HB

154

"An Act relating to criminal assault."

2/12/75

COMMITTEE REPORT

HOUSE

Mr. Speaker: Date _____

The Committee on Judiciary has had HB 154 under consideration. A Majority of the members of the Committee

( ) recommends it DO PASS

( ) recommends it DO NOT PASS

( ) recommends it DO PASS WITH ATTACHED AMENDMENT(S)

(✓) recommends it BE REPLACED WITH CS FOR HB 154 AND THAT CS FOR HB 154 DO PASS

( ) "and" recommends it BE REFERRED TO THE _____ COMMITTEE

( ) reports it back WITHOUT RECOMMENDATION

( ) "other"

Members signing the Majority report:

Jerry Hardin

Members NOT concurring in the Majority report:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

Jerry Hardin Chairman

February 20, 1975

House Judiciary Committee
Statement of Intent on CS HB 154

It is the intent of the committee to: first, delete archaic language found in the existing assault statutes; second, to include uniform provisions for fine and imprisonment for any type of assault; and third, because assault is a serious offense, to raise the maximum sentence for simple assault and assault and battery.

A section on aggravated assault has been added in order to cover the situation where great bodily injury results from an assault. The penalty for such an attack should be much more severe than it currently is (being only a simple assault misdemeanor with a maximum sentence of six months). An example of an aggravated assault might be the professional beating situation where the victim is seriously injured.

Section 11.15.228 is intended to reach those who cause injuries under circumstances which would justify a negligent homicide prosecution under AS 11.15.080, had death resulted. An archtypical example would be the operator of a motor vehicle who, while under the influence of intoxicating beverages, is involved in an accident which injures another as a direct and proximate result of his intoxicated condition. If the person dies, he can be prosecuted under AS 11.15.080, but if the victim lives, no matter how serious his injury, the driver under the present law can only be prosecuted for reckless driving or operating a motor vehicle under the influence of alcohol, both of which [illegible] misdemeanors.

House Judiciary Committee
February 14, 1975

HB 74/ HB 154 Assault

The meeting was called to order at 1:35 p.m. by Chairman Gardiner. All members were present except Mr. Cotton.

Dan Hickey, DA, testified that HB 154 cleans up technical problems and archaic language in the existing statutes and creates the new offense of aggravated assault.

The discussion centered primarily around language proposed by Mr. Brown including the word purposely. Mr. Hickey stated that this word might be interpreted by the courts to introduce an element of wilfulness or specific intent.

Rep. Parr objected to the proposed use of the word reckless since assault presupposes general intent.

Sec. 11.15.190, Assault while armed, imposes a minimum penalty of one year while Sec. 11.15.220 imposes a minimum sentence of six months. Also, 190 contains no fine provision. Mr. Hickey indicated no objection to making both one year minimums and the addition of a fine provision. Minimum sentences are unnecessary unless mandatory.

The committee discussed the possibility of forming a seperate section to cover Mr. Brown's proposed amendment. It was decided that the committee would meet again to vote on the original bill.

House Judiciary Committee
February 18, 1975

The meeting was called to order at 3:10 p.m. by Chairman Gardiner. Members present: Gardiner, Bradley, Fink, Cotton, Brown.

HB 45 Ombudsman

Stu Hall presented the committee substitute which incorporated the amendments requested by the committee. Rep. Fink moved that the CS be adopted after language on page 9 concerning the judicial branch be deleted. Mr. Brown amended Mr. Fink's motion to delete the language on the first two lines of page 10 also. Mr. Brown's amended motion failed. Mr. Fink's motion passed and so the CS was adopted. Mr. Brown moved that when the committee receives SB 1 that the CS HB 45 be substituted and that it do pass. There being no objection, Mr. Brown's motion passed.

HB 129 Smoking in Public

Mr. Gardiner indicated that he wished only an idea of what the committee intended to do with this bill. Mr. Fink stated that he would attempt to prove that smoking is not "dangerous" and would then add other habits that bother people to the bill. Mr. Brown recommended that the definition of public accommodation in the 1964 Civil Rights Act be checked to possibly include more public places. Other committee members mentioned other possible amendments including the substitution of approved air conditioning for separate areas.

HB 154/HB 74

Mr. Cotton moved that in 220 six months be changed to 1 year. Amendment 1 passed.

Mr. Brown moved that in 190 the language in lines 22 and 23 relating to imposition of fine be added.
Amendment 2 passed.

Mr. Brown will draft language to cover reckless actions to be another section either before or after Sect 4.

House Judiciary Committee
February 20, 1975

The meeting was called to order at 11:15 a.m. by Chairman Gardiner. All members were present except Mr. Bradley.

Rep. Brown explained his proposed language for a new section on reckless battery. He moved that this language be incorporated into the CS. There being no objection, Amendment 3 passed.

Rep. Brown moved HB 154 out with a do pass as the CS for HB 154. He also asked that a letter of intent be drafted to accompany the bill. There being no objection, CS HB 154 was passed out of committee.

PROPOSED AMENDMENT TO HOUSE BILL 154

After the end of section 3, line 6, page 2, add the following:

Sec. 4 AS 11.15 is amended by adding a new section to read:

Sec. 11.15.228. RECKLESS BATTERY. A person who recklessly causes great bodily injury to another under circumstances manifesting extreme indifference to the value of human life, is guilty of reckless battery. Upon conviction, a person guilty of reckless battery is punishable by imprisonment for not less than six months nor more than five years, or by a fine of not less than $ 100 nor more than $ 1,000, or by both.

Suggested letter of intent:

Section 11.15.228 is intended to reach those who cause injuries under circumstances which would justify a negligent homocide prosecution under AS 11.15.080, had death resulted. An archtypical example would be the operator of a motor vehicle who, while under the influence of intoxicating beverages, is involved in an accident which injures another as a direct and proximate result of his intoxicated condition. If the person dies, he can be prosecuted under AS 11.15.080, but the victim lives, no matter how serious his injury, the driver under present law can only be prosecuted for reckless driving or operating a motor vehicle under the influence of alcohol, both of which are misdemeanors.

now for other sections

summary

range of non-homicide injuries

by legal intent

225

February 14, 1975

TO: House Judiciary Committee

FROM: Fred Brown

SUBJECT: PROPOSED AMENDMENT TO HB 154
by the Rules Committee by Request of the Governor

I have suggested a change in the Governor's bill in Section 3 beginning at line 24. As it stands right now, the Governor's bill does not take into account the problem of reckless or negligent causing of extreme bodily harm, which is covered by our HB 74.

The rest of the Governor's bill cleans up some problems relating to the existing assault statutes. One problem that Tom Turnbull pointed out is in the existing law (carried through in the Governor's bill) under which the minimum sentence for assault with a dangerous weapon is less than the minimum sentence for assault while armed. This is strange, since assault with a dangerous weapon is considered to be a more serious felony. Tom and I would suggest that the minimum sentence for each of the two crimes be made the same, either six months or one year.

What follows is the suggested substitute language for Section 3, line 25 of HB 154. It includes the situation covered by our bill, and not covered by the Governor's bill, under which serious bodily injury is caused recklessly by someone, but not intentionally or as part of an intentional assault. The language inserted is in the style of modern penal codes, and follows in part some of the language of Section 211.1 (2) of the proposed official draft of the model penal code. The sentence structure is left in the style of the present law and the Governor's bill but inserts language covering the omitted offenses.

Section 3 AS 11.15 is amended by adding a new section to read:

Sec. 11.15.225 AGGRAVATED ASSAULT (a) A person who unlawfully attempts to cause great bodily injury to another, or who causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life, is guilty of aggravated assault. Upon conviction, a person guilty of aggravated assault is punishable by imprisonment for not less than six months nor more than five years, or by a fine of not less than $100 or more than $1,000, or by both.

I would urge that the Governor's bill be changed in the manner described in this memo and then be submitted with a "do pass" by this committee as a CS for HB 74.

Turning in false aborm (fine)

max 1 year

Disinterring corpse from a grave

max 1 year

Pimping

max 1 year

February 14, 1975

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by the Rules Committee by Request of the Governor

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I would urge that the Governor's bill be changed in the manner described in this memo and then be submitted with a "do pass" by this committee as a CS for HB 74.

HB

157

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GEKERAL

POUCH K — STATE CAPITOL
JUNEAU 99801

March 4, 1975

Honorable Terry Gardiner
House Judiciary Committee
Room 100
State Capitol Building
Juneau, Alaska 99811

Dear Representative Gardiner:

It has come to my attention through Thomas Turnbull, that your committee is considering the Administration's proposed amendment to the unauthorized entry prohibition--HB-157.

The reasons for the amendment are fairly narrow and restrictive in nature, but are ones the Administration feels are important. The present state of the law in Alaska provides for no prohibition against anyone entering a motor vehicle of another person or otherwise tampering with the motor vehicle. This gives rise, on occasion, to cases where someone is caught rifling through another person's motor vehicle at a stage before anything is stolen from the vehicle, thus providing no opportunity to charge the person with larceny. In addition, the same situation arises when someone is caught before the motor vehicle is taken thus providing no opportunity to charge that person with joy-riding.

It is felt that private property as valuable as motor vehicles, should be protected from situations such as those mentioned above. It is further felt that the best way to address the problem is to amend the unauthorized entry statute, AS 11.20.135.

If the Department of Law can be of any further service to you please do not hesitate to call.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Michael Stark
Michael J. Stark
Assistant Attorney General

AMG:jeh

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
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March 4, 1975

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If the Department of Law can be of any further service to you please do not hesitate to call.

Sincerely yours,

AVRUM M. CROSS
ATTORNEY GENERAL

By: Michael Stark
Michael J. Stark
Assistant Attorney General

HB
159

"An Act relating to salvaging the edible meat of wild food animals."

COMMITTEE REPORT

HOUSE

3/29/75

Mr. Speaker: Date 4/10/75

The Committee on JUDICIARY has had HB 159 under consideration. A Majority of the members of the Committee

( ) recommends it DO PASS

( ) recommends it DO NOT PASS

( ) recommends it DO PASS WITH ATTACHED AMENDMENT(S)

(X) recommends it BE REPLACED WITH CS FOR HB 159 (Amended) AND THAT CS FOR HB 159 DO PASS

( ) "and" recommends it BE REFERRED TO THE _____ COMMITTEE

( ) reports it back WITHOUT RECOMMENDATION

( ) "other"

Members signing the Majority report:

_____ _____ _____

_____ _____ _____

_____ _____ _____

_____ _____ _____

Members NOT concurring in the Majority report:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

Jerry Gardner Chairman

STATE OF ALASKA

JAY S. HAMMOND, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
JUNEAU 99801

March 19, 1975

The Honorable Nels Anderson
Chairman
Committee on Resources
House of Representatives
State of Alaska
Juneau, Alaska 99811

Re: Opinion on CSHB 159

Dear Mr. Chairman:

This is in response to your request for an opinion from this department regarding certain provisions in the Committee Substitute for House Bill No. 159, dealing with waste of wild food animals. Specifically, your Committee has asked for a constitutional evaluation of proposed AS 16.30.012 (Section 2 of the bill), which would append to the existing waste control measure a presumption of unlawful waste where raw horns or antlers were not accompanied by most of the edible meat. Section 2 of the bill reads in part:

> Sec. 16.30.012. POSSESSION OF RAW HORNS OR ANTLERS. The possession of the raw horns or antlers of a wild food animal without its being accompanied by most of its edible meat creates a presumption of failure to salvage most of the edible meat under secs. 10 - 30 of this chapter. The burden of proof is on the possessor to overcome the presumption of failure to salvage most of the edible meat and it is not overcome until substantial proof is offered other than a personal statement, establishing the fact that it was not salvaged due to circumstances beyond control as set out in (a) of this section, or that the horns or antlers were otherwise obtained lawfully. * * *

Rebuttable presumptions, such as that contained in proposed sec. 12, are not uncommon. During the 1974 session, the Alaska Legislature approved at least two of them. See AS 11.20.350(b) (concerning receipt of stolen property) and AS 16.05.810 (pertaining to illegal possession of fish or game). However, not all presumptions are valid as a matter

example mailing letter - presumption disappears when evidence to the contrary is presented

conclusive presumption - paternity - (strong social policy)

of course. The Supreme Court of the United States has reviewed a number of statutory presumptions in criminal cases, usually in light of 14th Amendment due process claims, and has established some relatively firm guidelines on what is allowable and what i not.

The first and most often cited rule laid down by the Court was in Tot v. United States, 319 U.S. 463 (1942):

> Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts. [319 U.S. at 467-468.]

The Supreme Court later reaffirmed the "rational connection" test in United States v. Gainey, 380 U.S. 63 (1965), sustaining a jury instruction tracking a statute authorizing corviction for operating an illegal still based on mere presence at the still site. See also United States v. Romano, 382 U.S. 136 (1965). The Court, however, apparently recognized that "rational connection" might not be sufficiently explicit in determining the permissibility of statutory provisions which necessarily involved a considerable amount of subjective judgment by the legislative body. Subsequent to Gainey and Romano, the Supreme Court decided Leary v. United States, 395 U.S. 6 (1969), in which the defendant was subjected to a presumption of illegal importation of marijuana when all that was proved was possession. The Court pointed out that a substantial volume of illegally possessed marijuana is in fact grown in the United States, and that a presumption of illegal importation from simple possession was unjustified. An inference, the Court said, is "'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36. From this opinion originated the "more likely than not test". A similar evaluation appeared in Turner v. United States, 396 U.S. 398 (1970).

Paralleling the Court's consideration of the contents of a valid presumption was the effect of the presumption as it operates in criminal proceedings. At the hearing on CSHB 159, Representative Eliason raised the question of whether a statutory presumption changes the fundamental principle that a person is presumed innocent until proven guilty. The Supreme Court has pointed out clearly that a statutory inference is not a rule of substantive law, but rather a rule of evidence which may serve as a guideline for the court and the jury. This same line of cases shows that the presence of a presumption does not mean that the defendant is automatically convicted. Two very substantial hurdles must be passed before a presumption can operate to contribute to a conviction. First, as was stated in United States v. Gainey, supra, at 69:

> Our Constitution places in the hands of the trial judge the responsibility for safeguarding the integrity of the jury trial, including the right to have a case withheld from the jury when the evidence is insufficient as a matter of law to support a conviction.

Second, even if the judge decides that the existence of the facts supporting a presumption constitutes sufficient evidence to send the case to the jury, there is no requirement that the jury accept the presumption and render a guilty verdict. In United States v. Turner, supra, the Court emphasized that the presumption in that case (possession of heroin allowed a presumption that it was illegally imported since no heroin is manufactured in the United States) was merely one fact among many that the jury was to consider in rendering its verdict; that the jury was in no way obligated to rely upon the presumption; and that the jury was still required to find the defendant guilty beyond a reasonable doubt regardless of the existence or nonexistence of the presumption. Of course, verdicts based upon presumptions are subject to further review in the form of motions for judgment notwithstanding the verdict, and appeals to a higher court. Up through the 1970 Turner decision, however, the Supreme Court had not satisfactorily explained the relationship between the "more likely than not" test and the "reasonable doubt" standard applied to all criminal trials. In 1972, the Court handed down an opinion in Barnes v. United States, 412 U.S. 837, which re-evaluated and reaffirmed the earlier decisions and attempted to explain their import. In conducting its review, the Court stated as follows:

> What has been established by the cases, however, is at least this: that if a statutory inference

> submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.

The segment of the opinion containing the holding is also instructive with respect to CSHB 159:

> In the present case the challenged instruction only permitted the inference of guilt from the unexplained possession of recently stolen property. The evidence established that petitioner possessed recently stolen Treasury checks payable to persons he did not know, and it provided no plausible explanation for such possession consistent with innocence. On the basis of this evidence alone common sense and experience tell us that the petitioner must have known or been aware of the high probability that the checks were stolen. [Citations omitted.] Such evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that petitioner knew the checks were stolen. Since the inference thus satisfies the reasonable doubt standard * * * we conclude that it satisfies the requirements of due process. [412 U.S. at 845-846.]

CSHB 159 appears to operate similarly to the presumption approved in Barnes. If a person possesses horns or antlers which are "raw" in appearance (a term defined in the bill), and they are not accompanied by most of the edible meat (which, by definition, includes actual or constructive possession), then it is incumbent upon him to deliver a plausible explanation for the absence of the meat. As in Barnes, it is reasonable to expect the defendant to perform this duty since the facts surrounding the absence of meat are best available to the defendant. If he has no explanation "consistent with innocence", then it would seem reasonable for a jury to rely upon the inference contained in the statute as the basis for a guilty verdict, and that such a finding could be beyond a reasonable doubt. Under such circumstances, a conviction under proposed sec. 12 would appear to satisfy the due process prerequisites set forth by the Supreme Court.

We notice, however, one element of sec. 12 which may be objectionable. On page 2, line 4, of CSHB 159, the "explanation" which the defendant must come up with cannot include a personal declaration. This provision may operate to prohibit the defendant from offering into evidence information which could prove his innocence. It is possible that such a presumption could be used in limited situations, but since the Committee has drafted this bill so that the presumption appies to the general public, it is probable that this requirement would violate due process. Consequently, it would be advisable to drop the phrase "other than a personal statement". A recent Supreme Court decision, Vladis v. Kline, 412 U.S. 441 (1972), strongly supports this interpretation. As a result, it would be well to delete similar language appearing in line 13 on page 1 of the bill.

Finally, in lines 5- 6 on page 2 of the bill, there appears the language "due to circumstances beyond control as set out in (a) of this section". Since there is no subsection (a) in sec. 12, we would presume this is intended to refer to subsection (a) of sec. 10, where the situations constituting circumstances beyond control are set out.

We hope that this opinion will be of assistance to you in your consideration of CSHB 159.

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Geoffrey Haynes
Geoffrey Haynes
Assistant Attorney General

GH:md

Original sponsor: Anderson, Bradley, Duncan, et al

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 159 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to salvaging the edible meat of wild food animals."

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

* Section 1. AS 16.30.010(a) and (b) are repealed and re-enacted to read:

(a) It is unlawful for a person who kills a wild food animal to intentionally, knowingly, recklessly or negligently fail to salvage for human consumption most of the edible meat of a wild food animal, unless he shows that failure to salvage the meat was due to circumstances beyond his control, including but not limited to

(1) loss in the field to another animal;

(2) weather or other acts of God;

(3) theft.

(b) If the edible meat is not lawfully salvaged for human consumption under (a) of this section, the person who killed the animal is guilty of a misdemeanor and upon conviction

(1) is punishable by a fine of not more than $5,000, or by imprisonment for not more than six months, or by both; and

(2) shall surrender to the Department of Fish and Game all portions of the animal that have been salvaged.

* Sec. 2. AS 16.30 is amended by adding a new section to read:

Sec. 16.30.012. POSSESSION OF RAW HORNS OR ANTLERS. The possession of the raw horns or antlers of a wild food animal without its being accompanied by most of its edible meat creates a presumption of failure to salvage most of the edible meat under secs. 10 - 30 of this chapter.

presumption of guilt

is rebuttable — some evidence to contrary

then state must prove

it guy says nothing then guilty; if he rebuts then it's up to the jury state must offer more proof to win case

plausible explanation - could be testimony

The burden of proof is on the possessor to overcome the presumption of failure to salvage most of the edible meat and it is not overcome until substantial proof is offered establishing the fact that it was not salvaged due to circumstances beyond control as set out in sec. 10(a) of this chapter, or that the horns or antlers were otherwise obtained lawfully. In this section,

(1) "being accompanied" means having most of the meat in actual possession with the horns or antlers unless the person is engaging in the act of transporting most of the meat from the same animal in portions at different times but in a continuous manner without unnecessary interruption, from the place of taking to its destination for human consumption;

(2) "raw" means an appearance, by reasonable observation, that indicates its having been taken from a wild food animal during the current or most recent lawful hunting season for that animal.

* Sec. 3. AS 16.30.020 is amended to read:

Sec. 16.30.020. ANIMALS EXCEPTED. The provisions of secs. 10 - 12 [SEC. 10] of this chapter do not apply to animals which the department exempts by regulation.

deleted sec 4 move to front page

HB

170

"An Act relating to payments for judicial services by political subdivisions; and providing for an effective date."

COMMITTEE REPORT

2/18/75 FINANCE

HOUSE

Mr. Speaker: Date 3/2-/75

The Committee on JUDICIARY has had HB 170 under consideration. A Majority of the members of the Committee

( ) recommends it DO PASS

( ) recommends it DO NOT PASS

( ) recommends it DO PASS WITH ATTACHED AMENDMENT(S)

( ) recommends it BE REPLACED WITH CS FOR _____ AND THAT CS FOR _____ DO PASS

( ) "and" recommends it BE REFERRED TO THE _____ COMMITTEE

( ) reports it back WITHOUT RECOMMENDATION

(✓) "other" Individual recommendations

Members signing the Majority report:

_____ _____ _____

_____ _____ _____

_____ _____ _____

_____ _____ _____

Members NOT concurring in the Majority report:

_____ recommends: No Rec.

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ Chairman

House Judiciary Committee
March 24, 1975

The meeting was called to order at 1:30 p.m. by Chairman Gardiner. All members were present except Mr. Brown, Mr. Bradley and Mr. Specking.

HB 170 Judicial Payments

Clark Gruening, sponsor of the bill stated that the State now provides most judicial services but that they charge back cities for employee salaries.

Art Snowden testified that minicipalities are supposed to reimburse the state for judicial services provided by the state but this not now being enforced. The selective enforcement (big cities only) is not fair. The Supreme Court has mandated that the state will take over providing all judicial services and that the minicipal employees now providing some of the services will become state employees. The state is presently charging back the municipalities for services but they do not charge corporations, regional corporations or individuals, etc. If the state were forced to enforce the present statute it would result is loss of judicial services in the bush.

John Spencer stated that the provision of judicial services is free to everyone but cities. The fines should be reimbursed to municipalities also since city police arrest state not merely city people who commit crimes.

Mr. Fink moved HB 170 out of committee with individual recommendations. There being no objection, it was so ordered.

FISCAL NOTE - HB 170

House Bill 170 repeals the requirement that political subdivisions pay the State for judicial services provided to them by the Alaska Court System. Under the provisions of HB 170, therefore, the Alaska Court System would process municipal ordinance violations, local traffic tickets and other municipal criminal cases at no expense to the political subdivisions. Since the Court System is already processing these cases, no additional expenditures would be incurred. However, the State would lose the revenue that it presently is receiving as payment for services from the political subdivisions.

The estimated revenue loss for the next five years would be as follows:

	FY 76	FY 77	FY 78	FY 79	FY 80
Revenue Loss:	$440,000	$480,000	$530,000	$580,000	$640,000

Note Prepared By:

Richard P. Barrier
Alaska Court System

March 6, 1975

Anuch v State

demands that muni pay back for the judicial services supplied to them by state.

Total collected revenues ± $140,000. The state must collect if statute isn't revised.

Have taken over former muni employees and are charging back for their salaries.

F.N #2 covers:

a. lost fines + fees

b. the loss of charging back for salaries.

Why should a city have to pay costs for judicial services - nobody else does.

Why should cities keep revenues? Cities pay for police protection + revenues don't come near paying for

March 10, 1975

John R. Spencer
City Attorney
City of Anchorage
P.O. Box 400
Anchorage, Ak. 99510

Dear Mr. Spencer:

Our meeting on HB 170 will last until at least 3 p.m. We would certainly like to obtain your testimony and will hold time open for you.

Sincerely,

Terry Gardiner
Representative

CITY OF ANCHORAGE ALASKA

International
Polar air crossroads of the world

POST OFFICE BOX 400
ANCHORAGE, ALASKA
99510

March 5, 1975

Hon. Terry Gardiner,
Chairman, House Judiciary Committee,
Capitol Building,
JUNEAU, Alaska

Re: House Judiciary Committee meeting -
H.B. 170 March 24, 1975

Dear Terry:

I understand that a hearing is going to be held by the House Judiciary Committee on House Bill 170, which concerns the State absorbing the cost of operating the court system for activities which are generated by municipalities.

I further understand that this hearing is going to be on March 24 at 1:15 P.M. I would hope that you could delay this a few minutes so that I can testify at the hearing, both for the City of Anchorage and the Alaska Municipal League. I will be arriving on the flight from Anchorage which gets into Juneau (barring unforeseen circumstances) at 1:15 P.M. that day. It would be practically impossible for me to get to the hill until approximately 1:45 P.M. at the earliest.

Please advise if this is satisfactory so far as you are concerned.

Sincerely,

John R. Spencer,
City Attorney

cc: Don Berry, Alaska Municipal League

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The estimated revenue loss for the next five years would be as follows:

	FY 76	FY 77	FY 78	FY 79	FY 80
Revenue Loss:	$440,000	$480,000	$530,000	$580,000	$640,000

Note Prepared By:

Richard P. Barrier
Alaska Court System

March 6, 1975

Alaska has had a comparative neg statute since 1949 AS 23.25.010

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

Modified forms of C.N.

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

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

(c) 49% system - most popular plan. Wisconsin started it. P recovers where his % is less than that of any given D, reduced by P's %. Where P's negligence is equal to or greater than that of D, contrib bars recovery.

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

Liability Joint Tortfeasors

state statutes p. 40 apportioned where gross differences
See Minnesota's Nevada's all apportioned
see p 256 for 50% results. Texas Nevada statute

Contribution

a) Idaho, Maine et al - each D liable for whole amt P's damages
b) N.H. + Vermont - each D liable only for his part.
c) where D_2's neg < P's, D_2 liable for only his share

Comparative negligence, even modified, should have no effect on doctrine of contribution Bielske v. Schultz 16 W 2d 1 114 N.W 2d 105. Follow pure C.N. rules here.

Reckless + Gross Negligence

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

Example 1.

P, motorcyclist is 90% cause of accident $100,000 damages
D, truck driver is 10% " " " —0— damages

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

1. Present law in negligence cases

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

It is the old English common law rule, and the rule in fewer than 13 states, of which AK is one

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

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

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

2. Comparative negligence

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

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

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

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

3. Forms of Comparative Negligence

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

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

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

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

Why is a 50% system more equitable? See examples

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

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

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

EXAMPLES

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

Results

a. "Pure" system
P will recover 10% of his damages, here $10,000
D will recover 90% of his damages, here $900
Offsetting the claims, P collects $9,100

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

c. "50%" system
Same results as in b. above, for same reasons.

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

Results

a. "Pure" system
P will recover 50% of his damages, here $50,000
D will recover 50% of his damages, here $500.
Offsetting claims, P collects $49,500

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

c. "50%" system
P recovers 50% of his damages, here $50,000
D recovers 50% of his damages, here $500
Offsetting claims, P collects $49,500

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

Results

a. "Pure" system

P will recover 51% of his damages, here $51,000
D will recover 49% of his damages, here $490.
Offsetting claims, P recovers $50,510.

b. "49%" system

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

c. "50%" system

Same results as in b, for same reasons.

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

a. "Pure"

P recovers 10% of his damages, here $100
D recovers 90% of his damages, here $90,000
Offsetting claims, D recovers $89,900

b. "49%"

P, being more than 49% negligent, recovers -0-
D recovers 90% of his damages, here $90,000.

c 50%

Same results as in b above.

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

Results

a. "Pure"

P recovers 50% of his damages, here $500
D " " " " " " $50,000
Offsetting claims, D recovers $49,500

b. "49%"

P, being more than 49% at fault, is barred
D would be also

c. "50%"

P recovers 50% of his damages, here 500
D recovers 50% of his damages here 50,000
D recovers net of 49,500.

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

a. "Pure"

P recovers 51%, or 51,000
D recovers 49%, or 490
Offset, P recovers 50,510

b. 49%

P recovers 51% of his damages, $510
D is barred, gets —0—

c. 50%

P recovers 510
D is barred —0-

The bill

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

types of cases it will apply to:

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

Does not apply to:

a) cases where D's conduct was "reckless"
b) cases where D's conduct was "intentional"

Jury instructions
no problem

Multiple Parties

joint and several liability is retained. Example:
P is injured in amount of $100,000 by D_1 and D_2, who each cause 30% of the accident and have no damages. P is 40% responsible for his harm. Results: P collects 60% of his damages, $60,000 and if D_2 is insolvent, D_1 must pay it all under principles of joint and several liability.

California case

judicially adopting comparative negligence - "pure"

April 8, 1975

Alaska Supreme Court
Pouch U
Juneau, Alaska 99801

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

Dear Chief Justice Rabinowitz and Members of the Supreme Court:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

ROBERTSON, MONAGLE, EASTAUGH & BRADLEY

W. G. Ruddy

M. T. Thomas

Of Attorneys for Appellants
Kaatz and Lindley

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

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

NGA LI, Plaintiff and Appellant, v. YELLOW CAB COMPANY OF CALIFORNIA et al., Defendants and Respondents.	L.A. 30277 Super. Ct. No. 947 992

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

SEE CONCURRING AND DISSENTING OPINIONS

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

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

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

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

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

I

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

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

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

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

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

It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the "all-or-nothing" approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault.[3] Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task.[4] The basic

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

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

(Fn. continued)

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

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

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

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

889, at p. 916[5]; Note (1974) 21 U.C.L.A.L.Rev. 1566, 1596-1597.)

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

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

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

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

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

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

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

II

It is urged that any change in the law of contributory negligence must be made by the Legislature, not by this court. Although the doctrine of contributory negligence is of judicial origin -- its genesis being traditionally attributed to the opinion of Lord Ellenborough in Butterfield v. Forrester (K.B. 1809) 103 Eng. Rep. 926 -- the enactment of section 1714 of the Civil Code[7] in 1872 codified the doctrine as it stood at that date and, the argument continues, rendered it invulnerable to attack in the courts except on constitutional grounds. Subsequent cases of this court, it is pointed out, have unanimously affirmed that -- barring the appearance of some constitutional infirmity -- the "all-or-nothing" rule is the law of this state and shall remain so until the Legislature directs otherwise. The fundamental constitutional doctrine of separation of powers, the argument concludes, requires judicial abstention.

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

We are further urged to observe that a basic distinction exists between the situation obtaining in Florida prior to the decision of that state's Supreme Court abrogating the doctrine (Hoffman v. Jones, supra, 280 So.2d 431), and the situation now confronting this court. There, to be sure, the Florida court was also faced with a statute, and the dissenting justice considered that fact sufficient to bar judicial change of the rule. The statute there in question, however, merely declared that the general English common and statute law in effect on July 4, 1776, was to be in force in Florida except to the extent it was inconsistent with federal constitutional and statutory law and acts of the state Legislature. (Fla. Stat., § 2.01, F.S.A.) The majority simply concluded that there was no clear-cut common law rule of contributory negligence prior to the 1809 Butterfield decision (Butterfield v. Forrester, supra, 103 Eng. Rep. 926), and that therefore that rule was not made a part of Florida law by the statute.[8] (280 So.2d at

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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10. In determining whether a specific code section was intended to depart from or merely restate the common law, weight is to be accorded the notes and comments of the Code Commissioners. (See O'Hara v. Wattson (1916) 172 Cal. 525, 534 535.)

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

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

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

This argument fails to withstand close scrutiny. The civil law statutes cited in the note, like the common law cases cited immediately following them, deal not with "defenses" to negligence but with the basic concept of negligence itself.[11] In fact the Code Commissioners' Note to the parallel section of the Field draft cites the very same statutes and the very same cases in direct support of its statement of the basic rule.[12] Moreover, in

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11. Section 1383 of the Code Napoleon (1804) provided: "Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence." [Every person is responsible for the damage that he has caused not only by his act, but also by his negligence or by his imprudence.]
In 1872, article 2295 of the Louisiana Civil Code (now art. 2316) provided: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

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

 (footnote continued)

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

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

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

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

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

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

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

new doctrine in any form, and should choose to cite in their note the very statutes and decisions which the New York Code Commissioners had cited in support of their statement of the common law rule. (See fn. 12, ante, and accompanying text.) It is in our view manifest that neither the Legislature nor the Code Commissioners harbored any such intention -- and that the use of the words "except so far as" in section 1714 manifests an intention other than that of declaring comparative negligence the law of California in 1872.[15]

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

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

 (footnote continued)

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

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

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

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

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

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

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

 (footnote continued)

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

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

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ascertain what share of the damages is due to his negligence. He is both legally and morally to blame, but there is no standard by which the law can measure the consequences of his fault, and therefore, and therefore only, he is allowed to go free of judgment. The impossibility of ascertaining in what degree his negligence contributed to the injury being then the sole ground of his exemption from liability, it follows that such exemption cannot be allowed where such impossibility does not exist; or, in other words, the general rule that a plaintiff who is himself at fault cannot recover, is limited by the reason upon which it is founded." (37 Cal. 409, 419; italics added.) This language clearly contains the germ of a comparative approach, if not the outright statement that such an approach would be adopted if apportionment of damages were technically possible.

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

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

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

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

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

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

III

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

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