VIOLATION CODE	COMPLAINT SIGNED BY	LOCATION	VIOLATION DATE	TIME	CITED BY	CITED DATE	SEIZED FG	BOP	PLEA	USC NO TRAIL BAIL	IN DATE	VERDICT	FINE TOTAL	FINE NET	JAIL TOTAL	JAIL NET	MO LIC REV
		E-75-03228			CF42 - FISH DUNGENESS W/O REGISTRATION												
320200			7/10		CARPENTER	7/10/75			GUILTY		7/14/75	GUILTY	100	50			
569-58-3138 KODIAK				MALE	E-BU H-BR	10/17/43	160	5-8	RES								
		E-75-03201	40		CF01 - COMM FISH CLOSED WATER					1248							
18350			7/16	3:25P	SELDEN	7/16/75	Y				7/21/75		DIS				
000-00-0000																	
		E-75-03201	30		CF01 - COMM FISH CLOSED WATER												
183508			7/16	3:25P	SELDEN	7/16/75	Y				7/21/75		DIS				
000-00-0000 KODIAK				MALE	E-BR H-BR	1/20/18	170	5-8									
		E-75-03201	20		CF01 - COMM FISH CLOSED WATER					1249							
18350			7/16	3:25P		7/16/75					7/21/75		DIS				
000-00-0000 KODIAK				MALE		5/12/55	180	5-11									
		D-76-07024-X			CF25 - MINIMUM DISTANCE BETWEEN GEAR												
21335 WALDEN	KENAI		6/30	1:15P	CARPENTER	6/29/76	N	N	NOLO		6/30/76	N GLTY	DIS	DIS			
574-20-8908 NINILCHIK				MALE	E-BU H-BL	11/30/52	155	5-7	RES								
		D-76-07023-X			CF25 - MINIMUM DISTANCE BETWEEN GEAR												
21335 WALDEN	KENAI		6/30	1:15P	CARPENTER	6/30/76	N	N	NOLO		6/30/76	GUILTY	100	100			
574-12-3401 ANCHORAGE				MALE	E-BR H-BR	3/16/17	200	5-10	RES								
		E-75-03201	10		CF01 - COMM FISH CLOSED WATER					1250							
18350			7/16	3:25P		7/16/75	N				7/21/75		DIS				
000-00-0000 KODIAK				MALE		9/16/20	180	5-8									
		E-75-03120-K			CF11 - FISH TANNER CRAB W/O PERMIT												
1643140A CARPENTER	KODIAK		7/01		CARPENTER	12/26/75	N	N	GUILTY		1/05/76	GUILTY	100	25			
574-16-1803 KODIAK				MALE	E-BR H-BR	5/28/45	180	5-10	RES								
		E-75-03095-K			CF02 - C/F CLOSED PERIOD												
93200 BYRD	KODIAK		6/25	6:55A	BYRD	8/03/75	N	N	N CLTY		10/22/75	GUILTY	SIS				
536-26-2201 ANCHORAGE				MALE	E-BU H-BL	6/09/29	230	5-10	RES								
		E-75-03035			CF11 - NO ENTRY PERMIT/TANNER CRAB												
1643140A BYRD	KODIAK		5/19		BYRD	8/14/75	N	N	GUILTY	50	10/16/76	GUILTY	50	50			
542-40-7478 KODIAK				MALE	E-HZ H-BK	10/10/37	200	5-9	RES								
		D-76-07220-X	02		CF61 - UNMARKED VESSEL												
21336 WALDEN	KENAI		7/05	5:45P	HOEKMAN	9/01/76	N	N	GUILTY		9/03/76	GUILTY	50	50			
574-14-6283 KENAI				MALE	E-HZ H-BR	3/28/42	180	5-5	RES								
		D-76-07220-X	01		CF61 - UNMARKED GEAR												
21334 WALDEN	KENAI		7/05	5:45P	HOEKMAN	9/01/76	N	N	GUILTY		9/03/76	GUILTY	50	50			
574-14-6283 KENAI				MALE	E-HZ H-BR	3/28/42	180	5-5	RES								
		D-76-07208-X			CF01 - COMMERCIAL FISH IN CLOSED AREA												
1605920A WALDEN	KENAI		7/26	4:30P	THOMPSON	7/29/76	N	N	GUILTY		8/24/76	GUILTY	200	200			
536-30-7941 SOLDOTNA				MALE	E-BR H-BR	11/14/36	180	6-2	RES								

VIOLATION	COMPLAINT	VIOLATION		CITED	SEIZED	USC	NO TRAIL		FINE		JAIL	MO LI
CODE SIGNED BY	LOCATION	DATE	TIME CITED BY	DATE	EQ	COP	PLEA	BAIL	IM DAT	VERDICT	TOTAL	NET	TOTAL	NET	REV
	D-76-07185-X	CF25 - EXCEEDING MAXIMUM 105 FATHOMS													
213310 WALDEN	KENAI	8/02	2:15P REED	8/02/76	N	N	N GLTY		10/07/76	GUILTY	50	50			
525-70-2432 KENAI		MALE	E-BR H-BR	4/29/37	160	5-10	RES								
	D-76-07154-X	CF01 - COMM FISH CLOSED AREA													
1605920A WALDEN	KENAI	7/26	4:20P	7/29/76	N	N	NOLO		8/05/76	GUILTY	350	350			
574-28-1767 SOLDOTNA		MALE	G-GN H-BL	6/10/55	120	5-5	RES								
	D-76-07150-X	CF01 - COMM FISHED CLOSED AREA													
1605920A WALDEN	KENAI	7/26	4:20P HOEKMAN	7/29/76	N	N	GUILTY		8/03/76	GUILTY	250	250			
556-03-7873 KLAMATH FALLS OR		MALE	E-BR H-BK	10/01/19	200	6	N-RES								
	I-76-07149-K	CF61 - COMM FISH UNMARKED NET						11801							
32348 YOUNGREN	KOTZEBUE	8/03	10:00P YOUNGREN	8/04/76	Y	Y	GUILTY		8/05/76	GUILTY	25	10			
574-16-0350 KOTZEBUE		MALE	E-HZ H-BR	6/02/45	200	5-11	RES								
	I-76-06657-F	CF22 - COMMERCIAL FISHING W/O LICENSE													
39110A BUNSELMEIER	FAIRBANKS	7/24	BUNSELMEIER	8/06/76	N	N	GUILTY		8/11/76	GUILTY	25	25	SIS		
494-44-8645 FAIRBANKS		FEMALE	E-HZ H-BR	6/29/43	170	5-6	RES								

CF TOTAL ARRESTS 525 TOTAL FINES 219,024 AV. 417 NET FINES 103,513 AV. 197 MULTIPLE COUNTS 221

CATEGORY: NATURAL RESOURCES
AGENCY: PUBLIC SAFETY
PROGRAM: PROTECTION
SUB-PROGRAM: PROTECTION DETACHMENTS
05-12-01-01-00
12410305010I

EXPEND. AND FUNDING RECORD	(01) FY74 ACT	(02) FY75 ACT	(03) FY76 ATH	(04) FY76 RP	(05) FY76 SUP	(06) MAINT.	(07) REQUEST	(08) GOVERNOR	(09) HOUSE	(10) SENATE	(11) F.C.C.	(12) SPC APPR	(13) FIS NOTE
01 PERS SERVICE		1761.1	2085.2			3417.0	3417.0	2572.0	2572.0	2516.8	2516.8		
02 TRAVEL		120.4	110.0			155.7	155.7	133.7	133.7	134.1	134.1		
03 CONTRACTUAL		478.0	600.0			736.2	736.2	567.9	482.5	567.9	567.9		
04 COMMODITIES		79.2	84.2			44.1	44.1	41.7	41.7	40.0	40.0		
05 EQUIPMENT		19.5	65.0			177.8	249.5	99.3	99.3	99.3	99.3		
06 LAND, BLDGS								61.1	61.1	61.1	61.1		
07 GRANTS, CLMS													
08 MISC													
** TOTAL EXP.		2458.2	2944.4			4530.8	4602.5	3475.7	3390.3	3419.2	3419.2		
09 I-A TRANSFER		238.4	398.3			504.7	504.7						
10 FEDERAL RECP													
11 GF MATCH													
12 GENERAL FUND		2458.2	2944.4			4530.8	4602.5	3475.7	3390.3	3419.2	3419.2		
13 PROGRAM RECP													
14 OTHER FUNDS													
15 FULL-TIME		62.0	69.0			87.0	87.0	69.0	69.0	69.0	69.0		
16 PART-TIME													
17 TEMPORARY		11.0	9.0			9.0	9.0	9.0	9.0				
18 MAN MONTHS		876.0	936.0			1152.0	1152.0	936.0	936.0	936.0	936.0		

NEW POSITION RECORD SEGMENTS

POSITION TITLE	LOCATION	TYP	PRI	NP	S&B COST	OTH.COST	TOT.COST	FED.FUND	GEN.FUND	OTH.FUND	GV	HS	SN	FC	FN

NO ENTRIES

TEMPORARY MAN MONTHS - 108

Most effective tool - creek robbers

1. airplane surveillance & Boat patrols
2. any other methods

Biologist agree "stake-out"

stream guards are used in bigger bays

S. E.	0	495 hours stake out
Yakutat		
P.W.S.	0	
C.I.		
Chain	1	
Kodiak	1-2	
Bristo Bay		
AYK		

$8 | 495 | $2
48

Stake out crews in 1960 started

1976

D.A.s — are ineffective

1963 - 17 — 59 temporaries 976 a month
1976 9 — 11 Aides 1400 a month

the officers switch b

HB 111 – Osterback

"stake-out crew"

letting the fishermen capture fish before taking action

Problem isn't stake out → it's waiting until after the act

Jury trial — on case on Peninsula
Bay Pt on Unga Is

Col Wolstad + Frank Sharp

(1) Preserve sample of fish for evidence

80% of violations – fish are released

~~~ Aides are instructed ~~to~~ to arrest when net goes overboard

1. Some cases proceed with no fish
2. Open breast line
3.
~~~

1. Salmon runs in Alaska Peninsula

2. fish confiscated by regions

3. A. G. letter

STATE of ALASKA

MEMORANDUM

TO: Richard L. Burton
Commissioner
Department of Public Safety
Juneau

DATE : February 16, 1977

FROM: Col. Fred M. Woldstad
Director
Fish & Wildlife Protection
Anchorage

SUBJECT: E-76-0811/Controversial Incident - House Resources Committee.

I have taken the liberty of summarizing a rather lengthy investigation report that includes a number of statements attesting to identical information. Two seine vessels were involved and six defendants:

F/V "Andronica"

William Dushkin - Captain, Sand Point.
Carl R. Furguson - Crewmember, Sand Point.
Jack Foster, Jr. - Crewmember, Sand Point.

F/V "Norse Maid"

Carl G. Carlson, Jr. - Captain, Sand Point.
Charles G. Gundersen - Crewmember, Sand Point.
Henry P. Nielsen - Crewmember, Sand Point.

On July 23, 1976 at 10:30 a.m., a stakeout team composed of Officer Steve Case and Officer Mike Webber was placed at Bay Point by a Department of Public Safety Goose flown by Ed Fleek. They set up camp about a mile from the creek at Bay Point.

At approximately 9:30 p.m., Officer Case observed two boats heading toward Bay Point. Both boats were white in color and towing skiffs. The boats were later identified as the "Andronica" and the "Norse Maid". The two subject vessels anchored up, side by side, about 30 yards from the entrance to the lagoon at Bay Point (Nigger Head). At approximately 10:15 p.m., two skiffs left the anchored boats and entered into the lagoon. Each skiff contained two men.

Shots were fired from one skiff into the brush around the edge of the lagoon, apparently by a semi-automatic rifle. The two skiffs then returned to the "Andronica" and "Norse Maid".

At 11:00 p.m., four skiffs left the subject boats and proceeded into the waters of the lagoon at Bay Point. Officer Case moved around to where he could observe what they were doing. He observed the skiffs engaging in making two sets with their commercial type salmon seines, taking salmon from the closed waters at Bay Point. At 11:25 p.m., one skiff headed back to the anchored vessels. At midnight the other three seine skiffs followed. Officer Webber observed that two of the boats were low in the water and had what appeared to be a seine with a bulge in it alongside. At 12:45 a.m.,

Officer Case, who has commercial fished in the past, heard the hydraulics start up, as if the brailer was in operation on the subject vessels. At 3:00 a.m., the two vessels pulled anchor and left Bay Point.

On 7/24/76, the Captain of the P/V "Enforcer" was patrolling in a skiff at Settlement Point with Fish and Wildlife Aide Shaul when he observed the "Norse Maid" pull their anchors and head off toward the North.

Gunnar Hamren, the Captain of the tender "Logger", reports in his statement that the F/V "Norse Maid", Captained by Carl Carlson, Jr., got into the line behind his tender at 11:00 p.m. on 7/24/76. About midnight the "Norse Maid" pulled up alongside the Logger with approximatley 7,000 salmon on board. Carlson asked Hamren to split his load with the "Andronica", stating they had been fishing together. The crew from the "Andronica" came over and helped take the salmon off the "Norse Maid". The "Logger" was anchored in Canoe Bay.

Mrs. Bertha Jean Hamren, who made out the ADF&G Fish Tickets #393789 and #393319, in her statement relates a conversation with Carlson in which he told her that the "Andronica" and "Norse Maid" had been fishing together and he wanted to split his load with the "Andronica". The fish tickets were made out at approximately 12:30 a.m. on 7/25/76. Later that day the skipper ot the "Andronica" came over and signed his fish ticket, #393789. The poundage on the fish tickets totaled 32,255; 16,127 lbs. to William Dushkin on the "Andronica" and 16,128 lbs. to the "Norse Maid", skippered by Carl Carlson, Jr. James Harrington, a crew member on the "Logger", was present when the Captain of the "Andronica" signed his fish ticket the morning of 7/25/76.

William Fishell was a Fish and Game employee sampling the catches on board the "Logger" when the subject fish were delivered. He states he remembers one boat bringing in a large number of salmon and states that without the delivery made by the "Norse Maid" figured into the daily catches, the boat average was 1,149.5 salmon per boat. The catches reflected for the "Norse Maid" and the "Andronica" were over three times the average for boats delivering to the "Logger" on the day in question.

On 7/26/76 at 12:20 p.m., the F/V "Norse Maid" was boarded soon after it moored at the fuel dock in Sand Point. Corporal Winn advised the Captain and crew of their legal rights and that they would be charged for seining in closed waters. Also on 7/26/76, Captain Sharp flew to Canoe Bay and boarded the F/V "Andronica", advised the Captain and crew of their rights and that they would be charged for seining in closed waters. While aboard the "Andronica" Captain Sharp observed a 30 caliber carbine semi-automatic weapon with a 30 shot clip and during the conversation the owner of the weapon was identified as Jack Foster, Jr.

The six defendants were cited to the Sand Point District Court and each entered a not guilty plea requesting a jury trial. Subsequent trial in Sand Point before a jury found all six defendants not guilty. Stated cause for the not guilty verdict was that the state did not prove fish were taken by the skiffs in the stream mouth, and the jury was not advised that "take" is also defined as "attempting to take".

Two additional statements are found in the report which are pertinent to the character and honesty of the defendants involved. Both are statements of Fish and Wildlife Aide Steve Case.

"On the 4th of July, 1976, at the New England Reservoir in Sand Point, I was testing outboards and rafts when we were approached by Charles G. Gundersen on the subject of bribery and asked what our salary was and if we were getting paid enough for watching the streams. I said, "yes, we were getting paid enough". Then he approached me with an offer for $2,000.00 or $3,000.00 for turning my back while they made a couple sets in the creek. He kept saying he would make it good to me for twice the amount I'm getting paid. He said that if I would get hold of him later we would talk real business and a part of $2,000.00 or $3,000.00. Then we departed the area."

On August 29, 1976, Charles G. Gundersen approached Officer Steve Case and Officer Jim Johnston stating that if the State lost their case, he would sue for false arrest. He also advised that they better be careful or they would leave Sand Point in a pine box. Gundersen stated he was passed out drunk when the skiff from the "Norse Maid" went up into the creek. Gundersen was drunk while making the statements.

FMW:rp

TENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 111

Title An Act, relating to stream surveillance for fisheries violations.

Requested by _____ Date _____

II. FISCAL DETAIL

Agency Affected Department of Public Safety

Program Category Affected NRMEC

Budget Request Unit(s) Affected Fish & Wildlife Protection Detachments

EXPENDITURES (Thousands of Dollars)

	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
100 PERSONAL SERVICES		804.6	804.6	804.6		
200 TRAVEL						
300 CONTRACTUAL		89.4	89.4	89.4		
400 COMMODITIES		89.4	89.4	89.4		
500 EQUIPMENT		318.1	63.0	63.0		
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		1,301.5	1,046.4	1,046.4		

FUNDING (Thousands of Dollars)

GENERAL FUND		1,301.5	1,046.4	1,046.4		
FEDERAL FUNDS						
OTHER (Specify)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY		149	149	149		

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

A. Assumptions: Salary for all positions estimated at Juneau rate ($7.50) Benefits of 9.5% were not included. Actual salary without benefits would range from $7.58 to $9.67 per hour for each Range 12 Protection Aide. Overtime limited to 15 hours per week for each stream guard. Training cost, logistics costs not included. Replacement equipment budgeted at 20% per year. All costs in constant dollars (FY-77 costs).

IV. DATE Feb. 23, 1977 PREPARED BY Trygve R. Hermann, Administrative Director

AGENCY Department of Public Safety

PHONE 465-4322

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named)

Commissioner Brooks, Dept. of Fish & Game

33-001 (Rev. 10/76)

FISCAL ANALYSIS.

(Attachment)

1. CHANGES IN PERSONNEL.

To provide a minimal level of surveillance to spawning activity on a stream guard concept, temporary man months must be increased to the following level:

SOUTHEASTERN ALASKA:
Ketchikan, Craig, Wrangell, Petersburg, Sitka, and Juneau.

	60 temp. employees at 3 mo. each.
Yakutat	5 temp. employees at 3 mo. each.
Cordova	12 temp. employees at 4 mo. each.
Valdez	6 temp. employees at 3 mo. each.
Seward	10 temp. employees at 3 mo. each.
Homer	8 temp. employees at 3 mo. each.
Kodiak	32 temp. employees at 3 mo. each.
Sand Point and westward	16 temp. employees at 3 mo. each.

TOTAL TEMP. EMPLOYEES -- 149 TOTAL TEMP. MAN MONTHS - 459

The following is an estimate of the costs of hiring, equipping and maintaining one stream guard for a 10 week period:

EQUIPMENT

Tent, 10 x 12 white wall		100.00
Boat, Avon S-400 Sportboat, 12' 4" (40 h.p. rated)		1,200.00
Motor, 25 h.p. Johnson, Short Shaft, Manual Start		520.00
Coleman Lantern		30.00
Coleman Stove		30.00
Foam Mattress		35.00
Tent Frame		200.00
Cooking Utensils		20.00
Gas cans, funnels, misc. gear		100.00
	Sub Total	$2,135.00
Air Charter - Minimum 6 trips including setting up camp		600.00
Food - 10 weeks at $50.00 per week		500.00
Fuel - White gas, outboard fuel		100.00
		1,200.00
(DOES NOT INCLUDE 9.5% BENEFITS)		
Wages - 12 weeks - 37.5 straight time (hourly rate $7.50)		3,375.00
Actual salaries range from $7.58 to $9.67 per hour) 15 hours overtime/week $11.25		2,025.00
	TOTAL	$ 8,735.00 each

This figure does not include the cost of training or the cost of maintaining the man in the field. Depending on the number of stream guards in the field, it will take one to two men to handle engine repairs, buy groceries, run errands and chauffeur.

HB

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RICE, HOPPNER & HEDLAND
ATTORNEYS AND COUNSELORS AT LAW
SUITE A-330 WENDELL STREET
P.O. BOX 2551
FAIRBANKS, ALASKA 99707
(907) 452-1201

JULIAN C. RICE
LLOYD I. HOPPNER
JOHN S. HEDLAND
GEORGE S. SMALL
MILLARD F. INGRAHAM
HUGH W. FLEISCHER
CHRISTOPHER R. COOKE
SAUL R. FRIEDMAN
PATRICK T. BROWN
DAVID A. ENGELS
LINDA L. WALTON
MARK I. WOOD
NIESJE J. STEINKRUGER
ROGER BRUNNER
STEPHANIE J. COLE

CHARLES J. CLASBY
OF COUNSEL

ANCHORAGE OFFICE
1016 WEST 6TH AVENUE (99501)
(907) 279-5528

BETHEL OFFICE
P.O. BOX 555 (99559)
(907) 543-2850

VALDEZ OFFICE
P.O. BOX 486 (99686)
(907) 835-4385

December 30, 1976

Representative Steve Cowper
Pouch V
Juneau AK 99811

Re: Uniform Comparative Fault Act

Dear Steve:

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

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

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

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

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

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

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

Yours very truly,

RICE, HOPPNER & HEDLAND

Millard F. Ingraham

MFI/mcb
Enclosures

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

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

7. § 434, supra.

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

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

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

11. Walton v Tull, supra.

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

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

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

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

UNIFORM COMPARATIVE FAULT ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS EIGHTY-FIFTH YEAR
ATLANTA, GEORGIA

JULY 31 - AUGUST 6, 1976

UNIFORM COMPARATIVE FAULT ACT

With Comments

SPECIAL COMMITTEE ON UNIFORM COMPARATIVE FAULT ACT

John W. Wade, Vanderbilt University, School of Law, Nashville, TN 37203, Chairman

Francis Bergan, 5 Circle Lane, Albany, NY 12203

Windsor Dean Calkins, 1163 Olive Street, Eugene, OR 97401

Floyd R. Gibson, 837 U. S. Courthouse, Kansas City, MO 64106

Elmer R. Oettinger, Institute of Government, University of North Carolina, Chapel Hill, NC 27514

James H. Clarke, 800 Pacific Building, Portland, OR 97204, Chairman, Division F, Ex Officio

James M. Bush, 363 North First Avenue, Phoenix, AZ 85003, President, Ex Officio

REVIEW COMMITTEE ON UNIFORM COMPARATIVE FAULT ACT

Lindsey Cowen, Case Western Reserve University, Law School, Cleveland, OH 44106, Chairman

John A. Chanin, 700 Bishop Street, Honolulu, HI 96813

John F. Hayes. P. O. Box 705, Hutchinson, KS 67501

Richard L. Jones, 3153 Warrington Road, Birmingham, AL 35223

John R. Parker, P. O. Box 27, Clinton, NC 28328

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

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

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

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

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

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

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

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

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

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

UNIFORM COMPARATIVE FAULT ACT

Section 1. In a tort action for damages based on negligence, recklessness, or strict liability (including breach of warranty), ~~plaintiff~~ claimant's contributory fault does not bar recovery but has the effect of diminishing his damages proportionately according to his own fault or the fault attributable to him. This section applies to a tort action based upon a statute, unless otherwise expressed or construed. In a derivative action or an action for wrongful death, ~~plaintiff~~ claimant's damages are diminished according to the fault of any person whose conduct might otherwise have barred the liability. This section applies whether or not the contributory fault previously constituted a defense and replaces such common law principles as last clear chance and implied assumption of risk.

COMMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMENT

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

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

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

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

SECTION 3. Contribution rights among multiple ~~defendants~~ tort feasors are determined in accordance with the percentage of fault of each ~~defendant~~ tort feasor, as found by the trier of fact. The court shall enter judgment on the basis of these rights and findings made under Section 2. ~~If a judgment against a party cannot be collected within [one year] after the judgment becomes final, the responsibility for the amount involved is distributed among the other parties in proportion to their relative fault.~~ All tortfeasors liable to claimant are jointly and severally liable for all damages to which claimant is entitled. See Ch. 16.

COMMENT

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

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

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

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

SECTION 4. A release or a covenant not to sue or enforce judgment, given by a ~~tort~~ claimant to a tortfeasor, does not discharge other tortfeasors liable for the same harm unless it so provides; but it reduces the claim against the others to the extent of the consideration paid for it or the amount stipulated in it, if greater. If the release or covenant is given in good faith, it discharges the person to whom it is given from liability for contribution.

See 09.16.0

COMMENT

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

Alternative 1

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

Alternative 2

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

COMMENT

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

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

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

SECTION 7. If any provision of this Act or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Amendment of Uniform Contribution Among Tortfeasors Act (1955)

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

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

~~relative degrees of fault shall not be so~~ sidered their relative degrees of fault shall be the basis for allocation; (b) if equity requires, the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply.

COMMENT

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

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE AMERICAN MOTORCYCLE ASSOCIATION, a nonprofit corporation, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent. --- VIKING MOTORCYCLE CLUB, an unincorp. assn., JERRALD KINDSVOGEL, STEPHEN ELSNER; DENNIS ALDERETTE, CHUCK ALEXANDER, PAUL ASHFORD, DON BOYER, JOHN GRANVILLE, LEE GREENWOOD, DON HARRIS, RAMON LOWE, FRED MacDOUGALL, HOYT MORROW, BICK RAINO, RON PARK, BENNY PADILLA, GARY REICHENBACK, ED SCHLUP, JIM SOVIE, ED TOMMASINO, RICHARD TRUSTY, JIM TUCKER, BILL TURNER, BOB PHILLIPS, ROB PHILLIPS, GLEN GREGOS, a minor by and through his Guardian ad litem GORDON GREGOS; GORDON GREGOS and "DOE" GREGOS, Real Parties in Interest.	2d Civil No. 49032

Lawler, Felix & Hall, Thomas E. Workman, Jr., Erwin E. Adler, and Jane H. Barrett for Petitioner.

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

No appearance for Respondent.

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

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

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

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

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

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

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

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

Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Pre-Li Law

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

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

Consequences of Li v. Yellow Cab

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

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

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

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

Effect of Li upon Traditional Bases of Joint and Several Liability

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Specifically, then, we must determine whether, in the

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

Plaintiffs have historically borne the risk of insolvency of the defendant where only one defendant negligently caused damage as well as the total loss where they themselves were negligent. Only in the situation where the plaintiff was not negligent, one of the defendants was insolvent, and another responsible in damages was the risk of the negligent insolvent defendant socialized by the rule of joint and several liability.

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

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

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

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

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

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

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

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

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

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

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[2] "§ 875. [Existence and incidents of right of contribution]
(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided.
(b) Such right of contribution shall be administered in accordance with the principles of equity.
(c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof. It shall be limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment.
(d) There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person.
(e) A liability insurer who by payment has discharged the liability of a tortfeasor judgment debtor shall be subrogated to his right of contribution.
(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them.
(g) This title shall not impair the right of a plaintiff to satisfy a judgment in full as against any tortfeasor judgment debtor."

"§ 876. [Pro rata share]
(a) The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them.
(b) Where one or more persons are held liable solely for the tort of one of them or of another, as in the case of the liability of a master for the tort of his servant, they shall contribute a single pro rata share, as to which there may be indemnity between them."

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

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

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

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

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

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

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

Parties to the Action

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

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

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

Disposition

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

CERTIFIED FOR PUBLICATION.

THOMPSON, J.

We concur:

WOOD, P. J.

LILLIE, J.

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

Jurisdiction	Pure	Adulterated			Joint & Several	Several Only	Joint Where Defendant's Fault Equals Plaintiff's; Otherwise Several	Contribution Proportionate to Fault	Uniform Contribution Among Tortfeasors Act Adopted	Defendant Permitted to Join/Seek Contribution ... to Party Not Named by Plaintiff	Notes
		50/50 Aggregate	50/50 Each Defendant	Other							
Mississippi	45				46			No 47	47	47	
Montana			48								
Nebraska				49							
Nevada			50			51		No 52	52	52	
New Hampshire			53			54					
New Jersey			55		56			May-be 57/58	58	58	
New York	59				60			Yes 61		62	
North Dakota			63		64			May-be 65/66	66	66	
Oklahoma				67							
Oregon		68					69	Yes 70			
Pennsylvania		71			72			May-be 73/74	74	74	
Rhode Island	75							No 76	76	76	

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

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

Arizona	100									
District of Columbia	101									
Iowa	102									

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

1. Kaatz v. State of Alaska (1975) 540 P.2d 1037

2. Alaska Stat. §§ 09.16.010 to 09.16.060

3. Ark. Stat. Ann. §§ 27-1763 to 27-1765, 27-1730.1 to 27-1730.2

4. Walton v. Tull (1962) 356 S.W.2d 20

5. Id., at p. 25

6. Ark. Stats. §§ 34-1001 to 34-1009

7. Lacewell v. Griffin (1949) 219 S.W.2d 227

8. Id.; contribution not limited to parties named by plaintiff; unclear as to whether defendant has right to join parties not named by plaintiff.

9. Colo. Rev. Stat. Ann. §§ 13-21-111, 41-2-14

10. Bass v. United States (1974) 379 F.Supp. 1208, 1209

11. Colo. Rules of Civil Procedure, Rule 22

12. Id.; no contribution, indemnity only.

13. Conn. Gen. Stat. § 52-572h(a)

14. Id., § 52-104

15. Hoffman v. Jones (1973) 280 So.2d 431

16. Stuart v. Hertz Corp. (1974) 302 So.2d 187

17. Lincenberg v. Issen (1975) 318 So.2d 386, 391

18. Stuart v. Hertz Corp., supra, 302 So.2d at p. 194, fn. 3

19. Fla. Stats. Ann. § 768.31

20. Ga. Code Ann. §§ 105-603, 94-703; Smith v. American Oil Co. 49 S.E.2d 90; Elk Cotton Mills v. Grant (1913) 79 S.E. 836

21. Higginbotham v. Ford Motor Co. (5th Cir. 1976) 540 F.2d 762 (no apportionment in strict liability cases)

22. Haw. Rev. Stat. § 663-31

23. Id., §§ 663-31, 663-12 663-17

24. Id., § 663-12

25. Id., §§ 663-11 to 663-17

26. Id., § 663-17(a)

27. Idaho Code Ann. § 6-801

28. Id., § 6-804

29. Id., § 6-803(3)

30. Id., § 6-803(4)

31. Kan. Stat. Ann. § 60-258a(a)

32. Id., § 60-258a(d)

33. Id., § 60-258a(c)

34. Me. Rev. Stat. Ann., Tit. 14, § 156

35. Id., § 156; see also Packard v. Whitten (1971) 274 A.2d 169, 180

36. Packard v. Whitten, supra, 274 A.2d 169

37. Packard v. Whitten, supra, 274 A.2d at p. 174

38. Mass. Gen. Laws Ann., Ch. 231, § 85; 54 Mass.L.Q. 140

39. Id., Ch. 231 B, §§ 1 to 4

40. Minn. Stat. Ann. § 604.01(1)

41. Id.

42. But see Kowalski v. Armour & Co. (1974) 220 N.W.2d 268

43. Minn. Stat. Ann. § 604.01(1)

44. Where plaintiff contributes by his own negligence to the injury, liability is several only; where there is no contributory negligence attributable to plaintiff, liability is joint and several.

45. Miss. Code Ann. § 11-7-15

46. Saucier v. [illegible] (1967) 203 So.2d 299

47. Miss. Code Ann. § 85-5-5

48. Mont. Stat. § 58-607.1

49. Neb. Rev. Stat. § 25-1151

50. Nev. Laws § 41.141(1)

51. Id., § 41.141(3)(a)

52. Id., §§ 17.215 to 17.325

53. N.H. Rev. Stat. Ann. § 507:7-a

54. Id.

55. N.J. Stat. Ann. § 2A:15-5.1

56. Id., § 2A:15-5.3

57. Id., §§ 2A:15-5.2, 2A:15-5.3

58. Id., §§ 2A:53A-1 to 2A:53A-5

59. N.Y. C.P.L.R. § 1411; see also Rossman v. LaGrega (1971) 270 N.E.2d 313

60. N.Y. C.P.L.R. §§ 1401-1402

61. Id., § 1401, 1402; Dole v. Dow Chemical Co. (1972) 282 N.E.2d 288

62. N.Y. C.P.L.R. §§ 1401-1403; Berliner v. Kacov (1974) 361 N.Y.S.2d 477

63. N.D. Cent. Code § 9-10-07

64. Id.

65. Id.

66. Id., §§ 32-38-01 to 32-38-04

67. Okla. Stat. Ann., Tit. 23, § 11

68. Ore. Rev. Stat. § 18.470

69. Id., § 18.485

70. Id.

71. Pa. Stat. Ann. § 2101

72. Id., § 2102

73. Id.

74. Id., §§ 2082-2089

75. R.I. Gen. Laws Ann. § 9.20.4

76. Id., §§ 10-6-1 to 10-6-11

77. S.C. Code § 46-802.1

78. S.D. Comp. Laws § 20-9-2

79. Burmeister v. Youngstrom (1965) 139 N.W.2d 226 (several unless plaintiff has right of recovery against other party)

80. S.D. Comp. Laws §§ 15-8-11 to 15-8-22

81. Tex. Vernon's Civ. Stat. Art. 2212a, § 1

82. Id., § 2(c); see also Goodyear Tire & Rubber Co. v. Edwards (1974) 512 S.W.2d 748

83. Tex. Vernon's Civ. Stat. Art. 2212a, § 2(b)

84. Id., § 2(g)

85. Utah Code Ann. § 78-27-37

86. Id., §§ 78-27-40(2), 78-27-41(1); see also 1973 Utah L.Rev. 406, 421

87. Id., § 78-27-40(2)

88. Id., § 78-27-40(3)

89. Vt. Stat. Ann., Tit. 12, § 1036

90. Id.

91. Howard v. Spafford (1971) 321 A.2d 74

92. Wash. Rev. Code, Ch. 4.22.010

93. Wis. Stat. § 895.045; but see Chille v. Howell, 149 N.W.2d 600, suggesting that plaintiff cannot recover if his negligence is greater than that of all defendants, rather than greater than that of any one defendant. See also Vincent v. Pabst Brewing Co. (1970) 177 N.W.2d 513 where, over a strong dissent, the majority refused to switch to pure comparative negligence but suggested that upon failure of the Legislature to so act within a reasonable period of time the court would judicially make the change.

94. Chille v. Howell, supra, 149 N.W.2d 600

95. Bielski v. Schulze (1962) 114 N.W.2d 105

96. Wyo. Stat. Ann. § 1-7.2(a)

97. Id., §§ 1-7.3(d), 1-7.4(a)

98. Id., § 1-7.3(c); cf. Pure Gas & Chemical Co. v. Cook (1974) 526 P.2d 986, 989, fn. 3

99. Id., § 1-7.3(d)

100. Ariz. Stat. Rev., §§ 23-801 to 23-808, limited to damages arising from manufacturing, mining, building, etc.

101. Dist. of Col. Code §§ 44-401 to 44-404, limited to damages arising from employment by common carrier only.

102. Iowa Code Ann. §§ 479-124, 479-125, limited to damages arising from employment by railway.

103. Ky. Rev. Stat. §§ 277.310 to 277.320, limited to damages arising from employment by railway.

104. Mich. Stat. Ann. §§ 17-461 to 17-464, limited to damages arising from employment by railway.

105. N.C. Gen. Stat. § 62-242, limited to damages arising from employment by railroad.

106. Ohio Rev. Stat. §§ 4973.07 to 4973.09, limited to damages arising from employment by railroad or other employment not covered by workers compensation.

107. Va. Code §§ 8-641, 8-64[illegible], limited to damages arising from employment by railroad and damage to traveler on public highway caused by railroad.

108. 45 U.S.C. §§ 51-60

109. 46 U.S.C. § 688

110. 46 U.S.C. § 766

A M E N D M E N T

Offered in the HOUSE By the Commerce Committee

TO: HOUSE BILL NO. 124

Page 1, line 6:

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

Page 2, line 16:

Add a new section to read:

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

File HB 124

Supreme Court

State of Alaska

March 30, 1977

POUCH U
STATE COURT AND OFFICE BUILDING
JUNEAU, ALASKA
99811
907-465-3410

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

Dear Rep. Gardiner:

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

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

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

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

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

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

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

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

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

Sincerely yours,

Bob Boochever

Robert Boochever
Chief Justice

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

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

UNIFORM COMPARATIVE FAULT ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS EIGHTY-FIFTH YEAR
ATLANTA, GEORGIA

JULY 31 - AUGUST 6, 1976

UNIFORM COMPARATIVE FAULT ACT

With Comments

SPECIAL COMMITTEE ON UNIFORM COMPARATIVE FAULT ACT

John W. Wade, Vanderbilt University, School of Law, Nashville, TN 37203, Chairman

Francis Bergan, 5 Circle Lane, Albany, NY 12203

Windsor Dean Calkins, 1163 Olive Street, Eugene, O. 97401

Floyd R. Gibson, 837 U. S. Courthouse, Kansas City, MO 64106

Elmer R. Oettinger, Institute of Government, University of North Carolina, Chapel Hill, NC 27514

James H. Clarke, 800 Pacific Building, Portland, OR 97204, Chairman, Division F, Ex Officio

James M. Bush, 363 North First Avenue, Phoenix, AZ 85003, President, Ex Officio

REVIEW COMMITTEE ON UNIFORM COMPARATIVE FAULT ACT

Lindsey Cowen, Case Western Reserve University, Law School, Cleveland, OH 44106, Chairman

John A. Chanin, 700 Bishop Street, Honolulu, HI 96813

John F. Hayes, P. O. Box 705, Hutchinson, KS 67501

Richard L. Jones, 3153 Warrington Road, Birmingham, AL 35223

John R. Parker, P. O. Box 27, Clinton, NC 28328

PREFATORY NOTE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

UNIFORM COMPARATIVE FAULT ACT

Section 1. In a tort action for damages based on negligence, recklessness, or strict liability (including breach of warranty), plaintiff's contributory fault does not bar recovery but has the effect of diminishing his damages proportionately according to his own fault or the fault attributable to him. This section applies to a tort action based upon a statute, unless otherwise expressed or construed. In a derivative action or an action for wrongful death, plaintiff's damages are diminished according to the fault of any person whose conduct might otherwise have barred the liability. This section applies whether or not the contributory fault previously constituted a defense and replaces such common law principles as last clear chance and implied assumption of risk.

COMMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMENT

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

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

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

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

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

COMMENT

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

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

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

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

SECTION 4. A release or a covenant not to sue or enforce judgment, given by a tort claimant to a tortfeasor, does not discharge other tortfeasors liable for the same harm unless it so provides; but it reduces the claim against the others to the extent of the consideration paid for it or the amount stipulated in it, if greater. If the release or covenant is given in good faith, it discharges the person to whom it is given from liability for contribution.

COMMENT

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

Alternative 1

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

Alternative 2

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

COMMENT

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

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

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

SECTION 7. If any provision of this Act or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Amendment of Uniform Contribution Among Tortfeasors Act (1955)

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

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

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

COMMENT

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

from the personal attitudes and prejudices of individual jurors. But that is also true of other issues traditionally allocated to the jury in negligence litigation. Moreover, "the utilization of special verdicts or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards and appropriate reverence."[49]

b. Administrative Problems: Multiple Parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analogous distribution also appears to be the better rule in 50 percent jurisdictions in order to spread the share of a defendant who is excused. Suppose P is 20 percent at fault, D_1 40 percent, D_2 30 percent, and D_3 10 percent. P cannot recover from D_3, whose share is spread proportionately among P, D_1, and D_2. Hence, P's share becomes 20/90, D_1's 40/90, and D_2's 30/90. Comment, *Comparative Negligence and Comparative Contribution in Maine: The Need for Guidelines*, 24 ME. L. REV. 243, 246-48 (1972).

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

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

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

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

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

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

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

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

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

61. See note 56 *supra*.

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