATIVE FAULT ACT

1           Section 1. In a tort action for damages based on  
2 negligence, recklessness, or strict liability (including breach  
3 of warranty), plaintiff's contributory fault does not bar re-  
4 covery but has the effect of diminishing his damages proportion-  
5 ately according to his own fault or the fault attributable to  
6 him. This section applies to a tort action based upon a  
7 statute, unless otherwise expressed or construed. In a deriv-  
8 ative action or an action for wrongful death, plaintiff's  
9 damages are diminished according to the fault of any person  
10 whose conduct might otherwise have barred the liability.  
11 This section applies whether or not the contributory fault  
12 previously constituted a defense and replaces such common  
13 law principles as last clear chance and implied assumption of  
14 risk.

COMMENT

Torts covered by the Act. The proposed act applies to tort actions for negligence, recklessness and strict liability. As to recklessness, the common-law rule that contributory negligence did not bar recovery or diminish damages was an overcure. A comparison of the relative fault of the parties is appropriate here.

There is more question about applying the act to strict liability, since the theory is that the defendant is liable regardless of fault. But for strict liability for both abnormally dangerous activities and for products there is strong similarity to negligence declared by the court as a matter of

law (negligence per se); and it is not anticipated that the trier of fact will have serious difficulty in setting percentages of fault. In addition, it would be highly anomalous in a products' liability case to have the damages mitigated if the plaintiff elects to sue in negligence, but to allow him to recover full damages if he elects instead to sue for strict liability in tort. The two actions should be treated alike, especially when they are separate counts in the same complaint. There would also be anomaly in diminishing the amount of the plaintiff's recovery for contributory negligence if the defendant is found to be negligent but in allowing the plaintiff to recover his full damages in the absence of a finding of defendant's negligence.

There is a problem about how to handle an action for breach of implied warranty. The Act is not intended to include actions which are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not obtain what he contracted to receive. But many actions for breach of warranty sound primarily, or partially, in tort -- especially when the damage involves physical harm to person or property. These actions should be included. The essential nature of the breach-of-warranty action varies greatly in different states, and the language may have to vary for some states. The words "strict liability (including breach of warranty)" are intended to indicate that the act includes an action for breach of warranty which comes within the common concept of an action of strict tort liability for products.

By conscious decision, the Act does not apply to intentional torts. It seems inappropriate in that situation, and no state has attempted to extend the concept of comparative fault to intentional torts.

For certain types of torts, such as nuisance, the defendant's tortious conduct may be intentional, negligent or subject to strict liability. In the latter two instances the Act would apply, but not in the case of intentionally inflicting the injury on the plaintiff. A similar analysis applies to actions for misrepresentation.

"Contributory fault" is treated as a term of art referring to fault on the part of the plaintiff (or one under whom he claims), and which has a causal relationship to his injury.

"Fault attributable to the plaintiff" is to take care of imputed negligence, as in the case of respondeat superior.

Comparison of fault of parties. In comparing plaintiff's fault with that of the defendants, there are a number of im-

plications arising from the concept of fault. The conduct of plaintiff, or of any defendant, may be more or less at fault, depending on whether it was mere inadvertence or acting with an awareness of the danger involved, on the magnitude of the risk created by the conduct, on the significance of what he was seeking to attain by his conduct, and on his superior or inferior capacities. The rule of law that a particular defendant owes a higher degree of care (as in the case of a common carrier of passengers) or a lesser degree of care (as in the case of an automobile host in a state having a valid automobile-guest statute) is important in determining whether he is liable at all; but if his liability has been established, the rule does not play a part in determining the relative proportion of fault of this party in comparison with the others.

On the other hand, in determining the relative fault of the parties, the trier of fact may give consideration to the relative closeness of causal relationship, so that the concept of comparative fault absorbs the causation elements of the common law doctrine of last clear chance. This holding in such cases as Cushman v. Perkins, 245 A.2d 846 (Me. 1968); and Lovesee v. Allied Dev. Corp., 45 Wis.2d 340, 170 N.W.2d 196 (1970) seems properly applicable to this Act.

"Action based on a statute" includes wrongful death and survival acts, dram-shop acts, dog-bite statutes, actions of negligence per se based on criminal statutes, etc. An attempt to enumerate them in the statute would almost inevitably leave some out. "Unless otherwise expressed or construed" is to keep from repealing by implication and to give a court the authority to construe a statute such as a child-labor act to prevent any mitigation if it thinks the policy of the act requires protection of a class of persons even against their own weaknesses or inadequacies.

"Whether previously constituting a defense or not" includes last clear chance, assumption of risk (to the extent that it is based on fault), contributory fault for recklessness or strict liability, etc., plus all cases where contributory negligence was a complete defense. Consent to defendant's conduct is not regarded as a form of contributory fault.

1 Section 2. In a tort action involving contributory  
2 fault, the court, unless otherwise requested by the parties, shall  
3 instruct the jury to give answers to special interrogatories  
4 [to render special verdicts], or make findings itself if  
5 there is no jury, indicating:

6 (1) the amount of damages each claimant  
7 would recover if contributory fault were  
8 disregarded, and

9 (2) the percentage of the fault for each party to  
10 the action as compared with the combined fault of all  
11 parties to the action. For this purpose, the court  
12 may determine that 2 or more persons are approp-  
13 riately treated as a single party.

#### COMMENT

These questions are expected to reach percentages whose total for the relevant parties (plaintiffs or defendants) will add up to 100%.

"Parties to the action" includes third-party defendants, whether made defendants by the original plaintiff or not.

The limitation to "parties to the action" means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. There is no way of telling whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he was not a party would not be binding on him as *res judicata*. If a separate suit is necessary to settle these issues in any event, there seems to be no point in speculating on the matter in the first suit. The second suit would probably be brought by a defendant in the first suit who is seeking contribution; other defendants in the first suit should be willing to join with him, and the plaintiff might also be joined as a party. Nothing is said about this in the Act because the common law is adequate to cover it.

The court should have, without providing for it in this section, the usual powers of setting aside or modifying a verdict if it is internally inconsistent or shows bias or prejudice, etc. On the same basis as the remittitur principle, a court might indicate its intent to set aside a percentage allocation unless the parties agreed to a somewhat different one.

1           SECTION 3. Contribution rights among multiple  
2 defendants are determined in accordance with the percentage  
3 of fault of each defendant, as found by the trier of fact. The  
4 court shall enter judgment on the basis of those rights and  
5 findings made under Section 2. If a judgment against a  
6 party cannot be collected within [one year] after the judg-  
7 ment becomes final, the responsibility for the amount in-  
8 volved is distributed among the other parties in proportion  
9 to their relative fault.

COMMENT

A state which does not already have a practice of granting contribution between joint tortfeasors may wish to start the section with language like this: "The right of contribution exists as among multiple defendants, and apportionment is determined . . . ."

Joint and severable liability under the common law means that every defendant contributing to a plaintiff's injury is liable to him for the whole amount of the recoverable damages. This is not changed by the Act. Between the defendants themselves, however, the apportionment is in accordance with the percentages established under § 2.

Special problems exist when defendants are not liable for exactly the same injuries, as when an automobile accident victim has his injury exacerbated by negligence of the doctor treating him; but these are better handled by the trial judge in the light of the facts before him than by providing for them in the statute in advance and in the abstract.

If an award against one party is uncollectible, the plaintiff could collect at common law against any of the other defendants, who are jointly and severally liable. The last sentence in the section provides that the apportionment for the uncollectible amount will be made among all of the other parties (including the claimant) according to their relative percentages of fault, as established in the suit.

1           SECTION 4. A release or a covenant not to sue or  
2           enforce           judgment, given by a tort claimant to a tort-  
3           feasor, does not discharge other tortfeasors liable for the  
4           same harm unless it so provides; but it reduces the claim  
5           against the others to the extent of the consideration paid  
6           for it or       the amount stipulated in it, if greater. If  
7           the release or covenant is given in good faith, it discharges  
8           the person to whom it is given from liability for con-  
9           tribution.

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COMMENT

The question of the contribution rights of Tortfeasors A and B against Tortfeasor C who settled and obtained a release admits of three answers: (1) A and B are still able to obtain contribution against C despite the release, (2) the plaintiff's total claim is reduced for the proportionate share of C, and (3) B and C are not entitled to contribution unless the release was given not in good faith but by way of collusion. Experience has shown that the first two solutions both strongly discourage settlements, though for different reasons. A careful study of the matter was made when the Uniform Contribution Among Tortfeasors Act (1955) was drafted and the third solution was adopted in § 4. This section follows that decision, though the wording is slightly different.

Alternative 1

1           SECTION 5. Damages awarded under this Act may  
2           be set off only           to the extent that an award against  
3           one party cannot be collected.

Alternative 2

SECTION 5. To the extent that liability insurance is available to pay a judgment entered under this Act, damages awarded under this Act may not be set off.

If plaintiff and defendant are both found to be 50% negligent and they suffered the same amount of damages, neither party would recover anything if set-off is applied, even though they both carried liability insurance and paid for coverage. The loss is taken from the insurance companies who were paid to carry it and placed upon the parties, who paid to have it carried. Factual variations do not change the essence of the result. Set-off would thus destroy the effectiveness of the Act.

Two alternative provisions are offered. The second may raise some constitutional questions of equal protection.

1           SECTION 6. This Act applies to all injuries incurred  
2 after     it   takes effect.

1           SECTION 7. If any provision of this Act or appli-  
2 cation thereof to any person or circumstance is held invalid,  
3 the invalidity does not affect other provisions or appli-  
4 cations of the Act that can be given effect without the in-  
5 valid provision or application, and to this end the provisions  
6 of this Act are severable.

Amendment of Uniform Contribution Among Tortfeasors Act (1955)

1           Amend Section 2 of the Uniform Contribution Among  
2 Tortfeasors Act to read as follows:

3           "SECTION 2. [Pro Rata Shares.] In determining the  
4 pro rata shares of tortfeasors in the entire liability (a) their

5 ~~relative degrees of fault shall not be considered~~ their relative  
6 degrees of fault shall be the basis for allocation; (b) if  
7 equity requires, the collective liability of some as a group shall  
8 constitute a single share; and (c) principles of equity appli-  
9 cable to contribution generally shall apply.

COMMENT

This is needed. The Uniform Contribution Among Tortfeasors Act had assumed no comparative negligence, so that it was concerned solely with dividing the responsibility between the defendants. It had divided into halves, thirds, fourths, etc. --- a rough sort of justice, as in the former American admiralty rule for comparative negligence. If the plaintiff's diminution is determined on a percentage basis, the allocation among the defendants should be on a percentage basis, too. A mixture of the two systems will produce confusion and inequity. Some states by statute or judicial decision presently provide for contribution on the basis of fault.

from the personal attitudes and prejudices of individual jurors. But that is also true of other issues traditionally allocated to the jury in negligence litigation. Moreover, "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."<sup>49</sup>

*b. Administrative Problems: Multiple Parties*

Among unresolved matters left to the future, the *Li* court identified two administrative problems which have been given much play by opponents of comparative negligence.<sup>50</sup> Both concern multiple parties, to which passing reference has already been made. Indeed, Prosser viewed the prospect of entrusting multiple-party problems to the Ameri-

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49. 13 Cal. 3d at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872. Statutes in four states (Colo., Hawaii, Mass. and N.J.) require the use of special verdicts; in six more states (Idaho, Minn., Nev., N.D., Utah, Wyo.) special verdicts are required at the request of either party. For citations, see notes 1 and 4 *supra*. Nearly all states, including California, permit special verdicts at the discretion of the trial judge. The *Li* court was content "for the present" to leave the matter in that posture. *Id.* at 824 n.18, 532 P.2d at n.18, 119 Cal. Rptr. at n.18. Calif. S.B. 494, 1975-76 Reg. Sess. (Senator Grunsky) would mandate special verdicts. On the other hand, the New Hampshire and Vermont statutes specifically call for general verdicts, and those in Mississippi, Rhode Island and Maine appear to exclude special verdicts. Also consider SCHWARTZ, *supra* note 1, ch. 17; Aiken, *Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulations*, 53 MARQ. L. REV. 293 (1970). The link between special verdicts and blindfolding the jury has been already noted. See note 26, *supra*. Special verdicts, in addition to controlling jury bias, also help to reveal jury confusion or poor arithmetic. For example, in *Black v. McCabe*, [1964] North Ire. I.R. 1, the jury assessed the plaintiff's damages at £1,450 (which they reduced to £1000) and the defendant's damages at £120 (which they reduced to £90). This placed the plaintiff's responsibility at about 75 percent and the defendant's at 69 percent. Only in special circumstances may the aggregate of faults exceed 100 percent—as, for example, where some of the plaintiff's fault did not cause injury to the defendant but only to himself. *E.g.*, *Hanly v. Berlin*, [1975] Qd. R. 52 (where two cars sideswiped each other due to the fault of both drivers and one of them sustained injury to his elbow, which had been negligently protruding over the open window sill—the accident fault was divided 40:60, but the plaintiff suffered an additional 10 percent reduction for his elbow injury). In Wisconsin this is misleadingly known as the distinction between "active and passive" negligence. *Vroman v. Kempke*, 34 Wis. 2d 680, 150 N.W.2d 423 (1967). The English statute, Law Reform (Contributory Negligence) Act, 8 & 9 Geo. 6, c. 28, § 1 (1945), which refers to "shares of responsibility" has also been thought to require deference to causation, at least in addition to (if not in lieu of) fault. *Stapley v. Gypsum Mines*, [1953] A.C. 663, 682, trenchantly criticized by Williams, *The Two Negligent Servants*, 17 MOD. L. REV. 66 (1954). But as one commentator exclaimed, speaking of the same problem in relation to "comparative contribution," "[C]ausation itself is difficult enough; degrees of causation would really be a nightmare." Chapman, *Apportionment of Liability between Tortfeasors*, 64 LAW Q. REV. 26, 28 (1948). An illustration of its possible relevance would be the case of a child, just capable of negligence, dashing into the path of an automobile. To its negligible fault should perhaps be added a factor for its equal share in causing the accident, in arriving at its "share of responsibility" for the damage.

50. 13 Cal. 3d at 823-24, 532 P.2d at 1239-40, 119 Cal. Rptr. at 871-72.

can jury with such apprehension as to cast a blight on the very feasibility of introducing comparative negligence into the general accident law. As he saw it, the fact that these problems have not proved daunting to British and Canadian law offers no real encouragement because the civil jury has been virtually displaced in those countries by professional and capable judges.<sup>51</sup>

1. *Contribution.* The central problem concerns the relationship between comparative negligence and contribution. Suppose A, B and C are involved in a collision, injuring A. A recovers a judgment against B and C in which responsibility for his damages of \$5000 are allocated in the proportion of 30 percent to A, 50 percent to B and 20 percent to C. Two questions arise: (1) how much can A recover from C—20 percent or 70 percent of \$5000; and (2) if C has to pay 70 percent, can he claim contribution from B, and if so, for how much—35 percent or 50 percent of \$5,000?

With regard to the first question, it must be noted that the accepted common law principle has hitherto been that concurrent tortfeasors liable for the same damage are liable *in solidum* ("entire liability"), each being liable for the total amount regardless of the shared responsibility of his co-tortfeasors.<sup>52</sup> This result is only fair, since there would be no justification for exposing an *innocent* plaintiff to the risk of being unable to collect a portion from one of the co-defendants: in other words, if one of the co-defendants is insolvent that risk should be borne by his co-tortfeasor rather than by the plaintiff. But if the plaintiff is himself at fault, his "equity" is no greater than that of the co-defendants, and it would be a perfectly defensible solution to make him share that risk. This seems particularly desirable when, as in the suggested example, the solvent defendant, C, was only 20 percent at fault, compared with the 50 percent liability of his co-defendant B and the 30 percent fault of plaintiff A.<sup>53</sup> The risk of B's insolvency may be distributed in two ways: one limits A's claim against B and C to their respective shares of responsibility, the other distributes B's share between A and C in proportion to their own shares. Under the first method, A could only

51. PROSSER, *THE LAW OF TORTS* § 67, at 438 (4th ed. 1971).

52. *Id.* at 292-98. "Entire liability" is sometimes misnamed "joint and several liability." The latter means that joint defendants may be sued jointly or separately, i.e., severally.

53. In "50 percent" jurisdictions, this contingency argues for measuring A's negligence against B and C separately so as to free C from all liability. See note 27 *supra*. See the dissent in *Walten v. Tull*, 234 Ark. 882, 356 S.W.2d 20 (1962). In that case the majority consoled itself with the thought that "we cannot adopt a narrow construction of our comparative negligence statute in the vain hope of avoiding inequitable situations due to insolvency. Obviously either the plaintiff or the solvent defendant must suffer, and the loss has traditionally fallen upon the wrongdoer." *Id.* at 894, 356 S.W.2d at 26.

recover from C 20 percent of his damages, under the second method he could recover only 40 percent. The first method appears to be mandated by the New Hampshire, Vermont, and Kansas statutes;<sup>54</sup> the second was deliberately chosen in the sophisticated Irish statute drafted by Professor Glanville Williams.<sup>55</sup>

With regard to the second question, suppose that A has recovered 70 percent from C, and B is solvent, can C recover contribution from B and, if so, for how much? Here again, a great deal of diversity prevails. About half the states still retain the common law rule against contribution; among the remainder some allow contribution in accordance with the relative degrees of fault of the tortfeasors,<sup>56</sup> but the majority have adopted the rule of the 1955 Uniform Contribution Act, prescribing

54. See SCHWARTZ, *supra* note 1, at 264. The Vermont statute reads: "Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed." VT. STAT. ANN. tit. 12, § 1036 (1973). The New Hampshire statute is virtually identical. N.H. REV. STAT. ANN. ch. 507, § 7-9 (Supp. 1973).

On the other hand some statutes—for example, those in New Jersey, N.J.S.A. tit. 2A:15-5.3 (Supp. 1975), and North Dakota, N.D. CENT. CODE tit. 32-38-01 (1960)—have specifically preserved the "entire" liability rule.

55. Civil Liability Act 1961, 1961 Acts of the Oireachtas c. 41, § 38, at 1403. The idea was first suggested by C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTION 77-79 (1936), the first systematic (American) study of contribution among tortfeasors and comparative negligence. It corresponds substantially to the rule applicable where one of more than two defendants is insolvent: thus, if A, without fault, is injured by B, C, and D, and D is insolvent, the shares of B and C are ratably increased to absorb D's portion. RESTATEMENT OF RESTITUTION § 85, comment h at 384; 64 A.L.R. 224; WILLIAMS, *supra* note 37, § 48. This is probably also the California rule. (Tucker v. Nicholson, 12 Cal. 2d 427, 433-34, 84 P.2d 1045, 1049 (1938).) It is expressly incorporated in section 3(c) of the model statute, proposed by Braun, *Contribution: A Fresh Look*, 50 CALIF. ST. B.J. 166 (1975) [hereinafter cited as Braun].

Analogous distribution also appears to be the better rule in 50 percent jurisdictions in order to spread the share of a defendant who is excused. Suppose P is 20 percent at fault, D<sub>1</sub> 40 percent, D<sub>2</sub> 30 percent, and D<sub>3</sub> 10 percent. P cannot recover from D<sub>3</sub>, whose share is spread proportionately among P, D<sub>1</sub>, and D<sub>2</sub>. Hence, P's share becomes 20/90, D<sub>1</sub>'s 40/90, and D<sub>2</sub>'s 30/90. Comment, *Comparative Negligence and Comparative Contribution in Maine: The Need for Guidelines*, 24 ME. L. REV. 243, 246-48 (1972).

56. The 1939 version of the Uniform Contribution Act, in HANDBOOK OF THE NAT'L CONF. OF COMM. ON UNIFORM STATE LAWS 244 (1939), provided, as an alternative to pro rata shares, unequal division "when there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution . . ." Arkansas, Delaware, Hawaii, South Dakota and Utah adopted that alternative. ARK. STAT. ANN. § 34-1002 (1962); DEL. CODE ANN. tit. 10, § 6302 (1974); HAWAII REV. STAT. § 663-12 (Supp. 1974); S.D. COMP. LAWS ANN. § 15-8-15 (1967); UTAH CODE ANN. § 78-27-34 (1975). Idaho, Minnesota, New Jersey, North Dakota and Texas adopted "pure" comparative contribution at the same time and in the same statutes as comparative negligence. The latter is also the British rule and is followed in most of the rest of the world.

equal division.<sup>57</sup> That rule is, of course, based on a theory of causation, in contrast to comparative negligence, which is based on fault. This incompatibility results in an indefensible allocation of shares, especially where more than one participant in the accident suffers damages and cross-claims are made.

If (to revert to the previous illustration) A, 30 percent at fault, had recovered 70 percent from C, contribution in equal shares would allow C to recover from B only 35 percent rather than 50 percent, B's share of the total fault for the accident. Just, as in this example, C would in the end shoulder an excessive share, B would escape with less than his proper share if A had executed judgment against him (in which event he could have recovered 35 percent from C, 15 percent more than his due).

The position in California in these respects is obscure but not beyond redemption by bold and imaginative judicial statecraft. The stumbling block is the state Contribution Act,<sup>58</sup> reluctantly enacted in 1958, which permits contribution only between tortfeasors liable under a joint judgment and prescribes the rule of equal division. The Act still leaves it entirely to the whim of a plaintiff how the burden as between several tortfeasors is to be borne, since he may choose to sue only one of them to judgment and that one cannot even (as in Michigan<sup>59</sup>) implead the other(s) for contribution.<sup>60</sup> How can this statutory scheme be brought into harmony with the new rule of comparative negligence?

The most obvious and best method would, of course, be to legislate "comparative contribution," contribution in proportion to the parties' negligence.<sup>61</sup> Failing that, there is, fortunately, ample precedent even for a judicial initiative on a broad front. In minor key is the Wisconsin story, which underscores the tie between comparative negligence and contribution. Wisconsin had judicially developed a rule of contribution in equal shares before adopting a comparative negligence statute in 1931. In *Bielski v. Schulze*,<sup>62</sup> however, the Wisconsin Supreme Court

57. Section 2(a) specifically directs that the parties' "relative degrees of fault shall not be considered." 12 UNIF. LAWS ANN. 63 (1975).

58. CAL. CODE CIV. PRO. §§ 875-80 (West 1975).

59. This was expressly authorized by MICH. COMP. LAW ANN. § 600.2925 (1974) [the Michigan Contribution Act]. Since 1974 the requirement of a joint judgment has been dropped. *Id.*

60. *Fox v. Western New York Motor Lines*, 257 N.Y. 305, 178 N.E. 289 (1931) (construing a statute identical to California's). Comment, *Joint Tortfeasors: Legislative Changes in the Rules Regarding Releases and Contribution*, 9 HAST. L.J. 180, 188-89 (1958). The effect of the joint judgment rule on C's share of liability is considered at note 74 *infra*.

61. See note 56 *supra*.

62. 16 Wis. 2d 1, 114 N.W.2d 105 (1962). Maine followed the same course in *Packard v. Whitten*, 274 A.2d 169 (Me. 1971); and so did the Third Circuit for the

reversed its earlier position and substituted a rule of contribution in accordance with the tortfeasors' shares of fault ("comparative contribution"), partly in recognition of its greater fairness, but partly also in deference to the comparative negligence rule. Admittedly, the court could have pretended a deference to the legislative preference—and it was in any event merely reversing a prior judicially created doctrine<sup>63</sup>—but it felt and responded to the need for harmonization of the two regimes.

A much bolder assault was mounted by the New York Court of Appeals in *Dole v. Dow Chemical Co.*<sup>64</sup> Here the plaintiff's husband, employed by Urban, was overcome by poisonous fumes while fumigating a storage bin with a chemical supplied by the defendant. The plaintiff's wrongful death action against the defendant's alleged negligence in not properly labeling the fumigant so as to warn users; the defendant's cross-complained against Urban, seeking an indemnity (if held liable) for its negligence in failing to follow instructions on the label and thus contributing to its employee's death. The difficulty facing Dow in its third-party complaint was that the New York contribution statute, like the Californian, authorizes contribution only between tortfeasors held liable in a joint judgment—here joint judgment was precluded by the immunity provision of the New York Workmen's Compensation Act,<sup>65</sup> barring tort recovery against an employer "on account of such injury or death." Still, according to a widely accepted construction, this immunity does not protect against claims for indemnity (as distinct from contribution) on the sophisticated ground that indemnity is based not on the personal injury cause of action, but on the relation between indemnitor and indemnitee (here supplier and user of the harmful product). Unfortunately, Dow's indemnity claim seemed jeopardized by the requirement that the claimant's negligence must have

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Virgin Islands, in *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1967), and the Seventh Circuit as the federal rule for mid-air collisions in federal airspace in *Kohr v. Allegheny Airlines*, 504 F.2d 400 (7th Cir. 1974). In addition, comparative fault recently replaced the "equal division" rule for property damage in maritime collisions, in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), thereby bringing that rule in line with the rule for personal injury under the Jones Act, 46 U.S.C. § 688 (1970), and the Death on the High Seas Act, 46 U.S.C. §§ 761-68 (1970), and the Brussels Maritime Convention of 1910, 37 Stat. 1658, TS 756 (March 1, 1913) (concerning collisions between vessels).

63. In Wisconsin, contribution had been judicially created in 1918 (*Ellis v. Chicago & N.W. Ry.*, 167 Wis. 392, 167 N.W. 1048 (1918)), but comparative negligence was introduced by statute in 1931.

64. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), noted in 53 A.L.R.3d 175. *Dole* has been the subject of a great deal of law review comment. See, e.g., 58 CORNELL L.Q. 602 (1973); 42 N.Y.U.L. REV. 815 (1972); 24 SYR. L. REV. 462-70, 551-56 (1973).

65. N.Y. WORKMEN'S COMP. LAW § 29(4) (McKinney 1965).

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been "passive" and the indemnitor's "active." However, undaunted the court of appeals invented a form of "partial indemnity" for those, like Dow, who could not hope to satisfy that exacting requirement: the court created an indemnity with the remarkable attribute of allowing recovery which, though not a full recovery, was apportioned to the respective degrees of fault of the parties. In thus denying Urban's motion to dismiss Dow's third-party complaint, the court flouted at least three statutory rules: (1) it countenanced contribution under the false label of "indemnity" in violation of the Contribution Act's requirement of a joint judgment;<sup>66</sup> (2) such contribution was to be apportioned to the parties' shares of responsibility, in violation of the Contribution Act's requirement of equal division; and (3) it gave the go-by to the immunity provision of the New York Workmen's Compensation Act by enlarging the court-created exception for indemnity by brazenly mislabeling contribution "partial indemnity."

While this tour de force probably has no equal even in an era that has become accustomed to cynical manipulation of language in public life,<sup>67</sup> far less in the way of violence to the statutory norm is needed in the California context. For the only statutory rule requiring judicial qualification is the equal division rule of the California contribution statute<sup>68</sup> in a situation obviously un contemplated at the time of its enactment: the situation where the plaintiff also bears a share of responsibility and has become entitled to an apportioned award.<sup>69</sup> Better still,

66. N.Y. CIV. PRAC. LAW RULES § 1401 (McKinney 1963).

67. The *Dole* court was justified in drawing attention to occasional distortions of the "active-passive" criterion by some courts, but was less than frank in interpreting these distortions "as an attempt at realignment of the rule"). The courts that distorted the criterion were operating against the background of the unreformed common law rule against contribution and understood that indemnity meant a complete shifting of the loss. By contrast, the *Dole* court was faced with a contribution statute and laid an axe to the uniformly understood distinction between contribution (sharing) and indemnity (shifting). The "active-passive" criterion is discussed in Note, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490 (1969), commenting especially on *United Airlines v. Wiener*, 355 F.2d 379 (9th Cir. 1964).

Nor is *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1st Dist. 1964) a case where the court "although using the language of indemnity, . . . actually applied the principles of equitable contribution, quite like the partial indemnification or comparative negligence of *Dole*." Braun, *supra* note 55, at 202. *Herrero* shifted the whole loss caused by the malpractice from the tortfeasor to the negligent physician, while *Dole* shared it between "indemnitor" and "indemnitee." The first was therefore a case of true indemnity for a divisible part of the loss, the second a case of contribution, the sharing of an indivisible loss. Cf. *Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1st Dist. 1974).

The sauciness of *Dole* is all the more difficult to reconcile with the same court's cautious refusal only 1 year later in *Cudling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973) to extend apportionment to contributory negligence, a context in which the legislature had largely withheld its voice.

68. CAL. CODE CIV. PRO. §§ 875-80 (West Supp. 1975).

69. Thus Sen. Grunsky's bill, Calif. S.B. 494, 1975-76 Reg. Sess., would mandate

of course, would be a *general* abrogation of the equal division rule, but that reform would be widely regarded as falling more properly to the province of the legislature. A model bill along those lines has (once again) been recently proposed.<sup>70</sup>

A final option for accomplishing a correct distribution of shares that would altogether sidestep the problem of contribution is to abandon the "entire liability" rule, previously considered. Limiting P's claim to only D<sub>1</sub>'s apportioned share would thus solve not only the problem of D<sub>2</sub>'s insolvency but also the problem posed either by a "no contribution" rule<sup>71</sup> or, as in California, by a pro rata contribution rule. This solution would not be ideal, since it would apportion shares on the principle of fault when the plaintiff was contributorily negligent but would still apportion shares on the pro rata principle when he was not. But it has two attractions: first, the incongruity is less obvious, and second, this solution could be imposed more easily by the courts since it would involve a modification merely of the judicially created "entire liability" rule instead of the *statutory* pro rata rule of contribution.

2. *The Absent Tortfeasor.* Another problem connected with multiple parties, which the *Li* court identified as deserving the most serious future consideration, arises when all responsible parties are not brought before the court. As Justice Sullivan observed, "[i]t 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."<sup>72</sup>

Fortunately, the virtual absence of case law from other jurisdictions (including the British Commonwealth) suggests that the problem's theoretical difficulty is not matched by its practical importance. The

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apportionment among defendants in accordance with their negligence "when a judgment is rendered against more than one defendant in any such action." "Such action" seems to refer to an action in which a plaintiff's recovery is reduced by reason of his contributory negligence.

A more general measure would require apportionment in all contribution claims, as in Utah. See note 55 *supra*.

The Vermont court in *Howard v. Spafford*, — Vt. —, 321 A.2d 75 (1974) refused to follow *Dole* and permit contributions among tortfeasors in any form despite the enactment of a comparative negligence statute.

70. Braun, *supra* note 55. For earlier recommendations see Notes, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490 (1969) and *Joint Tortfeasors: Legislative Changes in the Rules Regarding Releases and Contribution*, 9 HARV. L.J. 180 (1958). As already noted, Utah introduced unequal apportionment simultaneously for contributory negligence and contribution. Thode, *Comparative Negligence, Contribution among Tortfeasors and the Effect of a Release—a Triple Play by the Utah Legislature*, 1973 UTAH L. REV. 406 [hereinafter cited as Thode].

71. This solution is therefore preferred for Florida by Timmons & Silvis, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law*, 28 U. OF MIAMI L. REV. 737, 778-87 (1974).

72. 13 Cal. 3d at 823, 532 P.2d at 1240, 119 Cal. Rptr. at 872.

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Appeal from the Superior Court of the State of Alaska,  
First Judicial District, Juneau,  
Victor D. Carlson, Judge.

Appearances: M. T. Thomas and W. G. Ruddy, Juneau,  
for Appellant. Allen T. Compton, Juneau, for  
Appellee.

Before: Rabinowitz, Chief Justice, Connor, Erwin and  
Bocchever, Justices. [Burke, Justice, not  
participating.]

CONNOR, Justice.

This appeal and cross-appeal result from a superior  
court ruling which denied any recovery to two wrongful death  
claimants.

We must decide whether the trial court erred in  
finding that the negligence of the State of Alaska caused  
the accident which took the decedents' lives. Additionally,  
we must decide whether the trial court erred in finding that  
the decedents' own negligence also contributed to their  
demise. Finally, if the court below did not err with regard  
to its findings of fact, we must determine whether the  
doctrine of contributory negligence should continue to  
operate as a complete bar to all recovery in cases of this  
type.

I.

The decedents, Ronald Lindley and Donald Kaatz,  
were employed by the Burgess Construction Company in early  
December 1970. At that time the company was working on a  
project in Wrangell, Alaska. The project required gravel,

which the company customarily obtained from Reid's gravel pit, located three miles south of Petersburg, Alaska, just off the Mitkof Highway.

In order to transport the gravel from the Petersburg area to Wrangell, the following procedure was usually utilized. Donald Kaatz, having taken up temporary residence in the town of Petersburg, readied the gravel at the pit for transportation to Wrangell. Periodically, the Burgess Construction Company would send a barge up the Wrangell Narrows to Petersburg. Before leaving Wrangell, the company would place a front-end loader on the barge. Ronald Lindley, an experienced operator of front-end loaders, would accompany the vessel to the Petersburg barge dock, located approximately four miles south of town.

Kaatz would meet the barge at the dock and, together with Mr. Lonnie Dreka, who supervised the operation, he would help to prepare the barge to carry the gravel back to Wrangell. When this was done, Kaatz and Dreka would drive Kaatz' pickup truck along the Mitkof Highway to the gravel pit, which was one mile north of the barge dock. Lindley would follow, driving the front-end loader.

When the men reached the gravel pit, Lindley would use the loader to fill a truck with gravel. The vehicle was then driven back to the barge dock, where the gravel was placed onto the vessel, along with the front-end loader. Dreka and Lindley then would accompany the barge back to

Wrangell and unload it. Kaatz would return to his chores in and around Petersburg.

On the evening of December 9, 1970, the barge arrived at the Petersburg dock around 7:00 p.m. Kaatz met the barge when it arrived. Lindley, Dreka and the front-end loader were on board. The weather was overcast, with intermittent rain and drizzle. The temperature throughout the day had hovered in the mid to low thirties.

On this particular evening Ronald Lindley did not wait for Dreka to finish preparing the barge for loading. Instead, he and Kaatz set out together in the front-end loader, headed north towards the gravel pit. When the balloon-tired vehicle had traveled approximately half of the one mile distance from the barge dock to the gravel pit, it began to descend a slight grade on the Mitkof Highway. At the base of the grade, the road turned to the right. The vehicle did not reach that curve because, as the loader descended the grade, it toppled off the side of the northbound lane over an embankment. Lindley and Kaatz were both killed.

The widows of these men each brought wrongful death actions against the State of Alaska. They alleged that the state was negligent in that it had failed to adequately maintain the icy road, so that it would be safe for vehicular traffic. Judge Victor D. Carlson tried the case and rendered a verdict for the defendants. In doing so, he specifically concluded that "[t]he negligence of the State of Alaska

[was] a cause of the death of Messrs. Lindley and Kaatz." However, he also found that the icy and very slippery condition of the Mitkof Highway on the evening of December 9, 1970, "was known to Mr. Kaatz before he climbed into the cab of the loader and it became known to Mr. Lindley immediately when the vehicle proceeded onto the highway." In addition, he found that it was "unreasonable for any person experienced with a front-end loader to operate such a vehicle on the highway" under those conditions. He thus concluded that the contributory negligence of the decedents was a complete defense to their claims.<sup>1/</sup>

The appellants contend that Judge Carlson clearly erred in finding that the decedents' conduct constituted contributory negligence. Alternatively, they urge us to abandon the doctrine of contributory negligence and adopt a "pure" comparative negligence formula instead.

The state, in its cross appeal, contends that the court erred in finding that it was negligent in its maintenance of the road and that such negligence caused the deaths of Lindley and Kaatz. The state also argues that Judge Carlson did not err in finding that the decedents were negligent and urges us not to abandon the doctrine of contributory negligence

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<sup>1/</sup> Judge Carlson indicated on the record that he did not favor the doctrine of contributory negligence, but was constrained by precedent to apply it.

in favor of comparative negligence. The record presented in this case requires us to address each of the contentions that has been raised.

## II.

We shall begin our analysis by determining whether the trial court erred in finding that negligence on the part of both the state and the decedents caused the accident. At the outset it is useful to restate the standard for review of judge-tryed cases in which all pertinent claims of error are predicated on an assertion of insufficient evidence. In Alaska Foods Inc., v. American Manufacturer's Mutual Insurance Co., 482 P.2d 842, 848 (Alaska 1971), we stated:

"The rule is this: Under Civil Rule 52(a) we shall not set aside the finding of fact of a trial judge unless it is clearly erroneous. A finding is clearly erroneous when, although there may be evidence to support it, we are left with the definite and firm conviction on the entire record that a mistake has been committed.

This rule applies to any finding, regardless of the nature of the evidence upon which it is based. The only difference between our review of findings based on oral testimony, and those based on documentary evidence or undisputed facts, is that in the former case we must pay some deference to the trial judge's assessment of the credibility of witnesses, whereas in the latter case we need not. It is because of the deference we pay to the trial judge's assessment of credibility of witnesses where there is oral testimony that we have characterized our scope of review in cases where there is no oral testimony as being a 'broader' type of review. Even in the latter situation, clear error must appear under the rule we apply.

The clearly erroneous standard, as we apply it, means something more than merely showing it is more probable than not that the trial judge was mistaken. We must be convinced, in a definite and firm way, that a mistake has been committed. We must be well persuaded by the party seeking to set aside the trial judge's findings before we will hold he was wrong." (footnotes omitted) 2/

With this standard in mind, we turn to the factual issues in this case.

The state, in its cross appeal, contends that its highway maintenance crew was not negligent in having failed to sand the Mitkof Highway before the accident occurred.

In State v. Abbott, 498 P.2d 712 (Alaska 1972), we held that the state has a duty to exercise reasonable care to maintain Alaska's highways in safe condition. <sup>3/</sup> That duty certainly extends to hazards created by ice and snow.

A breach of this duty of care occurs whenever lack of reasonable road maintenance exposes a person to an unreasonable risk of harm. In Abbott we stated:

"In order for a plaintiff to show that the state exposed him to an unreasonable risk of harm he would have to demonstrate that the likelihood and gravity of the harm threatened outweighed the utility of the state's conduct and the burden on the state for removing the danger. In making that determination in the case at bar, all of the following factors would be relevant: whether the state had notice of the dangerous condition, the length of time the ice and snow had been on the highway, the availability of men and equipment,

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2/ Accord, Ficke v. Alaska Airlines, 524 P.2d 271, 274 (Alaska 1974).

3/ See also State v. I'Anson, 529 P.2d 188, 193-94 (Alaska 1974).

and the amount of traffic on the highway."  
498 P.2d at 725. (footnotes omitted, emphasis  
in original)

In the present case, the evidence clearly supports  
a finding of negligence on the state's part.

Evidence at trial established that by 6:00 p.m.  
on the date of the accident, the state had both actual and  
constructive notice regarding the dangerous condition of  
the highway. For example, testimony established that by  
noon the road was dangerous, and that by 5:00 p.m. it was  
extremely dangerous, the worst that some Petersburg observers  
had ever seen. In a deposition, the school bus driver stated  
the he had alerted school authorities of the dangerous road  
conditions in mid-afternoon. Indeed, the state's road mainten-  
ance foreman in Petersburg, Mr. Cecil H. Donahue, conceded that  
he drove the road between 5:00 and 6:00 p.m., and he knew then  
that the road "probably did need sanding." Notice to Donahue  
was notice to the state in these circumstances.

The accident occurred at approximately 8:00 p.m. By  
that time the road had been in a bad condition for many hours.  
Since the highway maintenance facility was only about one mile  
from where the accident took place, time, in conjunction with  
logistics, would not have been a barrier to sanding the road.  
Nevertheless, the state did not begin sanding until after the  
accident.<sup>4/</sup>

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<sup>4/</sup> Compare Tetreault v. State, 269 N.Y.S.2d 812 (Ct. Cl. 1966),  
where the state began sanding 1/2 hour after it became aware of

Regarding the availability of men and equipment, suffice it to say that shortly after the accident, the road in fact was sanded.<sup>5/</sup>

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4. (Cont'd.)

the icy conditions. The court found that the state was not negligent, despite its failure to reach and sand that portion of the highway where the accident occurred.

5/ This does not mean that proof of subsequent repairs is to be admitted as direct evidence of negligence. Cf. *Otis Elevator Co. v. McLaney*, 406 P.2d 7, 15 (Alaska 1965); *Gunsolus v. City of Fairbanks*, 391 P.2d 13, 14 (Alaska 1964); *City of Anchorage v. Steward*, 374 P.2d 737, 739-40 (Alaska 1962). Rather, Alaska's position on this matter comports with the Federal Rule of Evidence 407, which provides:

"When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." (emphasis added)

Specifically, in *State v. Abbott*, 498 P.2d 712, 725 (Alaska 1972), we held that "availability of men and equipment" is a relevant factor in determining whether lack of road maintenance exposed plaintiff to an unreasonable risk of harm. Such evidence is crucial in determining whether a defendant could have done what plaintiff is claiming should have been done.

Therefore, the fact that the road maintenance crew in the present case did sand the Mitkof Highway shortly after the accident is admissible to prove that the road also could have been sanded before that time.

As to the amount of traffic on the highway, foreman Donahue stated that the accident occurred on the "most heavily traveled" portion of the Mitkof Highway. Other evidence established that, even on that raw, nasty night, numerous other vehicles were on the road.

Finally, we have held that an unexcused violation of administrative regulations may be negligence itself, or may be relevant evidence bearing on the issue of negligent conduct. Ferrell v. Baxter, 484 P.2d 250, 263-64 (Alaska 1971). The Department of Highways has adopted certain "standard operating procedures" with regard to highway maintenance. S.O.P. 4301-06 provides at page 13:

"Sanding crews must be dispatched at the first indication that traffic is having difficulty, with particular attention given to intersections and grades. Maintenance crews in outlying areas must keep steep grades and sharp curves well sanded, working overtime and at night if conditions warrant. Maintenance foremen must be alert to this condition and plan accordingly, and employees should be instructed to report for duty when inclement weather threatens. Sanding operations must continue as long as conditions warrant. First priority should be given to hills, intersections and curves. In the vicinity of the more populated areas, sanding crews should be dispatched in sufficient time to provide protection for the early morning and evening traffic proceeding to and from work and school."

Certainly the spirit, if not the letter of this regulation, was not complied with. The record, as a whole, shows no clear error whatever in Judge Carlson's finding that the state was negligent.

The state also argues that Judge Carlson erred in finding that the state's negligence caused the front-end loader to topple off the road. It contends that the evidence shows that the loader was simply driven off the road. Since there is no indication of slipping or sliding prior to the vehicle falling off the road, the state seemingly reasons that the icy road conditions did not cause the accident.

However, appellants never contended that the vehicle slid off the road. Their theory is that in order to obtain traction on a downhill grade with a rightward turn at the end, the driver of the vehicle was forced to allow his rig to go into the snow berm on the side of the road. The accident occurred when the berm suddenly and unpredictably broke through or ran out, causing the rig to topple off.

Appellants came forward with several witnesses who had extensive experience with operating heavy equipment. They testified that the driver probably had driven into the berm to obtain traction, and that this was the proper and only recourse available, once the vehicle started down the icy grade. To overcome this showing, the state offered highly speculative testimony to the effect that the men might have simply driven off the road during a moment of inadvertence.

In City of Fairbanks v. Schaible, 375 P.2d 201, 204 (Alaska 1962), we stated:

"A mere possibility of causation is not enough. When the matter remains one of conjecture . . . the trial court must find against the party carrying the burden of proof."

Appellants produced substantial testimony tending to show that decedents were forced to drive into the snow berm to obtain traction. That the vehicle did not leave the main road before descending the grade also substantiates this theory. We find that no error was made in the ruling that the state's negligence in failing to sand the road was a cause of the accident.

Turning to the conduct of the decedents, appellants urge that Judge Carlson erred in finding that Lindley and Kaatz were also negligent on the night of December 9, 1970. Because the facts surrounding the conduct of each man differ slightly, we will consider each case separately.

With regard to Ronald Lindley, Judge Carlson found that:

"22. The condition of the Mitkof Highway . . . became known to Mr. Lindley immediately when the vehicle proceeded onto the highway.

23. The condition of the Mitkof Highway on the evening of December 9, 1970 was so slippery that it was unreasonable for any person experienced with a front-end loader to operate such a vehicle on the highway except in case of an emergency."

Having apparently determined that Lindley's conduct was both voluntary and unreasonable,<sup>6/</sup> the judge concluded that Lindley's own negligence was a cause of his death.

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<sup>6/</sup> Cf. Hale v. O'Neill, 492 P.2d 101, 103 (Alaska 1971); Young v. State, 491 P.2d 122, 124-25 (Alaska 1971).

It is well established that knowingly crossing icy terrain in and of itself does not constitute negligent conduct.<sup>7/</sup> On the other hand, we have often intimated that knowing or having reason to know of such a dangerous condition is a minimum prerequisite to establishing negligence on the part of a plaintiff.<sup>8/</sup> In Ronald Lindley's case we must attempt to determine whether it was unreasonable to infer that he knew or should have known of the Mitkof Highway's icy condition immediately upon entering into it.<sup>9/</sup>

Our review of the record suggests that, in concluding that Lindley was aware of the road's condition immediately upon entering onto it, Judge Carlson apparently inferred knowledge based on the testimony of witnesses who stated that the road generally was very icy by late afternoon. However, the only direct testimony regarding the condition of the road immediately in front of the barge dock supports

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7/ Kremer v. Carr's Food Center, Inc., 462 P.2d 747, 752 (Alaska 1969); Cummins v. King & Sons, 453 P.2d 465, 467 (Alaska 1969); Hale v. City of Anchorage, 389 P.2d 434, 436 (Alaska 1964); Peterson v. Lang, 58 N.W.2d 609, 612 (Minn. 1953).

8/ See Roach v. Benson, 503 P.2d 1392, 1394 (Alaska 1972); Cummins v. King & Sons, 453 P.2d 465, 467 (Alaska 1969); Saslow v. Rexford, 395 P.2d 36, 41 (Alaska 1964); Hale v. City of Anchorage, 389 P.2d 434, 436 (Alaska 1962).

9/ Nothing in Judge Carlson's findings or in any of the briefs on record suggests that Lindley had any knowledge of the road's condition prior to going onto it. Nor is it likely that he would have had such prior knowledge since he did not live in Petersburg, and had arrived at the barge dock only shortly before the accident occurred.

the conclusion that Lindley would not have realized the hazardous condition until it was too late to do anything about it, i.e., after the loader started down the grade, one-half mile from the barge dock.

Mr. Dreka, who was supervising the men that night, drove his truck, without chains, to the crash scene. He did not recall having any problem driving to the scene. Additionally, a local resident testified that the road conditions varied from one spot to another, and that the area across from the barge landing wasn't always as bad as other spots on the road. Finally, there was no evidence that the loader encountered any difficulty prior to reaching the downhill grade.

There is nothing in the record to suggest that it is per se unreasonable to drive a front-end loader on either snowy or wet roads. Although such a vehicle has a propensity for instability on icy roads, every witness with experience on heavy equipment had driven similar equipment in inclement weather.

It is well established that something more than the mere occurrence of an accident generally must be shown before an inference of lack of due care will arise.<sup>10/</sup> We have

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<sup>10/</sup> See Cummins v. King & Sons, 453 P.2d 465, 467 (Alaska 1969); W. Prosser, Torts, § 39 at 211 (4th ed. 1971); 11 Blashfield, Automobile Law and Practice, § 417.2 at 116 (1968).

previously held that, if there is no evidence from which a judge could reasonably infer contributory negligence, a finding of contributory negligence constitutes clear error and must be reversed. Roach v. Benson, 503 P.2d 1392, 1394 (Alaska 1972).

In the case of Ronald Lindley, we are unable to ascertain from the findings of fact which Judge Carlson entered, what evidentiary basis he relied upon in concluding that Lindley's conduct was negligent. Specifically, we are uncertain about the evidentiary underpinnings for finding of fact #22, which states that the slippery condition of the Mitkof Highway "became known to Mr. Lindley immediately when the vehicle proceeded onto the highway." Certainly if Lindley did know of the icy conditions of the road, and yet voluntarily proceeded to drive on it in an unstable front-end loader, that conduct could be found to constitute negligence. But, if Lindley reasonably realized the condition of the road only at a time and place at which it was too late to halt the vehicle, negligence would have to be predicated on something other than the mere fact that he was driving an unstable vehicle in known icy conditions. Therefore, we remand this portion of the case for further findings of fact regarding the basis for the conclusion that Lindley was negligent.<sup>11/</sup>

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<sup>11/</sup> The state has argued that certain other facts established Lindley's negligence that night. Thus, it has been noted that Lindley departed in the loader without advising Dreka of

In the case of Donald Kaatz, the circumstances are somewhat different. The trial judge found that Donald Kaatz "had driven the portion of the Mitkof Highway which was . . . traversed by the loader within a short time before he climbed into the . . . loader" for the fatal trip. He also found that the condition of the Mitkof Highway "was known to Mr. Kaatz before he climbed into the . . . loader" that night. Finally, the court found that it was unreasonable to operate a loader under those conditions. Therefore, Judge Carlson concluded that Kaatz' conduct was negligent.

There are several facts in the Kaatz case which support the finding that Kaatz had traveled the road shortly before the accident and therefore knew the condition of the road. First, he was living in Petersburg, four miles north of the barge site, on the day in question. Second, he met the barge when it arrived at about 6:30 or 7:00 p.m. that

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11. (Cont'd.)

his departure. While the "usual practice" consisted of Dreka and Kaatz preceding Lindley and the loader with a pickup truck, there was no evidence that a variation from the normal procedure had any bearing on the accident.

The state has noted that Lindley and Kaatz were both riding in the loader's cab in violation of company policy. While this is not disputed, there is no evidence showing any causal connection between the violation and the accident. In addition, evidence suggests that the presence of two men in a cab is not uncommon.

Finally, there was evidence that another loader was already at the gravel pit and therefore it might not have been necessary to drive the death vehicle at all that night. This fact is only relevant if Lindley had been aware of the road's condition.

night, having driven to the barge site in the company's pickup truck. Finally, certain precautionary flares, which Kaatz usually lit when the company was about to load gravel, were lit when the barge arrived at the Petersburg dock that night.

It is entirely reasonable to infer from these facts that Kaatz had driven to the dock shortly before the barge arrived. It seems implausible that Kaatz would have arrived early and waited at the dock for a long time, since the weather was raw and nasty and his home was only a short distance from the dock. Although several witnesses had driven past the dock earlier in the day, there was no testimony placing Kaatz at the dock at any appreciable time before the arrival of the barge.

If Kaatz did drive the road shortly before climbing into the loader, then it is apparent that he would have or should have perceived the treacherous and unsanded condition of the road. If, despite such knowledge, he chose to ride in the cab of a vehicle which is notoriously "unstable" on ice, then his conduct can be properly said to be voluntary and unreasonable. We hold that the trial court did not commit clear error in ruling that Kaatz' conduct that evening was negligent.

III.

Since we find no clear error in the trial court's ruling that Donald Kaatz was contributorily negligent on the night of the accident, we must next decide whether such negligence should continue to operate as a complete bar to recovery in cases such as this.

Initially we must consider a procedural objection which the state raises, regarding our review of the issue. The state points out that plaintiff Kaatz first presented the issue of comparative negligence to the trial court on a motion to amend and supplement the court's findings of fact and conclusions of law. It is urged that the issue was not presented below in a timely manner, and therefore is not properly before this court on appeal.<sup>12/</sup>

We have consistently held that an issue which was not raised in the trial court will not be reached on appeal.<sup>13/</sup> Likewise, in jury cases, one cannot await the jury's verdict before objecting to various aspects of the preceding trial.<sup>14/</sup>

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<sup>12/</sup> We note that the state has devoted one paragraph to this procedural contention, and has not cited any authority in support of its claim. This normally would render the state's claim non-meritorious. *Wernberg v. Matanuska Electric Association*, 494 P.2d 790, 794 (Alaska 1972). However, because of the importance of the issue in question, we will briefly address the argument.

<sup>13/</sup> See, e.g., *University of Alaska v. Simpson Building Supply Co.*, 530 P.2d 1317, 1324 (Alaska 1975); *Powell v. Alaska Marine Equipment, Inc.* 453 P.2d 407, 410 (Alaska 1969).

<sup>14/</sup> See *Veal v. Newlin, Inc.*, 367 P.2d 155, 157 (Alaska 1961).

But, in this judge-tried case, appellant called the matter to the attention of the trial court by motion, memorandum and oral argument, and the trial court expressly rejected appellant's contention. Under these circumstances the issue is properly before us on appeal.<sup>15/</sup> We now turn to the question of whether the doctrine of contributory negligence should have continued vitality in Alaska.

Contributory negligence is the failure of a plaintiff to use due care for his own safety. When contributory negligence is a substantial factor in bringing about a plaintiff's harm, it operates in law to prevent a recovery of damages by him, even though he was injured through the negligence of the defendant. Restatement (Second) of Torts § 463 (1965). This has been the rule followed in Alaska in the past. Saslow v. Rexford, 395 P.2d 36, 41 (Alaska 1964); Ogden v. State, 395 P.2d 371, 372 (Alaska 1964); Bertram v. Harris, 423 P.2d 909, 914 (Alaska 1967).

The contributory negligence doctrine is of judicial origin. Traditionally it is ascribed to the opinion of Lord Ellenborough in Butterfield v. Forster, 103 Eng. Rep. 926 (K.B. 1809). In that case plaintiff was riding on his horse at a fast pace on the highway. He ran into an obstruction in the roadway which had been left there by defendant. While

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<sup>15/</sup> Cf., Church v. Roemer, 498 P.2d 1255, 1258 n.3 (Idaho 1972); Williams v. Idaho Potato Starch Co., 245 P.2d 1045, 1050 (Idaho 1952).

the case can be interpreted as merely a holding that the plaintiff was himself the sole cause of the accident,<sup>16/</sup> it gave rise to the broad and sweeping principle described above. This principle held full sway in the nineteenth century and still persists in the twentieth century, although it has undergone modifications and has been replaced in many jurisdictions by some system of comparative negligence.

Contributory negligence is an "all-or-nothing" doctrine. When it is operative it is a total bar to recovery by an injured plaintiff. A comparative negligence rule, on the other hand, seeks to apportion damages, i.e., distribute responsibility, in proportion to the degree of fault attributable to the parties who have negligently caused an injury.

It should be noted that comparative negligence systems have long been employed in other nations and in various jurisdictions in the United States. In one form or another it is the system employed for apportioning damages in at least 27 states.<sup>17/</sup> In

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<sup>16/</sup> See V. Schwartz, Comparative Negligence 3-4 (1974). Apparently Lord Ellenborough's rationale is somewhat terse:

"[A] party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right." 103 Eng. Rep. at 927.

<sup>17/</sup> See *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1232, n.6 (Cal. 1975). These states include Arkansas, Colorado, Connecticut, Florida, 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, and most recently, California.

federal law comparative negligence has long been employed in admiralty personal injury cases. Under federal statutes it has been applicable since 1908 to cases arising under the Federal Employers Liability Act, 45 U.S.C. § 53, and since 1920 to cases arising under the Jones Act, 46 U.S.C. § 688, and under the Death on the High Seas Act, 46 U.S.C. § 766. It has long been used in other nations of the civilized Western world.<sup>18/</sup> Moreover, in England, the source of Butterfield v. Forrester, supra, and its precedential descendants, Parliament abolished the contributory negligence defense in 1945 and replaced it with a pure comparative negligence rule for apportioning damages.<sup>19/</sup>

The benefits to be derived from a comparative negligence rule are several. It diminishes the need to employ rules which are designed to ameliorate the harshness of the contributory negligence rule. For example, the "last clear chance" doctrine becomes largely superfluous in jurisdictions which employ the comparative negligence rule. It is said that comparative negligence provides a better distribution of risk under a fault system of liability, for both plaintiffs and defendants benefit to the extent of their respective blameworthiness or lack thereof.<sup>20/</sup>

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<sup>18/</sup> See V. Schwartz, supra note 16, at 9-10. These countries include Austria, Canada, France, Germany, the Philippines, Portugal, and Spain.

<sup>19/</sup> Law Reform Act of 1945, 8 & 9 Geo. 6, c. 28.

<sup>20/</sup> See V. Schwartz, supra note 16, at 339-41.

The supporters of the contributory negligence rule have argued that fault cannot be measured on a scientific basis, that contributory negligence is a deterrent to careless conduct, that comparative negligence is difficult for courts to administer, and that settlement of negligence cases is encouraged by the contributory negligence rule.<sup>21/</sup> Contrary arguments have already been presented.

Although jurors' verdicts are not precisely scientific, an allocation of proportionate fault approaches reality more closely than the total loss or victory represented by the contributory negligence rule. As to the deterrent effect of the contributory negligence rule, Dean Prosser points out that the law must also aim to deter wrongful conduct by defendants and not only plaintiffs.<sup>22/</sup> Judicial administration of the rule has not presented insuperable difficulties in those jurisdictions which have long employed it. Experience has not borne out the argument that comparative negligence is difficult for courts and juries to apply.

Similarly, careful studies tend to show that settlement of cases can be achieved as readily under the

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<sup>21/</sup> Id. at 335-37.

<sup>22/</sup> W. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 468 (1953).

comparative negligence system as under the contributory negligence rule.<sup>23/</sup> Studies have also shown that the effect of the comparative negligence rule on insurance rates is minimal.<sup>24/</sup>

The central reason for adopting a comparative negligence system lies in the inherent injustice of the contributory negligence rule. As the California Supreme Court recently observed concerning the contributory negligence doctrine:

"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. Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task. The basic 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." Li v. Yellow Cab Company, 532 P.2d 1226, 1230-31, (Cal. 1975) (footnotes omitted).

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<sup>23/</sup> Rosenberg, Comparative Negligence in Arkansas: A "Before and After" Survey, 36 N.Y.S.B.J. 457 (1964).

It has been reported that in maritime personal injury cases involving a federal question, in which a comparative negligence standard is used, only 9.6% of the cases terminated in 1974 ever reached trial. Annual Report of the Director of the Administrative Office of the United States Courts, Table C4, at 429 (1974). This supports the argument that a comparative negligence standard does not seriously discourage settlements.

<sup>24/</sup> V. Schwartz, supra note 16, at 337-38.

And as Professor Prosser has stated:

"The hardship of the doctrine of contributory negligence upon the plaintiff is readily apparent. It places upon one party the entire burden of a loss for which two are, by hypothesis, responsible. The negligence of the defendant has played no less a part in causing the damage; the plaintiff's deviation from the community standard of conduct may even be relatively slight, and the defendant's more extreme; the injured man is in all probability, for the very reason of his injury, the less able of the two to bear the financial burden of his loss; and the answer of the law to all this is that the defendant goes scot free of all liability and the plaintiff bears it all." W. Prosser, Torts 433 (4th ed. 1971).

Of great significance to us is the recent adoption of a comparative negligence rule by judicial decision in other jurisdictions. In many instances the rule has been adopted through legislative action, but increasingly it is perceived that a rule which is judicial in origin can be, and appropriately should be,<sup>25/</sup> altered by the institution which was its creator.<sup>26/</sup> Thus Florida in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), and California in Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975), through the judicial process have overturned the contributory negligence rule and have replaced it with the comparative negligence principle.

We are also particularly impressed with a recent decision of the United States Supreme Court in the field of

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<sup>25/</sup> See Leflar, Comments on Maki v. Frelk, 21 Vand. L. Rev. 918, 926-29 (1968).

<sup>26/</sup> Contra, Maki v. Frelk, 239 N.E.2d 445, 447 (Ill. 1968); Krise v. Gillund, 184 N.W.2d 405, 409 (N.D. 1971).

admiralty. In United States v. Reliable Transfer Co.,  
-U.S.-, 44 L.Ed 2d 251 (1975), the Court discarded the  
historic rule of divided damages in maritime collision cases  
and replaced it with a pure comparative negligence rule.  
Hereafter liability for property damages in admiralty collision  
cases will be allocated in proportion to the fault of each party.

The Court's reason for abandoning the divided damages  
rule is relevant to our consideration of the contributory  
negligence rule: the divided damages rule, like the contributory  
negligence rule, yields palpably crude and inequitable results  
in cases where the degree of fault is greatly disproportionate.  
Furthermore, the Court was persuaded by the rejection of the  
rule by every other maritime nation in the world. All other  
maritime nations, including England where the rule emerged,  
employ a proportionate fault measure of damages in marine  
collision cases.

It appears to us that continued adherence to the  
contributory negligence rule, absent legislative change,  
represents judicial inertia rather than a reasoned consideration  
of the intrinsic value of the rule. We are persuaded that  
the contributory negligence rule yields unfair results which  
can no longer be justified. We hold, therefore, that the  
doctrine of contributory negligence shall no longer be  
applicable in Alaska, and in its stead the principle of  
comparative negligence must be applied.

Systems of comparative negligence can take several forms. Under a "pure" form the plaintiff's damages are simply reduced in proportion to the amount of negligence which is attributed to him. There are also several "modified" forms of comparative negligence. One of these is the divided damages rule in maritime collision cases, which has now been abolished. Another is the 50% system, applicable by statute in many of the states. Under that system a negligent plaintiff may recover so long as the amount of his fault does not exceed 50% of the total fault attributable to the parties.<sup>27/</sup> We are convinced that the pure system is the one which is the simplest to administer and which is best calculated to bring about substantial justice in negligence cases. It is the system most favored by modern jurists and commentators.<sup>28/</sup> We will employ the pure system of comparative negligence hereafter in Alaska.

Our adoption of this new principle does not, of course, end our judicial tasks in this area. Subsidiary questions and problems concerning the relationship of the new rule to other doctrines of tort law must necessarily be adjudicated in the future. We must, for the most part,

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27/ There are numerous variations of the modified system. These are discussed at length in V. Schwartz, supra note 16, at 73-82.

28/ See, e.g., Hoffman v. Jones, 280 So. 2d 431, 436-37 (Fla. 1973); Li v. Yellow Cab Co., 532 P.2d 1226, 1240 (Cal. 1975); United States v. Reliable Transfer Co., 43 U.S.L.W. 4610, 4612-14 (May 19, 1975); V. Schwartz supra note 16, at 341-48.

await future cases for the further development of law in this field.

We are, however, prepared to deal with one facet of the comparative negligence rule at this time: the status of the doctrine of "last clear chance". The rationale underlying this doctrine is that even though the plaintiff has been contributorily negligent he should still be able to recover his entire damages if the defendant had the last opportunity to avoid the accident. The application of the doctrine is particularly apt in cases where the plaintiff is in a helpless predicament, owing to his own negligence, and the defendant, although perceiving plaintiff's situation and realizing the plaintiff's peril, fails negligently thereafter to avoid injuring the plaintiff.<sup>29/</sup> Unfortunately the search for limits to the doctrine and for the proper sphere of its application has led to great confusion in the law of tort, much of which can probably never be dispelled.<sup>30/</sup> But it is

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<sup>29/</sup> The doctrine had its origins in the English case of *Davies v. Mann*, 152 Eng. Rep. 588 (1842). Plaintiff there left his ass fettered upon the highway, and the defendant drove into it. It was held that plaintiff could recover, despite his negligence, if the defendant might by proper care have avoided injuring plaintiff's animal. One commentator has said,

"[T]he doctrine has been in search of a lucid rationale ever since." V. Schwartz, supra note 16, at 129.

<sup>30/</sup> See the discussion in W. Prosser, *Torts*, 427-33 (4th ed. 1971).

recognized by nearly all who have reflected upon the subject that the last clear chance doctrine is, in the final analysis, merely a means of ameliorating the harshness of the contributory negligence rule.<sup>31/</sup> Without the contributory negligence rule there would be no need for the palliative doctrine of last clear chance. To give continued life to that principle would defeat the very purpose of the comparative negligence rule--the apportionment of damages according to the degree of mutual fault. There is, therefore, no longer any reason for resort to the doctrine of last clear chance in the courts of Alaska.<sup>32/</sup>

Lastly, we must determine the extent to which the rule we have announced today shall have application to cases other than those which are filed in the future. The rule will, of course, apply in the retrial of the case in which we have reversed the judgment today. It will also apply to any case in which the trial commences after the date of this opinion. In any case pending on direct appeal in which the

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31/ See, e.g., *id.* at 433; *Cushman v. Perkins*, 245 A.2d 846, 850 (Maine 1968); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1237 (Cal. 1975).

32/ This is not to say that the notion of last clear chance is unavailable as a matter of trial court advocacy. Either party may attempt to persuade the trier of fact that one party or another should bear a greater proportion of the liability for an accident by reason of the factual pattern adduced, including a consideration of the helplessness or inattentiveness which may have led to a plaintiff's predicament, with subsequent injury at the hands of a negligent defendant.

application of the comparative negligence rule was requested or asserted in the trial court, and in which the request or assertion was preserved as a ground for appeal, there shall be a retrial under the principle of comparative negligence. Our holding today will be applicable to any trial which has commenced, but has not been submitted for decision by the trier of fact, and in which prior to submission to the trier of fact for decision there has been a request or an assertion that the rule of comparative negligence should be applied.

We observe that in the present case defense counsel offered no evidence with regard to the issue of damages. This may have occurred because of a belief by defense counsel that under the contributory negligence doctrine plaintiffs' claims should have been barred entirely. Since we have abandoned the contributory negligence doctrine today, we feel that it is appropriate to require a new trial on the issue of damages.

We remand this case to the superior court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART.

March 1, 1977

MEMO

TO: Terry Gardiner  
Steve Cowper

FROM: John Sund *JS*

RE: Hb 124

*file HB  
124*

HB 124 is scheduled for hearing in the Judiciary for Wednesday, March 2, 1977. On my advice that bill has been taken off the calendar for a brief period of time for further review prior to a hearing.

I have not had a chance to talk with Mr. Cowper directly regarding the intent behind the bill and what it is to accomplish. There are several facets of comparative negligence which are not dealt with in the bill and which are really the guts of deciding where comparative negligence is going to go in the State of Alaska. The present bill, as written, basically does not add anything to the Supreme Courts' decision in the Kaatz-Linsley case.

The area of multiple defendants is not addressed in the bill. The basic question is whether, in the situation of multiple defendants, where one of the defendants is insolvent that the other defendants will be jointly and separately liable for the damages.

It may be that the sponsors of the bill have resolved that issue in the bill, in fact, does represent all of the areas they wish it to address but I have not had a chance to discuss that with them. I know the Bar Association is attempting to come up with a position on the issue of the multiple defendants and to the best of my information would like to testify at the hearing. I also talked to Milard Ingrham, an attorney in Fairbanks, who is a member of the Alaska Bar Association Civil Rules Committee and also had sent a letter regarding the Uniform Comparative Fault Act to Rep. Cowper. In that conversation, he indicated he would like to testify before the Committee on the bill and that the present HB 124 as introduced did not address the major issues that he considered to be necessary.

I will attempt to contact Legislative Affairs to see who drafted the bill. Hopefully we can put the bill back on the calendar for early or the middle part of next week.

Introduced: 1/28/77  
Referred: Commerce and  
Judiciary

1 IN THE HOUSE

BY COWPER AND BROWN

2 HOUSE BILL NO. 124

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to comparative fault."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 \* Section 1. AS 09.16.020(1) is amended to read:

9 (1) their relative degrees of fault shall be the basis for  
10 allocation [NOT BE CONSIDERED];

11 \* Sec. 2. AS 09 is amended by adding a new chapter to read:

12 CHAPTER 17. COMPARATIVE FAULT.

13 Sec. 09.17.010. CLAIMANT'S CONTRIBUTORY FAULT. In a tort action  
14 for damages based on negligence, recklessness, or strict liability (in-  
15 cluding breach of warranty), a claimant's contributory fault does not  
16 bar recovery but has the effect of diminishing his damage proportion-  
17 ately according to his own fault or the fault attributable to him. In a  
18 derivative action or an action for wrongful death, the claimant's  
19 damages are diminished according to the fault of any person whose con-  
20 duct might otherwise have barred the liability. This section applies  
21 whether or not the contributory fault previously constituted a defense  
22 and replaces such common law principles as last clear chance and implied  
23 assumption of risk.

24 Sec. 09.17.020. SPECIAL INTERROGATORIES. In a tort action in-  
25 volving contributory fault, the court, unless otherwise requested by the  
26 parties, shall instruct the jury to give answers to special interroga-  
27 tories (to render special verdicts), or make findings itself if there is  
28 no jury, indicating

29 (1) the amount of damages each claimant would recover if con-

1 tributary fault were disregarded; and

2 (2) the percentage of the fault for each party to the action  
3 as compared with the combined fault of all parties to the action. For  
4 this purpose, the court may determine that two or more persons are  
5 appropriately treated as a single party.

6 Sec. 09.17.030. DAMAGES SET OFF. Damages awarded under this chap-  
7 ter may be set off only to the extent that an award against one party  
8 cannot be collected.

9 Sec. 09.17.040. INJURIES AFFECTED. This chapter applies to all  
10 injuries incurred after the effective date of this Act.

11 Sec. 09.17.050. SEVERABILITY. If any provision of this chapter or  
12 application of it to any person or circumstance is held invalid, the  
13 invalidity does not affect other provisions or applications of the chap-  
14 ter that can be given effect without the invalid provision or applica-  
15 tion, and to this end the provisions of this chapter are severable.

16  
17  
18 → Florida - does -

Millard Ingram

19  
20 *multi*  
21 *Joint Tortfeasors*

22  
23 *Brown*

24 *Casper*

25 *Boddy*  
26  
27  
28  
29

RICE, HOPPNER & HEDLAND

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GEORGE S. SMALL  
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December 30, 1976

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Representative Steve Cowper  
Pouch V  
Juneau AK 99811

Re: Uniform Comparative Fault Act

Dear Steve:

Enclosed please find a copy of Uniform Comparative Fault Act with my proposed modifications. I have already spoken to you generally about the Act.

As I mentioned, the Act first came to my attention as a member of the Alaska Bar Association Civil Rules Committee. The Act was sent to us by Chief Justice Boochever with the request that we review it with the idea, I assume, of adopting it as a Civil Rule. All members of the committee felt they were disqualified from acting with regard to the Act because all had cases pending that would be directly affected by some portion of the Act. Furthermore, all members of the committee felt that the matters contained in the Act were more appropriately the subject for legislation rather than rules. Regardless of what our committee felt, I believe it can be inferred from Chief Justice Boochever's request to the committee that if the legislature does not adopt some sort of legislation implementing comparative negligence in Alaska, the court will do so by rules.

The main argument that I have with the proposed Act is in section 3. Under section 3, the common law doctrine of joint and several liability of joint tortfeasors is abolished and all parties, including the injured party, must share proportionately in the insolvency of an uninsured or otherwise insolvent tortfeasor. This is not the law in other jurisdictions that have considered the problem. See 57 Am. Jur. 2nd, Negligence §435, especially notes 12, 13, and 14, a copy of which I am enclosing. The whole theory of comparative negligence is that a tort victim should be penalized in recovery from a tortfeasor in an amount equal to his contribution to his own injuries. It would be contrary to the humanitarian spirit of the doctrine to further penalize the tort victim for the

Representative Steve Cowper  
Re: Uniform Comparative Fault Act  
December 30, 1976  
Page 2

insolvency of one or more tort feasons. Furthermore, the proposed Act, in practice, would severely complicate litigation. I can imagine in every action filed under the proposed Act, that defendants would attempt to join every potential insolvent defendant around in an effort to decrease their own liability. I have had many cases where potential defendants are not joined because they are uninsured or otherwise insolvent and to join them under such circumstances would merely complicate the litigation. Defendants in such actions have not joined them either because, under the rule of joint and several liability, they know that they could not collect contribution from them. But if there is no joint and several liability, there would be very good reason for defendants to join insolvent defendants in an effort to reduce their own liability to the plaintiff.

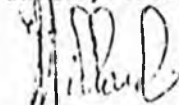
The other changes that I have made are strictly technical. I have everywhere changed "plaintiff" to "claimant" and "defendant" to "tort feason". The reason for this is that often a tort claimant may be cast in the role of a counterclaiming defendant and a tort feason may be cast in the role of a plaintiff. In section 5, I have adopted alternative 1, for the reasons stated in the second paragraph of the comments, and for the reason that some defendants, may be uninsured but have assets or be self-insured. I believe that the amendment to the Uniform Contribution Among Tort Feasons Act should be adopted.

I wish that you would attempt to get this Uniform Act, as amended by me, adopted as law. I have no particular vanity about draftsmanship and would be agreeable to any language so long as the end is accomplished.

If you have any questions, please do not hesitate to call me collect, either at the office (452-1201) or at home (456-5000). I would like to go to Juneau to testify at any important hearings regarding the Act and would appreciate it if you would advise me when any are scheduled.

Yours very truly,

RICE, HOPPNER & HEDLAND



Millard F. Ingraham

MFI/mcb  
Enclosures

A M E N D M E N T

Offered in the HOUSE

By the Commerce Committee

TO: HOUSE BILL NO. 124

Page 1, line 6:

After "fault" add "; and amending Rule 49(c) of the Alaska Supreme Court's Rules of Civil Procedure"

Page 2, line 16:

Add a new section to read:

"Sec. 3. AS 09.17.020 of sec. 2 of this Act amends Rule 49(c) of the Alaska Supreme Court's Rules of Civil Procedure by requiring the trial court to instruct the jury to give answers to special interrogatories in a tort action involving contributory fault."

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

JAY S. HAMMOND, GOVERNOR

POUCH K - STATE CAPITOL  
JUNEAU 99811

February 14, 1977

The Honorable Steve Cowper  
Chairman  
House Finance Committee  
Tenth State Legislature  
Pouch V  
Juneau, Alaska 99811

The Honorable Fred Brown  
Chairman  
Labor and Management Committee  
Tenth State Legislature  
Pouch V  
Juneau, Alaska 99811

Re: HB 124

Dear Representatives Cowper and Brown:

The following are comments on behalf of the Attorney General's Office on the referenced bill.

The primary effect of the bill is to make a matter of statute the doctrine of "pure" comparative negligence established by the Alaska Supreme Court in Kaatz v. State, 540 P.2d 1037 (Alaska 1975). The bill would appear to achieve its purpose in this regard.

There does appear to be at least one difficulty with the bill. In order to make this apparent difficulty clear, some background discussion is necessary. The Uniform Contribution Among Joint Tortfeasors Act has been enacted into statute in Alaska at AS 09.16.010 - .060. Prior to comparative negligence becoming the law of Alaska, a claimant in a tort action could recover a judgment rendered against joint tortfeasors from any one or a combination of the joint tortfeasors who had done him injury. Additionally, the Uniform Contribution Among Joint Tortfeasors Act provided

In determining the pro rata shares of tortfeasors in the entire liability their relative degrees of fault shall not be considered. AS 09.16.020(1).

The bill in Section 1 proposes an amendment to that provision as follows:

The Honorable Steve Cowper  
The Honorable Fred Brown  
February 14, 1977  
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In determining the pro rata shares of tortfeasors in the entire liability their relative degrees of fault shall be the basis for allocation [NOT BE CONSIDERED].

The draft of the Uniform Comparative Fault Act, largely relied on by the drafters of the bill, has an additional section not incorporated into the bill which reads as follows:

Section 3. Contribution rights among multiple defendants are determined in accordance with the percentage of fault of each defendant, as found by the trier of fact. The court shall enter judgment on the basis of those rights and findings made under Section 2. If a judgment against a party cannot be collected within [one year] after the judgment becomes final, the responsibility for the amount involved is distributed among the other parties in proportion to their relative fault.

This section has two effects: (1) it makes it clear that contribution among joint tortfeasors is to be determined on the basis of their relative degrees of fault (see AS 09.16.020(1), set forth above), and (2) it provides that if one tortfeasor cannot be made to pay his share of the judgment because he is uninsured or otherwise insolvent, then all parties, including the claimant, shall bear the burden proportionate to their relative degrees of fault. The second effect of the proposed section is to change the common law, in that, if part of a judgment is uncollectible, the amount that the claimant is to receive will be diminished proportionate to his own negligence as determined by the trier of fact.

The bill does not include this section of the draft Uniform Comparative Fault Act, apparently with the intent not to diminish the claimant's recovery proportionate to his relative degree of fault in the situation where part of the judgment is uncollectible. For example, assume that a court determines the injuries to a claimant to be \$100,000, and that the plaintiff and the two joint tortfeasors are each 33% liable. If both tortfeasors are solvent, the claimant would collect \$33,000 from each of them. However, if one of the two joint tortfeasors is insolvent, then under the section of the draft Uniform Comparative Fault Act set forth above (which the bill does not incorporate), the claimant and the solvent tortfeasor would have to share the loss proportionate to their relative degrees of fault, and

The Honorable Steve Cowper  
The Honorable Fred Brown  
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the claimant would collect \$50,000 of his judgment (\$33,000 from the solvent joint tortfeasor, plus an additional \$17,000 from that same joint tortfeasor, which represents one-half of the uncollectible part of the judgment). On the other hand, the apparent intent of the bill is to allow the claimant to collect the entire judgment to which he would be otherwise entitled. Under the fact situation above, it is the apparent intent of the drafters of the bill to allow the claimant to collect all \$66,000 from the single solvent joint tortfeasor.

There is some question, however, as to whether the bill in fact achieves its purpose. Accordingly, it is suggested that an additional section be added to the bill, incorporating Section 3 of the draft Uniform Comparative Fault Act, set forth above, modified as follows:

Contribution rights among multiple tortfeasors [defendants] are determined in accordance with the percentage of fault of each tortfeasor [defendant], as found by the trier of fact. The court shall enter judgment on the basis of those rights and findings made under Section 2. If a judgment against a party cannot be collected within [one year] after the judgment becomes final, the responsibility for the amount involved is distributed among the other parties in proportion to their relative fault.

The purpose of this proposed change is explained in Millard F. Ingraham's December 30, 1976, letter to Representative Cowper. I repeat the applicable portion of Mr. Ingraham's letter below:

I have everywhere changed 'plaintiff' to 'claimant' and 'defendant' to 'tortfeasor'. The reason for this is that often a tort claimant may be cast in the role of a counterclaiming defendant and a tortfeasor may be cast in the role of a plaintiff.

If, on the other hand, the bill is to be drafted so as not to require that the claimant share in any diminution of the judgment proportionate to his relative fault, then the third sentence of Section 3 of the draft Uniform Comparative Fault Act should be modified as follows:

All tortfeasors liable to claimant are jointly and severally liable for all damages to which claimant is entitled.

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The Honorable Fred Brown  
February 14, 1977  
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This proposed change was also suggested in Mr. Ingraham's letter to you. Set forth below are the applicable comments in that letter:

The main argument that I have with the proposed Act is in section 3. Under section 3, the common law doctrine of joint and several liability of joint tortfeasors is abolished and all parties, including the injured party, must share proportionately in the insolvency of an uninsured or otherwise insolvent tortfeasor. This is not the law in other jurisdictions that have considered the problem. See 57 Am. Jur. 2nd, Negligence §435, especially notes 12, 13, and 14, a copy of which I am enclosing. The whole theory of comparative negligence is that a tort victim should be penalized in recovery from a tortfeasor in an amount equal to his contribution to his own injuries. It would be contrary to the humanitarian spirit of the doctrine to further penalize the tort victim for the insolvency of one or more tortfeasors. Furthermore, the proposed Act, in practice, would severely complicate litigation. I can imagine in every action filed under the proposed Act, that defendants would attempt to join every potential insolvent defendant around in an effort to decrease their own liability. I have had many cases where potential defendants are not joined because they are uninsured or otherwise insolvent and to join them under such circumstances would merely complicate the litigation. Defendants in such actions have not joined them either because, under the rule of joint and several liability, they know that they could not collect contribution from them. But if there is no joint and several liability, there would be very good reason for defendants to join insolvent defendants in an effort to reduce their own liability to the plaintiff.

Again, it is possible that the bill in its present form does not create the problem discussed above; however, Section 3 of the draft Uniform Comparative Fault Act, with the changes suggested above, does make the intent behind the legislation clearer. Section 3 also, in the second sentence,

The Honorable Steve Cowper  
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February 14, 1977  
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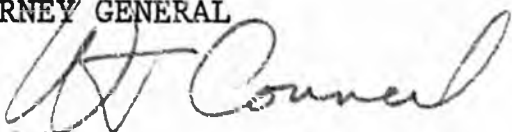
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specifies that the court shall as part of its judgment apportion damages. This sentence has the effect of dispelling any doubt as to the court's affirmative obligation to apportion at the time the initial judgment is entered.

If I can provide further assistance to the committee, please do not hesitate to contact me.

Sincerely,

AVRUM M. GROSS  
ATTORNEY GENERAL

By:   
William T. Council  
Assistant Attorney General

WTC:chp

cc: Hon. Terry Gardiner, Chairman  
House Judiciary Committee

John George  
Risk Management  
Dept. of Administration